human rights law resource centre

Bulletin
Number 28 – August 2008

INDEX

OPINION 1
NEWS..... 2
VICTORIAN CHARTER OF RIGHTS DEVELOPMENTS.... 4
OTHER CHARTER OF RIGHTS DEVELOPMENTS.... 9
VICTORIAN CHARTER CASE NOTES..... 9
COMPARATIVE LAW CASE NOTES..... 16
HRLRC POLICY WORK..... 26
HRLRC CASEWORK..... 28
SEMINARS AND EVENTS... 29
HUMAN RIGHTS RESOURCES..... 30
HUMAN RIGHTS JOBS 30
FOREIGN CORRESPONDENT 31
IF I WERE ATTORNEY-GENERAL… 33

Human Rights Law Resource Centre Ltd
Level 1, 550 Lonsdale Street
Melbourne VIC 3001
P: + 61 3 9225 6695
F: + 61 3 9225 6686
W: www.hrlrc.org.au
ABN: 31 117 719 267

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

Human Rights, Aid and Development: A Complex Relationship in Complex Environments

Despite the dire humanitarian conditions, on 4 June this year the operations of all aid and development NGOs in Zimbabwe were suspended by the Government.

As was widely reported, it is reasonably clear that this action was taken to mimimise witnesses to the acts of intimidation and violence that the Government used to influence the outcome of the election. Since that time, limited operations have re-commenced; however, the future for NGOs operating in Zimbabwe remains very uncertain.

In contrast to the human-made disaster in Zimbabwe, Cyclone Nargis, which hit Myanmar on 2 May was, in terms of the human death toll, the third worst Asian cyclone. Only a 1970 storm that killed 500,000 people and another that killed 143,000 people in 1991, both in neighbouring Bangladesh, had higher death tolls. Yet, fear and distrust resulted in the Government of Myanmar initially prohibiting international NGO staff from entering the country. While international staff can now obtain entry visas, limitations on freedom of movement in the country remain and it is uncertain for how long access will continue to be permitted by the Government.

In Darfur, the operations of NGOs are constantly hampered by the Government and the safety of agency staff threatened on a daily basis. This is likely to deteriorate even further now that the International Criminal Court has charged Sudanese President Omar Hassan al-Bashir with crimes against humanity.

There are a number of possible explanations for why restrictive regimes may be increasingly wary of aid and development NGOs.

Firstly, the political nature of aid and development work is becoming increasingly evident. Although there were Cold War struggles over civil and political rights versus economic, social and cultural rights, much of the time aid and development work has been viewed (and even represented) as a largely technical exercise. This charade has, however, become much more difficult to play. With the adoption of rights based approaches by many agencies, aid and development work has been purposely aligned with human rights outcomes. This is a significant change.

In the immediate post-colonial period following World War II it was often argued that economic development required an inevitable trade off against some human rights. Now, there is almost universal recognition of an intimate relationship between the two. In the same way, development work is no longer seen as charity but as a contribution to the fulfilment of rights.

Secondly, the continued growth of the human rights discourse, the increasing activism of the ICC and the gradual (and grudging) emergence of a 'responsibility to protect' within the international community, is leading those in power to pause and become more concerned about who is witnessing their actions.

Thirdly, in many places, the 'war on terror' is a battle for hearts and minds resulting in aid activities becoming a 'force multiplier' and a key battlefield tactic. It is not by accident that, on some calculations, nearly 25% of the US government's aid is distributed by the Department of Defence. Military personnel are also directly involved in delivering humanitarian aid, blurring the distinction between them and aid workers. The result is that, despite often decades long presence in a country, aid and development actors can no longer expect that they will be permitted to continue to operate when political conditions become more restrictive.

While I personally welcome the increased recognition given to the inherently political nature of development work, there are, of course, many critics of this trend and it does create a number of practical challenges, particularly in managing relationships with governments in difficult contexts. Some commentators, such as David Rieff, author of *A Bed For the Night: Humanitarianism in Crisis*, argue that this watering down of humanitarian principles of impartiality and neutrality results in development agencies losing their moral bearings. Rieff argues that aid and development agencies should focus on the humanitarian aspects of their work, irrespective of their frustration with this approach and whether it fails to address the underlying causes of poverty. On the other hand, Hugo Slim argues that basing humanitarian action on human rights makes values explicit and 'humanitarian action less vulnerable to being shrouded in moral generalisations and driven by mixed motives'. Peter Uvin, goes even further. He believes that NGOs should impose minimum standards on recipient governments, below which they refuse to operate. In this way, they will avoid being seen as condoning the actions of tyrants or accusations of complicity. If adopted, Uvin's approach would probably result in aid and development NGOs withdrawing from many of the world's most dire humanitarian crisis.

There are also practical challenges. If human rights are indivisible yet finances limited, how does one make policy choices? While the passports of the few expatriate staff are usually 'get out of jail free cards', what about the hundreds of local staff that aid and development NGOs usually employ and their families? To what extent should their opinions be taken into account? And if good development work requires the active participation of government, how can this be secured if development NGOs are simultaneously involved in an explicitly political agenda?

The result of this changed operating environment is that aid and development actors need to spend much more time engaged in analysis of the costs and benefits of their actions, not just to the organisation itself but to the broader humanitarian context. This requires staff with well developed political science skills, not a usual area of expertise in such organisations. It also requires development actors to engage with a much broader range of actors if their work is to be effective. They need to partner more and use collective advocacy to maintain operations while continuing to address some of the underlying issues. Finally, they need to remain deeply pragmatic. Aid and development NGOs should not become human rights NGOs. There are real advantages in working together while recognising that each is important and has a different mandate.

The more NGOs that adopt a rights-based approach to their work, the greater the normative power of human rights and the more likely that citizens' rights claims will be met by their governments. Ideas do matter, even in international relations and human rights are a powerful idea. Seriously implemented rights-based approaches should also lead to much more effective development work. However, this more explicitly political approach to aid and development work makes the endeavour even more complex. For aid and development agencies, this means it's out of the fire and into the frying pan.

Paul Ronalds is Deputy CEO of World Vision. The opinions expressed in this article are the author's own and do not necessarily reflect the views of World Vision.

News

Australia Ratifies UN Disabilities Convention

Australia has become the 30th country to ratify the UN *Convention on the Rights of Persons with Disabilities*, after becoming a party to the Convention on 17 July 2008.

The ratification followed an expedited process, including the Joint Standing Committee on Treaties recommending ratification of the instrument prior to releasing its report, and means that Australia can participate in the inaugural election of the Committee on the Rights of Persons with Disabilities.

UN Human Rights Council Adopts Optional Protocol to the *International Covenant on Economic, Social and Cultural Rights*

In an historic move, the UN Human Rights Council has adopted an Optional Protocol to the *International Covenant on Economic, Social and Cultural Rights* ('OP-ICESCR'). The OP-ICESCR was approved by the Human Rights Council by consensus on 18 June 2008. The Council has recommended that the General Assembly adopt the OP-ICESCR and open it for signature, ratification and accession at a signing ceremony in Geneva in March 2009. The OP-ICESCR will enter into force once it has been ratified by 10 States.

The United Nations High Commissioner for Human Rights, Louise Arbour, congratulated the Human Rights Council on this significant achievement, stating that the OP-ICESCR 'will provide an important platform to expose abuses that are often linked to poverty, discrimination and neglect, and that victims frequently endure in silence and helplessness'.

As indicated in the June 2008 edition of this Bulletin, if the OP-ICESCR is adopted by the General Assembly, it will enable the UN Committee on Economic, Social and Cultural Rights to receive and consider complaints from individuals or groups of individuals regarding violations of any of the rights contained in the ICESCR. While previous drafts of the OP-ICESCR provided that collective complaints may be submitted by accredited NGOs, this provision was removed from the OP-ICESCR prior to its adoption.

The OP-ICESCR also provides an inquiry procedure which enables the CESCR to invite a State party to cooperate with an inquiry into alleged social, economic or cultural rights violations by that State. Under the OP-ICESCR, this inquiry procedure may be invoked if the CESCR receives reliable information indicating grave or systematic violations by the State of any ICESCR rights, and that State has voluntarily submitted to the OP-ICESCR inquiry procedure.

If the OP-ICESCR is adopted, a special fund will be established to assist States to implement effective remedies in line with the CESCR's recommendations. This fund will enable expert and technical assistance to be provided to States to build national capacities in the area of ESC rights.

The OP-ICESCR has been debated by various UN bodies and NGOs for over 15 years and, more recently, has been the subject of a campaign coordinated by an International NGO Coalition, of which the HRLRC is a member. The adoption of the OP-ICESCR by the Human Rights Council represents a major advancement in this ongoing campaign. For further information about how to support and contribute to this campaign, see http://www.opicescr-coalition.org/.

Melanie Schleiger is a lawyer on secondment to the HRLRC from Lander & Rogers

Campaign for End to Mandatory, Indefinite and Unreviewable Detention of Asylum Seekers

Chances like this don't come very often – to end a regrettable chapter of Australian history that caused unimaginable suffering to some of the world's most desperate and downtrodden.

The Government has launched an unexpected but long-awaited inquiry into immigration detention – the system that gave us children in detention, the 'Pacific Solution', sewn lips, the Cornelia Rau affair, razor wire and condemnation from the international community.

We believe this inquiry signals that the Government genuinely wants to put an end to Australia's inhumane detention regime, and for the first time they are asking us for our views. If ever you have despaired at the treatment of asylum seekers, add your name to GetUp's petition submission and help end this ongoing national shame: http://www.getup.org.au/campaign/EndMandatoryDetention&id=365.

For over a decade, governments have been so concerned not to appear soft on asylum seekers that they have denied basic rights and dignity and opted for the cheap politics of fear. This is our chance to stand up and demonstrate that Australians demand decency. Speak up now to right over a decade of wrongs.

Anna Saulwick is Rights, Justice and Democracy Campaigner with GetUp!

Former World Leaders Call for Renewed Commitment to International Human Rights and the Rule of Law

A meeting of more than 25 former Heads of State and Government from across the world have called for a renewed commitment to international human rights and the rule of law, stating that global problems – such as food security, climate change, international financial stability, nuclear proliferation, poverty and inequality – require global, rule-based solutions and strong international institutions.

In a Communiqué released following their meeting in Stockholm, the InterAction Council of Former Heads of State and Government stated:

> The need for a rule-based international society committed to justice and development is greater than ever before in consideration of the complex challenges facing humankind today. Adherence to international law and trust in multilateral institutions must be restored. Unilateral actions put the world at risk and undermine efforts to uphold international peace and security.

The Communiqué contained 15 recommendations to promote human rights and the rule of law, both domestically and internationally, including that all states should:

- accept the compulsory jurisdiction of the International Court of Justice and ratify the Rome Statute of the International Criminal Court;
- encourage and enable NGOs to advocate for the promotion and protection of human rights and the rule of law;
- enact a Bill or Charter of Rights at the national level; and
- treat terrorism as criminal acts to be handled through existing systems of law enforcement and with full respect for human rights and the rule of law.

The Centre's Director, Phil Lynch, attended the meeting in Stockholm as one of 20 'Global Young Leaders' invited to participate. His opinion piece on the meeting and its Communiqué is available at http://www.theage.com.au/opinion/we-should-become-a-human-rights-leader-again-20080707-3450.html?skin=text-only.

Minter Ellison and Lander & Rogers Make Major Contributions to Centre through Pro Bono Secondment Program

The Human Rights Law Resource Centre is delighted to welcome Melanie Schleiger on secondment for three months as a Human Rights Lawyer from Lander & Rogers. Melanie works in the Workplace Relations & Safety Group at Landers and has written and researched on the application of the Victorian *Charter* to employment law.

The Centre is also very grateful to Minter Ellison for extending the secondment of Phoebe Knowles for a further 6 months from August, which will bring the total length of her secondment to one year. Phoebe's secondment will focus on coordinating the Centre's work around the development and adoption of a national Charter of Human Rights. Phoebe holds a Masters in Public International Law from London School of Economics and has previously also worked in international criminal law at the UN Special Court for Sierra Leone as a defence legal assistant.

Human Rights Advice Line for Lawyers and Community Organisations

The Human Rights Law Resource Centre now offers a dedicated advice line for lawyers and community organizations needing advice about human rights law issues to help them assist their clients.

Inquiries should be directed to our Human Rights Lawyer, Rachel Ball, on (03) 9225 6647.

Victorian Charter of Rights Developments

'Your Rights, Your Stories'

The Victorian Equal Opportunity & Human Rights Commission has launched a web-based campaign to collect stories about working and living with Victoria's *Charter of Human Rights and Responsibilities*. VEOHRC is seeking stories about:

- implementing human rights in organisations;

- using the *Charter* as an advocacy tool; and
- human rights issues for children and young people.

Stories will be published on VEOHRC's website and will provide a valuable source of information for the public, advocates and government. 'Your Rights, Your Stories' can be accessed at: http://www.humanrightscommission.vic.gov.au/human%20rights/your%20rights%20your%20stories/.

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.

Local Government Amendment (Elections) Bill 2008

The *Local Government Amendment (Elections) Bill 2008* (Vic) seeks to amend the rules surrounding local government elections. In particular, the Bill aims to:

- remove owners of single car space and boat moorings from the definition of 'rateable property' so as to remove their right to vote in municipal elections; and
- alter council nomination requirements so that councillors who have been removed from office are no longer eligible to be elected.

The amendments engage and have the potential to conflict with s 18(2)(a) of the *Charter* which states that every eligible person has the right to vote and be elected at municipal elections.

The Statement of Compatibility asserts that the limits placed on an individual's right to vote and be elected under the bill were justified because:

- owners of single car spaces and boat moorings have a substantially smaller direct interest in council issues when compared to occupiers of residential property; and
- a determination that a person is ineligible for election will only be made if a councillor has failed to live up to the standards expected of individuals holding public office.

