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The Human Rights Law
Resource Centre Ltd 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

Religion Must not Provide a Licence to Discriminate

Last year a group which aims to raise awareness about the needs of same sex attracted young people planned a weekend forum. Their request to book facilities was refused by an organisation affiliated with a Christian association on the basis that they were unable to accommodate 'a group such as yours'.

This event should not be surprising; it is lawful in Victoria to discriminate on the basis of sexuality, disability, marital status, race, sex and other attributes as long as the discrimination conforms to religious doctrines or is necessary to avoid injury to religious sensitivities.

This regime is the subject of a current parliamentary inquiry into the exceptions and exemptions in the *Equal Opportunity Act*. It's time for us to seriously question the blanket carve-outs for religious groups.

After all, religious groups have to comply with other civil and criminal laws. Australians can only be married to one person at a time; regardless of how deeply entrenched polygamy is in their religion. Similarly, sexual abuse, ritual use of narcotic drugs and misleading and deceptive trade practices are all prohibited even where the prohibition infringes upon religious beliefs.

So why do we allow religious groups a blanket exception from anti-discrimination laws?

Answers to this question often rely on the right to freedom of religion. Freedom of religion is protected under the Victorian *Charter of Human Rights and Responsibilities* and has been described by the UN Human Rights Committee as 'far-reaching and profound'.

However, the government also has an obligation to promote equality. In addition to the ethical and rights-based arguments for equality, effective anti-discrimination laws bring important social and economic benefits.

Neither freedom of religion nor equality is an absolute right. This means that in cases of conflict neither should act as an automatic, pre-determined trump. Instead, it is necessary to consider the particular circumstances of the case and to strike an appropriate balance between competing rights and interests.

The blanket exceptions for religious groups undermine equality by excluding consideration of individual cases and permitting discrimination in the name of religious freedom, whether the discrimination is fair and reasonable or not. This regime perpetuates a false hierarchy of rights.

The exceptions also entrench systemic discrimination. Religious organisations set social standards and provide moral guidance to many members of our community. While religious groups do important work which contributes to social inclusion and promotes equality, there are some instances where they fall short. If religious organisations do not have to comply with anti-discrimination legislation, we are walking towards equality with our feet bound.

Contrary to much of the misinformation that has surrounded the Parliamentary inquiry, removal of the religious exceptions would not result in a situation where a person or organisation could never discriminate in order to comply with their religious beliefs. Christian churches would not be required to hire a Satanist to teach Sunday school.

Repealing the exceptions would simply open up discussion and allow a line to be drawn between those religious practices that can be accommodated in a fair and functioning society and those which cannot. All groups that do not receive special protection from a permanent exception in the Act are already subject to a similar process.

If, for example, a government-funded community housing organisation doesn't want to rent accommodation to a single mother on the basis of its religious belief, it would need to explain and justify its decision. If it can't provide a good reason, taking into account the effect on the woman in question and on women generally, then the discrimination should not be allowed.

A society that is committed to equality should listen to and respect the needs and interests of religious bodies and individuals. However, the law should not pay undue deference to religious groups by providing a free licence to discriminate.

Rachel Ball is a lawyer at the Human Rights Law Resource Centre

News

ASEAN Establishes Intergovernmental Commission on Human Rights

The Association of Southeast Asian Nations ('ASEAN') has established the first human rights body in its 40 year history. The Terms of Reference for the ASEAN Intergovernmental Commission on Human Rights ('AICHR') were formally approved at the July meeting of the ASEAN Foreign Ministers in Phuket, Thailand.

The International community has cautiously welcomed the creation of the AICHR. Praise for the AICHR has been highly qualified, with a general recognition that the AICHR is a step in the right direction but that there remains more work to effectively protect and promote human rights in the region.

ASEAN governments have been urged to make the AICHR a truly independent and robust body with full powers to monitor, investigate and report on the human rights records of all 10 member states (Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam).

The key concerns with the current form of the AICHR are the lack of a clear protection mandate; the lack of binding requirements for independence and expertise of AICHR appointees; and an emphasis on 'regional particularities' and 'non-interference in internal affairs', which could undermine respect for universal human rights standards.

Another key concern with the Terms of Reference is that decisions are made by consensus. This may allow states to effectively veto criticism of their own human rights record. The consensus model has been criticised as an inherent weakness in the AICHR model, as, in effect, it enshrines a model that favours decision making at the lowest common denominator.

There is also a lack of certainty around when further reviews of the AICHR terms of reference will be conducted, and this may hamper progress towards strengthening the protection mandate of the AICHR. Whilst most NGOs have applauded the initiative in developing the AICHR, they have called on the ASEAN nations to ensure that the AICHR develops into a body that upholds all human rights in accordance with universal principles and internationally agreed treaties and standards.

Victoria Edwards is on secondment to the Centre from Freehills

Australia to Ratify Optional Protocol to Convention on the Rights of Persons with Disabilities

On 30 July 2009, the Australia Government announced that it will ratify the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

The Optional Protocol establishes two procedures designed to supplement the Convention and strengthen and promote its implementation; a communication procedure and an inquiry procedure. The communication procedure allows individuals or groups to submit a communication to the Committee on the Rights of Persons with Disabilities alleging violations of the substantive rights protected under the CRPD. The inquiry procedure allows the Committee to initiate inquiries into reliable information indicating grave or systematic violations of the CRPD by a State Party.

Announcing the proposed ratification, Attorney-General Robert McClelland stated, 'Accession to the protocol is important...It not only permits international scrutiny of our laws and practices, but also demonstrates our commitment to re-engage with the international community and to provide leadership in our region.'

The Centre warmly welcomes Australia's proposed ratification of the Optional Protocol. As set out in our submissions to both the National Interest Analysis and the Joint Standing Committee on Treaties, Australia's ratification of the Optional Protocol will:

- complement and strengthen existing domestic mechanisms designed to promote disability rights;
- foster and promote analysis and change;
- strengthen Australia's role within the international community;
- bolster Australia's commitment to constructive engagement with the United Nations human rights system; and
- enhance public awareness and understanding of the rights of people living with disabilities.

The Centre's submission to JSCOT is available at

<http://www.hrlrc.org.au/content/topics/disability/disability-rights-jscot-ratification-optional-protocol-disability-convention/>.

UN Special Rapporteur on Indigenous Rights Visits Australia

The United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Professor James Anaya, is on a mission to Australia from 17 to 28 August 2009, at the invitation of the Australian Government.

During his mission to Australia, the Special Rapporteur will investigate and report on the major challenges faced by Indigenous peoples of Australia in the enjoyment of their human rights, with a view toward contributing to steps to address those problems, as well as to identify good practices.

The Special Rapporteur will travel to Canberra and to Adelaide, Perth, Alice Springs, Darwin, Yirrkala, Groote Eylandt, Cairns, Sydney, and Brisbane to hold discussions with government representatives, Indigenous communities and civil society groups on the human rights of Indigenous peoples. At the conclusion of his visit a press conference will be held in Canberra on 27 August 2009.

The Special Rapporteur will outline the visit's findings in a Country Report which will be presented at a forthcoming session of the UN Human Rights Council.

The Indigenous Peoples' Organisations (IPO) Network of Australia has submitted a brief to the Special Rapporteur on current Indigenous human rights issues in Australia. A copy of the brief can be accessed at the Australian Human Rights Commission's website at:

http://www.humanrights.gov.au/social_justice/publications/srip_2009/index.html.

Australian Human Rights Commission

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www.hrlrc.org.au. You can also keep up with the most recent developments by subscribing to our RSS Feed, also at www.hrlrc.org.au.

National Charter of Rights Developments

Major Report on First Five Years of ACT Human Rights Act 2004

The ACT Human Rights Act Research Project at the ANU has released a major report on the impact of the ACT Human Rights Act during the first five years of its operation.

Extracted below is the Executive Summary of the report. The full report is available at <http://acthra.anu.edu.au/index.html>.

“The ACT *Human Rights Act 2004* (HRA) has had considerable significance as Australia’s first legislative bill of rights. By breaking the political deadlock, it has added momentum to efforts in other Australian jurisdictions to consider the desirability of a bill of rights, and provided a model that could be adopted and adapted elsewhere.

It is commendable that the HRA has not remained a static document, and a number of provisions have already been improved in response to the lessons learned in these early years. With the duty on public authorities to comply with the HRA and an independent right of action in the Supreme Court for breaches of the HRA coming into force on 1 January 2009, the HRA’s sixth year should be its most significant.

The first five years of the HRA’s operation illustrate both the potential and the limits of a dialogue model of human rights protection. Although critics predicted a surge in litigation and an undermining of the elected government by an unaccountable judiciary, the experience of the HRA is that its impact on policy-making and legislative processes has been more extensive and arguably more important than its impact in the courts. Its main effects have been on the legislature and executive, fostering a lively, if sometimes fragile, human rights culture within government. While it has not attracted extensive public attention, and its workings have not always been apparent to the broader community, the HRA has operated in subtle ways to enhance the standing of human rights in the ACT.

One of the clearest effects of the HRA has been to improve the quality of law-making in the Territory, to ensure that human rights concerns are given due consideration in the framing of new legislation and policy. The development of new laws by the executive has been shaped by the requirement to issue a statement of compatibility for each new bill, and the approach of government has been influenced by a robust dialogue with the legislature, the Scrutiny Committee and the Human Rights Commissioner. These improved laws are likely to have tangible benefits over the longer term, particularly in the form of additional safeguards for vulnerable individuals in the community.

Nevertheless, parts of the bureaucracy are still to become familiar with the HRA and the implications of protecting human rights. The 12-month review of the HRA recognised that the legislation had not equally penetrated all levels of the bureaucracy, and that further support and training was required to clarify the implementation of the HRA to public servants. The review also recognised that there was still much work to be done to develop fully a culture of human rights in the ACT community. These issues are largely still present and are likely to have been amplified by the changed environment since 1 January 2009 with the commencement of the duty on public authorities. It will be important for the government’s five year review to address the lack of systematic education inside the bureaucracy, including ways to support the Human Rights Commissioner in training and education initiatives. It will also be important to consolidate measures that the executive and legislature have adopted to ensure that these processes endure an informed and explicit consideration of the HRA. In this regard, JACS as lead agency for the implementation of the HRA has a critical role to play, but to do so effectively will require sustained and strategic leadership and commitment.

With some exceptions, the courts have, for the most part, remained a spectator to the HRA dialogue thus far. While the HRA has been referred to in some 91 cases in the ACT courts and tribunals, and there is some indication that its application in the Supreme Court is increasing, in most instances its use has been perfunctory and/or displays a lack of understanding by the legal profession of the provisions of the HRA, and their potential application. Until the courts fully grasp their part in the human rights conversation, there will remain some question as to the HRA’s ability to generate dialogue between the

courts and legislature, and to provide accountability for the government's implementation of human rights.

