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The Human Rights Law Resource Centre Ltd aims to:

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

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

Opinion

The Anniversary of the other Declaration: The UN Declaration on Human Rights Defenders

While we celebrated the 60th anniversary of the *Universal Declaration on Human Rights* on 10 December 2008, another important milestone passed a day earlier with little fanfare: the 10th anniversary of the *UN Human Rights Defenders Declaration*. After ten years, it is an appropriate time to review the interesting history of the Declaration, as well as its shortcomings and vulnerabilities to attack from unsympathetic governments.

After 13 years of negotiation, on 9 December 1998, the UN General Assembly adopted the groundbreaking *Defenders Declaration* by consensus. For the first time it explicitly recognized the right to peacefully promote or protect human rights and entered the concept of human rights defenders into the lexicon of international law. The Declaration reaffirms rights already contained in international treaties, such as the rights to freedom of expression and peaceful assembly, but articulates them in a way that is particularly relevant to the reality of defenders. The Declaration also contains unique rights, not protected by other agreements, such as the right to receive and obtain funding for human rights activities.

The international community demonstrated the importance of the Declaration by proclaiming it on the eve of the 50th anniversary of the *UDHR* and by subsequently appointing a UN independent expert (Special Procedure) to support its implementation. The Special Rapporteur on Human Rights Defenders is empowered to uphold the standards contained in the Declaration and to pressure governments to stop intimidating those who speak out for human rights. I have worked with the current Special Rapporteur to promote greater coordination and cooperation with regional human rights mechanisms. A joint press release from UN and regional human rights officials on the anniversary of the Declaration signals a growing commitment of international human rights mechanisms to work together to better protect human rights defenders. A recent joint mission to Togo by the UN Special Rapporteur and her counterpart from the African Commission on Human and Peoples' Rights was another step forward.

Unfortunately, despite the many achievements of both the Special Rapporteur and the Declaration, on its 10th anniversary, activists around the world remain in peril. In Australia we take for granted the ability to freely engage in human rights advocacy. However, in many countries, promoting human rights is a dangerous occupation. State and non-state actors frequently target human rights defenders with threats, killings, detention or other forms of harassment and intimidation. For example, in Colombia, human

rights activist Carmelo Agamez, who has spent his career exposing government ties to violent paramilitary death squads, has been speciously charged with membership of a paramilitary organization by corrupt prosecutors. He is now at considerable risk because he is detained with the very paramilitary leaders he has denounced.

As cultural relativists try to undermine the universality of the *UDHR*, states such as Russia, Cuba and Iran also try to undermine the basis of the Declaration. At recent Human Rights Council and General Assembly debates, those specious arguments have been plainly evident. First, some states argue that international law does not have a clear enough definition of the term 'human rights defenders'. Yet the Declaration provides a comprehensive framework to deal with defenders and importantly defines them by virtue of their activity. States that call for a clearer definition of the term actually want to restrict the definition such that already marginalized groups, like lesbian, gay, bisexual and transgender activists, are not included. Second, states such as Cuba argue that more attention is needed on the responsibilities of defenders rather than on their rights.

Instead of espousing spurious arguments that seek to undermine international law and the situation of human rights defenders, governments around the world should recognize the legitimacy of human rights work, remove obstacles to defenders' work and proactively support them. Defenders are, in fact, important partners for states, which must meet both their international obligations and the demands of their citizens for democratic development. As the Secretary-General noted on 10 December 2008, the realisation of human rights for all, proclaimed in the *UDHR*, cannot occur without the dedication and commitment of individual human rights defenders.

Andrew Hudson, a Melbourne lawyer, is Senior Associate in the human rights defenders program at Human Rights First in New York

News

UN Human Rights Committee releases List of Issues on Australia

Earlier this year, a coalition of Australian NGOs submitted a major report to the UN Human Rights Committee regarding Australia's implementation of and compliance with the *International Covenant on Civil and Political Rights*. Australia is due to be reviewed by the UN Human Rights Committee in March 2009.

In advance of the Committee's session — at which it will engage in a 'constructive dialogue' with the Australian Government — the Committee has developed a 'List of Issues' to be taken up in connection with the consideration of Australia's periodic report. The List of Issues contains a number of questions relating to issues about which the Committee would like further information from the Australian Government.

The List of Issues, released on 24 November 2008, contains 24 questions relating to, among other issues: ensuring comprehensive protection of human rights in Australia; the withdrawal of Australia's reservations to the *ICCPR*; Australia's lack of response to adverse findings of the Committee against Australia; Indigenous rights; refugee and asylum-seeker issues; conditions of detention for people with mental illness; and measures being taken to reduce domestic violence against women.

A copy of the full List of Issues is available at:

<http://www2.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR-C-AUS-Q5.doc>.

Ben Schokman is the DLA Phillips Fox Human Rights Lawyer with the Human Rights Law Resource Centre

UN General Assembly Adopts Historic Treaty on Protection of Socio-Economic Rights

The UN General Assembly has adopted an important new human rights instrument to strengthen the protection of economic, social and cultural rights.

The *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, adopted on 10 December 2008, will enable victims of socio-economic rights to have their complaint heard and determined by a body of independent international human rights experts provided that they have exhausted any available domestic remedies. The Optional Protocol will also establish an inquiry

procedure pursuant to which the experts can investigate and make recommendations regarding widespread and systematic socio-economic rights breaches.

According to the UN High Commissioner for Human Rights, Navi Pillay, 'The approval of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights is of singular importance by closing a historic gap. The Optional Protocol represents a milestone in the history of universal human rights, making a strong and unequivocal statement about the equal value and importance of all human rights and the need for strengthened legal protection of economic, social and cultural rights.'

The adoption of the Optional Protocol was very warmly welcomed by a large number of UN human rights experts, who stated that its adoption 'makes it clear that economic, social and cultural rights, including the rights to adequate housing, food, health, education and work, are not a matter of charity, but rather rights that can be claimed by all without discrimination of any kind.'

The combination of the petitions mechanism, the inquiry procedure and the possibility of interim measures will contribute to a body of jurisprudence around these rights, thereby helping States to ensure their implementation. The Experts emphasized that the new complaint and inquiry mechanism will also play a role in enhancing protection of other rights, stating that 'Widespread violations of economic, social and cultural rights are often root causes of social unrest and conflict which can lead to massive violations of civil and political rights. By providing an additional avenue for redress these new mechanisms can thus help prevent other human rights violations.'

The Optional Protocol will be opened for signature during 2009 and enter into force following ratification by ten States.

Philip Lynch is Director of the Human Rights Law Resource Centre

Human Rights, Human Responsibilities and the Environment

On 10 December 2008, Attorney-General Robert McClelland launched the National Human Rights Consultation which will seek community views on human rights in Australia. Just a couple of months earlier, in October 2008, the World Conservation Congress in Barcelona, Spain, endorsed a suite of resolutions concerned with the global environment, many of which raised environment-related human rights issues. These included resolutions in relation to:

- Indigenous peoples rights, including land rights and implementation of the United Nations Declaration on the Rights of Indigenous Peoples
- Recognition and conservation of sacred natural sites in protected areas
- Rights-based approaches to conservation
- Reducing emissions from deforestation and degradation
- Climate change and human rights
- Impacts of infrastructure and extractive industries on protected areas

These resolutions can be accessed at: http://www.iucn.org/congress_08/assembly/policy/index.cfm.

