

**IN THE SUPREME COURT OF VICTORIA
COURT OF APPEAL**

No. 798 of 2008

BETWEEN:

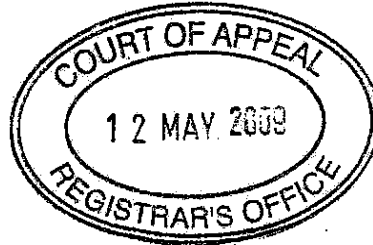
VERA MOMCILOVIC

and

THE QUEEN

and

**ATTORNEY-GENERAL (VIC) & VICTORIAN
HUMAN RIGHTS AND EQUAL OPPORTUNITY
COMMISSION**



Applicant

Respondent

Interveners

AFFIDAVIT OF PHILIP ALAN LYNCH

Date of Document:	7 May 2009
Filed on behalf of:	Human Rights Law Resource Centre
Prepared by:	Solicitors Code: 21455
Allens Arthur Robinson	DX 30999 Melbourne
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	Ref. Belinda Thompson / Rachel Nicholson

I, **PHILIP ALAN LYNCH**, of Level 17, 461 Bourke Street, Melbourne, do **SOLEMNLY AND SINCERELY AFFIRM** that:

1. I am the director and principal solicitor of the Human Rights Law Resource Centre Limited (ACN 117 719 267) (the "**HRLRC**").
2. I am authorised to make this affidavit on behalf of the HRLRC in support of the HRLRC's application to appear as *amicus curiae* in these proceedings. Except as otherwise indicated, I make this affidavit from my own knowledge.

A handwritten signature in black ink, appearing to read "PAL", located at the bottom left of the page.

The HRLRC's Constitution and objects

3. The HRLRC is a company limited by guarantee which was registered under the *Corporations Act 2001* (Cth) on 3 January 2006.
4. The objects of the HRLRC are set out in rule 2(a) of its Constitution and include:
 - (1) to promote, protect and contribute to the fulfilment of human rights in Australia, particularly the human rights of people that are disadvantaged or living in poverty;
 - (2) to contribute to the harmonization of law, policy and practice in Australia with regard to human rights; and
 - (3) to empower people that are disadvantaged or living in poverty by operating within a human rights framework.
5. Rule 3 of the Constitution provides that the HRLRC may, for the purpose of carrying out its objects, provide legal services and act as *amicus curiae*. (A copy of the HRLRC's Constitution will be available at the hearing of the HRLRC's application in case the Court would like to refer to it.)
6. As indicated by its Constitution, the HRLRC aims to promote, protect and contribute to the fulfilment of human rights in Australia, particularly the human rights of people that are disadvantaged or living in poverty, through the practice of law. Within this broad mandate, one of the HRLRC's priorities is to ensure the effective operation and informed jurisprudential development of the Victorian *Charter of Human Rights and Responsibilities 2006* (Vic) ("Charter").

Work undertaken by the HRLRC in relation to the Charter

7. Since January 2006, the HRLRC has undertaken a diverse range of activities in relation to the Charter, including case work and legal advice, legal education, training, research, publications and capacity building.
8. Examples of these activities include:



- (1) providing education and training regarding the Charter to a range of entities and organisations, including the Department of Justice of the State of Victoria, judicial officers of the Magistrates' Court of Victoria, members of the Victorian Civil and Administrative Tribunal (VCAT), the Victorian Electoral Commission, local councils, Victoria Legal Aid, TAFEs, community legal centres and non-profit organisations, commercial law firms and the Victorian Bar;
- (2) publishing the first comprehensive Guide to the Charter (available at www.hrlrc.org.au);
- (3) publishing a monthly Human Rights Bulletin which includes articles, case notes and analyses and commentary on the Charter;
- (4) developing an on-line database of domestic and comparative jurisprudence relevant to the Charter;
- (5) regularly speaking at conferences on the Charter and convening a Human Rights Seminar series which regularly considers the Charter;
- (6) providing legal advice to a range of bodies regarding the relevance and potential implications of the Charter for areas such as mental health, women in prison, access to education for children with disabilities, and conditions of detention; and
- (7) my appearance, in my capacity as Director of the HRLRC, as a witness in the VCAT to provide evidence regarding the relevance and application of the Charter and international human rights to questions in the proceeding.

9. The HRLRC's expertise in relation to the Charter has been recognised by:

- (1) my appointment, in my capacity as the Director of the HRLRC, to the Victorian Attorney-General's Human Rights Leadership Forum; and
- (2) the provision of funding to the HRLRC, through the Department of Justice, to assist with the effective implementation of the Charter by



providing human rights-focused legal assistance to disadvantaged and marginalised individuals and groups.

10. An independent evaluation of the HRLRC by Jackson Consulting and Melbourne Law School in early 2008 found that the HRLRC 'is a significant player in human rights in Australia and is increasingly influential in the international human rights arena' and that the HRLRC has made a significant and positive contribution to the promotion of human rights through its case work, litigation, policy work and educational activities.