Though the Statement considers the Bill to be compatible with the *Charter*, the Scrutiny of Acts and Regulations Committee expressed concerns that the Bill conflicted with the principles drawn out in the recent High Court decision in *Roach v. Electoral Commission* [2007] HCA 43. In *Roach*, the High Court assessed the validity of the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth), which sought to exclude all individuals serving a sentence of imprisonment from voting at elections. The court found that blanket disenfranchisement of prisoners was invalid because was not reasonably appropriate and adapted (or proportionate) to the maintenance of representative government.

Having regard to the relevance of this principle to the present Bill, SARC referred back to Parliament the issue of whether the Bill was appropriately adapted to the maintenance of representative government.

In light of the fact that no limits are in place to minimize the reasons for dismissing a councillor, the amendments have the potential to undermine the principles of representative government. For example, if a councillor is dismissed from office for an unfair reason (such as for a failure to take an oath or attend meetings) and is otherwise dedicated and hard-working, then the fact that he or she is unable to be re-elected would appear to lead to a disproportionately harsh outcome.

Jess Krulis and Charlotte Beeny, Human Rights Law Group, Mallesons Stephen Jaques

Medical Treatment (Physician Assisted Dying) Bill 2008

Overview of the Bill

The Medical Treatment (Physician Assisted Dying) Bill 2008 seeks to:

- recognise the right of a 'mentally competent adult person', who is 'suffering intolerably from a terminal illness or advanced incurable illness', to request a doctor to provide medical assistance that allows that person to end his or her life peacefully;
- grant a doctor who does so immunity from liability in criminal, civil and disciplinary proceedings; and
- provide procedural protections against the possibility of abuse of the rights recognised by the Bill.

The Bill provides numerous safeguards that must be met before a doctor can assist a sufferer to end their life, including requirements that:

- the treating doctor not be related to the sufferer by blood, marriage or close personal relationship;
- the treating doctor be satisfied on reasonable grounds that the sufferer has lived in Victoria for a minimum of 12 months;
- the treating doctor be satisfied on reasonable grounds that the sufferer has a 'terminal or incurable illness that is causing the sufferer intolerable suffering';
- the treating doctor inform the sufferer of the nature of their illness, its likely course, and available medical treatments including palliative care;
- the sufferer receive advice from a doctor practicing in palliative care concerning the availability and likely effects of palliative care (the Bill does not specify whether this doctor can be the treating doctor or must be independent);
- the treating doctor be satisfied on reasonable grounds that the sufferer's decision to end his or her life has been made freely, voluntarily and after due consideration;
- the treating doctor be satisfied of the sufferer's mental competence and that their decision to end their life has not resulted from a mental illness, informed if necessary by a qualified psychiatrist's report;
- the sufferer (or if they are unable to do so, their agent) sign Part A of the Certificate of Request asking the treating doctor to provide assistance, and the treating doctor witnesses this signature;
- the sufferer's case be reviewed by a second independent doctor who signs Part B of the Certificate of Request;
- at least one of either the treating doctor or the independent doctor 'has special or particular knowledge and experience in the sufferer's type of illness';
- the sufferer sign part C of the Certificate of Request, witnessed by a person who is not the treating doctor or the independent doctor (this ensures that a minimum of 3 different medical practitioners are involved in the process);
- cooling-off periods be enforced (for all sufferers there is a minimum cooling-off period of 48 hours between the sufferer signing Part A and the sufferer signing Part C of the Certificate of Request. For sufferers with an incurable illness, an additional 14 day minimum cooling-off period exists after the sufferer receives the requisite psychiatric and palliative care consultations and before they can sign Part A of the Certificate of Request); and
- persons or health care providers that provide advice, sign, countersign, or witness documents or help the sufferer to ingest the drug forfeit any financial benefit they would otherwise obtain directly or indirectly from the death of the sufferer if that death occurs in accordance with the provisions of the Bill.

The Bill provides criminal, civil and disciplinary immunity for doctors, nurses, health care providers, pharmacists, those who follow the instructions of the treating doctor, and other persons present, except where they are negligent. Immunity is also provided for doctors, nurses, lawyers or any other individual who provides information or advice concerning a sufferer's rights under the Bill.

Fundamental and Competing Rights?

The Statement of Compatibility identifies four rights contained in the *Charter* that are engaged by the Bill, being: the right to life (s 9); protection from torture and cruel, inhuman or degrading treatment (s 10); freedom of thought, conscience, religion and belief (s 14); and freedom of expression (s 15).

The SARC Report identifies that provisions in the Bill 'concern matters of fundamental and competing rights' that necessarily require careful balancing between the public interest in preserving and protecting life, and the competing rights of individuals who wish to end their own intolerable suffering.

This divergence is apparently reconciled in the Preamble to the Bill, which simultaneously 'affirms its belief that life is precious, yet recognises that some persons… have a compassionate right to a death they believe to be peaceful and dignified.' Closer scrutiny of the Statement and the SARC report, however, reveals ongoing tensions.

Right to Life and Physician Assisted Dying

By enabling doctors to legally assist a sufferer to end their life, the Bill directly engages s 9 of the *Charter*, which states that every person 'has the right to life and has the right not to be arbitrarily deprived of life.' The Statement and SARC Report present conflicting interpretations of the compatibility of the Bill with this provision.

The Statement claims that physician assisted dying is consistent with this section of the *Charter* because the 'right to seek a peaceful death in no way impedes anyone's right to life.' The Statement explains that the 'autonomous nature of a patient's request and action,' combined with 'strict safeguards' contained in the Bill ensure that life is not arbitrarily deprived.

The Statement's assertion that the rights to life and physician assisted dying 'are mutually compatible and can coexist without conflict' is made without reference to any supporting case law or other materials.

The Bill and its second reading speech are careful to distinguish physician assisted dying from the act of suicide, because according to the second reading speech, the 'patient is only hastening a death that is imminent and unavoidable.'

Conversely, the SARC Report repeatedly refers to acts performed under the Bill as 'suicide'. The SARC emphasise the fact that 'people who commit suicide may do so because of mental illness, external pressures or poor decision-making.' The SARC Report calls on Parliament to consider whether the Bill's provisions are a 'reasonable limit' on the right not to be arbitrarily deprived of life according to the test set out in s 7(2) of the *Charter*.

The SARC Report quotes the European Court of Human Rights when emphasising that States owe both positive and negative duties 'not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction' through criminal law provisions and law-enforcement machinery.

Unacknowledged in the Statement, but emphasised in the SARC Report, is the question posed by George Zdenkowski in his article *The International Covenant on Civil and Political Rights and Euthanasia:*

> Will the consent of the patient render nugatory what would otherwise constitute an infringement of [the right to life]? Asked another way: can someone waive his or her right to life?

The right to life contained in the *Charter* is modelled on art 6(1) of the ICCPR. International courts and tribunals have generally interpreted the right broadly. In its *General Comment No 6: The Right to Life*, the UN Human Rights Committee stated that the 'expression "inherent right to life" cannot be properly understood in a restrictive manner.' The *General Comment* does not, however, refer specifically to physician assisted dying.

In 2001, the House of Lords found that UK legislation banning a husband from assisting his terminally ill wife to end her life was not incompatible with the *European Convention on Human Rights* (*Pretty v Director of Public Prosecutions and Secretary of the State for the Home Department* [2001] UKHL 61). Dianne Pretty suffered from motor neurone disease and argued that s 2(1) of the *Suicide Act 1961* (UK) encroached on her right to life by preventing her from choosing whether to live or die. The House of Lords dismissed her appeal, finding that the right to life provision should not be interpreted in this way.

Although the SARC Report refrains from definitively resolving the matter, it calls on Parliament to consider whether the Bill:

> by exempting some acts of assisting suicide from criminal, civil and disciplinary liability, breach[es] the state's duty under *Charter* s 9 to protect people with terminal or incurable illnesses from suicide.

It also asks Parliament to consider whether the Bill permits:

> the assistance of a suicide that is the result of mental illness, external pressure or poor decision-making and, if so, whether or not the Bill's provisions are a reasonable limit on the *Charter* rights of people with terminal or incurable illnesses to life and to not be arbitrarily deprived of life according to the test set out in *Charter* s 7(2).

These questions highlight underlying tensions between the SARC Report and the Statement. The SARC Report appears to suggest that the Bill necessarily limits the right to life and calls on Parliament to consider the reasonableness of the limitation, whilst the Statement emphasises the compatibility of the rights and does not consider the Bill to be limiting the *Charter* right to life in any way.

Protection from Torture and Cruel, Inhuman or Degrading Treatment

The Statement claims that the Bill will strengthen Victoria's compliance with the *Charter* provision concerning torture, cruel, inhumane or degrading treatment. It explains that to 'force an ill person to suffer intolerably against their wishes with no lawful way to end their suffering (with death as the only realistic and rational option for relief, in the patient's opinion) amounts to cruel, inhuman and degrading treatment.'

The Statement also highlights current inconsistency and injustice in Victorian legislation. The *Medical Treatment Act 1988* allows patients to refuse medical treatment, but 'leaves no lawful alternative for those to whom medical treatment and palliative care are unacceptable or unhelpful.' As a result, sufferers in practice often take their own lives in a 'violent and precipitate way' before they feel they will be 'trapped by their illness.'

The SARC does not comment on this provision in the Charter.

Freedom of Thought, Conscience, Religion and Belief

The Statement emphasises the rights of patients to act on their beliefs, provided there are no harmful effects upon others resulting from their actions. It claims that the *Charter* 'right to freedom of thought, conscience, religion and belief' contained in s 14 'would be hollow indeed' if it did not allow individuals to act on their thoughts, and states that the Bill would strengthen Victoria's compliance with the *Charter*.

The Statement says that independent polls show 82% of Victorians support physician assisted dying for the terminally or incurably ill patient with intolerable suffering, and the fact that this practice is currently unlawful interferes with the expression of freedom of the majority.

The SARC Report focuses on the fact that although doctors are not under a duty to assist the death of a patient, various provisions in the Bill oblige doctors to 'play a role in a process that leads to suicide,' or refrain from life-saving activities, even if they have a conscientious objection. They emphasise that the Bill:

- requires doctors who decline to provide assistance to tell the sufferer that other doctors may be willing to provide assistance. They also must transfer the patient's medical records to the new practitioner (s 9);
- forbids professional organisations, associations and health care providers from applying pressure or penalties on doctors for lawful activity under the Bill, except for providers 'that do not permit their facilities or associations to provide assistance under the Bill' (s 10); and
- prohibits attempted resuscitation of patients who take a drug to end his or her life pursuant to the Bill (s 11).

The SARC find that these clauses 'may limit the *Charter* right of people to be coerced or restrained in a way that limits their freedom to adopt their beliefs in practice.' They call on Parliament to consider this further, but did not express a firm opposing view.

The SARC Report does not consider the fact that the *Charter* rights of practitioners and patients who do believe in physician assisted dying would be curtailed should the Bill not be passed.

Freedom of Expression

The Statement claims that Victoria's compliance with the freedom of expression provision contained in s 15 of the *Charter* would be strengthened by the Bill. It is currently unlawful for a practitioner to discuss the option of physician assisted dying. The Bill allows doctors to discuss all options with their patient, and mandates explanation of palliative care and other medical treatments. By allowing practitioners to discuss all available options for relief, patients will be better able to 'make a fully informed decision that best meets their own beliefs and values.'

Because there is no duty to assist with dying, the Statement claims that the Bill allows 'those who both agree and disagree with such an act to act in accordance with their own beliefs and values.'

The SARC Report does not consider this aspect, except insofar as it relates to the issues discussed above regarding freedom of thought, conscience, religion and belief.

Complementary or Conflicting Fundamental Rights?

The right to life is 'the supreme right' according to the Human Rights Committee. The Committee calls on States to refrain from taking life, to prevent loss of life through enforceable laws, and to ensure quality of life, for example by working to 'eliminate malnutrition and epidemics' (*General Comment No 6: The Right to Life*). Physician assisted dying sits at the heart of tension surrounding States' obligation to preserve both life itself, as well as quality of life.

Although the *Charter* does not contain expressly non-derogable rights, but rather permits all *Charter* rights to be limited in accordance with s 7, it is important to note that all of the above mentioned *Charter* rights, except freedom of expression, are non-derogable under the *ICCPR*. Under art 4(2) of the *ICCPR*, certain human rights are absolute and must not be subject to limitation or derogation. The challenge arises however, when these non-derogable rights conflict with each other, and when central definitions, such as what constitutes 'life' are open to interpretation.

Catherine Dow and Charlotte Beeny, Human Rights Law Group, Mallesons Stephen Jaques

Other Charter of Rights Developments

UK Parliamentary Committee Calls for Broad Definition of 'Public Authority'

The UK's Public Administration Select Committee has called for legislative amendment to the *Human Rights Act 1998* to ensure that 'all organisations delivering public services…be considered to be public authorities', regardless of whether they are public, private or community sector organizations.

Consistently with the views expressed in numerous reports of the UK Joint Parliamentary Committee on Human Rights, the Select Committee stated that 'nobody's human rights should be reduced by the outsourcing of a service'. They recommended that 'the original scope of the *Human Rights Act* needs to be restored so that non-public sector organisations can be considered public authorities for the purposes of the *Human Rights Act* when they are discharging functions on behalf of the State. We acknowledge that this is complex, but it is essential to achieve.'

In response to the report of the UK Select Committee, together with the previous reports of the UK Joint Parliamentary Committee, the UK Government has announced that it proposes to conduct consultations regarding the meaning and expansion of the term 'public authority'. The scope and timing of the consultations has not yet been announced.

The Select Committee report is available at http://www.publications.parliament.uk/pa/cm200708/cmselect/cmpubadm/112/112.pdf.