United Nations resolutions often recognise the interdependence of human rights and sustainable development. In March 2008, the Human Rights Council initiated a detailed analytical study on the links between climate change and human rights; recognising that climate change poses a threat to human rights around the world. Australia's Human Rights Commission has also engaged with this issue:

www.humanrights.gov.au/human_rights/climate_change/index.html. The interdependence of human rights and the environment was earlier recognised in a 2003 Human Rights Commission resolution, the UN Millennium Declaration and the Implementation Plan agreed at the Johannesburg World Summit on Sustainable Development. The 1994 Ksentini report to the UN Human Rights Commission also examined the links between human rights and the environment.

In a recent paper published in the international journal, *Global Environmental Change*, CSIRO physicist Dr Graham Turner compared forecasts from the 1972 book, *The Limits to Growth*, with global data from the past 30 years and found that unless consumption is reduced, and technological progress increased, the world will continue to move along an unsustainable trajectory to ecological and economic collapse by mid-century. Peak oil, climate change, and food and water security are components of Australia's national security challenge, but they also pose profound threats to human rights globally.

The national consultation on human rights protection in Australia provides a timely opportunity for community debate about the extent to which Australians should act responsibly in relation to global sustainable development.

Dr Hanna Jaireth is a member of the International Union for Conservation of Nature

National Charter of Rights Developments

Historic Opportunity to Bring Human Rights Home through the National Consultation

The National Human Rights Consultation announced by the Attorney-General on 10 December 2008 is an historic opportunity for individuals and communities throughout Australia to improve our democracy. The Human Rights Law Resource Centre encourages all Australians to have their say about the protection of fundamental values such as freedom, respect, dignity and a fair go.

The Government has appointed a Committee, chaired by Fr Frank Brennan, to undertake the Australia-wide community consultation.

The Committee has been tasked to ask the Australian community:

- Which human rights (including corresponding responsibilities) should be protected and promoted?
- Are these human rights currently sufficiently protected and promoted?
- How could Australia better protect and promote human rights?

Submissions to the Committee are due by 29 May 2009 and the Committee has been asked to report to the Australian Government by 31 July 2009 on the issues raised and the options identified to enhance the protection and promotion of human rights. The options identified should preserve the sovereignty of the Parliament and not include a constitutionally entrenched bill of rights.

Australia is the only developed democracy without a national Human Rights Act or constitutional protection.

The Centre supports a comprehensive Australian Human Rights Act that enshrines the fundamental civil, political, economic, social and cultural rights that are necessary for all people to participate fully in our community.

An Australian Human Rights Act could improve public services, promote more responsive and accountable government, and address disadvantage.

An Australian Human Rights Act could be modeled on legislation such as the Victorian Charter of Human Rights and Human Rights Acts in the United Kingdom and the Australian Capital Territory.

These Acts ensure that human rights are taken into account by parliament, the courts and public services when developing and applying law and policy. They promote a conversation between the community and government about how best to protect human rights and community interests.

The evidence from bodies such as the UK Audit Commission, the British Institute of Human Rights, and the ACT and Victorian Human Rights Commissions is clear: the institutionalization of a human rights culture through this type of legislation leads to better public services and outcomes.

Human Rights Acts have great potential to address disadvantage and promote dignity. Some recent examples are illustrative.

In Victoria, the Charter has been used to promote better educational opportunities for children with disability, prevent the eviction of a single mother and her kids from public housing into homelessness, and gain access to medical assistance for an elderly woman with a brain injury.

In the UK, the right to life has been relied on to require the state to support vulnerable persons and prevent destitution. The right to freedom from cruel treatment has required authorities to protect children from abuse and neglect. And the right to privacy has been used to ensure that an elderly couple could continue to cohabit in a nursing home after 65 years of marriage.

These are commonsense decisions that have improved lives.

It is important that the debate about a Human Rights Act is evidence-based and avoids myths.

A Human Rights Act would not shift power from parliament to the judiciary. Human rights are profoundly democratic. The Victorian Charter, for example, entrenches rights such as free expression, peaceful assembly and public participation, which enhance democracy. The Charter does not give courts the

power to strike down legislation, but merely to remit a law to parliament for reconsideration if it cannot be interpreted compatibly with human rights. Parliament retains absolute sovereignty to respond to these declarations as it sees fit.

Another common myth is that Human Rights Acts are a lawyers' picnic. This is not supported by evidence. A two year review of the ACT Human Rights Act noted there has been no flood of litigation. In the UK, where the Human Rights Act has been in force for 10 years, a major report found that there has been no increase in the volume, length or costs of litigation.

For further information about the Federal Government's National Human Rights Consultation, see www.humanrightsconsultation.gov.au.

For resources and information regarding a Human Rights Act for Australia, see www.hrlrc.org.au.

Submissions can also be made via www.amnesty.org.au and www.getup.org.au.

Philip Lynch is Director of the Human Rights Law Resource Centre. Phoebe Knowles is on secondment to the Centre from Minter Ellison.

Case Studies: How a Human Rights Act can Promote Dignity and Address Disadvantage

Human rights belong to everyone. The Centre has recently published a collection of real-life case studies which show that human rights are not just for lawyers, celebrities and criminals; they are an important tool that can help create a more just society where everyone receives a fair go. The stories illustrate how human rights laws can be used to encourage common-sense policies and decisions that promote human dignity and addresses disadvantage.

See www.hrlrc.org.au under 'Our Rights, Our Charter – Take Action for a National Charter of Rights'.

Victorian Charter of Rights Developments

Department of Justice Releases Guidelines on the Victorian Charter

The Victorian Department of Justice has recently published comprehensive *Guidelines on the Victorian Charter of Human Rights and Responsibilities*.

The *Charter Guidelines* provide information for lawyers and legislation officers across government on the *Charter*. They seek to explain the practical application of the *Charter* to policy development and to identify the content of the rights protected. In respect of each right there is a discussion of the scope of the right and circumstances in which the right may be engaged, limits on the right, measures to improve compliance, and history and jurisprudence of the right.

For a copy of the Guidelines, see

<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Your+Rights/Human+Rights/Human+Rights+Charter/JUSTICE++Guidelines+for+Charter+of+Human+Rights>.

Parole Boards Again Exempted from Operation of Victorian Charter of Rights

On 16 December 2008, the Governor in Council promulgated the *Charter of Human Rights and Responsibilities (Public Authorities) (Interim) Regulations 2008* (Vic). The Regulations declare that the Adult Parole Board, the Youth Parole Board and the Youth Residential Board are not 'public authorities' for the purposes of the Victorian *Charter of Human Rights*. They are therefore not subject to the legal obligation under s 38 to act compatibly with, or give proper consideration to, human rights.