After almost five years of operation, the HRA has overall succeeded in creating a fledgling human rights culture in the ACT. It is important to recall that the major test of the real success of the HRA is the extent to which it has shaped the policy-making and legislative process, as well as the delivery of services in the ACT. Notwithstanding the fairly limited in-depth examination of the HRA in the courts since its enactment, the progress in these other areas, which is less immediately visible, has been significant. It has brought human rights questions explicitly into the consideration of policy and legislation, thereby improving their quality. Although the findings of the Project show that there is still much to be done, there is little doubt that the implementation of the HRA so far has involved important advances in the endeavour to ensure the full enjoyment of human rights in the ACT. The task for the next five years is to increase and deepen knowledge of the HRA."

ACT Human Rights Act Research Project at the ANU

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.

Tobacco Amendment (Protection of Children) Bill 2009

The *Tobacco Amendment (Protection of Children) Bill 2009* amends the *Tobacco Act 1987* by creating new offences including:

- displaying tobacco advertising in retail outlets (with several exceptions);
- selling tobacco from temporary outlets; and
- smoking in motor vehicles where a minor is present.

The Bill increases penalties for various existing offences relating to the sale or promotion of tobacco products. The Bill also gives the Minister the power to ban:

- the sale of tobacco products;
- packaging of tobacco products in a way which appeals to young people; and
- non-tobacco products which resemble tobacco products.

The Bill implements aspects of the Victorian Tobacco Control Strategy 2008–2013, and constitutes the latest round of reforms to the *Tobacco Act 1987*. These reforms have most recently included introducing smoking bans in enclosed workplaces, restaurants, public transport areas and licensed premises.

The Statement of Compatibility notes that the Bill engages and implements, *inter alia*, the 'right of every person to enjoy the highest attainable standard of health' (art 12 of the *International Covenant on Economic, Social and Cultural Rights*) and the protection of the family and of children (s 17(1) of the *Victorian Charter of Human Rights and Responsibilities*).

The Bill appears broadly in line with the UN Committee on Economic, Social and Cultural Rights' previous recommendations that states implement measures to limit and discourage the use of tobacco. However, as the Scrutiny of Acts and Regulations Committee has noted, the Statement fails to consider key issues such as the wide Ministerial discretion to ban products and the substantial increases in penalties for various offences.

The Statement first notes that although regulation of advertising engages the right to freedom of expression (s 15 of the *Victorian Charter*), such a restriction does not limit human rights because it is "reasonably necessary" for the protection of public health. This conclusion is consistent with UK jurisprudence on tobacco advertising restrictions.

The Statement considers that the bill engages the right to freedom from arbitrary interference with privacy (s 13(a) of the *Victorian Charter*) in its prohibition on smoking in motor vehicles. The Statement

concludes that such interference would be neither unlawful nor arbitrary as the provisions clearly specify the circumstances in which the interference is lawful, and appropriately restrict enforcement of the offence to members of the police force. However, the Statement also implies that laws regulating conduct in motor vehicles may *never* be capable of limiting the right to privacy. This assumption appears inconsistent with international jurisprudence, and limiting the right of privacy in this way has the potential to disproportionately affect various groups such as the homeless.

The Statement reviews how the Bill engages the right of a person charged with a criminal offence to be presumed innocent until proven guilty (s 25(1) of the Victorian *Charter*). Section 5U of the Bill provides that, in proceedings regarding the offence of smoking in a car with a minor, evidence that a person appears to be a minor is, in the absence of contrary evidence, proof that the person is a minor.

The Statement concludes that such evidentiary burdens do not limit the right to be assumed innocent because, once the issue of the passenger's age is contested, the prosecution must prove beyond reasonable doubt that the passenger was a minor. SARC's review of the Statement, however, concluded that the provision 'relieves the prosecution of the burden of proving an essential element of the offence', and considered that it could be difficult in some cases for a defendant to establish the passenger's age. SARC was also concerned that the offence itself could have unintended applications in circumstances where a minor is charged with the offence, or is the passenger but is also smoking. SARC noted that the offence might 'partially criminalise teen smoking' and impede children's freedom of association. SARC's review of the Statement recommended that the offence be narrowed so that it would not apply to minors, or would apply only where the passenger is under 16 (as in various other jurisdictions).

Zach Meyers, Human Rights Law Group, Mallesons Stephen Jaques

Access to Health Care for Asylum Seeker

The following case study has recently been added to the Centre's public database of case studies which illustrate how human rights laws can be used to promote human dignity and addresses disadvantage.

On the same day as receiving advocacy training on how to use the Victorian *Charter of Rights*, a community nurse who had been trying to assist a refugee with pressing health needs to gain health care raised the *Charter* with a hospital. The hospital had indicated that they would refuse health services if the patient could not pay. As a refugee, the patient had no access to Medicare. On questioning the hospital as to whether refusing access in this way 'contravened the *Charter*', the relevant staff member said she did not know. The community nurse then sent an email to senior staff at the hospital raising *Charter* rights and obligations. Subsequently, a directive was sent to hospital staff advising all staff to implement a DHS directive stating all asylum seekers and refugees were to receive free services.

Relevant Human Rights: The right to life; protection from cruel, inhuman or degrading treatment; right to non-discrimination, right to security of person.

Source: West Heidelberg Community Legal Service

The Centre's public database of select case studies now contains 30 case studies from Victoria, the ACT and the UK: see <http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/case-studies/>. To share your story, please contact Rachel Ball from the HRLRC at rachel.ball@hrlrc.org.au. All stories will be de-identified.

Victorian Charter Case Notes

Supervised Treatment and Limitations on the Rights of Persons with Disability under the *Charter*

AC (Guardianship) [2009] VCAT 1186 (8 July 2009)

This case concerns AC, a 26 year old man with a mild intellectual disability who has been living at Sandhurst since 2000. Due to a history of assaultive and sexualised behaviours, AC was placed on a Supervised Treatment Order ('STO') under the *Disability Act 2006* (Vic). The STO required him to be under constant supervision and allowed him to leave Sandhurst only in restricted circumstances and under the supervision of two staff members. In 2009, AC applied to the Victorian Civil and

Administrative Tribunal for review of the STO. AC wanted the STO to be revised so that he could come and go from Sandhurst as he wished during the daytime and have much more freedom in the community. AC stated that he was prepared to remain at Sandhurst and receive treatment voluntarily. The Department of Human Services opposed AC's application.

STOs under the Disability Act

Under the Act, the Tribunal may make an STO if it is satisfied that the matters specified in s 191 apply, namely: the person must have an intellectual disability, be receiving residential services and have a treatment plan in place that has been approved by a Senior Practitioner. In addition, the Tribunal must be satisfied of the following elements:

- The person has previously exhibited a pattern of violent or dangerous behaviour causing serious harm to another person or exposing another person to a significant risk of serious harm;
- There is a significant risk of serious harm to another person which cannot be substantially reduced by using less restrictive means;
- The services to be provided to the person in accordance with the treatment plan will be of benefit to the person and substantially reduce the significant risk of serious harm to another person;
- The person is unable or unwilling to consent to voluntarily complying with a treatment plan to substantially reduce the significant risk of serious harm to another person; and
- It is necessary to detain the person to ensure compliance with the treatment plan and prevent the significant risk of serious harm to another person.

Decision

Before determining whether the criteria in s 191 of the Act had been satisfied in respect of AC, the Tribunal was required to identify the correct meaning of s 191 and, in particular, the meaning of the term 'serious harm' when interpreted in accordance with s 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). AC argued that the STO limited a number of his human rights under the Charter and that the interpretative obligation contained in s 32(1) therefore required the Tribunal adopt a narrow interpretation of the term 'serious harm'.

In determining the application of the Charter to the Act, the Tribunal applied the 'four step' approach set out by Justice Bell in *Kracke v Mental Health Review Board & Ors* [2009] VCAT 646 – that its, engagement, justification, reinterpretation and (for the Supreme Court alone) declaring inconsistency.

At the 'engagement' stage, the Tribunal interpreted the provision '*according to the standard principles of interpretation*'. This included adopting an interpretation that was consistent with international treaties such as the Declaration on the Disabled Persons and applying the principle of legality which states that freedoms cannot be abrogated without clear intent. The Tribunal held that the legislative purpose of the Act was to benefit persons with an intellectual disability but also to protect other members of the community. It went on to say that the meaning of 'serious harm' according to standard principles of interpretation; was '*harm – physical or mental – that is, when compared to other cases of harm or potential harm "very considerable" and more than significant or marked*'.

The 'engagement' stage also required the Tribunal to identify the scope of the rights engaged and to determine whether the provision limits the scope of those rights. AC submitted that the STO limited his rights to non-discrimination, to be free from medical treatment without consent, to freedom of movement, to privacy and not to be subjected to arbitrary detention. The Department argued that the last two rights were not engaged because the limitation of those rights was not arbitrary. The Tribunal rejected this argument and stated that where rights are expressed in terms that contain a specific internal limitation such as 'arbitrariness', this does not reduce the nature and content of the right. Rather, the specific limitation is seen as an indication of what might be considered at the later stage of determining whether the limitation is justifiable. The right to privacy was clearly engaged as the STO limited the ability of AC to express himself, to enter into relationships, and to develop personally in the way that he would wish for. In relation to the right not to be detained arbitrarily, this right was engaged since the question of whether or not AC's detention is arbitrary also arises at the later 'justification' stage.

Having found that five of AC's human rights had been engaged by the *Charter*, the Tribunal then moved on to the second stage of the *Charter* analysis, determining whether the limitation on those rights was justifiable in accordance with s 7(2), taking into account each of the five factors listed in that section. The Tribunal noted that at the source of all of the rights engaged was a core value of autonomy – that is, the right to make decisions about oneself in all areas of life. The Tribunal recognised that '*this may involve taking risks, making decisions that others disagree with and being accountable for decision making.*' The Tribunal found that there were two purposes of the legislation, to enable AC to receive appropriate treatment while at the same time to protect AC and others from a significant risk of violent and dangerous behaviours. The Tribunal recognised that the limitations placed on AC were significant but pointed to the safeguards provided by the Act which were designed to ensure that the limitation was as minimal as possible. The Tribunal then examined the relationship between the limitation and its purpose, highlighting the complexity of the treatment plan and the fact that it was aimed at the reduction of supervision and the gaining of greater autonomy for AC. Finally, the Tribunal examined the evidence and concluded that the only less restrictive option, receiving treatment voluntarily, was not realistic given AC's past history.

Weighing up all of these considerations, the Tribunal found that while AC's pattern of violent and sexualised behaviour had not yet caused serious harm to another person, there was a significant risk of serious harm occurring if the STO was modified. The limitations were therefore justifiable under s 7(2) and it was not necessary to move on to the third step of the *Charter* analysis. The Tribunal confirmed the STO in relation to AC.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VCAT/2009/1186.html>.