HRLRC's role as amicus curiae

11. The HRLRC has been granted leave to appear as *amicus curiae* in the following proceedings involving the Charter:
- (1) *Kracke v Mental Health Review Board* [2009] VCAT 646, which was heard by the Honourable Justice Bell, President of VCAT; and
 - (2) *Metrowest Housing Services v Hailu* (VCAT proceeding no R2008/38217/00).
12. In the *Kracke* proceeding, the HRLRC submitted (inter alia) that the VCAT could and should make a declaration that Mr Kracke's human right to a fair hearing had been infringed. This submission was adopted by the applicant and was successful.
13. Additionally, the HRLRC sought leave to appear as *amicus curiae* in the matter of *Kortel v Mirik* [2008] VSC 103. In that case, the Honourable Justice Bell indicated in his reasons that he would have granted that leave but for his conclusion that the issues about the Charter had been rendered hypothetical.

The role of amicus curiae in cases involving the Human Rights Act 1998 (UK)

14. The Charter is modelled to a considerable extent on the *Human Rights Act 1998 (UK)*. In many cases before the House of Lords relating to the *Human Rights Act* leave has been granted for barristers or organisations to appear as *amicus curiae*. Cases in which this has occurred include:

- (1) *R v Lambert* [2002] 2 AC 545
 - (2) *Ghaidan v Godin-Mendoza* [2004] 2 AC 557
 - (3) *Al-Skeini v Secretary of State for Defence* [2008] 1 AC 153
 - (4) *Secretary of State for the Home Department v Huang* [2007] 2 AC 167
 - (5) *R (Al-Jedda) v Secretary of State for Defence* [2008] 1 AC 332
 - (6) *YL v Birmingham City Council* [2008] 1 AC 95
 - (7) *Kay v Lambeth Borough Council* [2006] 2 AC 465
 - (8) *A v Secretary of State for the Home Department* [2006] 2 AC 221
 - (9) *R (Laporte) v Chief Constable* [2007] 2 AC 105.
15. I believe that such leave has been given in recognition that the issues to be determined by the House of Lords in relation to the *Human Rights Act* often affect a wide cross-section of the community beyond the immediate parties to the case.
- Leave to appear as amicus curiae*
16. On 17 April 2009, the applicant gave notice to the Attorney-General and to the Victorian Equal Opportunity and Human Rights Commission that questions of law arise in this proceeding involving the application of the Charter and the interpretation of s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic). This provision is sometimes referred to as a “reverse onus” provision. The question whether “reverse onus” provisions are compatible with human rights (specifically, the presumption of innocence) has been the subject of consideration by the House of Lords in *Lambert* (referred to above); by the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103; and by the Supreme Court of New Zealand in *R v Hansen* [2007] 3 NZLR 1.
17. By letter dated 6 May 2009, Allens Arthur Robinson, the solicitors for the HRLRC, informed the Court of Appeal Registry of the HRLRC’s intention to seek leave to appear as *amicus curiae* in this proceeding.

18. If the HRLRC is granted leave to appear as *amicus curiae*, its submissions will focus on the proper approach to the interpretative task that the Court is required to perform under s 32 of the Charter. The central questions upon which the HRLRC would seek to make submissions are:

- (1) is it necessary first to construe a statutory provision absent s 32 of the Charter, to arrive at an "ordinary" construction of the provision, before considering s 32?
- (2) what is the relationship, if any, between s 7 and s 32 of the Charter? Does s 32 only come into play after the statutory provision has been measured against s 7?

Because of the breadth of the obligation imposed by s 32 of the Charter, those questions arise whenever a court, tribunal or indeed any other person is called upon to construe a statutory provision and so the manner in which s 32 operates is a matter of fundamental importance to the operation of the Charter in Victoria.

19. In relation to the two questions identified in paragraph 18 above, the submissions that the HRLRC would seek to make are, in summary, as follows:

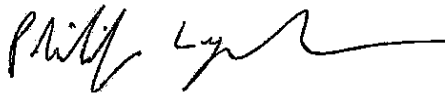
- (1) The proper approach to statutory construction under the Charter is to *start with* s 32, that is, to see s 32 as a cardinal principle of statutory construction (rather than seeing s 32 as a 'last resort' or 'extraordinary' provision which only comes into play in the event that a statutory provision is incompatible with human rights as a matter of 'ordinary' construction).
- (2) Further, the HRLRC will submit that where a provision is said to limit a human right, it is wrong to consider, first, whether such limits can be justified under s 7(2), before considering whether it is possible to interpret the provision compatibly with human rights under s 32. Rather, where it is alleged that a statutory provision limits human rights, it is necessary to consider whether it is possible to interpret the provision in a way that is compatible with human rights in accordance with s 32 of the Charter;

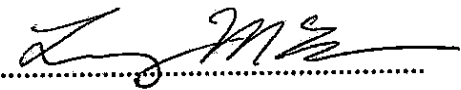


consideration of s 7 only arises in the event that it is not possible to interpret the provision compatibly with human rights under s 32.

20. By virtue of its work in the field of human rights law, and in particular the work undertaken to date relating to the Charter (identified in paragraphs 7 to 9 above), I believe the HRLRC is in a special position to assist the Court in relation to the Charter issues arising in the present matter. In that regard, senior and junior counsel instructed by Allens Arthur Robinson are currently engaged by HRLRC in this matter.

AFFIRMED by
PHILIP ALAN LYNCH at
Sydney
in the State of New South Wales
on 7 May 2009

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) Before me: 

Lucy MCKERNAN
An Australian Legal
Practitioner within the
meaning of the Legal
Profession Act 2004 (Vic)