These Regulations renew an exemption granted in 2007 which was said to enable the Boards to undertake further activities to ensure the compliance of their policies and operations with human rights. According to the Explanatory Memorandum, this review of the implications of the *Charter* for the Boards has not been completed and will be finalized in the first half of 2009.

The new Regulations expire on 29 December 2008.

Statements of Compatibility under the Victorian *Charter*

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

Below is an analysis of recent significant Statements.

Assisted Reproductive Treatment Bill 2008

The Assisted Reproductive Treatment Bill 2008 aims to regulate assisted reproductive treatment and artificial insemination, and makes various provisions with respect to surrogacy arrangements. The Bill will amend Victoria's laws on ART and surrogacy by:

- removing the current statutory requirement that women be married, or in a de facto relationship with a male, to access ART in Victoria;
- enhancing screening for ART, expanding donor-conceived children's access to information about their genetic history and clarifying parentage laws;
- establishing an independent expert Patient Review Panel to make complex treatment decisions, with provision for review of decisions by the Victorian Civil and Administrative Tribunal;
- expanding the opportunity for altruistic surrogacy and posthumous use of gametes in treatment procedures;
- providing that prescribed ART records are to be held by the Registry of Births, Deaths and Marriages; and
- introducing a deemed registration system.

The Bill seeks to repeal the current *Infertility Treatment Act 1995 (Vic)* and replace it with the *Assisted Reproductive Treatment Act 2008 (Vic)*. The Bill also amends the *Status of Children Act 1974 (Vic)* and the *Births, Deaths and Marriages Registration Act 1996 (Vic)*.

The Statement of Compatibility to the Bill identifies a number of *Charter* rights engaged, including:

- the right to recognition and equality before the law (s 8 of the *Charter*);
- the right not to be subject to medical or scientific treatment without full, free and informed consent (s 10);
- the right to privacy (s 13);
- the right to protection of families and children (s 17); and
- the right to a fair hearing (s 24).

The issues arising in relation to the right to recognition and equality before the law and the right to privacy are discussed below.

Right to recognition and equality before the law

Section 8 of the *Charter* protects a number of aspects of the overarching right to equality before the law.

Clause 5 of the Bill sets out the guiding principles for the use of ART in the manner proposed, including that persons seeking to undergo reproductive treatment must not be discriminated against on the basis of their sexual orientation, marital status, race or religion.

However, a number of provisions in the Bill discriminate on the grounds of age (engaging s 8 of the *Charter*), including:

- gametes or embryos produced from a child can only be used for the treatment of the child;
- restrictions on access to information on the central register where a donor, a parent of a person born as a result of a donor treatment, or a child born as a result of a donor treatment procedure applies for access to information on the register;
- an exclusion against entering into a surrogacy arrangement for a woman if the surrogate mother is younger than 25 years of age.

The Statement asserts that while these provisions do amount to discrimination, they constitute reasonable limitations on the rights protected by s 8 of the *Charter*.

The Statement states that the right to equality is not absolute and can be subject to reasonable limitations under s 7 of the *Charter*. In the case of the limitations on access to information in the register, the restrictions are limited in time and last until the child or young person reaches the prescribed age.

In relation to the requirement that a surrogate mother be 25 years of age, the Statement asserts that there is a direct and rational connection between protecting young women from exploitation and the imposition of an age restriction. While a less restrictive means is available, it was considered that this would not ensure sufficient protection of young women from possible coercion, exploitation and psychosocial difficulties potentially arising from entering into a surrogacy arrangement.

Right to privacy

Section 13(a) of the *Charter* recognises a person's right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with.

Clause 14 of the Bill requires a woman seeking ART and her partner (if applicable) to provide a criminal record check and consent to a child protection order check. Treatment will be refused if the woman or her partner have had charges proven against them for a sexual offence, been convicted of a violent offence or had a child protection order made in respect of a child in their care, unless the Patient Review Panel determines that there is no barrier to the person undergoing treatment. This requirement engages the right of the woman and her partner to privacy.

The Statement states that a criminal record check is the only available objective mechanism to identify the existence of offences pertinent to determining potential risk of abuse or harm to the child to be born from ART. It states that the requirements of clause 14 are reasonable given the importance of protecting the child to be born. The interference with privacy is said to be proportionate to the purpose, and therefore is said to be not arbitrary or unlawful.

However, the Statement does not consider the extent to which the aim of the criminal record check is itself consistent with human rights protected under the *Charter*. While it states that the rights protected by s 13 of the Charter do not require the State to allow unconditional access to ART, it then simply asserts that presumption against treatment where the criminal record check is positive does not constitute discrimination under the *Equal Opportunity Act 1995* (Vic), and is therefore not discriminatory, unlawful or arbitrary.

Robert Kovacs and Jonathan Kelp, Human Rights Law Group, Mallesons Stephen Jaques

Relationships Amendment (Caring Relationships) Bill

The Relationships Amendment (Caring Relationships) Bill 2008 (Vic) amends the *Relationships Act 2008* (Vic) to establish a register of 'caring relationships', and accords these relationships with a range of legal rights and obligations.

The purpose of the relationship register is to allow people to register their primary caring relationship. A registrable caring relationship is a relationship between two adults, which is not a marriage or a traditional couple-relationship (but where the partners may be related by family) where one or both partners in the relationship provide the other with personal or financial commitment and/or support of a domestic nature.

The Bill allows partners in registered caring relationships that have broken down to apply to a court for an adjustment of interests in the property of the relationship and for maintenance, and allows people to enter into "relationship agreements" in relation to a caring relationship.

The Statement of Compatibility to the Bill identifies a number of *Charter* rights that are engaged by the Bill, including:

- the right to equality before the law (s 8(3) of the *Charter*);
- the right to privacy and reputation (s 13);
- the protection of property rights (s 20); and
- the right to fair hearing (s 24),

and concludes that the Bill is compatible with the Charter.

Equality before the law

Section 8(3) of the *Charter* provides that every person is entitled to equal protection of the law without discrimination. The provisions in the Bill which engage section 8(3) include:

- Age limitations – to register a caring relationship under the Bill, each partner in the relationship must be 18 years of age or older. The stated purpose of the age requirement is to protect persons under 18 years of age who are more vulnerable than adults, and therefore are less likely to have the maturity and capacity to make an informed decision about registering a relationship and to understand the consequences of registration. The age requirement is stated to be a reasonable and demonstrably justifiable limitation of the *Charter* right to equality before the law and the Statement asserts that no less restrictive means are reasonably available.
- Restrictions if married – there is a restriction on registering a caring relationship if the partners are already married, in a domestic relationship or in another relationship. This requirement is said to be reasonable given the purpose of the registration scheme is to allow people to register their primary relationship. It is stated that preventing people from registering more than one relationship does not amount to discrimination based on an attribute recognised in the *Equal Opportunity Act 1995* (Vic).