Victorian Charter Case Notes

Application of the *Charter* to *Mental Health Act* and Mental Health Review Board

09-003 [2008] VMHRB 1 (8 July 2008)

In this case, concerning the failure of the Mental Health Board to conduct a review of the involuntary treatment of a patient under the *Mental Health Act*, a number of very significant *Charter* issues arose:

1. Does the *Charter* apply to the proceeding and, if so, how?
2. Is the Board a 'public authority' and / or a 'court or tribunal' for the purposes of the *Charter*?
3. How does the *Charter* apply to the Board when hearing matters?
4. Is the Board required by the *Charter* to ensure a 'fair hearing'?
5. What are the obligations of the Board and its staff as public authorities?
6. What *Charter* rights are engaged by involuntary mental health treatment?
7. What is the scope of the *Charter* obligation to interpret legislation consistently with human rights?
8. How should s 30(4) of the *Mental Health Act* be interpreted and applied in light of the *Charter*?

Facts

P's community treatment order ('CTO'), pursuant to which he was subject to involuntary mental health treatment, was extended by an authorised psychiatrist on 15 February 2007.

Pursuant to s 30(4) of the *Mental Health Act 1986* (Vic), the Mental Health Review Board '*must* conduct a review of the extension of a community treatment order *within* 8 weeks after the order is extended'. The Act does not articulate the consequences of non-compliance.

The Board listed a review of P's CTO for 4 April 2007. On the application of P's legal representative, this review was adjourned to a date to be fixed to enable P to obtain an independent psychiatric opinion.

In May 2007, the Board administratively postponed the adjourned hearing on advice from the treatment service that an independent opinion had not been obtained. None of P, his legal representative or the treating service subsequently advised the Board that an independent opinion had been obtained and the Board did not make any further inquiries itself. The matter was therefore not re-listed and the review of the CTO did not occur until more than one year later at the annual review required under s 30.

At the annual review, P's legal representative submitted that s 30(4) of the Act 'plainly provides an imperative duty upon the Board to conduct a review of a CTO within 8 weeks of its extension' and that failure to conduct such a review within 8 weeks (or indeed at any stage in the 12 month period) rendered the CTO invalid.

It was further submitted by P's legal representative that the *Charter* strengthens the argument that s 30(4) requires 'strict compliance' and the conclusion that failure to conduct the mandatory review within 8 weeks (or at all) results in invalidation of a CTO.

The Attorney-General intervened in the matter in respect of the *Charter* issues.

Decision

Does the *Charter* apply to the proceeding and, if so, how?

As the proceeding commenced after 1 January 2007, the *Charter* applied to its conduct (s 49(2)).

However, the transitional provisions of the *Charter* are silent as to whether the obligation to interpret statutory provisions compatibly with human rights (s 32), which came into force on 1 January 2008, applies to how legislation should be interpreted in respect of pre-1 January 2008 events. That is, does s 32 apply retrospectively to pre-enactment events?

Having regard to the decision of the House of Lords in *Wilson v First County Trust (No 2)* [2003] UKHL 40, the Board concluded that the interpretative principle does not apply to causes of action or events that arose before commencement. In that case, the Lords concluded that:

> The principle does not apply because to apply it in such cases, and thereby change the interpretation and effect of existing legislation, might well produce an unfair result for one party or the other.

With respect, this principle should not have been applied in this case given that the Board did not, or at least should not, have had a vested interest in the case. Indeed, in *Wilson v First County Trust*, Lord Nicholls made the important qualification that the interpretative principle may apply to post-commencement criminal trials relating to pre-commencement events, stating that 'the prosecution does not have an accrued or vested right in any relevant sense'. Lord Hope similarly expressed that the principle has much less weight in public interest proceedings concerning public authorities.

It was common ground that s 32 of the *Charter* did apply to the Board's conduct and to the application of the interpretative principle to events occurring after 1 January 2008.

Is the Board a 'public authority' and / or a 'court or tribunal' for the purposes of the *Charter*?

The Board concluded that, pursuant to s 4(1)(a) of the *Charter*, the Board's staff are 'clearly' public authorities and are required to act compatibly and give proper consideration to human rights under s 38.

The Board further concluded that, pursuant to s 4(1)(j) of the *Charter*, the Board itself is a public authority when acting in an administrative capacity, including listing cases, scheduling hearings and sending out notices for hearing. Consistently with the decision of King J in *R v Williams* [2007] VSC 2, however, the Board held that the determination of an adjournment is a judicial or quasi-judicial function and, in such cases, the Board is not bound as a public authority.

The question then turned to whether the Board is a 'court or tribunal' when exercising its decision-making capacities (and thereby subject to the *Charter* under s 6(2)(b), discussed below). The Board concluded that it is a tribunal for the purposes of the *Charter*, having regard to factors including that:

- it is established by statute and comprises a President and members;

- the Act refers to 'proceedings' and 'parties' and requires that the Board exercise 'court-like' duties and functions, including affording natural justice;
- members of the Board are appointed by the Governor in Council;
- legal members of the Board are required to have the same qualifications as judicial officers and questions of law arising must be determined by legal members; and
- the decisions of the Board are substantive, binding and have significant consequences for the rights and duties of parties.

How does the *Charter* apply to the Board when hearing matters?

Section 6(2)(b) of the *Charter* relevantly provides that the *Charter* applies to courts and tribunals to the extent that they have functions under Part 2 (Human Rights) and Division 3 of Part 3 (Interpretation of Laws).

The view advanced by P was that s 6(2)(b) of the *Charter* requires a court or tribunal to give effect to any rights under Part 2 of the *Charter* in so far as those rights arise in relation to the matter the subject of the proceeding before the court or tribunal.

The Attorney advanced a very narrow view of s 6(2)(b), submitting that a court or tribunal is required to give effect only to those rights under Part 2 that are 'explicitly and exclusively addressed to courts and tribunals'. The Board adopted this narrow view, stating that 'the Board's functions under Part 2 must be limited to those relevant to its hearing proceedings' (namely, the right to a fair hearing under s 24).

The adoption of this narrow view is regrettable and, if adopted by higher courts, will significantly limit the judicial protection afforded to human rights.

The only rights that are explicitly and exclusively addressed to courts and tribunals arise under s 21(5)-(8) (detention on criminal charges) and s 24 (fair hearing). Courts and tribunals have significant capacity, however, through both their processes and decisions, to impact on other human rights, including privacy (eg, closing or suppressing proceedings), free expression (eg, contempt) and cruel or inhuman treatment (eg, admissibility of confessional evidence). Narrow readings of s 6(2)(b) should be rejected. As Evans and Evans note in *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act* (2008), 'if courts do not have direct obligations with respect to rights…there could be serious gaps in the protection of human rights' (see also *R v Williams* [2007] VSC 2, [51]-[57]).

The broad reading of s 6(2)(b) is also consistent with the principles that human rights and human rights instruments should be interpreted so as to render their protections 'real and effective', not 'theoretical and illusory' (see, eg, *Kijewska v Poland* [2007] ECHR 73002/01; Human Rights Committee, *General Comment 31*, [13]-[16]). It is also consistent with the principle that human rights impose positive obligations of conduct and result (see, eg, *Savage v South Essex Partnership NHS Foundation Trust* [2007] EWCA Civ 1375; Human Rights Committee, *General Comment 31*, [13]-[16]).

Is the Board required by the *Charter* to ensure a 'fair hearing'?

A separate issue arose as to whether the Board is required to ensure a 'fair hearing' under s 24 of the *Charter*, with the Attorney remarkably submitting that the right 'is not engaged in a Board hearing' but is 'limited to civil suits [commenced by originating motion] between two parties that determine rights and obligations at law'.

The Board rejected the Attorney's argument, stating that it considers itself 'bound by s 24 of the *Charter*, which obliges it to provide parties before the Board with a fair hearing'. The Board considered that this obligation reinforces the Board's obligation under the *Mental Health Act* to ensure natural justice, although noted that 'it is unclear as to the extent to which the [right to a fair hearing] may require the Board to make changes to its hearing procedures, practices and processes'.

In our view, this is the correct conclusion. The powers of the Board include the power to interfere substantially with a person's human rights, including the right to liberty and freedom from detention and involuntary treatment. Recognising this, Principles 17 and 18 of the UN *Principles for the Protection of Persons with Mental Illness* apply the elements of the right to a fair hearing (such as: the right to legal representation; access to documents before the review body; the right to a public hearing; the right to reasons; and the right to an expeditious hearing) to mental health review bodies. It is notable that,

overwhelmingly, the UK courts and the European Court of Human Rights have simply accepted that mental health review bodies within their jurisdictions are subject to the right to a fair hearing.

What are the obligations of the Board and its staff as public authorities?

The Board noted that the 'fact situation raises the question as to the respective responsibilities of the parties and of the Board in monitoring the progress or lack of progress in obtaining the second psychiatric opinion'.

It is welcome that the Board acknowledged the failure to conduct a review as 'regrettable to say the least' and noted that it has amended its administrative procedures to prevent a similar situation occurring. It is also welcome that the Board recognized that 'the *Charter* may require the Board to reconsider and, if necessary, adapt its practices, procedures and processes to ensure compliance with patients' *Charter* rights'. Having regard to the above, it is perhaps surprising that the Board nevertheless found that it had 'substantially complied with its review obligation under the Act', with the failure to re-list for over a year while awaiting advice that a second opinion had been obtained being 'consistent with an appropriate degree of flexibility in the Board's practices and procedures necessary to balance elements of fairness and finality'.

It is also regrettable that, notwithstanding the Board's conclusions that P suffers from a mental illness, is prone to psychotic episodes and disorganization, is not well enough to offer informed consent to treatment, and is a threat to his own health, he 'had a responsibility to pursue the independent psychiatric opinion in a timely manner and to keep the treating team and Board informed of his progress' and to 'to reduce the delay'. It is the mandatory obligation of the Board under s 30(4) of the *Mental Health Act* to conduct a review of a CTO extension within 8 weeks, not that of the patient or even his or her legal representative.

What *Charter* rights are engaged by involuntary mental health treatment?

It was submitted for P that his continued involuntary treatment engaged and limited his rights to freedom from medical treatment without consent (s 10(c)) and to privacy (s 13(a)). While the Board did not consider the content of these rights in detail, it did appear to accept that, at the least, they are engaged by involuntary treatment and, while not raised by P himself, further found that the right to a fair hearing under s 24 was engaged by the facts of the case.

Although not necessarily directly engaged by the facts of this case, further *Charter* rights which will often be relevant to involuntary treatment and review under the *Mental Health Act* include: the right to recognition and equality before the law (s 8); protection from torture and cruel, inhumane and degrading treatment (ss 10(a) and (b)); freedom of movement (s 12); liberty and security of person (s 21); and humane treatment when deprived of liberty (s 22).

What is the scope of the *Charter* obligation to interpret legislation consistently with human rights?

The Board accepted that, under s 32(1) 'in cases where it is required and able to do so in order to apply the Act, the Board must make a *Charter* consistent interpretation of the Act'. It went on to say, however, that 'as the Board in most cases is concerned with the application of statutory criteria to an involuntary patient, this interpretative obligation is likely to be limited to specific cases where the interpretation of specific provisions of the Act is in issue'.

In terms of an approach to s 32, the Board adopted the five step approach of the New Zealand Supreme Court in *Hansen v The Queen* [2007] NZSC 7:

1. Identify the human rights relevant to the issue under consideration;
2. Identify the ordinary construction of the statutory provision and determine whether it burdens or limits any of the rights identified;
3. If any rights are limited by the ordinary construction of the statute, determine whether such limitation is permissible under s 7;
4. If the limitation is not permissible, but the wording of the Act does, consistently with its purpose, permit a *Charter* compatible interpretation, then adopt that interpretation; and
5. If it is not possible to render a *Charter* compatible interpretation within the scope of s 32(1), adopt the ordinary construction of the provision pursuant to s 32(3).

As to step 4, the Board appeared to endorse the approach taken by the House of Lords in *Ghaidan v Godin-Mendoza* [2004] AC 557, stating that 'every reasonable effort' should be taken 'to interpret the Act's provisions in a way that is compatible with *Charter* rights'. In that case, Lord Nicholls stated that:

> the interpretive obligation…is of an unusual and far reaching character. [It] may require a court to depart from the unambiguous meaning the legislation would otherwise bear.

He further stated that:

> [The interpretative obligation] enables language to be interpreted restrictively or expansively. But [it] goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting [the interpretative obligation] was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.

As to step 4, it is also important to note that the Supreme Court of New Zealand has stated that, where multiple interpretations are possible, the interpretation that is most compatible with, and the least restrictive of, rights is to be preferred: *Hansen v The Queen* [2007] NZSC 7, [93]-[94]; *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, [17]-[19].

How should s 30(4) of the *Mental Health Act* be interpreted and applied in light of the *Charter*?

Finally, the Board turned to consider how s 30(4) of the *Mental Health Act*, which requires that the Board '*must* conduct a review of the extension of a community treatment order *within* 8 weeks after the order is extended' but does not articulate the consequences of non-compliance, should be interpreted in light of s 32(1) of the *Charter*. P argued that the *Charter* required strict compliance with s 30(4), with failure to conduct a timely review rendering a CTO invalid. The Attorney submitted that it was only necessary to 'substantially comply' with s 30(4) in order for the CTO to remain valid.

At step 1 of the interpretative process, the Board accepted that the failure to review P's CTO engaged ss 10(c), 13 and 24 of the *Charter*.

Turning to step 2, however, it held that the current interpretation of s 30(4) of the *Mental Health Act*, pursuant to which 'substantial compliance' with the provision is required, is *Charter* consistent and does not limit any human rights. The Board concluded that it had substantially complied with the provision by initially listing and then adjourning the review within the period, notwithstanding that no review subsequently took place. It also concluded that, at all relevant times after 1 January 2008, the Board, the Board's staff and the authorised psychiatrist acted compatibly with P's human rights.