Lisa Mortimer is a lawyer with Allens Arthur Robinson

Equal Opportunity Exemptions and Special Measures under the Charter

Hobsons Bay City Council & Anor (Anti-Discrimination Exemption) [2009] VCAT 1198 (17 July 2009)

The Victorian Civil and Administrative Tribunal has again granted a swimming pool operator a temporary exemption from the *Equal Opportunity Act 1995* (Vic) ('EO Act') to enable it to conduct women-only swimming sessions and related programmes. Deputy President McKenzie held that the exemption was a special measure for advancing equality and imposed a reasonable limitation on the right of men to non-discrimination and freedom of movement under the *Charter*. Her reasons are very similar to those that she stated in the matter of *YMCA – Ascot Vale Leisure Centre (Anti-Discrimination Exemption)* [2009] VCAT 765 (4 May 2009).

Facts

Hobsons Bay City Council and Leisure Management Services ('LMS') applied for an exemption from the EO Act to conduct women-only swimming sessions and related programmes at the Bayfit Leisure Centre in North Altona (a facility managed by LMS on behalf of the Council). This case was brought under s 83 of the Act, which authorises VCAT to grant temporary exemptions to facilitate equality of opportunity and the elimination of discrimination.

The evidence before VCAT indicated that the Council had extensively consulted the local community and concluded that cultural constraints caused less women and less people from culturally and linguistically diverse communities to participate in sport and recreation compared to the rest of the community. VCAT was informed that there are 734 Islamic women living in North Altona. During the Council's consultations, swimming was identified as one of the most popular sports, particularly among the Muslim community. However McKenzie DP found that, for cultural and religious reasons, Muslim women and women from some cultures in the community were not able to participate in mixed male/female swimming sessions.

The report and recommendations that followed Council's consultation with the community recommended that Council's recreation programs become more culturally sensitive. In response, the Council and LSM proposed operating a swimming session staffed by women and open only to women on a Friday evening (the 'proposal'). This would shorten the use of the pool by men by half an hour, but would otherwise take place when the Centre is normally closed.

Decision

Deputy President McKenzie first determined the exemption application according to a pre-*Charter* interpretation of s 83, and held that the exemption was justified. This is because the benefits that would flow from granting the exemption are consistent with the special measures provision in the Act, which allows the selective provision of special services aimed at reducing the disadvantage to persons with special needs.

The application was then considered in light of the *Charter*. This disjunctive approach to determining exemption applications follows the previous decisions of Judge Harbison in *Royal Victorian Bowls Association Inc (Anti-Discrimination Exemption)* [2008] VCAT 2415 and McKenzie DP in *Victorian Netball Association Inc (Anti-Discrimination Exemption)* [2008] VCAT 2651 and *YMCA – Ascot Vale Leisure Centre (Anti-Discrimination Exemption)* [2009] VCAT 765.

Deputy President McKenzie accepted that, for the purposes of the proposal, the Council and LMS were public authorities. She also held that VCAT is a public authority when determining exemption applications and must therefore make a human rights compatible determination. In this instance, the proposal was found to impact on the right to equality and the freedom of movement of male users of the Centre. On the other hand, the cultural and religious rights of women who are otherwise unable to use the pool at the Centre were also considered relevant. The exemption would alleviate the indirect discrimination experienced by these women, who for cultural or religious reasons cannot attend 'mixed' swimming facilities. Deputy President McKenzie concluded that this was consistent with the special measures provision at s 8(4) of the *Charter*, which provides that measures taken to assist groups disadvantaged by discrimination do not constitute discrimination.

In addition to benefiting women who cannot swim in the presence of men for cultural and religious reasons, McKenzie DP considered that women who have been subject to abuse at the hands of men may also feel safer and more comfortable if they can swim without men present. It was accepted that women in the Hobsons Bay area are disproportionately subjected to family violence compared to the average Victorian woman. Deputy President McKenzie found that other women may also prefer swimming where men are not present for reasons of body image.

Deputy President McKenzie also considered the proposal to be a reasonable and proportionate limitation on the rights of men to equality and freedom of movement, particularly given that the proposal would only reduce the pool's normal operating hours by 30 minutes on a Friday evening, when attendance rates are usually lower in any event.

The exemption was granted on condition that the applicants monitor the swimming program's attendance rates and continued necessity, and submit annual reports on these matters to the Victorian Equal Opportunity and Human Rights Commission.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VCAT/2009/1198.html>.

Melanie Schleiger is a lawyer with Lander & Rogers and a Board member of the Human Rights Law Resource Centre

Freedom of Information, Freedom of Expression and the Charter

Smeaton v Victorian WorkCover Authority [2009] VCAT 1195 (5 August 2009)

The Applicant sought review of a decision by the Victorian WorkCover Authority to transfer documents that were the subject of a Freedom of Information request by the Applicant to the Ombudsman. The effect of the transfer was to place the documents beyond the Applicant's reach as, once a document is transferred to the Ombudsman, it is immune from release: s 29A of the *Ombudsman Act 1973*. The application for review was dismissed on the basis that VCAT does not have jurisdiction to review the relevant decision: s 50(2) of the FOI Act.

Decision

His Honour emphasised the right to a fair hearing and the steps a court may take in protecting this right in unrepresented parties.

Right to a fair hearing (s 24(1) of the Charter)

Justice Bell emphasised the Tribunal's duty to ensure a self-represented party receives a fair hearing and is provided with due assistance from the court or tribunal. This duty arises from the Tribunal's statutory duty to act fairly, its common law duty (citing *Tomasevic v Travaglini* (2007) 17 VR 100) and its

obligations under ss 24(1) and 38(1) of the *Charter* ... to act compatibly with Mr Smeaton's human right to a fair hearing in a civil proceeding, which directly applies to the tribunal not just, as in this case, when it is exercising administrative jurisdiction in the public law sense, but when it is exercising all of its jurisdictions. (See also *Kracke v Mental Health Review Board* [2009] VCAT 646, [252], [254], [332], [489]).

His Honour took a number of steps to ensure that the right to a fair hearing was preserved. Steps included articulating the procedure that was to be followed, the main issues involved and the relevant legal issues that needed to be addressed by the Applicant. In addition, His Honour directed that the Applicant seek pro bono legal representation.

Right to seek and receive information (s 15 of the Charter)

As discussed above, the application was for review of VWA's decision under s 18 of the FOI Act to transfer a document to the Ombudsman after the Applicant had requested the document from VWA. Once the document had been transferred, it was immune from release: s 29A of the *Ombudsman Act 1973*. As the power to transfer a document is discretionary, relevant considerations, including rights protected under the *Charter* and the obligations of public authorities, must be taken into account.

To determine whether VWA's decision breached the *Charter*, His Honour adopted the approach articulated in *Kracke*. This requires consideration of questions of: (1) engagement; (2) justification; and (3) reinterpretation if necessary. His Honour held that the Applicant's right to freedom of expression was not engaged because the Applicant was able to 'seek whatever information he wishes and receive whatever information he may be given. There is no restriction imposed on Mr Smeaton's capacity to receive information which others may wish to give him'. The FOI Act creates a right to obtain access to information subject to, among other things, the power to transfer documents under s 18. As the right was not engaged, justification and reinterpretation were not relevant.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VCAT/2009/1195.html>.

Phoebe Knowles is a barrister at the Victorian Bar

Comparative Law Case Notes

European Court Considers State Obligations to Prevent and Address Domestic Violence

Opuz v Turkey [2009] ECHR 33401/02 (9 June 2009)

In June 2009, the European Court of Human Rights found Turkey in violation of its obligations, under arts 2, 3 and 14 of the *European Convention on Human Rights*, to protect the applicant and her mother from domestic violence. In the landmark decision, the Court held that domestic violence is a form of discrimination that states are required to eliminate and remedy. The case brings the Court's jurisprudence in line with international human rights law, which has long recognised such violence as a form of discrimination.

Facts

The applicant, Nahide Opuz, claimed that Turkey had failed to protect her mother and her from domestic violence perpetrated by the applicant's husband, HO. The alleged incidences of violence included attempted murder, death threats, harassment and ongoing physical assault occasioning grievous bodily harm. The violence suffered by the applicant and her mother was brought to the attention of the relevant state authorities on numerous occasions, however, several criminal prosecutions against HO were discontinued because the two women withdrew their complaints. HO was fined on one occasion for running into the women with a car. In March 2002, HO shot the applicant's mother, killing her. He is currently appealing his conviction for the murder, during which time he has been released from prison. On release, HO again harassed the applicant and made death threats against her.

In her complaint to the European Court, the applicant alleged that the Turkish authorities had failed to protect her mother and her against domestic violence, in violation of the *European Convention on*

Human Rights. More specifically, she alleged that Turkey had violated the right to life (art 2) in respect of the death of the applicant's mother, and the freedom from degrading treatment (art 3) in respect of the failure to protect the applicant against domestic violence. She further alleged that Turkey had violated the rights to non-discrimination and equality (art 14), read in conjunction with the preceding rights.

Decision

The European Court held that Turkey had violated the right to life, the freedom from torture and the rights to non-discrimination and equality.

Right to life

In relation to art 2, the Court reiterated that states must not only refrain from interfering with the right to life, they must also take positive steps to ensure the right is protected. The Court explained that this positive obligation requires states to put in place 'effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions'. It also requires states to 'take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual'. The Court further explained that the obligation arises when it is established that the state 'knew or ought to have known' of the existence of a 'real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk'. On the facts, the Court concluded that, given HO's violent history, the state could have foreseen a lethal attack and should have exercised due diligence to prevent the murder of the applicant's mother. The Court further concluded that, despite the withdrawal of the victims' complaints, the legislative framework should have empowered the authorities to pursue criminal investigations against HO, based on the gravity of his conduct.

Freedom from torture

With respect to art 3, the Court held that the applicant's physical and mental injuries amounted to ill-treatment and that Turkey's response to those injuries was manifestly inadequate. Emphasising the gravity of the violence, the Court again criticised the legislative framework for requiring the authorities to discontinue criminal proceedings when a complaint is withdrawn, and stated that the authorities should have been empowered to pursue criminal investigations against HO despite the withdrawal of the complaints.

Rights to non-discrimination and equality

In relation to art 14 of the *European Convention*, the Court held that domestic violence in Turkey affected mainly women and that Turkey's failure to protect the applicant and her mother against domestic violence constituted discrimination. The Court welcomed the enactment of legislation to protect against domestic violence, but held that the discrimination in this particular case was based not on the legislation *per se*, but on the attitudes of state authorities. In particular, it highlighted the treatment of women at police stations when they reported domestic violence and judicial passivity in providing effective protection against domestic violence. It also highlighted the inadequate deterrent effect of the legislation and problems with its implementation. The Court concluded that domestic violence in Turkey 'affected mainly women and that the general and discriminatory judicial passivity ... created a climate that was conducive to domestic violence'. It further concluded that the violence suffered by the applicant and her mother could 'be regarded as gender-based violence which is a form of discrimination against women. ... [T]he overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the instant case, indicated that there was insufficient commitment to take appropriate action to address domestic violence'.