Right to privacy and reputation

Section 13 of the *Charter* provides that a person has the right not to have their privacy or family unlawfully or arbitrarily interfered with. The provisions in the Bill which engage s 13 are:

- Powers of the registrar – s 18 of the Bill allows the registrar of the Relationships Register to conduct an inquiry to verify information given in connection with a registration application or to verify whether the particulars of a registered relationship are correctly recorded. The Statement asserts that the purpose of the registrar's power is clear and limited, and therefore does not amount to an unlawful or arbitrary interference with the right to privacy.
- Access to and disclosure of personal information – ss 21 and 22 of the principal Act allow the registrar, on application, to search the Relationships Register for an entry about a particular relationship, and to issue a certificate of the search results. Section 24 provides that the registrar may allow a person or organisation access to information in the register or provide information extracted from the register. The circumstances in which the principal Act authorises the registrar to allow access to and disclose personal information are circumscribed. Applicants must provide adequate reasons for requesting a search or access to information on the register. In deciding whether an applicant has an adequate reason, the registrar must have regard to a number of relevant factors. Section 20 requires the registrar, when providing information from the register, to protect the persons to whom the information relates from unreasonable intrusions on their privacy and the registrar must maintain a written statement of the policies on which access to information is to be given or denied.

Property rights

Section 20 of the *Charter* provides that a person must not be deprived of their property other than in accordance with the law. The Bill affords property rights to registered caring partners, giving them the ability to seek court orders in relation to property of the relationship after the relationship has broken down. Under this regime, a Court may make an order for the adjustment of property interests, or for maintenance, which will have the effect of depriving a registered caring partner of their property. The principal Act provides that any such order (regardless of the relationship) must be just and equitable having regard to a number of clearly articulated factors. The Statement asserts that any deprivation of property will be in accordance with law and accordingly there is no limitation of the right protected under s 20 of the *Charter*.

Right to a fair hearing

Section 24 of the *Charter* provides that a party to a civil proceeding has the right to have the proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. Section 61 of the principal Act, the scope of which the Bill extends to partners in registered caring relationships, engages s 24 of the *Charter* by limiting the right to a fair hearing, in that a Court can make an order or grant an injunction *ex parte*. However, a Court can only do so in urgent cases and only for

specified purposes. An order or injunction must be expressed to operate or apply only for a limited time or until the court makes a further order.

According to the Statement, this limitation goes no further than is necessary to achieve the purpose of protecting property and/or enforcing an order, in circumstances where not having the power to make temporary orders *ex parte* would result in serious injustice to an applicant. It is stated that there are no less restrictive means reasonably available to protect property or to enforce an order. Accordingly, it is stated that a Court's power under s 61 to make orders and grant injunctions *ex parte* as it relates to parties in registered caring relationships is reasonable and demonstrably justifiable under s 7 of the *Charter*.

Robert Kovacs, Human Rights Law Group, Mallesons Stephen Jaques

Victorian Charter Case Notes

Court of Appeal Considers Obligation to Interpret Legislation Compatibly with Human Rights under *Charter*

RJE v Secretary to the Department of Justice [2008] VSCA 131 (18 December 2008)

In this case, Nettle J of the Victorian Court of Appeal considered the scope and operation of s 32(1) of the Victorian *Charter of Human Rights*, which provides that 'so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'.

Pursuant to s 32(1), Nettle J determined that the term 'likely' in s 11 of the *Serious Sex Offenders Monitoring Act 2005* (Vic), which provides that a court may make an 'extended supervision order' in respect of an offender if satisfied to a high degree of probability that the offender is likely to re-offend, should be interpreted to mean 'at least more likely than not'.

The other judges, Maxwell P and Weinberg J, did not consider it necessary to decide any issue under the *Charter*. In their view, the meaning of the word 'likely' in s 11 of the *Monitoring Act* could be resolved by reference to ordinary principles of statutory interpretation.

Facts

The appellant, RJE, was subject to an extended supervision order under the *Serious Sex Offenders Monitoring Act*. As discussed above, an ESO may be made if a court is 'satisfied to a high degree of probability' that the offender is 'likely to re-offend'. Previous authority from the Court of Appeal (*TSL v Secretary of the Department of Justice* (2006) 14 VR 109) had interpreted 'likely' as capable of meaning 'less likely than not'.

RJE appealed against the imposition of an ESO. Uncontroverted expert evidence before the Court of Appeal indicated that RJE did not present a high-risk of re-offending; his risk of re-offending within 10 years was well under 40 per cent.

Decision

Maxwell P and Weinberg J

The majority of the Court, Maxwell P and Weinberg J, considered that *TSL* should be overturned. In their view, the term 'likely' in s 11 means 'more likely than not' and does not admit of a less than 50 per cent chance that the person will re-offend. In support of this they stated (at [37]) that:

On ordinary principles of construction, we should favour that interpretation which produces the least infringement of common law rights – in this case, the right to be at liberty: *Balog v Independent Commission Against Corruption & Ors* (1990) 169 CLR 625, 635-6.

Having regard to this, Maxwell P and Weinberg did not consider it necessary to decide any issue under s 32(1) of the *Charter* (at paras 54-5).

Nettle J

In a separate but concurring decision, Nettle J also concluded that the term 'likely' should be interpreted to mean 'at least more likely than not' (at [119]). In so doing, his Honour relied on the *Charter*, stating (at [105]) that

performance of s 32 of the *Charter*, it is necessary to construe s 11 of the *Monitoring Act* (so far as it is possible to do so consistently with the purpose of the section) in a way that is 'compatible with human rights'.

In particular, having regard to the operation of ESOs, his Honour considered that 'one is compelled to construe s 11... in a way that subjects the appellant's right to freedom of movement, privacy and liberty only to such reasonable limits as can be demonstrably justified in a free and democratic society'. His Honour concluded in this regard that:

The making of an extended supervision order...so restricts an offender's right to move freely within Victoria and to enter and leave it (s 12 of the *Charter*), and his right to privacy (s 12), if not his right to liberty (s 21), that it is not capable of demonstrable justification in the relevant sense unless the risk of the offender committing a relevant offence is at least more likely than not (at [113]).

Justice Nettle then went on to discuss the intended scope of s 32 of the *Charter*, particularly by reference to jurisprudence under the analogous s 3 of the UK *Human Rights Act 1998*. His Honour cited with approval the views of Lord Woolf in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, in which his Lordship stated, inter alia, that:

- It is 'difficult to overestimate the importance of s 3. It applies to legislation passed both before and after the *Human Rights Act 1998* came into force. Subject to the section not requiring the court to go beyond that which is possible, it is mandatory in its terms'.
- Section 3 will not operate unless, on its ordinary construction, legislation would breach human rights.
- Section 3 will operate to modify the meaning of legislation only to the extent necessary to achieve compatibility with human rights.
- Section 3 does not entitle the court to legislate; its task is still one of interpretation.

Justice Nettle noted that this approach had also been followed by Mason NPJ in relation to the Hong Kong *Bill of Rights* in *HKSAR v Wai and Man* (2006, Final Court of Appeal of Hong Kong).

In the present case, Nettle J considered that the existing meaning given to 'likely' breached human rights and that, consistently with Lord Woolf's view on s 3 of the *Human Rights Act*, s 32 of the *Charter* must therefore be deployed. He further stated that 'to construe "likely" in s 11 as meaning "at least more likely than not" is within the permissible ambit of *interpretation*, well short of the forbidden territory of *legislation*' (at [117]).