Although it did not regard it as strictly necessary to consider, the Board then discussed step 3 of the interpretative process, concluding that any limitation on P's rights to freedom from forced treatment and to privacy through failure to review his status for over a year was reasonable and proportionate having regard to the importance of 'continued treatment for a serious mental illness' (notwithstanding that the necessity and importance of such treatment is precisely what should have been reviewed). They also noted that, 'at any time', P or his legal representative could have requested that the review be re-listed or lodged an appeal.

With respect, this conclusion is flawed. Involuntary treatment, while sometimes necessary, constitutes a serious interference with a person's right to liberty, bodily integrity, freedom of movement, privacy and autonomy. For that reason it is critical that such treatment be subject to rigorous and timely review and that the Board's positive obligations, under both the *Mental Health Act* and the *Charter*, to conduct such a review be strictly complied with and a CTO invalidated where a failure to do so occurs.

The decision is available at http://www.hrlrc.org.au/html/s02_article/article_view.asp?id=347&nav_top_id=-1&nav_cat_id=-1.

Philip Lynch is Director of the Human Rights Law Resource Centre

Charter Assists to Prevent Eviction of Family into Homelessness

Director of Housing v TP (Residential Tenancies) [2008] VCAT 1275 (24 June 2008)

In this case, VCAT considered that the rights to privacy and family, and to protection of children and the family unit, were relevant to determining whether an application for an order of possession by the Director of Housing should be granted as against a single mother of four children.

Facts

The respondent, TP, has lived as a tenant in Office of Housing premises since 1993. She lives there with her four children. On 21 March 2007, DG, the father of the youngest two of TP's children, was arrested on the rented premises and charged with using, possessing and cultivating cannabis.

On 31 May 2007, the applicant, the Director of Housing, served a notice on TP to vacate the premises. Section 250 of the *Residential Tenancies Act 1997* (Vic) provides that a landlord may serve such a notice 'if the tenant has used the rented premises or permitted their use for any purpose that is illegal at common law or under an Act'. The applicant alleged that TP had permitted the premises to be used for an illegal purpose.

Following service of the notice to vacate, the applicant applied to VCAT for an order for possession of the premises.

The central issue in the case was the circumstances in which DG had come to be arrested on TP's premises. DG has a mental illness and was frequently violent towards towards TP. Prior to DG's arrest, TP had taken out an intervention order against DG which DG frequently breached. The police, when informed by TP of these breaches, rarely took action. DG came to TP's premises after his mother threw him out for attempting to bring his marijuana onto her land. Despite protests from TP that he could not stay, DG insisted that he be allowed to stay and became violent. TP eventually relented and agreed that DG could stay for a few days on the condition that the plants be kept outside.

Findings

The Tribunal was called upon to consider two primary questions:

- Whether or not the premises were used, by DG, for an illegal purpose; and
- If so, whether or not TP had permitted that the premises be used for that illegal purpose?

VCAT found that the premises had not been *used* for an illegal purpose by DG. Accordingly, TP could be not be held to have *permitted* the use of the premises for an illegal purpose. VCAT went on to state that even had the premises been used for an illegal purpose by DG, TP would still not have *permitted* the use of the premises for the illegal purpose because she had no power to prevent DG's actions.

The applicant was therefore unsuccessful in obtaining an order for possession of the premises. Although the result of the case ultimately did not turn on an application of the *Charter of Rights and Responsibilities,* the Tribunal made some important observations about the application of the *Charter*, both in relation to the *Residential Tenancies Act*, and more generally.

Application of the *Charter*

VCAT noted that s 32(1) of the *Charter* 'requires that a human rights consistent interpretation be adopted when it is possible to do so, having regard to the language and purpose of, in this case, s 250 of the Act'. VCAT considered that a landlord's right to serve a notice to vacate under s 250 of the Act (and subsequently obtain an order for possession if necessary) enlivens two of the substantive rights protected under the *Charter*, namely ss 13 and 17. Those sections relevantly provide:

> 13(1)(a) A person has the right (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with.
>
> 17(1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.
>
> 17(2) Every child has the right, without discrimination, to such protection as is in his or her best interest and is needed by him or her by reason of being a child.

Although the rights guaranteed under the *Charter* must be respected, they may be subject to reasonable limitations in circumstances where such limitations are demonstrably justified. Section 7(2) sets out those factors which may be taken into account when considering whether or not a limitation is reasonable. They include:

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

VCAT considered the purpose of section 250 of the Act was the protection of a landlord's interest in his or her property. VCAT noted that in many cases this purpose will justify an intrusion upon, or limitation of, the rights contained in ss 13 and 17 of the *Charter*.

The Tribunal went on to consider whether there might be any less restrictive means reasonably available to achieve the purpose of the provision (as required by s7(2)(e) of the *Charter*). This required an assessment of proportionality. Even if the facts were such that the premises had been used for an illegal purpose, and the respondent had been found to have permitted them to be so used, then the respondent and her family would have been evicted from their family home of 15 years. The respondent and her family may also have faced the prospect of extended homelessness. On the other hand, the only interference with the landlord's rights was that a person stayed in the premises for three days with cannabis plants.

At this point it is necessary to return briefly to VCAT's reasoning in relation to the substantive finding that the premises were not in fact used for an illegal purpose. VCAT was referred to numerous authorities which described a continuum along which fact situations may be placed in determining whether premises were *used* for an illegal purpose. For example, the use of the premises as a brothel or gaming house would sit at one end of the continuum, while having drugs in one's pocket whilst visiting the premises at the other end of the continuum. The former scenario would constitute a clear use of the premises for an illegal purpose. Conversely, in the latter scenario, the illegal conduct would be so incidental and remote to the relevant person's presence on the premises that the conduct could not constitute use of the premises for an illegal purpose.

Applying this analysis, VCAT considered that there must be a half way point along the continuum at which the conduct would be regarded as use of the premises for an illegal purpose. DG's conduct in bringing his cannabis plants onto the premises for three days was found to fall short of the half way mark. However, the Tribunal noted that, 'if the fact situation of the case had placed it close to the half way mark along the continuum, an interpretation of the statutory provision in accordance with the Charter may have tipped it to one side'. In this particular case, that would have meant that the tenant would have been protected from eviction, as the interference with her rights and those of her family's would have been disproportionate to the potential interference with the landlord's interest in the property.

This case highlights an important feature of the *Charter* in its application to statutory interpretation. In considering whether particular conduct offends a statutory provision such as s 250 of the *Residential Tenancies Act*, Victorian courts and tribunals now have the power to import a key value judgment into that decision: namely, whether the limitation of an individual's rights under the provision is reasonably and justifiably proportional to the object of the legislation. Rather than being bound by rigid legal principles, Victorian courts and tribunals can interpret legislation flexibly, making a proportional assessment of the impact of the relevant statutory provision in each particular case. The case also provides a valuable precedent for the practical application of s 7 of the *Charter*. The Tribunal Member should be commended for considering the *Charter* issues, notwithstanding the fact that the *Charter* did not impact on the final decision.

The decision is available at http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2008/1275.html.

Jesse Rudd and Jason Pobjoy, Mallesons Human Rights Law Group

VCAT Required to Ensure a 'Fair Hearing' under the *Charter*

Carwoode Pty Ltd v Cardinia SC (Red Dot) [2008] VCAT 1334 (23 June 2008)

This was a case regarding an application for permits to subdivide land and construct various buildings ancillary to a freeway which would involve the removal of native vegetation to the detriment of the Growling Grass Frog. During the hearing of the merits, a challenge was made to VCAT's jurisdiction to hear the matter and submissions were made that VCAT had failed to abide by the principles of natural justice and the *Charter*.

The matter was heard by Philip Martin, the Presiding Member, and David Rae, Member.

The members determined that the *Charter* applied to the proceedings and must be complied with, particularly the fair trial requirement under s 24. The members determined that, as VCAT was reviewing the failure of the Council to make a decision in the statutory period, VCAT constituted a tribunal 'acting in an administrative capacity' as per s 4 (1)(j) of the *Charter* (and presumably constituted a public authority that must act compatibly with the *Charter*).

However the members rejected the argument that s 24 now requires all VCAT site inspections to be accompanied. In relation to natural justice issues raised generally, the members determined that the *VCAT Act 1998* (Vic) provides VCAT with broad powers as to how it conducts its hearings and VCAT is not required to conduct hearings in the same manner as court proceedings. VCAT is intended to be less formal than a court and VCAT hearings should take place with 'as much speed' and '...as little formality and technicality' as possible, in accordance with the *VCAT Act*. The members determined that in this instance VCAT had followed a fair process, consistent with natural justice principles, and had complied with the Charter right to a fair trial.

While receptive to *Charter* arguments, the members were critical of the applicant's failure to refer to any relevant case law from comparable overseas jurisdictions with a human rights charter, as is permitted by s32(2) of the *Charter.*

The decision is available at http://www.austlii.edu.au/au/cases/vic/VCAT/2008/1334.html.

Melanie Schleiger is a lawyer on secondment to the HRLRC from Lander & Rogers

Comparative Law Case Notes

Community Housing Association Held to be a 'Public Authority'

R (Weaver) v London and Quadrant Housing Trust [2008] EWHC 1377 (Admin) (24 June 2008)

The UK High Court of Justice has recently considered the meaning of 'public authority' under the *Human Rights Act 1998* (UK). In this decision, Registered Social Landlords were held to be public authorities for the purposes of the Act.

Facts

The claimant, Susan Weaver, was an assured tenant of the London & Quadrant Housing Trust ('LQHT'). LQHT was a Registered Social Landlord ('RSL') under the *Housing Act 1996* (UK), and was responsible for providing affordable housing to people whose needs were not met by the market.

Weaver applied for review of LQHT's decision to seek an order for possession against her on the ground that she was at least eight weeks in arrears in paying rent. She alleged, in part, that the decision was incompatible with the right to respect for the home under art 8 of the *European Convention on Human Rights*. She also alleged a breach of a legitimate expectation that LQHT would pursue all reasonable alternatives before resorting to a mandatory ground for possession of the property.

Under s 6(1) of the UK HRA, a public authority may not act in a way which is incompatible with a *Convention* right. The question therefore arose whether an RSL and, in particular LQHT, was a public authority within the meaning of the Act. The claimant argued that LQHT was a 'hybrid' or 'functional' public authority, in that some of its functions were public in nature (including the decision to grant or terminate social housing tenancies).

Decision

The Court held that the management and allocation of housing stock, including decisions relating to the termination of tenancies, was a function of a public nature. The Court regarded LQHT as a public authority despite several characteristics that were 'private' in nature. For example, LQHT was a privately formed body, was governed by its own rules, managed its own housing stock, shared no board members with a relevant public body and had limited or no statutory powers.

However, the following factors were relevant to the finding that LQHT was a public authority:

- LQHT's status as a not-for-profit organisation. While not in itself a determinative feature of a public authority, it was significant that LQHT lacked the private and commercial features of an entity acting for profit;

- The fact that the sector within which LQHT acted (social rented housing) was 'permeated by state control and influence with a view to meeting the Government's aims for affordable housing'. In this sense RSLs could be said to take the place of local authorities;
- LQHT received substantial public subsidy for particular development programs through capital grants from the UK Housing Corporation, in common with other RSLs;
- More than ten per cent of LQHT's housing stock had been transferred to it from the public sector, reflecting the fact that RSLs and local authorities were performing similar functions in the provision of social rented housing; and
- LQHT had a statutory duty to cooperate with local authorities in the way that it rented out its houses. This indicated that the relationship between LQHT and the local authorities was not purely contractual.

On this basis, LQHT was a public authority in relation to both the grant and termination of a tenancy. However, the Court did not hold that the claimant's legitimate expectation was enforceable or that she was in fact led to believe that LQHT would act differently from the way in which it did act.

The finding that RSLs are public authorities represents a move towards a broader interpretation of the concept of 'public authority'. The most recent previous case on the issue, *YL v Birmingham City Council*, held that a privately run aged care facility did not fall within the definition of public authority under the *Human Rights Act 1998* (UK), despite the fact that the facility achieved a purpose in the public interest and was subject to substantial regulation.

The Court in *Weaver* did distinguish some aspects of *YL*; for example, the aged care facility in *YL* was a commercial organisation run for profit and received no public funding as such. However, the decisions on the meaning of 'public authority' sometimes appear difficult to reconcile. Perhaps *Weaver* was decided with an awareness that the UK legislature was in the process of overturning the decision in *YL*. In the June 2008 edition of this Bulletin, James Welch of leading UK civil liberties group Liberty identified the courts' narrow interpretation of public authority as one of the key weaknesses of the UK human rights legislation.

LQHT intends to appeal this aspect of the decision, and therefore confirmation of the trend towards a broader definition of public authority may come from an appellate court. In the meantime the area remains, in the words of the Court in *Weaver*, not 'altogether easy to resolve'.

Relevance to the Victorian *Charter*

The definition of 'public authority' under the Victorian *Charter* is more detailed than that under the *Human Rights Act 1998* (UK). Nevertheless, this decision provides useful guidance on whether a particular entity will be a public authority when it is exercising certain functions.

If the *Weaver* decision is upheld, Australian courts may be encouraged to take a more liberal approach to determining what constitutes a public authority under the *Charter*. As government agencies continue to outsource their obligations to private enterprise, this could be a positive step in reinforcing the obligation to protect human rights regardless of technical distinctions as to the institutional nature of the entity. The decision is available at http://www.bailii.org/ew/cases/EWHC/Admin/2008/1377.html.

Purdie Bowden, Human Rights Law Group, Mallesons Stephen Jaques

Right to Equality may Require Special Measures to Address Disadvantage

R v Kapp, 2008 SCC 41 (27 June 2008)

In a significant recent decision, the Supreme Court of Canada held that proactive schemes which seek to ameliorate the conditions of disadvantaged groups do not contravene the guarantee of equality in the *Canadian Charter of Rights and Freedoms.* In doing so, the Court re-emphasised the Canadian Charter's concern with substantive equality.