Relevance to the Victorian Charter

In Australia, 1 in 3 women experience gender-based violence in their lifetime. Whilst gender-based violence, including domestic violence, cannot be eliminated through law alone, it is an essential component of any response to this socially pervasive and persistent wrong.

The Victorian *Charter* provides a key tool in the struggle against gender-based violence. Section 8 of the *Charter* guarantees the rights to non-discrimination and equality. Of particular relevance to the present discussion are sections 8(2) and 8(3), which provide that every person has a right to enjoy his or her rights without discrimination and is entitled to equal and effective protection against discrimination. Echoing a well-established body of international jurisprudence, *Opuz v Turkey* confirms the importance of characterising gender-based violence against women as a form of discrimination that public authorities are required, under arts 8(2) and 8(3), to eliminate and remedy.

In addition, ss 9 and 10 of the *Charter* afford protection to the right to life and the freedom from torture, respectively. It is important that these rights are interpreted in a way that provides women with meaningful protection against gender-based violence.

The decision is available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>.

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Rights of the Child and Minimum Sentencing Legislation

Centre for Child Law v Minister for Justice and Constitutional Development and Others (with the National Institute for Crime Prevention and the Re-integration of Offenders as Amicus Curiae) [2009] ZACC 18 (15 July 2009)

The Constitutional Court of South Africa upheld a decision of the High Court declaring invalid provisions of the *Criminal Law (Sentencing) Amendment Act 38 (2007)* ('Amendment Act') which made minimum sentences for certain serious crimes applicable to 16 and 17 year old children. The provisions were found to negate the Constitution's principles that children should only be detained as a last resort and for the shortest period of time.

Facts

In *S v B* 2006 (1) SACR 311 the Supreme Court of Appeal held that a discretion was automatically enlivened in a sentencing court for offenders aged between 16 and 17 years old. The discretion enabled a sentencing court, inter alia, to depart from prescribed minimum sentences. To reverse the decision of the Supreme Court of Appeal, the Amendment Act was enacted which amended the *Criminal Law Amendment Act 105 of 1997*. The effect of the amendments was to make minimum sentences applicable to offenders who were 16 or 17 at the time of the offence and to make it expressly clear that children under the age of 16 at the time of the offence are excluded from the application of minimum sentences.

The Centre for Child Law at the University of Pretoria challenged the constitutional validity of the Amendment Act. The High Court upheld the challenge finding that applying minimum sentences to children aged 16 or 17, was inconsistent with principles espoused in the Constitution of imprisonment as a last resort and for the shortest appropriate period of time.

The Centre sought confirmation of the declaration of invalidity in the Constitutional Court. The Centre also sought an order that children already sentenced under the amended provisions be identified and have their sentences reconsidered.

Decision

Cameron J, with whom Langa CJ, Moseneke DCJ, Mokgoro, O'Regan, Sachs and Van der Westhuizen JJ concurred, upheld the High Court's judgment. (Yacoob, Ngcobo, Nkabinde and Skweyiya JJ dissenting)

The Court considered the scope and reasons for the protection under s 28 of the Constitution. Section 28(1)(g) stipulates that a child has the right not to be detained except as a measure of last resort and only for the shortest period of time. Subsection (2) provides that a child's best interests are paramount. The Court stated at [32] that section 28(1)(g) requires an 'individuated judicial response to sentencing, one that focuses on the particular child who is being sentenced, rather than an approach encumbered by the rigid starting point that minimum sentencing entails.' The Court held that the minimum sentencing provisions constrain their discretion in the sentencing process thereby diminishing the courts' power of individuation.

Having found that the Amendment Act limited the rights protection in section 28, the Court went on to consider whether the limitation was justifiable. The Court held that the government had not justified the purpose behind expressly excluding 16 and 17 year olds from the protections in the Constitution. The Court stated, at [55], that 'it could reasonably be expected that the Minister would set out reasons or policies that pertain to what specific conduct and social patterns within the age-group previously exempt, but now encompassed, created the need to impose a limitation on the rights in section 28'. The government's objective in enacting the Amendment Act was to reverse the effect of *S v B* which the Court held was insufficient. The government argued that judicial notice should be taken that serious crime in all categories had increased. The Court held, at [60], that 'high crime levels and well-justified public anger do not provide justification for a legislative intervention overriding a specific protection in the Bill of Rights.'

The Court did not grant the relief the Centre sought in relation to children already sentenced under the amended provisions on the grounds that it was inconsistent with the proper approach to retroactivity in criminal proceedings. Instead, the Court ordered the government to identify the number of affected children sentenced under the Amending Act to afford them an opportunity to lodge appeals.

Relevance to the Victorian Charter

Section 23 of the Victorian *Charter* protects the rights of children in the criminal process. Section 17 more generally enshrines the rights of children to be protected by society and the State. To date these provisions have not come before the courts, however interpretations of these protected rights could be guided by jurisprudence of the South African Constitutional Court.

The decision is available at <http://www.saflii.org/za/cases/ZACC/2009/18.html>.

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Proportionality and Limitations on Human Rights: Indefinite and Unreviewable Reporting Obligations Breach the Right to Privacy

JF & Anor, R (on the application of) v Secretary of State for the Home Department [2009] EWCA Civ 792 (23 July 2009)

The UK Court of Appeal has found that a regime providing for automatic and indefinite reporting obligations for certain sex offenders, without the possibility of any future review, imposes a disproportionate limit on the right to privacy.

Facts

Section 82 of the *Sexual Offences Act 2003* (UK) provides that individuals convicted of certain sexual offences are subject to reporting obligations. The obligations include a duty for the offender to notify police of:

- the offender's name, date of birth, insurance number, and relevant addresses (which must be re-notified annually);
- any subsequent changes to this information, including any other address the person has resided at for at least 7 days; and
- information regarding any travel plans and itineraries, which must be provided at least 7 days (or 24 hours in certain circumstances) before the person departs the UK.
- For offenders sentenced to a term of detention or imprisonment over 30 months for the offence, the reporting obligations apply indefinitely. There is no provision for review of the obligations.

The two claimants in this case were subject to the indefinite reporting regime. One of the claimants, sentenced to exactly 30 months' detention, was 11 years old when the offences were committed. Both claimants argued that the regime breached article 8 of the *European Convention on Human Rights*, which protects 'respect for private and family life'. The claimants sought a declaration of incompatibility pursuant to s 4 of the *Human Rights Act 1998* (UK).

A Divisional Court granted the declaration and the Secretary of State brought this appeal to the Court of Appeal.

Decision

The Secretary conceded that the *Sexual Offences Act 2003* intruded on the right to privacy, but argued that the law fell within article 8(2) of the *Convention*. Article 8(2) permits lawful intrusions on the right to privacy which are 'necessary in a democratic society' for reasons including the prevention of crime. The key issue between the parties was whether the reporting regime was proportionate to this objective, and thus permitted under art 8(2). It was common ground that the interference was required to be 'no more than is necessary to achieve the legitimate objective' of preventing crime.

Lack of review mechanism unnecessary and disproportionate

Reporting obligations on sex offenders were introduced in the UK in 1997, and then extended in 2000 and 2003. Courts had already held that the 1997 and 2000 regimes were compatible with the *Convention*. However, the Court of Appeal distinguished these cases on the basis that the previous reporting obligations were significantly less burdensome, and the cases had not considered the human rights compatibility of imposing indefinite reporting obligations without any *future* right of review.

With respect to proportionality, the Court found that:

- the impact of the notification requirements was substantial, particularly for individuals who travel frequently;
- there was inevitably a "real possibility" that an offender's reporting obligations would be discovered by others;
- a review mechanism would not prejudice law enforcement if it only relieved individuals with no risk of recidivism from reporting; and
- a review mechanism would not necessarily impose an undue burden on the state, because the legislature could impose appropriate limitations on eligibility for review.

Accordingly, the Court upheld the Divisional Court's finding that an offender subject to indefinite reporting obligations is entitled to have the obligations reviewed. This conclusion was strengthened in its application to child offenders, given the principle that 'an offender deemed by statute to be not fully mature when committing his crime should not be punished as if he were'.

Applicants not required to prove personal breach of rights

The Court also rejected an argument by the Secretary that the claimants should be required to prove that *their* human rights had been breached before issuing a statement of incompatibility. The Court held that, even though the reporting obligations might have been reasonably imposed in their situations, they nevertheless had a 'real interest' in having a potential future avenue of review.

Relevance to the Victorian Charter

Section 13 of the Victorian *Charter of Human Rights and Responsibilities 2006* (Vic) provides for the right of privacy. As in the UK, rights are subject to reasonable limits, although, in assessing such limits, s 7 of the Victorian *Charter* specifically requires consideration of whether there are 'less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve'.

The *Sex Offenders Registration Act 2004* (Vic) is very similar to the UK registration regime, providing for automatic and indefinite reporting obligations for certain sex offenders. However, unlike in the UK, individuals subject to indefinite reporting may apply to have the obligations suspended.

More generally, this case justifies Victorian courts applying careful scrutiny to laws which impose severe limits on human rights, and highlights the specificity with which courts may consider modifications to relieve such laws. Indeed, Victorian Courts have already used the *Charter* to narrow the scope of sexual offender supervision schemes. In *TSL v Secretary to the Department of Justice* [2006] VSCA (26 September 2006), for example, the Court of Appeal drew on s 7 of the *Charter* (which had not yet come into effect) to justify requiring a 'high degree of probability' of recidivism before a sex offender would be subject to a supervision order.

The decision is available at <http://www.bailii.org/ew/cases/EWCA/Civ/2009/792.html>.

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Legality and the Presumption against the Abrogation of Fundamental Freedoms: Control Orders Cannot Abrogate Fundamental Rights without Express Authority

Secretary of State for the Home Department v GG [2009] EWCA Civ 786 (23 July 2009)

The Court of Appeal of England and Wales has considered the Home Secretary's power to restrict a person's liberty with a control order made under the UK *Prevention of Terrorism Act 2005*. The Court held that broad powers under the relevant legislation had to be read consistently with the common law principle that fundamental rights must not be abrogated without express parliamentary authority.

Facts

The Home Secretary in the UK is the Minister responsible for matters of national security. The *Prevention of Terrorism Act 2005* confers on the Home Secretary the power to restrict a person's liberty by a control order if that person is suspected of being involved in terrorist activities. GG was subject to such a control order. One of the restrictions of GG's control order was that the Home Department could order that GG be personally searched on demand, even if GG was not suspected of having committed a criminal offence. The Court of Appeal had to consider whether this condition of the control order was lawful under the *Prevention of Terrorism Act 2005*.