Comment

The substantial and detailed analysis of s 32 given by Nettle J is welcome. In the Centre's view, however, the approach to human rights construction adopted by Elias CJ in the Supreme Court of New Zealand in *R v Hansen* [2007] 3 NZLR 1 is to be preferred to that of Lord Woolf in the England and Wales Court of Appeal.

Consistently with the Elias CJ approach, the Centre considers that the better view of s 32(1) is that interpretation of a statutory provision compatibly with human rights should be considered *in the first instance*, rather than only after some ambiguity or prima facie incompatibility has been identified. The *Charter* seeks to 'establish a framework for the protection and promotion of human rights in Victoria'. The purpose of s 32 is to establish a requirement that statutory provisions be interpreted in a way that is compatible with human rights. Consistently with these purposes, the *Charter*-compatible interpretation should now be regarded as 'ordinary' and 'normal'.

The decision is available at www.austlii.edu.au/au/cases/vic/VSCA/2008/265.html.

Philip Lynch is Director of the Human Rights Law Resource Centre

The *Charter*, Unreasonable Delay and the *Bail Act 1997* (Vic)

Re Dickson [2008] VSC 516 (26 November 2008)

In refusing an application for bail, Justice Lasry of the Victorian Supreme Court considered the impact of s 21(5) of the *Charter* – which provides the right to be brought to trial without unreasonable delay – on the *Bail Act 1997* (Vic).

Facts

The applicant, George Dickson, was charged with 25 counts of armed robbery and 4 counts of attempted armed robbery, all committed on 24 hour convenience stores in 2006. The disguised offender held-up the stores using a knife. Mr Dickson, who suffers from chronic paranoid schizophrenia, has prior convictions for armed robbery in both Victoria and Queensland.

Mr Dickson was first arrested in relation to the armed robberies on 27 February 2007 and has been remanded in custody since. While a trial date was first set for 6 October 2008, it was postponed to 29 June 2009 because the original four weeks allocated to the trial was considered insufficient given the substantial body of evidence the Crown wanted to lead.

In an unrelated matter in April 2008 Mr Dickson was sentenced to 180 days imprisonment for obtaining property by deception and the parole on which he had been released in relation to earlier offences was cancelled. Thus, at the time of hearing, the applicant was serving pre-existing sentences and time for breached parole.

Application of the Victorian *Charter*

In dismissing the application for bail, Lasry J had cause to consider the impact of s 21(5) of the *Charter* on the *Bail Act*, in particular s 4(4)(c) of that Act which provides that where an accused person is charged with an offence in the course of which they are alleged to have used or threatened to use a firearm, the Court must refuse bail unless the accused can demonstrate that detention is not justified.

The applicant argued that, by the time of his trial in 2009, he would have been in custody for a period of nearly two years and three months and that this constituted 'unreasonable delay' contrary to s 21(5) of the *Charter* which provides that:

- A person who is arrested or detained on a criminal charge –
 - (a) must be promptly brought before a court
 - (b) has the right to be brought to trial without unreasonable delay; and
 - (c) must be released if paragraph (a) or (b) is not complied with.

It was submitted by Counsel for the applicant that s 21(5) of the *Charter* 'created a legal right to be brought to trial without delay' and that the *Bail Act* 'must be interpreted in such a way as to give full effect to this right'. It was argued that the only remedy available where a court finds that a person has been in custody for an unreasonable period of time is release on bail. This proposition was rejected by Lasry J:

I cannot conclude that the *Charter* requires that the *Bail Act* be interpreted to allow for an accused to be released on bail, regardless of an established unacceptable risk, whether it be a risk of flight, re-offending, interference with witnesses or otherwise [...]

Section 1(2)(b) of the *Charter* requires that other statutory provisions be interpreted 'so far as is possible' compatibly with human rights. The provisions of the *Bail Act* contain no reference to delay or to a right to a speedy trial. In this particular case, the *Bail Act* requires me to refuse bail unless the applicant shows cause why his detention in custody is not justified.

Ultimately, Lasry J found the *Charter* did not assist Mr Dickson:

There are, in my opinion, a number of matters that point to a refusal of bail and where that is the case, whilst it is appropriate to take the terms of the *Charter* into account and give full effect to the right referred to, that must be done against the scheme of the *Bail Act* and its relevant provisions. For the reasons I have already referred to, whilst the delay in the trial until June 2009 is most regrettable, in the particular circumstances of this case, the delay is significantly less prejudicial to the applicant than might normally be expected. I do not consider the provisions of the *Charter* materially affect the role of delay in this particular application.

With respect, Lasry J's application of the *Charter* is raises a number of issues.

First, while Lasry J implicitly finds that the delay was 'unreasonable' on the facts – a finding which *prima facie* creates the right to be released on bail under s 21(5)(c) – his Honour does not then analyse whether the *Bail Act* can be interpreted so as to give effect to this right. It is submitted that the proper application of s 21 of the *Charter* would require the court to weigh up the individual's right to be released in cases of unreasonable delay – as granted by s 21(5)(c) – and the safety of the community, as reflected in s 4(4)(c) of the *Bail Act* which requires a person accused of an armed robbery to show cause why they should not be remanded in custody. In failing to grapple with the right granted by the

Charter, the Supreme Court fails to give full effect to the *Charter*. If Lasry J *did* come to the conclusion that the *Bail Act* cannot be interpreted compatibly with the *Charter* it is submitted that he ought to have made a declaration of inconsistent interpretation under s 36 of the *Charter*. Alternatively, he could have used s 7 of the *Charter* to analyse when the right engaged may reasonably be limited.

Second, Lasry J appears to treat the *Charter* as giving way to existing statutes. There is no indication that s 21(5) of the *Charter* has been given 'full effect' and Lasry J allows a finding of 'unreasonable delay' in bringing the applicant to trial to pass without censure or consequence.

The decision is available at www.austlii.edu.au/au/cases/vic/VSC/2008/516.html.

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The Right to Equality and Non-Discrimination and Exemptions under the *Equal Opportunity Act 1995 (Vic)*

Royal Victorian Bowls Association Inc (Anti-Discrimination Exemption) [2008] VCAT 2415 (26 November 2008)

In a recent VCAT decision, Harbison J has confirmed that the limitations provision of the *Charter* now defines the parameters of VCAT's power to grant an exemption from the *Equal Opportunity Act 1995 (Vic)* ('EO Act') under s 83 of the EO Act.

This decision concerned an application by the Royal Victorian Bowls Association ('RVBA') and the Victorian Ladies Bowling Association ('VLBA') for an exemption from the EO Act to allow them to conduct single sex lawn bowls competitions.

The EO Act provides a permanent exception from its operation for sporting activity in which the strength, stamina or physique of competitors is relevant. However, in 2000 DP Coghlan held that this permanent exception does not apply to lawn bowls, which is a 'gender neutral' sport. Deputy President Coghlan therefore upheld a complaint of discrimination made against the RVBA for denying a female competitor the opportunity to play in a male only competition.