Facts

To remedy low aboriginal involvement in commercial fishing, the Canadian federal government founded the Aboriginal Fisheries Strategy in 1992. Under this scheme, the *Aboriginal Communal Fishing Licences Regulations* provided for the issuance of communal fishing licences to aboriginal bands.

Pursuant to these regulations, the government issued exclusive licences to three aboriginal bands to fish in a designated area for a period of 24 hours. The appellants, who were commercial fishers, participated in a protest fishery in deliberate breach of the exclusive licence. Charged with fishing at a prohibited time, the appellants claimed that the fishing license discriminated against them on the basis of race.

The respondents argued that s 15(2) of the *Canadian Charter* enabled the government to take pro-active measures to ameliorate the situation of aboriginal people. Section 15(2) provides that the requirement for equality in s 15(1) 'does not preclude any law, programme or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

Decision

The Supreme Court unanimously upheld the validity of the exclusive licences. However, the Court was divided as to which *Canadian Charter* provision was applicable.

The majority restricted their analysis to the operation of s 15. Whilst s 15(1) prohibits measures which discriminate between individuals, s 15(2) enables the government to 'pro-actively combat existing discrimination through affirmative measures.' If the government is able to establish the applicability of sub-section (2), analysis under the prohibitory provision is not required. This is because the two provisions work in unison to promote substantive equality, and s 15(2) 'supports a full expression of equality, rather than derogating from it.' The Court systematically analysed the requirements under s 15(2) but noted that the framework for deciding a s 15 issue is flexible — future cases may require further refinement.

The Court held that the phrase 'has as its object' in s 15(2) is concerned with the 'legislative goal' of the particular government initiative, as opposed to its actual effect. Further, looking at legislative purpose does not require 'slavishly' accepting the government's stated characterisation of its purpose: the court can, and should, examine legislation to see that the purpose is genuine. In addition to examining statements made by the drafters of the programme, the Court suggested that there must be a 'rational' relationship between the ameliorative goal and the means chosen to reach that goal. Though the ameliorative purpose must also correlate with the disadvantage of the individual or group, it need not be the sole goal of the programme.

The Court also noted that s 15(2) seeks to protect reform directed at specifically identifiable groups. This does not import a requirement of individual disadvantage — the group as a whole must have experienced discrimination.

In light of these principles, the Court held that the ameliorative purpose of the programme was to provide economic opportunities to the aboriginal bands, thereby promoting self-sufficiency. Granting aboriginal groups exclusive fishing rights was rationally related to this purpose and, given the 'indisputable' disadvantage of aboriginal people, there existed the necessary correlation between the programme and the disadvantage.

The majority expressed concern at the opinion of Bastarache J who came to the same result on the basis of s 25 of the *Canadian Charter*. This provision notes that rights and freedoms in the *Canadian Charter* 'shall not be construed so as to abrogate or derogate from any aboriginal treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada'. The majority disagreed with Bastarache J's finding that the issuing of licences amounts to a relevant right; in the majority's opinion, s 25 is concerned with rights of a constitutional character. Furthermore, they suggested that s 25 may function as an interpretive provision, rather than an absolute bar to bringing an action under s 15.

By contrast, Bastarache J suggested that s 25 operates as a shield. Further, it must be interpreted carefully to ensure that there is no suggestion that 'there are distinct *Charter* rights for aboriginal individuals and non-aboriginal individuals'. Given the grant of fishing licences fell under s 25, the provision operated to eliminate the claim of the appellants under s 15.

Relevance to the Victorian *Charter*

This decision may aid in the interpretation of s 8 of the Victorian *Charter* which similarly provides for equality before the law without discrimination (s 8(3)), whilst recognising that '[m]easures taken for the

purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination' (s 8(4)).

Under the Canadian interpretation, these two provisions operate to promote substantive equality. If it can be shown that s 8(4) is in operation, then analysis under the prohibitory s 8(3) will not be required. Section 8(4) of the Victorian *Charter* specifically provides that the court must consider the 'purpose' of the measure. *R v Kapp* suggests that analysis of legislative purpose for genuineness and rationality of approach is appropriate.

The Victorian *Charter* also provides that Aboriginal persons 'must not be denied' their 'distinct cultural rights' (s 19(2)). On the minority's interpretation of s 25 of the *Canadian Charter* in *R v Kapp*, s 19 in the Victorian *Charter* operates as a shield — that is, the cultural rights of Aboriginal persons must not be denied even by operation of other *Charter* provisions. However, the absence of express reference to *Charter* rights and freedoms in s 19(2) may mean that the provision needs to be interpreted in light of the whole *Charter*. This is supported by the fact that, unlike the *Canadian Charter*, similar protection is provided to *all* persons with a particular cultural background (s 19(1)).

The decision is available at http://www.canlii.org/en/ca/scc/doc/2008/2008scc41/2008scc41.pdf.

Rebecca Pereira and Claire Agius, Mallesons Human Rights Law Group

Right to Respect for Family Life Encompasses Respect for Life of Partner and Children

Beoku-Betts (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2008] UKHL 39 (25 June 2008)

The House of Lords held that the right to family life should be interpreted broadly, and encompass consideration of the rights of other family members, when determining an appeal against the Secretary of State's refusal of leave to remain under s 65 of the *Immigration and Asylum Act 1999* (UK).

Facts

Beoku-Betts was a 29-year-old man from Sierra Leone. He fled to the UK via Senegal in 1997 at 19 following a violent military coup, which ousted President Kabbah's government. The belief that his family was at risk prompted the move; they were Creole, wealthy and prominent, and had a long history of involvement in Sierra Leonean political life. He and his brother were exposed to a terrifying mock execution following the coup.

His mother, father, and younger sister Candace followed Beoku-Betts to the UK. An older sister, Josepha, already lived there and held citizenship. His father died shortly after becoming a citizen. The immigration policy then in force granted his mother and younger sister indefinite leave to remain in the UK. However, Beoku-Betts was unable to benefit from the policy.

His initial grant of leave to stay in the UK had been for 12 months as a student. After he completed his A-levels, he went on to university. He obtained all the necessary extensions of leave to continue his education until 31 December 2000, when his final leave expired. Beoku-Betts mistakenly believed that his leave would continue until he completed his degree.

On 1 June 2001, he sought asylum and the right to remain in the UK under art 3 (protection from cruel treatment or punishment) and art 8 (respect for private and family life) of the *European Convention on Human Rights*.

On 27 February 2002, the Secretary of State refused both claims. Beoku-Betts appealed to an adjudicator under s 65 of the *Immigration and Asylum Act 1999* (now ss 82 and 84 of the *Nationality, Immigration and Asylum Act 2002*). He claimed that interference with his art 8 right to respect for family life was not justified in the interest of controlling immigration.

Decision

Adjudicator's Decision

The adjudicator held that the interference with Beoku-Betts' art 8 rights was not justified in the interest of controlling immigration. Reasons included the fact that the family was close-knit and interacted on a regular basis. Beoku-Betts travelled home most weekends during the term and lived with his mother and sister when he was not studying. He had several cousins and uncles in the UK. His mother relied

on him for emotional support since leaving Sierra Leone and continued to do so following the death of her husband. The family had strong connections in the UK, which they were unlikely to give up to follow Beoku-Betts back to Sierra Leone if he left the UK. Josepha worked at a local law firm, his mother worked as a study supervisor and Candace was in a local school. Therefore, if his art 8 claim failed, Beoku-Betts would inevitably be separated from his family.

Immigration Appeal Tribunal and Court of Appeal

The Immigration Appeal Tribunal overturned the adjudicator's decision because it placed too much importance on Beoku-Betts' mother and siblings. However, the Tribunal gave leave to appeal to the Court of Appeal on the extent of consideration that should be given to the claimant's family members in determining appeals under s 65.

On 6 June 2005, the Court of Appeal dismissed the appeal, holding that the right of appeal on human rights grounds under section 65 of the 1999 Act only requires consideration of the alleged breach of *the appellant's* human rights and not the art 8 rights of his family.

House of Lords

Lord Brown of Eaton-Under-Heywood, in delivering the unanimously supported judgment, canvassed domestic cases as well as the Strasbourg case law before rejecting the narrow interpretation of family under the 1999 Act.

In his judgment, he noted the UKHL decision in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, which says the core value which art 8 seeks to protect is the family unit. Human beings are social animals who depend heavily on their families for social, emotional, and financial support. Prolonged separation seriously inhibits their ability to live full and fulfilling lives. The age, health, and vulnerability of the applicant, closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, and the prevailing cultural tradition and conditions in the country of origin are all relevant considerations in making a determination in relation to article 8.

Relevance to the Victorian *Charter*

Section 17 of the Victorian *Charter* provides that families are the 'fundamental group unit of society', and as such, are entitled to protection by society and the state.

According to the Explanatory Memorandum, 'family' is intended to be interpreted broadly, to recognise the diversity of families living in Victoria.

This view is consistent with that of the UN Human Rights Committee; which says that the concept of family should be extended to protect any group regarded within a particular country or region as a family. The Committee also considers that one of the principal ways in which the family is to be protected is through the promotion of family unity.

Louise Fahy is a lawyer with DLA Phillips Fox

Deportation and the Right to Private and Family Life

Maslov v Austria [2008] ECHR 1638/03 (23 June 2008)

The Grand Chamber of the European Court of Human Rights has held that the deportation of a youth who had spent the majority of his childhood in Austria constituted a violation of his right to respect for his family and private life.

Facts

The applicant was a Bulgarian national. In November 1990, at the age of six, the applicant moved with his family to Austria, where he was legally resident until 2003. During his time in Austria, the applicant was convicted of aggravated burglary on two separate occasions; in September 1999 and in May 2000.

In January 2001, the Vienna Federal Police Authority ('VFPA') imposed a ten-year exclusion order on the applicant, pursuant to the *Aliens Act 1997*. The VFPA found that it would be contrary to the public interest to allow the applicant to stay in Austria, given the applicant's relapse into crime after his first conviction. The applicant unsuccessfully appealed to a number of Austrian authorities and, in December 2003, was deported to Bulgaria.

In March 2007, a Chamber of the European Court found that the applicant's exclusion order and deportation constituted a violation of art 8 of the *European Convention on Human Rights*. The Austrian government appealed to the Grand Chamber of the Court.

Decision

Article 8 of the *European Convention* protects the right to respect for private and family life. The article also prohibits interference with this right by a public authority, subject to specific exceptions that are 'in accordance with the law and necessary in a democratic society'. The relevant exception in this case was 'the prevention of disorder or crime'.

The Grand Chamber found that there had clearly been an interference with the applicant's rights under art 8. The main issue for consideration was therefore whether that interference was 'necessary in a democratic society'. The Grand Chamber held that the following criteria were relevant for determining this question, in relation to young adults who have previously been convicted of an offence and who have not yet founded a family of their own:

- the nature and seriousness of the offence committed by the applicant;
- the length of the applicant's stay in the host country;
- the time elapsed since the offence was committed and the applicant's conduct during that period; and
- the solidity of social, cultural and family ties with the host country and with the country of destination.

The Grand Chamber emphasised that very serious reasons would be required to justify the expulsion of a settled migrant who has lawfully spent all or the majority of their childhood in the host country. This is particularly so where the offences relevant to the expulsion order were committed while the migrant was still a juvenile.

The Grand Chamber upheld the decision at first instance, finding that the applicant's expulsion constituted a violation of art 8. The Grand Chamber considered that the relevant offences were generally of a non-violent nature and were committed whilst the applicant was still a minor, requiring the court to take into account the applicant's best interests as a child. Other factors held to be relevant by the Grand Chamber included:

- the applicant had lived in Austria since the age of six, and thus had spent the formative years of his childhood in Austria;
- the applicant's principal social, cultural, linguistic and family ties were in Austria. In contrast, the applicant did not speak Bulgarian at the time of his expulsion and had no other close ties with Bulgaria; and
- the applicant committed no further offences between January 2000 and his deportation in December 2003.

For these reasons, the Grand Chamber held that the exclusion order was disproportionate to the legitimate aim of preventing disorder or crime and was therefore not 'necessary in a democratic society', in violation of the applicant's art 8 rights.

Relevance to the Victorian *Charter*

Under section 13(a) of the Victorian *Charter*, every person has the right 'not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with'. This right may only be subject to 'such reasonable limits as can be demonstrably justified in a free and democratic society' (s 7).

Maslov v Austria provides useful criteria for assessing whether a person's (in particular, a minor's) rights under s 13(a) have been violated and, if so, whether the relevant action can nonetheless be justified under s 7.

The case may also provide guidance in the case of Mr Stefan Nystrom, a Swedish citizen who was deported from Australia in December 2007 and who is being assisted jointly by the HRLRC and Mallesons. One matter currently being considered by the UN Human Rights Committee in relation to Mr Nystrom's situation is whether his deportation constituted a violation of art 17 of the *ICCPR*, which is similar to s 13(a) of the Victorian *Charter* and art 8 of the *European Convention*. The reasoning in

Maslov v Austria suggests that Mr Nystrom's deportation may constitute an unjustifiable interference with his privacy, family and home, given that Mr Nystrom had lived permanently in Australia from 27 days old and had no relevant ties to Sweden.

Edwina Chin, Human Rights Law Group, Mallesons Stephen Jaques

Balancing the Rights of Children with Parents' Religious Beliefs

VM v British Columbia (Director of Child, Family and Community Service) 2008 BCSC 449 (13 June 2008)

The Supreme Court of British Columbia has held that the decisions of a Provincial Court and a public official to authorise medically-necessary blood transfusions for four infants against the express wishes of their parents did not breach the parents' rights under the *Canadian Charter of Rights and Freedoms.*

Facts

Premature sextuplets were born to parents who were members of the Jehovah's Witness Church. The infants were admitted to the Neonatal Intensive Care Unit where they received life support. Two of the infants died within the first two weeks due to complications. Despite attempts to minimise the need for blood transfusions given the parents' beliefs, the medical team eventually deemed that blood transfusions were necessary.