Section 1(3) of the *Prevention of Terrorism Act 2005* provides that the Home Secretary can impose *any* obligations *necessary* under a control order, for the purpose of preventing or restricting a person's involvement in a terrorist activity. Section 1(4) then provides a non-exhaustive list of possible restrictions and obligations that can be included in a control order.

The Act does not expressly provide that the Home Secretary can impose a restriction to make person subject to personal searches. Counsel of the Home Secretary argued that that language of s 1(3) is clear and unqualified and that it means what it says. He submitted that it was wide enough to permit the inclusion of any obligation, even one which deprives a person of his fundamental rights.

The Court was required to decide whether the broad power to impose conditions as part of a control order permitted the Home Secretary to order that GG be subject to personal searches on demand.

Decision

The Court of Appeal unanimously held that the condition that GG could be searched by an order of the Home Department was invalid. Lord Justice Sedley and Lord Justice Dyson (in separate judgements), with Lord Justice Wilson concurring, held that, despite the breadth of the statutory power, s 1(3) of the *Prevention of Terrorism Act 2005* did not either expressly or impliedly confer on the Home Secretary the power to impose an obligation for a person to submit to a personal search. Without express and explicit parliamentary authority, the executive could not abrogate a person's fundamental common law rights of personal security and personal liberty by allowing searches of that individual's clothing or person.

Sedley LJ explained that the absence of reference to personal searches from the list of specific obligations is as consistent with deliberate omission as with accidental omission. His Honour held that even if it were an oversight by the Parliament, it is not the role of the courts, in a matter affecting fundamental liberties, to provide what Parliament might have inserted. Dyson LJ followed similar reasoning in his judgment, noting that there was nothing in the legislation to indicate that Parliament thought about personal searches and, therefore, that the full implications of the unqualified meaning of s 1(3) argued for by counsel for the Home Secretary was noticed during the democratic process.

Relevance to the Victorian Charter

Section 21 of the Victorian *Charter* provides that a person has the right to liberty and security. The specific provisions of s 21 of the Victorian *Charter* include the right not to be deprived of liberty except on grounds, and in accordance with procedures, established by law.

This case reinforces the principle that restrictions on a person's liberty which touch on fundamental rights and freedoms must be expressly and explicitly authorised by legislation if they are to be valid under s 21 of the Victorian *Charter* and under common law principles.

The decision is available at <http://www.bailii.org/ew/cases/EWCA/Civ/2009/786.html>.

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Smoking Ban in High-Security Psychiatric Hospitals does not Contravene Right to Privacy

N, R (on the application of) v Secretary of State for Health [2009] EWCA Civ 795 (24 July 2009)

The House of Lords held that a policy of banning smoking at a psychiatric hospital did not contravene the patients' human rights and was lawful. Specifically the Court held that art 8 of the *European Convention of Human Rights* does not protect the right to smoke.

Facts

Under the *Mental Health Act 2006* all premises used by the public were to be 'smoke-free' from 1 July 2007. Following on from this statutory ban on smoking inside public premises, the Nottinghamshire Healthcare NHS Trust issued a policy banning smoking at Rampton, a high security psychiatric hospital. The policy prohibits smoking for both staff and patients throughout the premises of the hospital.

Regulation 10 of the *Smoke-Free (Exemption and Vehicles) Regulations 2007* ('Exemption Regulations') provided a temporary exemption from the smoking ban under the *Mental Health Act 2006* which provided for mental health units to have a designated room for smoking. The temporary exemption ceased to have effect on 1 July 2008. Regulation 5 provides a similar exemption for other residential accommodation including prisons, the critical difference being there is no time limitation.

The appellants (who were patients at Rampton) alleged the Trust's policy and the Exemption Regulations unlawfully infringed their rights under art 8 and/or art 14 of the *European Convention*. The appellants further alleged that it was discriminatory to only have a temporary exemption for mental health units when contrasted with the exemption for prisons which was unlimited in time.

Articles 8 and 14 of the *European Convention* provide as follows:

Article 8 – Right to respect for private life

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

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Decision

Lord Clarke, Master of the Rolls, delivered a joint judgment with Lord Justice Moses (Keene LJ dissenting). The Court firstly considered the nature of the place in which the appellants sought to exert their right to smoke. While it was accepted that the hospital was a patients' home it was not considered to be their private home, and the distinction was significant. The Court stated, at [44], that 'the patient does not lose all right to a private life but the nature of that life and the activities which he may pursue are seriously restricted and always overlooked.' The Court went on to draw a comparison between the ban on smoking and restrictions on food and drink in psychiatric institutions. The Court held there was no basis upon which to distinguish the loss of freedom in both situations. While accepting a patients' private life must not be eroded completely, it was held that the protection afforded by art 8 of the *European Convention* is confined by the restricted nature of a patients' life within a secure hospital.

The Court then went on to consider the nature of the activity and its proximity to a persons identity or physical and moral integrity. The Court stated, at [49]: 'difficult as it is to judge the importance of smoking to the integrity of a person's identity, it is not, in our view sufficiently close to qualify as an activity meriting the protection of art 8'. Accordingly, it was held that art 8 does not protect a right to smoke in Rampton and that a prohibition on smoking in such institutions does not have a sufficiently adverse effect on physical or moral integrity.

In relation to the appellant's argument that the Exemption Regulations were discriminatory, the Court considered the differential treatment between those in mental health units like Rampton and those in

prisons to be justified. Amongst the several reasons provided by the Court (see paras [77]-[85]), the difference in the nature of the care provided in each institution was considered to be a legitimate basis for the distinction.

Relevance to the Victorian Charter

Smoking in Victoria has been banned in enclosed workplaces and public areas. While most hospitals do not have a policy prohibiting smoking throughout their premises, such a proposal in the future does not seem unlikely. This case is likely to be persuasive in opposing any challenge to the validity of such legislation and policy.

More generally, this case has direct relevance for the interpretation of ss 13 and 8 of the Victorian *Charter* which are similar to arts 8 and 14 of the *European Convention* respectively. The findings regarding the restricted rights of patients under state care may be instructive in the interpretation of s 7 of the Victorian *Charter* which sets out circumstances when human rights may be limited.

The decision is available at www.bailii.org/ew/cases/EWCA/Civ/2009/795.html.

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Assisted Suicide and Human Rights: DPP Should Issue Guidelines on Exercise of Prosecutorial Discretion

Purdy, R (on the application of) v Director of Public Prosecutions [2009] UKHL 45 (30 July 2009)

In this case, the House of Lords found that art 8 of the *European Convention of Human Rights* compelled the DPP to issue specific guidelines as to when prosecution would be recommended for a person who had assisted another to commit suicide.

Facts

Debbie Purdy

Debbie Purdy (the Applicant) wanted to die. In 1995, she was diagnosed with primary progressive multiple sclerosis, an incurable condition. She was aware that there would come a time when she would consider her existence unbearable. When that time came, she wanted to be able to travel to a country where assisted suicide was lawful and end her own life. She could not, however, do this alone and, as Lord Hope noted, '[h]er husband, Mr Omar Puente, [was] willing to help her make [that] journey'.

The *Suicide Act* and the Code for Crown Prosecutors

While suicide is not illegal in the UK, the act of facilitating another's suicide is an offence under the *Suicide Act 1961*, s 2(1) (the *Suicide Act*). Section 2(1) of the *Suicide Act* reads as follows:

A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.

This is qualified by s 2(4) of the *Suicide Act*, which notes that no proceedings shall be instituted for an offence under s 2(1) except by or with the consent of the Director of Public Prosecutions.

A Crown Prosecutor exercising the discretion described in s 2(4) is required to do so according with the *Code for Crown Prosecutors*, issued by the DPP under s 10 of the *Prosecution of Offences Act 1985* (UK) c 23. It provides general guidelines as to when prosecutorial discretion should be used to institute proceedings for an offence. It is not specifically written with s 2(1) of the *Suicide Act* in mind.

Omar Puente and the *Suicide Act*

In light of the foregoing, the Applicant was faced with an uncertainty. If her husband assisted her in carrying out her wishes, would he be charged under s 2(1) of the *Suicide Act*, or would the DPP decline to prosecute him under s 2(4)?

The DPP had utilised the discretion conferred by s 2(4) and failed to pursue those who had committed similar offences in the past. Indeed, in one particular case, that of Daniel James, the DPP had gone so far as to issue a public statement explaining his determination that prosecution was unwarranted under the Code. Despite this, the Applicant argued, the principles surrounding the application of s 2(4) remained uncertain.

Article 8

The Applicant argued that ss 2(1) and 2(4) of the *Suicide Act* interfered with her right to privacy under art 8(2) of the *European Convention*. This states that '[e]veryone has the right to respect for his private and family life, his home and his correspondence'. Article 8(2) further provides that '[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society'.

The Applicant's argument was therefore twofold:

- first, it was argued that s 2(1) of the *Suicide Act* constituted an infringement of the Applicant's right to privacy by regulating the way in which she might choose to end her life by prohibiting assistance from others; and
- second, the Applicant argued that the *Suicide Act* violated art 8(2) of the *European Convention* and more particularly, the principle of legality contained therein.

Decision

Article 8(1)

The first question for determination by the House of Lords was whether s 2(1) of the *Suicide Act* interfered with the Applicant's right to privacy under art 8(1) of the *European Convention*. The Court of Appeal below reluctantly found that it did not, based on the House of Lords precedent *R (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department Intervening)* [2002] 1 AC 800. In *Pretty*, the Law Lords held that art 8 was directed to the protection of personal autonomy while the person was alive, but did not confer a right to decide when or how to die. Accordingly, it was held, s 2(1) of the *Suicide Act* did not infringe the right to privacy.

When *Pretty* was appealed to European Court of Human Rights in *Pretty v United Kingdom* (2002) 35 EHRR 1, Strasbourg disagreed with the House of Lords' assessment, holding that the right to privacy was not confined solely to those decisions that aimed to perpetuate life, as opposed to ending it. The Court of Appeal in *Purdy*, however, remained bound by the decision in *Pretty*.

When the matter was appealed to the House of Lords, however, the Court departed from *Pretty*, and followed the Strasbourg decision in that case. Lord Hope justified this departure at [34], noting:

[I]t is obvious that the interests of human rights law would not be well served if the House were to regard itself as bound by a previous decision as to the meaning or effect of a Convention right which was shown to be inconsistent with a subsequent decision in Strasbourg.

Article 8(2) and the principle of legality

The principle of legality is a fundamental aspect of the rule of law, and is ingrained in the words of art 8(2) of the *European Convention*. Insofar as the *Convention* is concerned, legality entails the following questions, as extracted by Lord Hope at [40]:

1. Is there a legal basis in domestic law for the relevant restriction on human rights?
2. Is the law in question accessible to the individual and sufficiently precise so as to allow him or her to regulate conduct without breaking the law?
3. Assuming the above are present, is the law being applied in such a way as to be arbitrary or in bad faith?