Deputy President Coghlan's decision caused concern in the Victorian lawn bowls community because of the ramifications that it has for the eligibility of Victorian players to compete at national and international levels. As eligibility to compete at these levels is dependent on winning a Victorian state title, unification of the two Victorian single-sex competitions would significantly disadvantage Victorian players, whose chances of progressing to the next level would be significantly reduced.

As a result of this detrimental effect of banning single sex State competitions, Justice Harbison granted the exemption to the RVBA and the VLBA, but only in relation to the 'elite pathway' competitions that lead to the national and international competitions. Events at a lower level were not granted an exemption, thereby encouraging mixed team play.

In arriving at this decision, Harbison J applied the exemption principles established in *Fernwood Fitness Centre* (1996) EOC 92-782, 'taking into account the objectives and scheme of the [EO Act], the reasonableness of the exemption sought and its public policy objective.' This decision and the principles it established has been particularly important to exemption applications to date, given that s 83 of the EO Act provides very little guidance as to what factors are relevant when considering an application for an exemption.

However, after considering the applications of the RVBA and the VLBA according to existing principles, Harbison J then proceeded to consider the impact of the *Charter* on the decision to grant an exemption under the EO Act.

Justice Harbison rejected the applicant's submission that s 83 of the EO Act does not require reinterpretation in light of the *Charter* because s 83 is unambiguous. According to Harbison J, s 32 of the *Charter* requires that all statutory provisions, whether they are ambiguous or clearly expressed, must be interpreted in a way that is compatible with human rights. In any event, Harbison J did not consider s 83 of the EO Act to be clear, as it is silent as to the permissible circumstances for granting an exemption.

Justice Harbison held that a human rights compatible interpretation of s 83 obliges VCAT to consider whether an exemption is permissible according to the limitation principles contained in s7 of the *Charter*. Her Honour accepted the submission of the Victorian Equal Opportunity and Human Rights Commission

that 'the test to apply when exercising [the discretion to grant an exemption] is to ask whether the proposed exemption is or is not a reasonable limitation on the right to equality, using the framework of considerations enunciated in s 7 [of the *Charter*]. If that analysis identifies that a proposed exemption is not a reasonable limitation on the rights to equality then the Commission view is that it should not be granted.'

As a result, Harbison J subjected the exemption sought by the applicants to the s 7 limitation analysis contained in the *Charter*. Namely, Harbison J considered whether the proposed exemption was important, proportionate and the least restrictive option. Applying these principles, Harbison J arrived at the same decision to grant the exemption, concluding that the restriction imposed by the proposed exemption on the right to equality (protected by s 8 of the *Charter*) was demonstrably justified.

The decision is available at www.austlii.edu.au/au/cases/vic/VCAT/2008/2415.html.

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Application of *Charter* in Public Housing Eviction Case

Director of Housing v IF [2008] VCAT 2413 (18 November 2008)

The Residential Tenancies List of the Victorian Civil and Administrative Tribunal rejected submissions that making a compliance order against a tenant would be contrary to the *Charter*. Member Nihill considered that the proceedings did engage the s 13 *Charter* 'privacy' right however considered the compliance procedure to be a reasonable limitation under s 7 of the Act.

Facts

It was alleged that over a number of years the respondent ('the tenant') engaged in threatening behaviour towards his neighbours which included a husband ('the neighbour'), wife and their child. As a result, the landlord (the Director of Housing) served a notice of breach which stated the incidents relied on by the landlord and required the tenant to 'remedy the breach within 14 days by ceasing such activities forthwith and to take action to avoid their reoccurrence at anytime in the future...' The landlord subsequently applied to the Tribunal under s 209 of the *Residential Tenancies Act 1997* for a compliance order under s 212 of that Act on the basis that the landlord was continuing to disturb the neighbour.

Decision

Member Nihill found the notice complied with the Act and that, on the balance of probabilities, the relevant conduct did occur. Member Nihill also found that the tenant breached the notice even though the conduct complained of occurred outside the 14 day period referred to in the notice of breach.

In response to argument, Member Nihill agreed that s 13 of the *Charter*, which provides that a person has the right 'not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with' was engaged by ss 208 and 209 of the Act. The Member noted that of itself a compliance order simply required the tenant to comply with the Act, however, when considering a breach of the order, she would also need to consider any potential interference with the tenant's privacy and home. The Member stated at paragraph 36 that the interference was 'a potentially serious one in the context of the current acute housing shortage'.

Member Nihill also considered the right to privacy as it applied to the neighbour and in addition noted s 17 of the *Charter* provided their child 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.'

The tenant argued that the landlord was a 'public authority' for the purposes of the *Charter* and was therefore required by s 38 to act compatibly with the *Charter*. It was further submitted that the *Charter* duties applied when exercising powers under the *Housing Act 1983* and that in deciding to issue the notice of breach, the landlord failed to act in accordance with the *Charter*.

Member Nihill refused to rule on whether the landlord had breached its *Charter* obligations in relation to the *Housing Act* submission. Member Nihill stated:

After careful reflection, I do not consider that I have the jurisdiction to go behind the application made by the landlord, and review whether or not the landlord acted in a *Charter* compatible way in reaching the

decision to make the application.. Any challenge to the decisions of the Director of Housing made under the *Housing Act* would need, I think, to be brought in a different jurisdiction.

The decision of *Sabet v Medical Practitioners Board of Victoria* [2008] VCA 346 was cited in support of this ruling.

The decision is available at www.austlii.edu.au/au/cases/vic/VCAT/2008/2413.html.

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Comparative Law Case Notes

Right to Life and Positive Obligation to Protect the Lives of Hospital Patients

Savage v South Essex Partnership NHS Foundation Trust [2008] UKHL 74 (10 December 2008)

The House of Lords has held that, pursuant to the right to life, health authorities have an 'over-arching obligation to protect the lives of patients in their hospitals'. This obligation includes a duty to ensure that staff are highly trained, professional and competent and that the policies, procedures and systems in place at the hospital adequately safeguard life.

In addition to this 'general obligation', hospitals are under an 'operational obligation' to take all reasonable steps and measures to prevent the suicide of any patient that the hospital knows or ought to have known presents a 'real and immediate' risk of suicide.

Facts

In July 2004, Carol Savage, who was suffering from paranoid schizophrenia, absconded from a hospital where she was being treated as an involuntary patient in an open acute psychiatric ward. She walked about two miles to a railway station and jumped in front of a train which killed her. An inquest jury concluded that the precautions taken to prevent her from absconding from the hospital were inadequate. Subsequently, the daughter of the deceased, Anna Savage, brought proceedings alleging that the South Essex Partnership NHS Foundation Trust violated Mrs Savage's right to life under art 2 of the *European Convention* by allowing her to escape from the hospital and kill herself. The issue before the House of Lord was the scope of the state's obligation to protect life under art 2.

Decision

Obligations imposed by the Right to Life

The House of Lords unanimously held that the right to life imposes three different duties upon the state, namely:

- a **negative duty to refrain from taking life**, save in exceptional circumstances – It was not suggested that this duty was broken in this case.
- a **positive duty to properly and openly investigate deaths** for which the state might bear some responsibility – It was not disputed that this obligation applied in this case, but it was not suggested that it was broken as there had been a proper investigation.
- a **duty to take positive steps to protect the lives of those within its jurisdiction** (per Baroness Hale at [76]).