The parents objected, at which point the Director of Child, Family and Community Service obtained orders in the Provincial Court authorising transfusions for two of the children pursuant to s 29 of the *Child, Family and Community Service Act* (RSBC) 1996. The Director then apprehended the remaining two children and authorised transfusions for them in the absence of a court order, pursuant to s 30 of the CFCSA. The children were given the transfusions.

The parents appealed the orders of the Provincial Court and sought judicial review of the Director's actions. They argued that, in compelling their children's transfusions, the Court and Director had violated their rights under ss 2(a) (freedom of conscience and religion) and 7 (right to life, liberty and security of the person) of the *Canadian Charter*.

Decision

<u>Medical decisions and religious beliefs</u>

Brenner CJ held that neither the parents' rights under s 2(a) or s 7 had been breached by the court orders or the actions of the Director. Drawing on previous authority that was directly concerned with the issue of freedom of religion and medical necessity, his Honour highlighted that the right to freedom of religion was not absolute and may need to be balanced against other fundamental rights.

In this case, 'medical necessity' and the children's rights to life, liberty and security of the person outweighed the freedom of the parents to choose medical treatment for their children based on the tenets of their religion. Importantly, Brenner CJ held that 'medical necessity' in such circumstances referred not only to treatment that would be essential for the preservation of life, but also treatment necessary to prevent serious or permanent injury.

Brenner CJ observed that previous authority suggested two potential analytical pathways for the Court to follow:

- that the actions in question *did* infringe the parents' rights to freedom of religion, thus requiring the Court to consider whether such infringement was justified under s 1 of the *Canadian Charter* (which provides that rights may be subject to 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'); or
- that such actions *did not* infringe the parents' rights to freedom of religion in the first place, rendering the s 1 analysis unnecessary.

Without indicating a preference for either analysis, Brenner CJ decided that 'there was no infringement of the parents' 2(a) rights, or, if there was an infringement, it was saved by s 1.

<u>Procedural Fairness</u>

The parents also argued that the procedural rights guaranteed under s 7 (that they not be deprived of such right except in accordance with the principles of fundamental justice) were infringed by the

'essentially' *ex parte* nature of the hearings before the Provincial Court. Brenner CJ held that, given that the legislation provided the Provincial Court with discretion to shorten the notice period or 'dispense with the notice requirement entirely', the Provincial Court did not offend principles of fundamental justice by proceeding with the hearings. Brenner CJ noted, however, that it was still necessary to take all reasonable steps to ensure the process was just.

Relevance to the Victorian *Charter*

The law relating to children's consent to medical procedures in Victoria is complex. The Children's Court has jurisdiction where a child is in need of protection; the Family Court has jurisdiction where a child's well-being is at risk; and the Supreme Court of Victoria may authorise medical treatment in the child's best interests in accordance with its *parens patriae* jurisdiction. Although there have been various Australian cases where courts have ordered that children be given blood transfusions against the express wishes of their parents (and occasionally, against the express wishes of the children), none of those cases have been decided under a Charter of Rights.

The relevant substantive provisions in the Victorian *Charter* are ss 9 (right to life), 14 (freedom of religion), 21 (liberty and security of the person) and 7(2) (rights under the Victorian *Charter* are subject to laws justified to maintain a free and democratic society). The presence of the various equivalent rights suggests that it is very likely that a Victorian court would reach similar conclusions to those reached in this case. Moreover, the Victorian *Charter* goes a step further than the *Canadian Charter* by also providing that children have the right to be protected by the State (s 17). If anything, this would only augment the State's ability to intercede in favour of the interests of the child.

The findings on the procedural issues are less likely to be influential. Unlike in s 7 of the *Canadian Charter*, the right to liberty and security of the person in s 21 of the Victorian *Charter* does not provide that a person can only be deprived of such right 'in accordance with the principles of fundamental justice'. Rather, a person may be deprived of such right on 'grounds, and in accordance with procedures, established by law'. This test is a lot more straightforward, and indicates that in cases where the law allows a court to hold an 'essentially' *ex parte* hearing, proceeding on this basis is unlikely to infringe a person's s 21 rights.

The decision is available at http://www.canlii.org/en/bc/bcsc/doc/2008/2008bcsc449/2008bcsc449.pdf.

Kaitilin Lowdon and Chris Thomas, Human Rights Law Group, Mallesons Stephen Jaques

Anonymous Witnesses and the Right to a Fair Trial

R v Davis [2008] UKHL 36 (18 June 2008)

In this case, the House of Lords held that the use of anonymous witnesses prevented the accused from adequately examining his accusers, and thereby denied him a fair trial in accordance with both the common law and art 6(3)(d) of the *European Convention on Human Rights*. Further, the House of Lords held that a conviction should not be based solely, nor to a decisive extent, upon the evidence of anonymous witnesses.

Facts

The appellant, Iain Davis, appealed against the dismissal of an appeal by the Court of Appeal Criminal Division. Mr Davis was convicted by the Central Criminal Court before a jury for the murder of two men on 1 January 2002.

At trial, the prosecution relied upon the evidence of three witnesses whose testimony was found to be essential to securing the conviction. However, those witnesses claimed to be in fear of their lives if the applicant learned that they had testified against him. To ensure the witnesses' safety and to induce them to give evidence, the trial judge ruled that their evidence was to be given under the protection of special measures. For example, the addresses and personal details of the witnesses were withheld from the appellant and his legal advisers, the witnesses' voices were mechanically distorted so that the appellant could not recognise them (though the judge and jury could hear the true voices), and counsel for the appellant was prevented from asking the witnesses any question that might enable them to be identified.

Consequently, the witnesses remained anonymous to the appellant. This was significant because the Court acknowledged that without the evidence of the anonymous witnesses, the appellant could not have been convicted.

The appellant challenged the conviction, relying on the combination of restrictive procedures and their effect on the fairness of the trial that was conducted. In particular, the appellant argued that the use of the procedures violated his right to a fair trial under common law and art 6(3)(d) of the *Convention*.

Decision

In five separate yet concurring judgments, the House of Lords held that the ability of the appellant's counsel to cross-examine the witnesses on points essential to the defence had been severely compromised by the special procedures, and as such the trial was unlawful and unfair.

The House acknowledged the 'long-established principle of English common law' that, subject to certain exceptions and statutory qualifications, the defendant in a criminal trial should be confronted by his or her accusers. It was accepted that although the court has an inherent jurisdiction to control its own proceedings, there is a 'strong imperative in favour of open justice'. The Lords indicated that, contrary to the position argued by the prosecution, there is no authority for the court to 'make far-reaching inroad[s] into the common law rights of a defendant'. Lord Rodger noted that it is for the government and Parliament to address the issue of the intimidation of witnesses, and that even then the use of restrictive procedures (such as those in this case) should be secondary to directly addressing witness intimidation.

Lord Mance noted that the appellant's trial failed to meet the standard required by art 6 of the *European Convention* for a fair and public hearing, particularly the requirement of art 6(3)(d) for the accused 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'. This is not to say, however, that the *Convention* forbids the anonymity of witnesses; it 'does not set its face absolutely against the admission of anonymous evidence in all circumstances'. Lord Mance suggested that the position under the *Convention* is broader than at common law, and that the admissibility of evidence is a matter primarily for regulation by national law. Whether proceedings are conducted fairly, however, should be the focus of the European Court of Human Rights' inquiry.

Lord Carswell agreed that the anonymity of the witnesses made the trial unfair for the accused, but stated that it is possible, in principle, to allow departure from the basic rule of open justice in a clear case of necessity. According to Lord Carswell, necessity would be established if the witnesses' reluctance to give evidence was genuine and warranted anonymity, or if it was established that the defendant himself had created the fear felt by the witnesses. This necessity would need to be weighed against the relative importance of the testimony. If the witnesses gave the sole or decisive evidence against the defendant, anonymity would most likely make the trial unfair. This position was not accepted by the rest of the House, and the issue was not capable of being addressed on such a 'flexible basis'.

Relevance for the Victorian *Charter*

The issue of anonymous witnesses giving evidence during trials has been addressed in Victoria. In the case of *Jarvie v Magistrates Court of Victoria* [1995] 1 VR 84, Brooking, Southwell and Teague JJ of the Supreme Court of Victoria found that witnesses may, in certain situations, give evidence anonymously. The Court ruled that the need for a fair trial is the overriding consideration, and means that the identity of a witness should never be withheld from a defendant when disclosure might be of substantial assistance to the defendant. This does not mean that witnesses may never give evidence anonymously. In the case of *Pong Su (Ruling No 20), Re; R v Ta Song* [2005] VSC 67, Kellam J allowed the evidence of two anonymous witnesses despite acknowledging his own personal reservations. However *Pong Su* can be contrasted to *R v Davis*, as the examination of the witnesses' identity was not relevant to the defence.

R v Davis highlights the limits that may be placed on the right to a fair trial, and the ability of the accused to examine witnesses testifying against them. This may have repercussions for the interpretation of the Victorian *Charter*, especially in relation to:

- s 24(1), which provides that '[a] person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing'; and

- s 25(2)(g), which outlines that a person charged with a criminal offence is entitled, without discrimination, 'to examine, or have examined, witnesses against him or her, unless otherwise provided for by law'.

These provisions are significantly similar to art 6 of the *European Convention*. In *R v Davis*, Lord Mance noted the European Court of Human Rights' view that the use of anonymous evidence 'is not under all circumstances incompatible with the Convention'. It is not clear, however, whether a more restrictive position will be adopted in relation to the Victorian *Charter*.

The *European Convention* was drafted in the knowledge that not all of the domestic laws of member states prohibit anonymous evidence, which may explain the European Court's broader approach. Given the weight of common law decisions in favour of the interpretation adopted by the House of Lords, the interpretation of ss 24 and 25 of the *Charter* will likely follow *R v Davis*. Therefore, while it may be impossible for a court to ignore competing considerations regarding a witness' security, where anonymous evidence is the decisive basis for a conviction it appears that the defence would be unfairly hampered and the trial would be ruled unfair.

The decision is available at http://www.bailii.org/uk/cases/UKHL/2008/36.html.

William Watson and Rebecca Pereira, Human Rights Law Group, Mallesons Stephen Jaques

Access to Legal Aid may be Required for a Fair Hearing

Bobrowski v Poland [2008] ECHR 64916/01 (17 June 2008)

The European Court of Human Rights has held that Poland violated its obligation to ensure a fair trial under art 6 of the *European Convention on Human Rights* by failing to grant legal aid to an individual in respect of civil proceedings. However, the Court held that a denial of legal aid was justified where the applicant had hired his or her own private lawyer, notwithstanding that the lawyer proved to not be competent.

Facts

The applicant argued that Poland was in breach of art 6 (the right to a fair hearing and access to a court) by reason of the following circumstances:

- The applicant applied to the regional court for legal aid for an appeal against a first-instance judgment. The court refused the application without giving written reasons. The court did, however, grant the applicant a partial exemption from court fees.
- The Supreme Court refused to examine the applicant's cassation appeal.
- The applicant was refused legal aid to lodge an appeal against the decision rejecting his cassation appeal. After failing to receive a response to a request that he be exempted from court fees, the applicant lodged an appeal with the help of a privately hired lawyer. However, this appeal failed to comply with legal requirements. The applicant's subsequent request for a legal aid lawyer to draft an appeal against this procedural decision was refused because the applicant had already hired a lawyer.

Decision

Denial of legal aid to lodge an appeal

The European Court observed that while there is no obligation under the *Convention* to make legal aid available for all disputes; the key principle governing art 6 of the *Convention* is fairness. A party in civil proceedings must be able to participate effectively by being able to put forward arguments to support his or her claims.

Having regard to the circumstances as a whole, the Court declared that the refusal to grant legal aid amounted to a contravention of art 6. The regional court's grant of a partial exemption from court fees indicated that it considered the applicant unable to bear the full costs of the proceedings. The fact that there were no written grounds for the decision in respect of legal aid meant that there was nothing to explain why the regional court believed the grant of legal aid was not justified. The principle of fairness required the court to give reasons for rejecting the applicant's request for legal aid.

Refusal to hear appeal

The European Court ruled that the Supreme Court's refusal to hear an appeal against the cassation appeal did not breach art 6. The applicant's case had been examined on the merits at two levels of jurisdiction. The domestic limitations against appeal pursued a 'legitimate aim' (accelerating proceedings by excluding the examination of appeals in cases of lesser importance).

Denial of legal aid to lodge a cassation appeal

The European Court dismissed the application that the denial of legal aid to lodge a cassation appeal constituted a breach of art 6 because the applicant had hired a private lawyer. The fact that the lawyer had incorrectly prepared the applicant's appeal application did not infringe his rights under art 6:

> The mere fact that the cassation appeal lodged by a privately hired lawyer was rejected by the court for failure to comply with the applicable formal requirements did not hinder the very essence of the applicant's right of access to a court.

Relevance to the Victorian *Charter*

This case may prove relevant to the interpretation of ss 8 and 24 of the Victorian *Charter*.

Section 8 protects the right to equality and freedom from discrimination, both integral components of the international human rights normative framework.

Section 24 provides for the right to a fair hearing. Specifically, s 24(1) provides that a 'person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.'

The issue of whether ss 8 and 24 necessitate the provision of legal aid in a civil case was recently raised in the case of *Kortel v Mirik and Mirik* [2008] VSC 103. That case concerned two individuals who were convicted of serious crimes. Although legal aid was provided for their criminal charges, it was refused in relation to the compensation application and they were therefore unrepresented. The issue was ultimately not resolved by the Court, as legal aid was provided. The decision in this case may provide some guidance when the issue is ultimately resolved by a Victorian Court.