It is important to note that the word 'law' as described above, includes not only statute and common law, but inferior sources such as policy statements, practice notes and, vitally, prosecutorial guidelines.

The Applicant addressed these questions not towards s 2(1) of the *Suicide Act*, but s 2(4). It was argued that, as the Code was not written with s 2(1) in mind and, to a certain extent, adopted a different set of principles in determining whether a prosecution was advisable, it did not provide a clear guide as to when a prosecution would be launched, as required by the second question above.

The House of Lords agreed, noting at [53] that the statement issued by the DPP when justifying his decision not to prosecute the James family showed that 'in a highly unusual and extremely sensitive case of this kind, the Code offers almost no guidance at all'.

Accordingly, their Lordships ordered that the DPP produce a set of guidelines exclusively for the *Suicide Act*. Once this was done, the Applicant would be able determine the risk of prosecution of her husband in the event that he was to help her end her life.

Relevance to the Victorian Charter

Assisted suicide and the right to privacy in Victoria

Section 6B of the *Crimes Act 1958* (Vic) provides that an attempt to aid, abet, counsel or procure another's suicide is an offence. If *Purdy* is adopted, then s 6B violates the right to privacy expressed in s 13 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

While the Victorian statute books contain no equivalent to s 2(4) of the *Suicide Act*, this does not deprive *Purdy* of relevance for the *Charter*. For all offences under Victorian law, the Office of Public Prosecutions possesses a discretion as to whether the perpetrator of an offence should be charged and, as in the UK, it has released a code as to the way that this discretion is to be exercised (see OPP, *Policy 2: The Prosecutorial Discretion* (2008) OPP). Additionally, s 38(1) of the *Charter* provides that it is unlawful for a public authority (including the OPP) to act in a way that is incompatible with a human right.

If the logic of *Purdy* is adopted in Victoria, therefore, the OPP should produce specific guidelines as to when unusual and sensitive offences such as assisting another person's suicide will be prosecuted.

The principle of legality under the Charter

Questions remain, however, as to whether the principle of legality as embodied in art 8(2) of the *European Convention* can be imported to s 13 of the *Charter*, as the latter does not include wording that expressly introduces the principle of legality. That said, considering the principle's status as a cornerstone of the rule of law, it would be surprising if it could not be implied into the *Charter*.

The most likely candidate for this introduction is s 7(2) of the *Charter*, which provides that a right can only be limited to an extent that is justifiable in a democratic society. Given that most free societies would adopt the principle of legality unquestioningly, s 7(2) arguably introduces similar considerations to art 8(2) of the *European Convention*. Given the nascent character of the *Charter*, however, further judicial interpretation will be required before this position can be stated with certainty.

The decision is available at <http://www.bailii.org/uk/cases/UKHL/2009/45.html>.

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Freedom of Religion May be Limited where Effects of Limitation are Proportionate and Justifiable

Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 (24 July 2009)

In a 4:3 decision handed down on 24 July 2009, the Supreme Court of Canada allowed an appeal regarding the constitutionality of a regulation requiring photographs be taken for the grant of a driver's licence. The regulation was held to be constitutional because it is a justifiable limit on the right to religious freedom; and does not constitute religious discrimination against the respondents.

The Court analysed whether there was a justifiable limit on the right to religious freedom, and discussed the proper consideration of the proportionality requirement.

Facts

Since 1974, the province of Alberta has required all motor vehicle drivers to hold a license which bears the photograph of the driver. An exemption was made for religious objectors, who were granted non-photo licences. In 2003, the province adopted a new regulation that made the photo requirement universal and allowed photographs to be placed in a facial recognition data bank.

The Wilson Colony of Hutterian Brethren is a religious group that sincerely believes that the Second Commandment prohibits them from having their photographs willingly taken. The Hutterites maintain a rural and communal lifestyle and attempt to be self-sufficient. However, some members travel outside the Colony to obtain necessary goods and services for the Colony and currently hold non-photo licences to do so.

In 2005, members of the Colony brought a claim against Alberta, alleging that the photo requirement violated their religious belief. Alberta argued that identity theft associated with driver's licenses is a growing problem and argued that the regulation is part of a new system that aims to reduce identity theft by placing photographs taken for licences in the province's facial recognition data bank.

At first instance, the case was decided in favour of the Colony members. Alberta appealed to the Alberta Court of Appeal in May 2007, which upheld the decision at first instance. Finally, Alberta appealed to the Supreme Court of Canada in October 2008.

Decision

All judges analysed the case on the presumption that the burden the regulation imposed was capable of interfering with the Colony claimants' religious beliefs and practice.

Is the regulation a justifiable limit?

Under s 1 of the Canadian Charter of Rights and Freedoms, limits may be imposed on Charter rights if they are measures that are prescribed by law and are reasonable and demonstrably justifiable in a free and democratic society. A measure must fall within a range of reasonable options.

The judges unanimously found that the regulation is a measure prescribed by law, and applied the *Oakes* test. The *Oakes* test examines whether the legislature's measure:

1. has a pressing and substantial objective; and
2. is proportionate in furthering its goals because it –
 - a. is rationally connected to the objective;
 - b. minimally impairs the right; and
 - c. infringes the right in a manner proportional to the objective.

Pressing and substantial objective

The Court found that Alberta's goal of maintaining the integrity of the drivers licensing system in a way that minimizes the risk of identity theft is a pressing and substantial objective, satisfying the first arm of the test.

Rational connection

The majority found that the photo requirement was rationally connected to the objective of maintaining the integrity of the licensing system, because an exemption from the photo requirement would increase the risk of identity fraud associated with the licensing system.

Minimal impairment

The majority found that the universal photo requirement is reasonably tailored to address the problem of identity theft associated with drivers' licences, and falls within a range of reasonable options. They considered that there is no alternative measure that would satisfy the objective and not infringe the claimants' right. As such, they found that the requirement minimally impaired the claimants' right to religious freedom.

Proportionality of infringement and objective

The majority considered the following effects in concluding that the measure was proportional:

- enhancement of the security of the driver's licensing system;
- enhancement of roadside safety and identification;
- harmonization of Alberta's licensing system with other jurisdictions; and
- that the measure imposes on the claimants the cost of not being able to drive on the highway.

The majority found that the judicial act of weighing up the deleterious effects on the right and the benefits of the measure is only relevant at the last stage of the test. The first two stages are an examination of the impugned measure only.

The majority considered that the aim of the measure was not to prevent *all* identity theft, its goal was to minimise identity theft associated with the drivers licence system. Although the Hutterites represented a very small proportion of the overall scheme, their exemption would impact on the integrity of the identification system. The majority further considered that the cost to the claimants of not being able to

drive on the highway did not deprive the claimants of a meaningful choice as to their religious practice. The measure imposed additional economic cost on the claimants because they would have to organise alternative means of transport in order to maintain the Colony. However this would not be prohibitive, even though their self-sufficiency would be threatened. The majority thus found that the universal photo requirement was proportionate to furthering the goal of maintaining the integrity of the licensing scheme. Justice Abella, in dissent, held that proportionality should be considered in all stages of the second arm of the *Oakes* test. Her Honour noted that many Albertans do not hold a license, and the exemption of 250 Hutterites would provide a marginal and hypothetical benefit. Her Honour found that the requirement forced the claimants to choose between compliance with their religious beliefs or giving up the self-sufficiency of their community. Self-sufficiency is significant for the claimants as it has been the way in which they have historically maintained their religious autonomy.

Religious discrimination

The majority found that the regulation does not infringe the right to equality of the claimants because the regulation does not create a distinction on the ground of religion.

Relevance to the Victorian Charter

Section 7(2) of the Victorian *Charter of Human Rights and Responsibilities*, in similar wording to the Canadian Charter, allows limitations that are reasonable and demonstrably justifiable in a free and democratic society. Section 7 includes a non-exhaustive list of factors to be considered in determining whether or not a measure is reasonable and demonstrably justifiable. The decision in *Hutterian Brothers* provides a useful guide to the Canadian jurisprudence on limits to rights and will be highly relevant in cases where Victorian laws of general application limit rights under the Victorian *Charter* and indicates that the relevant law's salutary and deleterious effects must be considered.

The decision is available at <http://www.canlii.org/en/ca/scc/doc/2009/2009scc37/2009scc37.html>.

Florence Seow is an Intern with the Human Rights Law Resource Centre

HRLRC Policy Work

Counter-Terrorism: Submission on National Security Legislation Monitor Bill

On 27 July 2009, the Human Rights Law Resource Centre and the Public Interest Law Clearing House made a Joint Submission to the Senate Standing Committee on Finance and Public Administration in relation to the *National Security Legislation Monitor Bill 2009*. The Bill establishes the National Security Legislation Monitor to review the operation, effectiveness and implications of counter-terrorism and national security legislation and report his or her findings and recommendations annually.

In September 2008, the Centre and PILCH independently made submissions to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Independent Reviewer of Terrorism Laws Bill 2008 (No 2)*. A number of positive changes have been made to the Bill since the report of the Senate Standing Legal and Constitutional Affairs Committee in October 2008.

While the Joint Submission strongly supports the establishment of the Monitor, a number of recommendations were proposed focussed on ensuring a transparent, independent and holistic framework of review, compliant with international human rights obligations. Examples of recommendations proposed in the submission include:

- Clarifying the definition of 'counter-terrorism and national security legislation' to ensure that any legislation which might impact upon the prevention, detection or prosecution of a terrorist act is covered, including new legislation.
- Amending the Bill to expressly require the Monitor, in conducting a review, to consider the human rights impacts of Australia's counter-terrorism and national security legislation and the compatibility of such legislation with international human rights standards and obligations.
- Requiring the Monitor to have regard to a non-exhaustive list of relevant considerations when determining review priorities, including but not limited to: Australia's human rights obligations; the extent to which the laws under review alter fundamental legal principles; whether the relevant laws are effective and workable, both within their own terms, and in combination with other legislation;

and whether there are any less-restrictive means by which the objectives of the relevant legislation could be achieved.

The submission is available at: <http://www.hrlrc.org.au/content/topics/counter-terrorism/counter-terrorism-and-human-rights-submission-on-national-security-legislation-monitor-bill-july-2009/>.

Prabha Nandagopal is on secondment to the Centre from DLA Phillips Fox

Refugee Rights: Submission on Migration Detention

On 2 August 2009, the Centre made a Submission to the Senate Legal and Constitutional Affairs Committee on the Migration Amendment (Immigration Reform) Bill 2009.

The Bill is intended to 'implement the Government's New Directions in Detention policy to increase clarity, fairness and consistency in the way the Minister and the Department of Immigration and Citizenship respond to unlawful non-citizens'.