This case concerned the scope of the last obligation, particularly as it applies to hospital patients. In particular, 'when does it extend beyond the primary duty, to have proper systems in place for protecting life, into an *operational* duty to protect this particular life?' (per Baroness Hale at [76]).

General Positive Obligation to Protect Life

Outlining the scope of the positive obligation, the House of Lords held that

The State is under an obligation to adopt appropriate (general) measures for protecting the lives of patients in hospitals. This will involve, for example, ensuring that competent staff are recruited, that high professional standards are maintained and that suitable systems of working are put in place. If the hospital authorities have performed these obligations, casual acts of negligence by members of staff will not give rise to a breach of article 2. (per Lord Rodger at [45])

Operational Positive Obligation to Protect Life

In addition to the 'general obligation' to protect life through proper systems, the House of Lords held that hospitals are under an 'operational obligation' to take all reasonable steps and measures to prevent the suicide of any patient that the hospital knows or ought to have known presents a 'real and immediate' risk of suicide. 'If they fail to do this, not only will they and the health authorities be liable in negligence, but there will also be a violation of the operational obligation under article 2 to protect the patient's life' (per Lord Rodger at para 72). Reiterating jurisprudence of the European Court, the House of Lords stated that 'the authorities are under an obligation to protect the health of persons deprived of liberty. By this the Court does not mean simply an obligation to have systems in place to provide access to necessary health care, but an obligation actually to provide it' (per Baroness Hale at [98]; see also *Keenan v United Kingdom* (2001) 33 EHRR 913, [110]).

Heightened Positive Obligation to Protect Life of People with Mental Illness

In considering the scope of both the 'general obligation' and the 'operational obligation' to safeguard life, the Lords affirmed the approach of the European Court which recognises the particular vulnerability of people with mental illness, holding that 'the position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with' (per *Herczegfalvy v Austria* (1992) 15 EHRR 437, [82]).

Expanding on this, the Lords held that:

The fact that patients are suffering from mental illness is also relevant to the authorities' obligations under article 2...[I]n deciding what measures should be taken to protect the lives of patients in mental hospitals, or of patients in general hospitals who are suffering from mental illness, the authorities will have to take account of the vulnerability of these patients – including a heightened risk they may commit suicide. (per Lord Rodger at [46])

Will the Positive Obligation to Protect Life of Patients Unduly Burden Hospitals?

In response to the submission that such an approach may impose an undue burden on hospitals to safeguard the life of particular patients to the detriment of caring for other patients, the Lords stated:

That is hardly so. The operational obligation simply means that, in these critical circumstances, priority has to be given to saving the patient's life. That is only practical common sense, since nothing else can be done to assist the patient or to promote her recovery unless her life is saved...[W]here there is a real and immediate risk of a patient committing suicide, article 2 imposes an operational obligation on the medical authorities to do all that can reasonably be expected of them to prevent it (per Lord Rodger at [66]).

In answer to the further submission that the positive obligation to protect life may 'encourage hospitals to be too restrictive of their patients' liberty for fear that they might commit suicide or otherwise come to harm', the Lords held that 'it is hard to understand how applying [this] approach in these cases can add to the hospitals' difficulties. They already face potential liability in negligence if they fail to take reasonable care of their patients. This test is different from and in practice more difficult to establish than negligence.' (per Baroness Hale at [99])

The Lords went on to state that due regard must be had to 'competing values in the Convention, in particular the liberty and autonomy rights'. Accordingly, any steps to safeguard life 'must be proportionate'.

Developing a patient's capacity to make sensible choices for herself, and providing her with as good a quality of life as possible, are important components in protecting her mental health. Keeping her absolutely safe from physical harm, by secluding or restraining her, or even by keeping her on a locked ward, may do more harm to her mental health. In judging what can reasonably be expected, the Court has also taken into account the problem of resources. The facilities available for looking after people with serious mental illnesses are not unlimited and the health care professionals have to make the best use they can of what they have. For all of these reasons, applying the [right to life] in this context should not persuade the professionals to behave any more cautiously or defensively than they are already persuaded to do by the ordinary law of negligence. (per Baroness Hale at [100])

The decision is available at www.bailii.org/uk/cases/UKHL/2008/74.html.

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Right to Life and Investigation of Near Deaths in State Custody or Care

R (on the application of JL) v Secretary of State for Justice [2008] UKHL 68 (26 November 2008)

The House of Lords has recently unanimously held that the right to life established by art 2 of the *European Convention on Human Rights* requires the state to carry out an independent investigation whenever a person is left incapacitated by a suicide attempt in custody.

Facts

JL, a 20 year old man, attempted to hang himself in custody in 2002. He was resuscitated and survived with serious and permanent brain damage that rendered him incapable of conducting his own affairs.

The area manager of the Prison Service subsequently directed a retired prison governor to investigate the incident. After his report was eventually released to JL's representatives in early 2005, they sought judicial review on the basis that art 2 imposed a duty on the State to carry out an independent investigation into his attempted suicide that was open to public scrutiny, took into account all relevant evidence and involved his next of kin.

The Court of Appeal upheld Langford J's decision that a death or serious injury of a person in custody gives rise to an obligation on the state to conduct an 'enhanced investigation' into the incident containing these elements. Waller LJ found that as it was not apparent from the initial investigation that state agents bore no responsibility for JL's suicide attempt, a further 'D type inquiry' (an inquiry conducted entirely in public, except where convention reasons dictate otherwise: *R (on the application of D) v Secretary of State for the Home Department* [2006] 3 All ER 946) was required in the circumstances. Concerned by the resources implications of the decision, the Secretary of State appealed to the House of Lords.

Decision

The primary issue was whether the state should be obliged to conduct an inquiry satisfying the minimum standards required by art 2 in the circumstances.

However, as the Secretary of State conceded before trial that it would conduct a 'D type inquiry' into JL's attempted suicide, discussion at the hearing turned not only on when an attempted suicide would trigger the requirement to investigate but also on the form which an inquiry should take.

When is an Article 2 investigation required?

Their Lordships (Lords Phillips, Rodger, Walker, Brown and Mance) unanimously rejected the Secretary of State's submission that an investigation complying with art 2 is only required where the State is in 'arguable breach' of its substantive duty to protect life. Rather, they found that a substantive breach of art 2 should logically be the possible result of, rather than a condition precedent to, an investigation. Moreover, contrary to the views of the Secretary of State, the purpose of an art 2 investigation extends beyond ensuring the accountability of state officials for past wrongs, to preventing incidents waiting to happen and maintaining public confidence in the prison system. The significance of this protective purpose was demonstrated by reference to the tragically high number of suicides in custody and the special vulnerability of persons in custody that distinguishes them from individuals at liberty under convention law.