Adrienne Lyle, Mallesons Human Rights Law Group

HRLRC Policy Work

Protecting the Human Rights of People Deprived of Liberty

The Human Rights Law Resource Centre strongly supports Australia's proposed accession to the Optional Protocol to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Optional Protocol).

The Optional Protocol establishes a system of regular visits to places of detention by both international and domestic independent expert bodies in order to prevent torture and other forms of ill-treatment from occurring.

In July 2008, the Centre made a Submission to the National Interest Analysis of OP-CAT examining the benefits of Australia's accession to the Optional Protocol and outlining what the domestic implementation of the obligations contained therein would entail.

The Centre considers that Australia's accession to the Optional Protocol would:

- protect the human rights of persons deprived of liberty and reduce the incidence and likelihood of ill-treatment of such persons;
- complement and strengthen existing domestic inspectorate and monitoring mechanisms for places of detention and promote human rights compatible detention management;
- foster and promote systematic analysis (and systemic change where necessary) of laws and policies affecting the rights of persons deprived of their liberty;
- strengthen Australia's leadership role within the international community; and
- be consistent with the Australian Government's commitment to constructive engagement with the UN human rights system and to the harmonisation of domestic laws, policies and practices with international human rights standards.

The Centre further considers that the Optional Protocol can be implemented with relative ease within Australia's existing political and legal structures.

The Centre's submission is available at www.hrlrc.org.au under Policy Work>Domestic Submissions>Centre Urges Australia to Ratify OP-CAT.

Protecting Women's Rights: Centre Supports Australia's Accession to the Optional Protocol to the Women's Convention

In May this year the Rudd Government announced plans to consider whether Australia should become a party to the *Optional Protocol to the Convention on the Elimination of all forms of Discrimination against Women* (Optional Protocol). As part of the consultation process, the Centre made a submission to the National Interest Analysis supporting Australia's accession to the Optional Protocol.

The Optional Protocol establishes two procedures: a communication procedure and an inquiry procedure. The communication procedure allows individuals or groups (or people acting on their behalf) to submit a communication to the Committee on the Elimination of Discrimination against Women alleging violations of the substantive rights protected under the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). The inquiry procedure allows the Committee to initiate inquiries into reliable information indicating grave or systematic violations of CEDAW by a State.

Accession to the Optional Protocol would strengthen the protection of women's rights in Australia by providing a mechanism under which individual and more widespread violations of CEDAW could be examined, assessed and remedied. It would also signal Australia's re-engagement with the United Nations and commitment to international human rights standards.

The Centre thanks Simone Cusack, formerly of Blake Dawson, for her contribution to the submission.

The Centre's submission is available at www.hrlrc.org.au under Policy Work>Domestic Submissions>Protecting Women's Rights.

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

Centre Calls for Amendment of Taxation Laws to Enable Charities to Advocate for 'Advancement of Human Rights'

On 7 July, the Centre and Blake Dawson wrote jointly to the Federal Government calling for an amendment to the *Income Tax Assessment Act 1997* (Cth) to introduce a deductible gift recipient category for human rights organisations.

The common law definition of 'charity' forms the basis for determining whether certain tax concessions are available to not-for-profit organisations. One of the key principles that has evolved from this definition is that organisations involved in political activities (such as advocacy, or lobbying for changes to the law or government policy) are not 'charitable' in nature. This means that organisations involved in advocating social or structural change in favour of recognising human rights are denied access to a number of tax concessions.

The previous Australian government recognised the difficulties with the current conception of 'charity' and the lack of access for 'advocacy' organisations to tax concessions, such as income tax exempt charity and DGR status. However, the recognition of these problems did not manifest in any actual changes to the way in which 'charity' is defined in our law, nor to the availability of tax concessions under the ITAA for entities that take part in advocacy-based activities.

It is hoped that the strong support that the Rudd Government has shown for advancing human rights, together with the introduction of amendments in the United Kingdom, may indicate that there is now a climate supporting real and achievable change, in favour of entities that engage in human rights activities. Blake Dawson and the Centre therefore requested that the Rudd Government consider introducing amendments to the ITAA to create a new DGR category for entities that promote the advancement of human rights in our community.

The Centre acknowledges the outstanding work of Teresa Dyson, Partner, and Sarah Hickey, Lawyer, of Blake Dawson on this submission.

Centre Contributes to Expedited Ratification of UN Disabilities Convention

On 17 July 2008, Australia ratified the UN *Convention on the Rights of Persons with Disabilities*.

The ratification followed an expedited process, including the Joint Standing Committee on Treaties recommending ratification of the instrument prior to releasing its final report. The Joint Standing Committee on Treaties tabled its preliminary report on the *Convention* on 19 June 2008. Consistent with submissions of the Centre, and in order to facilitate the timely implementation of the *Convention*, the Committee resolved to report its recommendation on the treaty to the Parliament immediately and provide a more detailed report on the provisions of the treaty at a later date.

The Committee report is available at http://www.aph.gov.au/house/committee/jsct/4june2008/index.htm.

HRLRC Casework

Transparency and Accountability in Prison Administration

VCAT has delivered judgment in a case in which the Centre gave evidence regarding human rights and transparency and accountability in prison administration and management (*Western Suburbs Legal Service v Department of Justice,* VCAT, Unreported, Deputy President Coghlan (25 June 2008)).

In this decision, VCAT held that a report regarding separation orders and high security units in Victorian prisons was not exempt from disclosure under the *Freedom of Information Act 1982* (Vic). VCAT ordered that the document should be released to Western Suburbs Legal Service ('WSLS').

In reviewing the original decision of the Department of Justice to deny access to the document, VCAT considered the 'public interest' arguments for release of the document in the context of human rights considerations regarding separation orders and transparency of the Correctional Services.

Facts

The proceeding involved an appeal by WSLS of a decision of the Department to deny access to a document sought under the FOI Act. The appeal was heard by Deputy President Coghlan at VCAT.

The document was entitled the '*Corrections Inspectorate Review of the Administration of Separation Orders – High Security and Management Units'* ('Report') dated September/October 2004.

The Report was produced by the Corrections Inspectorate ('CI') (now the Office of Correctional Services Review ('OCSR')). The role of the CI/OCSR is to oversee the corrections system on behalf of the Department. This role includes conducting reviews and investigations into the delivery of correctional services on behalf of the corrections system.

The Department contended that the Report was exempt from release pursuant to ss 38 and 30(1) of the FOI Act. Section 30(1) of the FOI Act deals with internal working documents and s 38 relates to documents to which secrecy provisions apply (in this case the Department argued that the Report attracted the secrecy provisions of the *Corrections Act 1986* (Vic)).

WSLS contended that the document should be released because the exemptions did not apply. WSLS also contended that due to the strong public interest in the issues of separation orders and transparency of the activities of the CI/OCSR, the public interest required release of the Report.

Decision

In short, DP Coghlan found in favour of WSLS. DP Coghlan found that the Report was not exempt under ss 30(1) or 38 of the FOI Act, and should be released within 28 days of the decision.

In relation to s 38, DP Coghlan found that this exemption was not made out because the Report did not engage the secrecy provisions of the Corrections Act.

In relation to s 30(1), DP Coghlan determined that although the Report was an internal working document, it was not contrary to the public interest to release the document.

In determining the public interest in favour of WSLS, DP Coghlan referred to the strong public interest in there being transparency regarding separation orders, and the strong public interest in there being public debate regarding the operations of CI/OCSR.

On this point, DP Coghlan referred to the evidence of a number of witnesses called by WSLS, including Mr Philip Lynch (Director and Principal Solicitor for the Human Rights Law Resource Centre).

Human Rights Considerations

The proceeding involved a number of human rights considerations. The human rights considerations arose in relation to the public interest arguments submitted on behalf of WSLS.

WSLS relied upon oral evidence and witness statements from Mr Lynch and other witnesses in relation to the public interest arguments in favour of disclosure of the Report.

Mr Lynch's evidence considered Victoria's obligations in relation to transparent and accountable prison management and conditions, in light of the human rights standards enshrined in the *Victorian Charter of Human Rights*, the *ICCPR*, the *UN Standard Minimum Rules for the Treatment of Prisoners*, and the *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.

Mr Lynch said in oral evidence that the public should be given the opportunity to independently scrutinise the degree to which the use of separation, segregation and isolation complies with Victoria's and Australia's obligations pursuant to international human rights laws and standards and the *Charter*.

DP Coghlan said (at 52):

> I accept the thrust of [Mr Lynch and the other witnesses'] evidence about the importance of openness and transparency in the administration of the prison system and the widespread and proper interest in the use of separation orders and their administration.

***Charter* Considerations**

WSLS made the following submissions in relation to the *Charter*:

- The Department is subject to s 7(1)(g) of the *Public Administration Act 2004* which provides that the Department has an obligation as a public officer to respect and promote the human rights set out in the Charter in making decision and in its actions generally.
- When reviewing the Department's decision not to grant access to the Report, VCAT is also bound by s 7(1)(g) of the *Public Administration Act* 2004 (having been vested with original jurisdiction).
- Pursuant to the interpretive obligation under s 32 of the *Charter*, VCAT should interpret the 'public interest' under ss 30(1)(b) and 50(4) of the FOI Act, in light of the right to access information contained in s 15 of the *Charter*.

DP Coghlan did not actually make a ruling on the Charter. However, she ultimately found that the public interest clearly weighed in favour of release of the document:

DP Coghlan said (at 63):

> …there is a public interest in ensuring that the prison system operates appropriately; disclosure, if anything, can only promote its good administration.

Zoe Bateman and Carmel McInerney are lawyers with Corrs Chambers Westgarth and acted pro bono for Western Suburbs Legal Service in the proceeding.

Seminars and Events

Strengthening Human Rights and the Rule of Law

with the Hon Robert McClelland MP, Attorney-General of Australia, and Justice Chris Maxwell, President of the Victorian Court of Appeal

Date: 5.45 to 7.45pm, Thursday, 7 August 2008

Venue: Mallesons Stephen Jaques, Level 50, 600 Bourke Street, Melbourne

Cost: $25 / $15 for full-time students and pensioners

Registration is essential. Use Booking Form available at www.hrlrc.org.au.

'Torture Team': Human Rights, Lawyers and the 'War on Terror'

with Professor Philippe Sands QC, Matrix Chambers and University College London, and the Right Hon Malcolm Fraser AC, former Prime Minister of Australia

Date: 5.45 to 7.45pm, Tuesday, 19 August 2008

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

Cost: $25 / $15 for full-time students and pensioners

Registration is essential. Use Booking Form available at www.hrlrc.org.au.

Can the World Survive Climate Change? Opportunities and Challenges for Developing Countries

with Dr Graeme Pearman (Science Advisory to Al Gore), Professor Robyn Eckersley (University of Melbourne) and Dr Brett Parriss (Chief Economist, World Vision Australia)

Date: 6.00 to 7.30pm, Wednesday, 30 July 2008

Venue: BMW Edge Theatre, Federation Square, Melbourne

For further information or to book, see www.onejustworld.com.au.

National Indigenous Legal Conference and Ball

12 and 13 September 2008, RACV Club Melbourne

The 2008 National Indigenous Legal Conference will bring together lawyers, law students, barristers, solicitors, judges, community workers, Elders, public servants, land councils and academics. In particular, the Conference will focus on topical issues such as the Northern Territory Intervention and Native Title. Keynote speakers include Commissioner Tom Calma (HREOC), and the Hon Justice Michael Kirby.

For program and registration details, see http://www.liv.asn.au/events/calendar/TarwirriProgram.pdf.

2008 Protecting Human Rights Conference

Date: 3 October 2008

Venue: Melbourne Law School, 185 Pelham Street, Carlton

Cost: $150 / $75 concession

This conference will focus on developments in relation to legislative protection of human rights at state and territory and national levels in Australia, in particular, the recently enacted Victorian *Charter of Human Rights and Responsibilities 2006*, and the Australian Capital Territory's *Human Rights Act 2004* and also the draft Bills being considered in Tasmania and Western Australia. It will include discussion of similar Acts in other countries.

Key confirmed speakers include: the Hon Rob McClelland MP, Attorney-General for Australia; the Right Hon Chief Justice Dame Sian Elias, New Zealand; and the Hon Justice Marcia Neave, Victorian Court of Appeal.

For further information, see http://acthra.anu.edu.au/news/Conference2008.htm or http://cccs.law.unimelb.edu.au/.

Human Rights Resources

What's New on the HRLRC Website?

The following articles, among others, have been posted to the Centre's website over the last month:

- Philip Lynch, 'We Should Become a Human Rights Leader (Again)', *The Age* (Melbourne), 8 July 2008
- Stanley Isaiah, 'House of Lords Approach in Human Rights Matters and the Victorian Charter', Paper to the Victorian Bar, 8 April 2008

Human Rights Jobs

Post-Graduate Fellowship in Human Rights, University of Texas Law School

The Rapoport Center for Human Rights and Justice at the University of Texas has established a two-year Human Rights Fellowship for the research and practice of international human rights in a

multidisciplinary academic setting. Applications close on 1 August 2008. For further information, see http://www.utexas.edu/law/academics/centers/humanrights/Post-Grad%20Announcement.pdf.

Project Coordinator, CEDAW Shadow Report

YWCA Australia, a women's membership organisation and movement, is seeking a motivated, innovative and independent person to join the organisation in a 10 month project position for the *Convention on the Elimination of all Forms of Discrimination Against Women* Shadow Report.

The closing date for applications is 9am on Friday 1 August.

For further information, contact Caroline Lambert on 03 9349 3711, 0422 598 008 or ed@ywca.org.au.