While welcoming aspects of the Bill, the Submission considers and makes recommendations regarding a number of deficiencies, including that:

- the Bill maintains the policy of mandatory immigration detention, contrary to international human rights law which requires adequate and individualised justification for detention in each case;
- while enshrining some important new 'principles', at the same time introduces substantive new operational provisions that fundamentally contradict those principles;
- does not prevent the detention of children in all closed detention facilities;
- certain provisions do not apply in exclusion zones, most notably on Christmas Island, and therefore denies all asylum seekers on Christmas Island any improvements introduced by the Bill;
- does not impose a time limit on immigration detention or require authorised officers to consider granting temporary community access permissions, therefore unnecessary detention can continue for long periods of time; and
- does not provide that decisions to detain should be subject to independent judicial review, as required by international human rights law.

Over the past year the Government has made commitments before domestic and international audiences that it will ensure that people are only held in immigration detention as a 'last resort'. The Centre's submission commends this principle, but argues that the Bill will not ensure that it is protected and implemented in practice. The deprivation of liberty is a grave intrusion on human rights. In the case of asylum seekers this intrusion is all the more serious by virtue of the vulnerability of many of those who seek Australia's protection.

On 20 August 2009 the Senate Committee completed its inquiry. The Committee's report supports the Bill subject to a number of recommendations, including that officers be required to consider a request to grant a Temporary Community Access Permission and that some of the Bills provisions be broadened to apply in excised zones. The Centre's submission is referred to extensively in the Committee's report.

The Centre's submission is available at: <http://www.hrlrc.org.au/content/topics/refugees-and-asylum-seekers/refugee-rights-submission-to-inquiry-into-immigration-detention-aug-2009/>

Rachel Ball is a lawyer with the Human Rights Law Resource Centre

Equality Rights: Submission to UN CERD regarding Draft General Recommendation on 'Special Measures'

On 21 August 2009, the Centre made a short submission to the UN Committee on the Elimination of Racial Discrimination for its consideration in the drafting of a General Recommendation on the issue of 'special measures', as provided in articles 1(4) and 2(2) of the *International Convention on the Elimination of All Forms of Racial Discrimination*.

The Centre's submission considers the following issues:

- the importance of a General Recommendation on special measures;
- harmonisation of terminology;

- definition and scope of the term 'special measures';
- the obligation to implement special measures; and
- the importance of participation of affected groups in the development of special measures.

The submission is available at <http://www.hrlrc.org.au/content/topics/equality/equality-rights-submission-to-un-committee-on-racial-discrimination-regarding-draft-general-comment-on-special-measures-aug-2009/>.

Ben Schokman is the Centre's DLA Phillips Fox Human Rights Lawyer

HRLRC Casework

Indigenous Rights: Centre Acts for Residents of Alice Springs Town Camps

The Centre is acting for a group of Aboriginal residents in Alice Springs town camps whose current tenancy arrangements are under threat by the Commonwealth Government. For over 12 months, the Minister for Families, Housing, Community Services and Indigenous Affairs, Jenny Macklin, has been negotiating with the Tangentyere Council over the investment of significant funding for housing and infrastructure upgrades in the town camps. Tangentyere Council is the Aboriginal representative body for the Alice Springs town camps.

During the course of the negotiations, the Minister has been proposing to take 40-year sub-leases over each of the town camps by which the Commonwealth would obtain 'secure land tenure'. The Minister has maintained that the Government will not invest any funding on housing unless it has control over the town camps. Negotiations between the Minister and Tangentyere have broken down over the question of tenancy management and decision making powers under the proposed arrangements, with the Aboriginal residents maintaining that they wish to preserve their right of self-determination and rights and interests over the land.

As a result, on 24 May 2009 the Minister announced that the Commonwealth Government was commencing the process of compulsory acquisition of the Alice Springs Town Camps, citing the failure of negotiations with the Tangentyere Council. The power to compulsorily acquire the town camps is pursuant to powers granted under the Northern Territory Intervention. The Minister set a deadline of 28 July 2009 for Tangentyere Council to agree to the proposed 40-years sub-leases, or else she would take steps to compulsorily acquire the town camps.

On 29 July 2009, Tangentyere Council indicated to the Minister that it was prepared to enter into the sub-leases because the only other alternative was that their land would be compulsorily acquired.

As a result, two proceedings have been initiated in the Federal Court of Australia by a group of town camps residents in order to protect their current tenancy rights and interests. On 6 August 2009, the town camp residents obtained injunctions preventing the Minister from entering into the proposed 40-year sub-leases and also from exercising her powers under s 47 of the NTNER Act to compulsorily acquire the town camps.

A full hearing of the case is due to take place on 31 August and 1 September 2009 in the Federal Court before Mansfield J. The primary questions before the Court are whether the Alice Springs town camp residents have been afforded natural justice obligations under the Minister's notice to compulsorily acquire the land, and whether entering into the proposed 40-year sub-leases is contrary to the interests of the members.

The Centre is being provided with significant pro bono assistance in this matter by Jonathan Beech QC and Diana Harding, Richard Niall and Fiona Forysth of Counsel, together with Allens Arthur Robinson.

Ben Schokman is the Centre's DLA Phillips Fox Human Rights Lawyer

Indigenous Rights: Update to UN CERD on Northern Territory Intervention

Earlier this year, the Centre sent a Request for Urgent Action to the UN Committee on the Elimination of Racial Discrimination in relation to key aspects of the Northern Territory Intervention. In response to that Request, on 13 March 2009 the Committee sent an Urgent Action Letter to the Australian Government, expressing concern about the suspension of the operation of the *Racial Discrimination Act*

and the lack of consultation with affected Aboriginal communities. The Committee requested that the Australian Government submit further details and information on these issues by 31 July 2009.

On 11 August 2009, the Centre provided an update to the Committee on actions taken by Australia since the Urgent Action Letter dated 13 March 2009. The update stated that, despite almost five months having passed since the Committee sent its Urgent Action Letter:

- consultation with affected Aboriginal communities and individuals has been manifestly inadequate;
- there has been very little progress in the drafting of redesigned measures of the Northern Territory Intervention; and
- suspension of the operation of the *Racial Discrimination Act 1975* (Cth) remains in force.

Details about the Request for Urgent Action to CERD are available at

<http://www.hrlrc.org.au/content/topics/equality/northern-territory-intervention-request-for-urgent-action-cerd/>.

Ben Schokman is the Centre's DLA Phillips Fox Human Rights Lawyer

Seminars and Events

Protecting Human Rights Conference

2 October 2009, Sydney

The 2009 Protecting Human Rights Conference will be held at the Art Gallery of NSW in Sydney on Friday, 2 October 2009. Keynote speakers include The Hon Catherine Branson QC (President, Australian Human Rights Commission), Father Frank Brennan AO (Chair of the National Human Rights Consultation Committee) and Professor Hilary Charlesworth (Australian National University).

Conference program and registration details are available at: www.gtcentre.unsw.edu.au.

Slavery and Conflict Exhibition

from 3 September 2009, St Paul's Cathedral, Swanston Street, Melbourne

Slavery Links, with the support of the City of Melbourne and the Design Centre at Swinburne University, is holding an exhibition of photographs by acclaimed war photographer Professor Tim Page. Professor Page teaches photojournalism at Griffith University, Queensland. He is currently on assignment in Afghanistan.

The exhibition, called 'Slavery Links at the Cathedral' is a first step in setting up the *Slavery Links* web portal. *Slavery Links* will connect people with reliable information about slavery in our region and thereby work to address the needs of 27 million poor and vulnerable people who are trapped by child labour, child soldiery, child trading, debt slavery, forced labour, organ trafficking, people trafficking or other forms of modern-day slavery.

Exhibition co-ordinator and anti-slavery campaigner Roscoe Howell says: 'The exhibition illustrates just one context for modern-day slavery. It shows how conflict can promote some forms of slavery (child labour, child soldiery, debt slavery, forced labour, human trafficking and so on). The exhibition asks us to consider that we can help to contain slavery by improving the way we manage conflict.'

For further information, contact roscoe.howell@hotmail.com.

Human Rights Policy and Practice Forum 2009

20 and 21 October 2009, InterContinental, The Rialto, Melbourne

The Human Rights Policy & Practice Forum aims to critically explore the human rights policy and practice in Australia in an open and interactive format, allowing for a robust discussion between all participants. This event is addressing challenging content and is a must attend event for all policy makers and practitioners who are seeking a broad understanding of the most pressing issues today.

Featured speakers include: The Rt Hon Malcolm Fraser, Geoffrey Robertson QC, Mick Palmer (National Human Rights Consultation Committee) and Rosslyn Noonan (Chief Commissioner, New Zealand Human Rights Commission).

For further information and registration, see: <http://liquidlearning.com.au/lq08/October/human-rights-policy-and-practice-forum-2009.html>.

Human Rights Resources

AusAID Human Rights Small Grants

2009-10 round of AusAID's Human Rights Grants Scheme has now opened and is accepting applications until 2 October 2009. The Scheme is open to CSOs and NGOs in developing countries – particularly Asia, the Pacific and the Middle East – to 'protect and promote human rights at the grassroots level'. Grants range from \$20,000 to \$150,000. For further information, see http://www.ausaid.gov.au/business/other_opps/humanrights_scheme.cfm.

Moving in the Open Daylight

by Ashley Hogan (foreword by the Hon Michael Kirby)

(available at www.evatt.org.au - AUD \$25.95 + \$4.95 p/h)

This short biography details the life of Dr Herbert Vere ('Doc') Evatt, an Australian who played an integral role in the formation of the United Nations.

Evatt's lifetime was one of extraordinary contributions and achievements. He was an exceptional student (graduating from Sydney University with one of the most outstanding academic records ever obtained) and an influential scholar and writer. Evatt was the youngest person ever appointed a Justice of the High Court. After resigning from his judicial position, Evatt entered politics – serving as Federal Attorney-General and Minister for External Affairs.

In San Francisco in 1945, at a conference to establish the United Nations, Evatt showed great courage, influencing the world's most powerful States to consider the interests of smaller nations such as Australia. Evatt was insistent that the UN model be resistant to domination by the Great Powers. He suggested that democratic procedures be adopted and that smaller nations be given the right to play a full part in drawing up peace treaties. Evatt's emphasis was not only on protecting small countries like Australia from possible security breaches, but also on protecting the political and economic rights of its citizens. In response to the suffering incurred in the Great Depression, one key item on Evatt's San Francisco agenda was a commitment to full employment. Despite resistance from the United States, Evatt was triumphant in achieving international commitment to full employment and higher standards of living in the UN Charter.

Further adding to his achievements, in 1948 Evatt was appointed President of the General Assembly, a title he held at the time of the adoption of the Universal Declaration of Human Rights. The adoption of the UDHR was a major achievement of the United Nations, and still remains the single most important statement of human rights norms. Evatt's role in this process cannot be understated.

Ashley Hogan delivers a candid description of Evatt's passionate, sometimes controversial, approach to the development of a democratic United Nations. She details Evatt's steadfast support for the United Nations and his consistent attempts to persuade the Australian public of the value of the international peace keeping body, even in spite of its visible operational flaws. Hogan's extensive research into the life of Evatt is evident, with quotes and sources cited throughout the biography, giving an honest depiction of the complex man that Doc Evatt was.

What is clear from Hogan's *Moving in the Open Daylight*, is that Evatt has left a legacy on the Australian political scene and the international arena that still endures.

Melissa Gundrill is on secondment to the Human Rights Law Resource Centre from Clayton Utz

Pertinent, Progressive, Provocative – Subscribe to the *Alternative Law Journal*

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 *Embracing and Protecting Rights*, contains articles on highly topical issues such as the role of a Human Rights Act (by Lord Thomas Bingham), discrimination against women,

human rights advocacy, the limits of the Apology to the Stolen Generations, the powers of ASIO, trying tyrants for mass atrocities, and the Chinese criminal justice system.

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

Human Rights Jobs

Centre on Housing Rights and Evictions

The Centre on Housing Rights and Evictions – a leading international economic, social and cultural rights NGO – is seeking candidates for the following vacancies:

- Geneva, Switzerland (International Secretariat)
 1. Director of International Advocacy and Programmes
 2. Media and Communications Officer
 3. Financial Controller
 4. Accountant/Bookkeeper
- Colombo, Sri Lanka
 5. Coordinator of the Sri Lanka Programme
- Nairobi, Kenya
 6. Coordinator of the Africa Programme (with a focus on Kenya, Nigeria, Ghana, and South Africa)

Further details at www.cohre.org/vacancies.

Human Rights Policy Officer, Department of Justice, Victorian Government

This role will involve undertaking research and providing advice on human rights law and practice and contributing to the implementation of human rights related programs determined as necessary by the Government. This position will have a particular responsibility for assisting in the design and delivery of training strategies to improve understanding of the Victorian *Charter of Rights* in the public sector.

Applications close on 13 September 2009.

For further information and to apply online, see <http://jobs.careers.vic.gov.au> or contact Eve.Stagoll@justice.vic.gov.au.

Foreign Correspondent

Human Rights Developments at the UN and in International Law

Indigenous Rights at the UN

The International Day of the World's Indigenous People was celebrated in Geneva this year with the opening of the second session of the Human Rights Council's Expert Mechanism on the Rights of Indigenous Peoples. For one week, over 300 representatives of Indigenous peoples from around the world, along with UN agencies, national human rights institutions, and NGOs, came together to discuss the implementation of the Declaration on the Rights of Indigenous Peoples at the national and regional levels, and a draft study of the lessons learned and challenges posed to realising Indigenous peoples' right to education.

Meanwhile, as is detailed elsewhere in this Bulletin, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, was busy undertaking a mission to Australia from 17 to 28 August. He will report on this mission to the Human Rights Council later in the year.

UN Social Forum

The 2009 UN Social Forum will take place from 31 August to 2 September 2009 in Geneva. The Social Forum is a subsidiary body of the UN Human Rights Council, meeting once a year to provide a forum for the exchange of views between governments, intergovernmental organizations, NGOs, and in particular

grassroots organizations. It is a unique forum in the UN system, due to the way in which it seeks to hear directly from the poorest and most marginalized groups in society, and because of its focus on economic, social and cultural rights in particular. This year, the focus of discussions will be on three issues: the negative impacts of economic and financial crises on efforts to combat poverty; national anti-poverty programmes and best practices in implementing social security programmes from a human rights perspective; and international assistance and cooperation in combating poverty. The High Commissioner for Human Rights has prepared an interesting background paper on these topics, which can be accessed from the OHCHR website.

The topic of the negative impacts of the financial crisis on human rights is also the subject of a paper being drafted for the UN Secretary-General – showing that this topic is being considered at various levels throughout the UN system at present.

Human Rights Council's Advisory Committee

The Human Rights Council's Advisory Committee met for the third time from 3 to 7 August 2009. Two of the main issues under discussion were the drafting of a declaration on Human Rights Education and Training, and work on the right to food and non-discrimination. The Advisory Committee also discussed the elimination of discrimination against persons affected by leprosy, and the topic of missing persons. Another area of discussion was the new work that the Committee would like to undertake in the future, in particular potential studies on the human rights of elderly people, and the promotion of the right to peace. A large part of the Advisory Committee's work at this third session was taken up with adopting a set of rules and procedures, which now means they can focus more on substance in future sessions.

The discussion about new work for the Advisory Committee was perhaps the most controversial aspect of this session. The Advisory Committee is a subsidiary body of the Human Rights Council, and must take its mandate from the Council regarding the work it can undertake. In this third session, the Advisory Committee tried to push this limitation by adopting recommendations to put to the Council on new areas of work it could address – this was not without controversy with at least one government cautioning that it was going too far for the Advisory Committee to advise the Council on what topics it could address. There is the potential for some tension between these two bodies, although we can only hope that a body of experts mandated with advising the Council will not be prevented from undertaking this task in a proactive manner.

60th Anniversary of Geneva Conventions

12 August 2009 marked the 60th anniversary of the Geneva Conventions. To celebrate, the NGO TRIAL (Track Impunity Always) produced a fun quiz to test your knowledge of the Geneva Conventions – try it out at <http://www.trial-ch.org/en/act/60-years-of-the-geneva-conventions.html>. This important anniversary gave many cause to reflect on the role that the Geneva Conventions have played over the last 60 years in the field of international humanitarian law, as well as in protecting human rights and the rights of civilians and others caught up in armed conflict.

UN experts deplore sentencing of Aung San Suu Kyi

The High Commissioner joined other experts, including the UN Secretary-General, in issuing a statement deploring the sentencing of Aung San Suu Kyi, calling her house arrest arbitrary detention and lacking in legitimacy. She called for the immediate and unconditional release of Aung San Suu Kyi, along with all other political prisoners in Myanmar, including the two National League for Democracy candidates who were elected as members of Parliament in 1990 and subsequently arrested and sentenced to 15 years for writing a letter to the Secretary-General.

NGOs call for reform in Human Rights Council practices

In August, a group of 74 NGOs sent an appeal to the members of the Human Rights Council, calling them to address their voting practices and requesting an end to the bloc voting system. The NGO appeal urged governments to stop vote trading and uncontested membership elections, in order to protect the credibility of the Council and its ability to adequately address human rights violations. Such problems are increasingly under the spotlight, highlighted by the failure of the Council to act on issues such as the crisis in Sri Lanka, due to the power that some governments have to ensure they are protected by other member states and shielded from criticism. These concerns will only become more

relevant as the Council continues discussions in preparation for its 5 year review in 2011.

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

If I Were Attorney-General...

Realising Rights in the Community

During the National Human Rights Consultation, I participated in a number of community forums, meeting with homeless people, elderly people, community workers and young people. The purpose of these forums was to ensure that, instead of simply speaking for these people, we facilitated their direct engagement with the consultation. What I also discovered was the extent to which these kinds of forums were a two-way street, as the participants offered insights and practical solutions to some long-standing problems.

Based on what I heard and experienced in the community consultations, as Attorney-General I would immediately enact a National Charter of Human Rights that was a mixture of the Canadian and UK models. It would become the framework within which my department would operate for the rest of my term. Importantly, it would protect economic, social and cultural rights (as well as civil and political rights) on the basis that human rights are interrelated and indivisible. Furthermore, providing Australians with formal 'rights', but not effective redress is pointless, so I would therefore include a free-standing right of action in the Charter as well as a provision enabling human rights advocacy groups to bring claims under the Charter.

I would also establish a large working group of people from all walks of life, including Aboriginal elders, old people, young people, homeless people, people with a disability, gays, lesbians, asylum-seekers as well as former judges, lawyers and politicians, to assist me in coming up with a broad campaign to maximise the effectiveness of human rights legislation in Australia. If we are going to talk the talk about human rights, we have to walk the walk and ensure that human rights protections are not simply something for 'legal experts', but a tool that empowers the community, particularly disadvantaged members of the community, to have a voice in matters that concern their lives and their rights. Involving people in decision-making processes and in the formation of public policy is itself a human right enshrined in art 25 of the *International Covenant on Civil and Political Rights*.

I anticipate that one of the key issues that the working group would focus on would be a public education campaign to introduce the language of rights into our community. My sense is that this would involve a range of strategies, including compulsory human rights education for all school children, education modules in community centres, offices and workplaces, and targeted training for judicial officers and government departments. I would, however, wait and see what the working group suggested and work with them to introduce their proposals.

There are a number of existing government policies and legislation that would not be compatible with a Charter and, rather than forcing individuals to fight these issues out in Court, I would insist that the government take immediate action to change these policies. As a result, we would close down the detention centre on Christmas Island, amend the Northern Territory Intervention legislation so that both the Charter and the *Racial Discrimination Act* applied, remove the references to marriage being described as a union between a man and a woman in the *Marriage Act*, introduce six months' paid maternity leave for all women, establish a Stolen Generations Reparations Tribunal, and initiate a review of counter-terrorism legislation.

I would also implement a number of significant changes to our legal system on the basis that, in too many cases, it does not adequately provide access to justice (let alone ensure justice) for many of the most disadvantaged members of our society. Some of the key reforms I would make include changing court rules to make it easier for NGOs to intervene in cases to represent the public interest, as well as amending costs rules so that adverse costs would only be awarded in human rights cases against applicants if the claim was vexatious, frivolous or brought in bad faith. I would also double the funding for community legal centres, Legal Aid Commissions and the Australian Human Rights Commission,

given the vital role these bodies play in ensuring access to justice for individuals whose rights have been breached and in bringing human rights breaches to government's attention.

I would also amend existing Federal anti-discrimination legislation so that it prohibited discrimination on the basis of a person's sexuality, criminal record and religious belief. Through the Industrial Relations Minister I would enact equal pay legislation akin to the UK *Equal Pay Act*, so that courts are able to award backpay to women who are able to show that they are doing the same or an equivalent job to men to ensure that they finally receive the same income.

Finally, I would be so impressed at the human rights working group, in particular their ability to come up with insightful and innovative solutions to difficult issues, that I would ask the members of the working groups to work with NGOs to establish a network of ongoing advocacy and advisory consumer groups throughout Australia. These groups would meet regularly with all levels of government to provide them with consumer input and advice, which would become a mandatory requirement for all government policy. There would also be agreement that such consultations should not simply be done through formal procedures such as submissions and parliamentary inquiries but also through focus groups, closer ties to NGOs and this new network of advocacy consumer groups. Not only would this ensure that Australia realises the promise it made over 60 years ago – to protect, promote and fulfil human rights in Australia – but would also lead to a resurgence in democratic engagement, participation and decision-making.

Lizzie Simpson is a solicitor with the Public Interest Advocacy Centre in Sydney