Foreign Correspondent

Developments at the UN and in International Human Rights Law

CESCR begins Examination of Australian Government and NGO Reports

It is nearly time for Australia to be reviewed by the Committee on Economic, Social and Cultural Rights. As part of the lead up to the session which will address this, CESCR began in June to review the reports submitted by the Australian Government and NGOs, including the report *Freedom, Respect, Equality, Dignity: Action* (the FREDA Report) jointly prepared by the Human Rights Law Resource Centre, the National Association of Community Legal Centres and Kingsford Legal Centre (and endorsed by over 100 organisations in Australia). This report was presented to the Committee during its pre-sessional working group meeting, along with oral submissions outlining the concerns Australian NGOs wanted addressed in the List of Issues that CESCR was preparing. The report was highly commended by the CESCR members, who praised the authors for their comprehensive and in-depth discussion of many important issues, and explained they would use the FREDA Report as an example of best-practice for NGO reporting. This is a great achievement, and should ensure the numerous concerns raised are well reflected in the recommendations CESCR will eventually produce. In particular, CESCR members were interested in the lack of legal entrenchment of human rights in Australia, the disadvantages faced by Indigenous Australian communities, homelessness, and the impact of the Northern Territory intervention. The CESCR review of Australia will take place in May or November 2009.

Human Rights Council Special Session on Global Food Crisis

On 22 May the Human Rights Council held its 7th, and perhaps best organised, Special Session on 'The negative impact on the realization of the right to food of the worsening of the world food crisis, caused inter alia by the soaring food prices'. This session was notable as it was the first ever special session to be convened on a thematic issue, and as such it sent a strong signal that economic, social and cultural rights are being taken seriously by the UN human rights machinery. The opportunity to discuss the food crisis, and its causes and effects, from a human rights perspective, will help to ensure that the issue is considered as not just as another humanitarian disaster, but rather as a situation which came about due to inadequate attention given to the right to food, and one which can be addressed through upholding the human rights obligations imposed upon the whole international community. The food crisis is a threat to the right to food for millions of people, and after more than a day of discussion about this, the Human Rights Council adopted a series of recommendations for governments, international agencies, and others, including the UN Special Rapporteur on the Right to Food.

Eighth Session of the Human Rights Council

The Eighth Session of the Human Rights Council was the last in the Council's second cycle, which means new Council member states are now at the helm, steered by a new President. Before this changing of the guard, one of the main controversies related to the appointment of new Special Rapporteurs. The Council adopted a contentious Presidential Statement regarding the 'terms in office of special procedure mandate holders', which will allow the Council to address situations where mandate holders are accused of not complying with the code of conduct that has been imposed upon them. Many are concerned, however, that this may limit the effectiveness of the special procedures system.

During the 8th session of the Council, 32 reports from the first two sessions of the Universal Periodic Review (UPR) were considered by the plenary. States and other stakeholders had the opportunity to comment upon the human rights situation in all 32 countries examined, and to give their views on the recommendations adopted by the working group.

The Council also adopted a number of resolutions, including one proposed by the European Union on human rights in Myanmar, prompted in part by the violent response to peaceful protests in August 2007, and the Government's obstruction of international assistance following Cyclone Nargis in May.

Finally, after much debate, the Council adopted the President's recommendations for new Special Rapporteurs, appointing 9 new individual experts, as well as 5 members of the new expert mechanisms on the rights of Indigenous peoples, and the forum on minority issues.

Human Rights Council's Programme of Work for 3rd year

The good news for human rights advocates who follow the work of the Human Rights Council is that a detailed draft programme of work for the Council's 3rd year (June 08-09) has recently been released, much earlier than usual, along with a provisional calendar of meetings. These can be found on the OHCHR extranet at http://portal.ohchr.org or at www.ishr.ch.

New Special Rapporteurs and their Work

The 14 new special procedures mandate holders elected in March by the Human Rights Council began their work in May/June, with the 9 elected in June starting sometime in July/August. A new mandate holder often takes time at the start of their mandate to formulate new strategies for addressing the issue, and makes plans for tackling new areas of interest. New Special Rapporteurs are in the process of holding consultations with NGOs and others interested in the work of their mandates, and for those advocates wishing to input into topics they would like to see addressed by the new mandate holders, now is the time to make your views known. All of the Special Procedures can be contacted through the OHCHR. In September further new appointments will be made, including for the recently created position of Independent Expert on water and sanitation.

Next Steps for the OP-ICESCR

The OP-ICESCR was adopted by the Human Rights Council on 18 June after a nail-biting few weeks of negotiations. For some time it appeared a lack of consensus about proposed amendments to include self-determination as a justiciable part of the *Covenant* would scuttle the adoption of the draft text prepared by the working group. A compromise was reached, amending the text to ensure the OP allows for complaints to be brought on the basis of violations of *any* of the economic, social and cultural rights in the *Covenant*. The next step is for the draft OP to be sent to the General Assembly, where it will be considered by the Third Committee in October, and, hopefully, adopted by the plenary on Human Rights Day on 10 December. The successful passing of the resolution and the adoption of the text at the Human Rights Council in June, while not yet guaranteeing the full adoption at the GA, is another landmark in what is hoped will be a new era of protection for ESC rights.

Interesting Developments in other Parts of the UN System

International Criminal Court arrest warrant for Sudanese President

On 14 July, the ICC prosecutor sought an arrest warrant for Sudanese President Bashir on charges of genocide and crimes against humanity. This is the first charge of genocide to be brought before the International Criminal Court in relation to the violence in Darfur, and it has already been quite controversial. Characterizing the atrocities in Darfur as genocide is a step further than the 2004 UN Commission of Inquiry chaired by Antonio Cassese was willing to go. There are concerns that the response to the indictment will include increased violence against peacekeepers and humanitarian workers, making the job of protecting human rights in Darfur even more difficult.

UN Security Council resolves rape is a war crime

On 19 June, the Security Council unanimously voted in favour of resolution 1829, surely one of its most interesting thematic resolutions of late, in which it described rape as a tactic of war and a threat to international security. A Security Council resolution demanding the 'immediate and complete cessation … of all acts of sexual violence against civilians … in times of armed conflict' is not going to fix the

situation of targeted sexual violence. However, human rights groups hope that the confirmation that 'rape and other forms of sexual violence can constitute war crimes, crimes against humanity or a constitutive act with respect to genocide' may herald an end to the culture of impunity that surrounds those using sexual violence as a weapon of armed conflict.

New publication on counter-terrorism and human rights

The OHCHR recently published an interesting 72-page publication on 'Human Rights, Terrorism and Counter-Terrorism' (available at www.ohchr.org/Documents/Publications/Factsheet32EN.pdf). The document addresses how States must ensure their anti-terrorism measures comply with international law *and* protect human rights principles. Given Australia's raft of anti-terrorism legislation has long been criticized for its potential to infringe human rights, this new publication may be very relevant for our law reformers.

A New High Commissioner for Human Rights

On 30 June 2008, Louise Arbour ended her four-year term as UN High Commissioner for Human Rights. A new replacement has yet to be announced, although it is expected that Secretary General Ban Ki Moon will make public his decision regarding the identity of the new High Commissioner within the coming days, which will be followed by endorsement by the General Assembly. The rumours in the international press about the lead candidate being Jose Ramos Horta are apparently just that, rumours. Supposedly the three names on the shortlist now are Navanethem Pillay from South Africa (a judge at the ICC), Hina Jilani from Pakistan (lawyer and former Special Representative of the Secretary General on Human Rights Defenders), and Juan Mendez from Argentina. The incoming High Commissioner will begin her or his term addressing things such as controversy over the relationship between the Human Rights Council and the OHCHR, as well as the drive to ensure regional balance in staff appointments, an ongoing concern which continues to create difficulties for Australians hoping for permanent employment in UN human rights roles.

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

If I Were Attorney-General…

Promoting the 'Responsibility to Protect'

If I were Attorney-General, after pinching myself and then proudly celebrating the fact that I was the first female Attorney-General of Australia, I would turn my gaze to the international sphere and ask: how might Australia best contribute to international and regional justice, peace and security? One project that has the potential to make a significant contribution to international justice is advocating for the acceptance and implementation of the responsibility to protect ('R2P'). R2P is an emerging international norm that aims to prevent genocide and other mass atrocity crimes. In essence the R2P principle says that states have a primary responsibility to protect individuals within their borders from genocide, war crimes, ethnic cleansing and crimes against humanity, and, where a state fails in that responsibility, the international community has a secondary responsibility to protect.

The principle was first propounded by the International Commission on Intervention and State Sovereignty ('ICISS'), chaired by my predecessor Gareth Evans, in its 2001 report, *The Responsibility to Protect*. The ICISS report responded to the failure on the part of the international community to prevent or react to mass atrocity crimes, such as the genocides in Rwanda and Srebrenica and other mass harms that occurred in spite of the *Genocide Convention of 1948*. The report tackled the perceived conflict between humanitarian intervention and sovereignty by reconceptualising sovereignty, so that the responsibility to protect individuals is prioritised over unconditional territorial control. The report also reframed the debate by shifting from a focus on the rights of states (to intervene) to the responsibility of states (to protect), and from the perspective of states providing humanitarian assistance, to the perspective of individuals demanding protection.

The R2P framework proposed by the ICISS report has 3 core elements: the responsibility to prevent atrocity crimes; the responsibility to react to events threatening to trigger atrocity crimes with appropriate

responses, including the use of force as a last resort; and the responsibility to rebuild after an intervention through assistance with recovery, reconstruction and reconciliation of communities. R2P has been endorsed by the UN Secretary General, the European Union, the African Union, the UN High-Level Panel on Threats, Challenges and Change, the UN General Assembly and the Security Council.

In recognition of the controversial nature of military interventions and the need to clarify the issue of authority, the ICISS report proposed six criteria for application of R2P. First, the intervention must be approved by the 'right authority', being the UN Security Council or the General Assembly or the geographically appropriate regional organisation. Second, there must be 'just cause' for the intervention, being large scale loss of life which is the product of deliberate state action, state neglect or inaction, or a failed state situation. Third, the primary purpose must be to avert human suffering. Fourth, military intervention must be the last resort after all non-military options have been explored. Fifth, the intervention must use 'proportional means', being the minimum necessary to avert the harm. Sixth, the intervention must have reasonable prospects of averting the mass harm. Importantly, the report suggested that in Security Council votes where there would otherwise be majority support for intervention, a permanent member of the Council should abstain from using its veto to block the intervention, unless its crucial national interests are at stake. Neither these criteria, nor the veto proposal, have been endorsed by the General Assembly or Security Council. Agreed criteria for military intervention will be critical to the successful implementation of R2P.

The emergence of R2P represents an important and positive step forward for three reasons. First, it debunks the myth that sovereignty entails control without responsibility. This is an important conceptual break with the past, but as we have seen in the debates surrounding action to halt the violence in Darfur, we still have a very long way to go to convince many states. Second, it attempts to address the problem of authority by codifying a previously ad hoc and ineffectual system of humanitarian intervention which allowed genocide to occur in Rwanda and produced the unfortunate result in Kosovo of an 'illegal but legitimate' intervention. Third and most importantly, R2P creates a culture of prevention, responsibility and protection, and hopefully will precipitate the construction of an intellectual and practical toolbox of preventive actions and responses to mass harms.

Whilst there has been much support for R2P from Western states, NGOs and international lawyers, there remain some key sceptics. Many states in the Global South are suspicious of the motives of potential interveners and wary of neo-imperialist or neo-colonialist use of the principle. In the Security Council, Russia and China have opposed R2P on the basis that it invites unjustified violations of state sovereignty. Russia was fiercely resistant to the General Assembly statement endorsing R2P and continues to be less than enthusiastic about it in Security Council debates. Similarly, China has blocked several attempts by the Security Council to refer to or use R2P. A UN report on the prospects and challenges for promoting R2P in South East Asia, found very cautious interest in the principle and real concerns about intervention attributable to the colonial experiences and continuing Western 'meddling' in the domestic affairs of South East Asian states. The report also highlights the importance of ASEAN as the best placed body to address humanitarian crises in the region.

There is still much work to be done in ensuring international support for R2P. It is probably not yet a 'norm' of customary international law. The real test will be in the implementation and the lack of substantive action by the international community to halt violence against civilians in Darfur, despite much reference to R2P in Security Council debates and resolutions, is not a good omen.

There remain considerable challenges to achieving implementation. Doubters must be persuaded of the value of R2P, including by alleviating concerns about Western imperialism. Proponents of R2P should encourage discussion from all perspectives and listen to concerns and cultural or regional nuances. The integrity of the R2P concept must be guarded; for example, by emphasising that R2P is about much more than just military intervention and that preventive action involves building state capacity, reinforcing the rule of law and utilizing diplomatic and political avenues. The limits of non-consensual military action must be specifically identified. There is also a need to build capacity within international institutions, governments and regional organizations to undertake preventive action and to react to mass harms with non-military and military responses. Two toolboxes are needed: one containing preventive measures such as early warning systems and peace-building mechanisms; and one containing reaction tools including political, diplomatic, legal, economic and military measures. Importantly, proponents must enlist strategies to deal with the problem of political will, through reinforcing the R2P norm and a culture of responsibility, prevention and protection.

Australia can play an influential role in working to reinforce the R2P norm, and ensuring its effective implementation. As part of the Rudd Government's commitment to 'effective international citizenship', human rights, and regional peace and stability, Australia could use its role in the South East Asian region to promote R2P and persuade detractors of its value.

Australia could also work towards the development of an R2P treaty and be involved in the further work necessary to develop the concept and the 'toolboxes' referred to above.

If I were Attorney-General, I would commit Australia to these tasks and provide appropriate resources to enable their achievement, because I believe that R2P has significant potential to prevent mass atrocities like those that occurred in the 20th century and to give substance to the vow 'never again'.

Lucy McKernan is a Senior Associate with Allens Arthur Robinson and a founding member of the Human Rights Law Resource Centre Advisory Committee.