The court went on to find that an art 2 investigation is required in circumstances where a near suicide in custody results in permanent and serious injury. Their Lordships notably stressed the limits of their ability to provide generalised guidance for the broad spectrum of possible suicide attempts and outcomes without the benefit of hearing full argument in context. Consequently, the judgment is expressly intended to prove most useful in factually similar circumstances. However, the court usefully reiterated that the state's procedural duty to investigate is parasitic upon the substantive positive obligation to protect life and so the duty to investigate cannot arise until life is threatened. It would appear then that the threshold test to be applied in each case is whether life was threatened as a matter of fact.

Requirements of an Article 2 investigation

Their Lordships accepted it was unavoidable that the first steps in an investigation would be internal to the prison service. However, the investigation must be handed over to an independent investigator as

soon as practicable in order to comply with art 2. For this reason, the original investigation into JL's suicide was non-compliant.

The basic requirements of an 'enhanced investigation' required by art 2 were usefully summarised by Lord Brown as follows:

besides being independent and involving the family, they must in addition be initiated by the state, be promptly and reasonably expeditiously carried out and provide for a sufficient element of public scrutiny. Beyond this, however, it is impossible to be prescriptive.

Ultimately, their Lordships recognised that the type of investigation necessary will vary in the circumstances and is thus a matter best left to the independent investigator's discretion. Lord Brown was alone in suggesting that D's case was wrongly decided, however their Lordships all rejected the proposition that every independent investigation must be a 'D type inquiry' for this reason.

Relevance to the Victorian Charter

Section 9 of the *Charter* provides for the right to life on similar terms to art 2 of the *European Convention*. As foreign judgments relevant to human rights may be considered when interpreting *Charter* rights (in accordance with s 32(2) of the *Charter*), the decision may assist Victorian courts to interpret s 9.

The *Charter's* Explanatory Memorandum expressly recognises that the right to life has been interpreted as encompassing a procedural obligation to undertake effective coronial investigations. Significantly, this decision now arguably expands the scope of the procedural obligation to conduct an effective investigation under s 9 to circumstances where a prisoner attempts suicide in custody, nearly succeeds and is left permanently incapacitated.

Furthermore, given that the appeal was essentially brought to illuminate the nature of art 2 in future cases, it provides some general guidance to Victorian courts about:

- when an investigation complying with art 2 may be required; and
- the form that such an investigation may take.

The decision is available at <http://www.bailii.org/uk/cases/UKHL/2008/68.html>.

Bec James and Peter Henley, Human Rights Law Group, Mallesons Stephen Jaques

Right to a Adequate Health Care in Detention and the Obligation of the State to Conduct an Effective Investigation

Dzieciak v Poland [2008] ECHR 77761/01 (9 December 2008)

The case concerns the applicant's complaint about the excessive length of his pre-trial detention and inadequacy of the medical care he had received during that time. After the applicant's death, the applicant's wife alleged that the authorities contributed to her husband's death by failing to take the appropriate measures to protect his health and life.

The applicant's wife relied on arts 2 (right to life), 3 (prohibition of inhuman or degrading treatment) and 5 (right to liberty and security) of the *European Convention*. This case is informative to the interpretation of corresponding provisions in the *Charter*, being ss 9, 10 and 21 respectively.

Facts

The applicant, now deceased, was arrested and placed in pre-trial detention on suspicion of recruiting persons used for international drug trafficking. Despite the applicant's numerous requests for release on grounds of ill-health, the domestic courts repeatedly extended his detention, relying on the reasonable suspicion against him and the complexity of the investigation, which involved organised crime.

Prior to his four years of pre-trial detention, the applicant had suffered from a serious heart disease and had had heart attacks. His state of health continued to deteriorate while in custody. The Government did not deny that the authorities had been aware of the applicant's condition, which required periodic hospitalisation and medical treatment. The applicant's condition deteriorated to the point where it was eventually recommended by a medical panel which examined him that he undergo a heart bypass operation.

Despite this, during his pre-trial detention, the applicant was transferred to a detention centre without a hospital wing, did not receive adequate medical treatment and his detention was arbitrarily extended by local courts on a number of occasions as they did not consider the applicant's state of health. Further, while several appointments were made for the applicant's heart surgery, the domestic authorities had not transferred him to hospital to have his operation, nor did they provide a satisfactory explanation as to why the applicant had not been transferred for his operation. The applicant died while in pre-trial detention; the post mortem concluding that he died of acute coronary insufficiency.

Decision

The alleged failure to protect the applicant's life

The Court reiterated that art 2(1) enjoins the State not only to refrain from intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. Persons in custody, are particularly vulnerable and, as such, authorities are under a duty to protect them. In this case, the obligation on the authorities 'to account for the treatment of an individual in custody is particularly stringent where that individual dies'.

The Court concluded that the conduct of the domestic authorities was particularly unsatisfactory given the serious state of the applicant's health and could not justify the overall period of the applicant's detention. In particular, the Court drew attention to:

- the lack of cooperation and coordination between the various state authorities;
- the failure to transport the applicant to hospital for two scheduled operations;
- the lack of adequate and prompt information to the trial court on the applicant's state of health; and
- the failure to secure him access to doctors during the final days of his life.

The Court considered that the failure to take into account his health in the automatic extensions of his detention amounted to inadequate medical treatment and constituted a violation of the State's obligation to protect the lives of persons in custody.

The alleged inadequacy of the investigation

The applicant's representative argued that the investigation into the applicant's death had not been properly carried out. In particular, the investigation had lasted more than two years and had been discontinued without having considered doubts expressed by experts about the postponing of the applicant's surgery on three occasions. Further, the course of events leading up to the applicant's death had not been established, the breadth of witness statements were limited and the accuracy of those obtained was not assessed.

The Court concluded that the authorities failed to carry out a thorough and effective investigation into the allegations that the applicant's death was caused by ineffective medical care during his four years in pre-trial detention, in further violation of art 2.

Relevance to the Victorian Charter

While complaints were raised under arts 2 (right to life), 3 (prohibition of inhuman or degrading treatment) and 5 (right to liberty and security), the court considered that it was not necessary to separately examine the complaints under arts 3 and 5, after making its determination under art 2.

Accordingly, while the facts of this case engage rights under ss 10 (protection from torture and cruel, inhuman or degrading treatment) and 21(5) of the *Charter* (right to liberty and security – promptness of being brought before a court), the decision in this case is more informative for the interpretation of s 9 (right to life) of the *Charter*.

Section 9 of the *Charter* provides that 'everyone has the right to life and has the right not to be arbitrarily deprived of life'.

The fact that the court in this case decided that it was not necessary to consider the other complaints, substantiates that the right to life is in and of itself, a crucial and therefore absolute, right. This case also reiterates the obligations of public authorities who hold people in custody.

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Right to Private and Family Life and the Protection of Children

EM (Lebanon) v Secretary of State For The Home Department [2008] UKHL 64 (22 October 2008)

The House of Lords recently ruled that a foreign national could not be removed from the UK in circumstances that would completely deny or nullify her right to family life, since such removal would be incompatible with the UK's obligations under the *European Convention on Human Rights*, given domestic effect by the *Human Rights Act 1998*.

Article 8 of the *European Convention* confers on everyone in the UK the right to respect for their family life, which may be the subject of interference by a public authority only if the interference is lawful, proportionate and directed to a legitimate end. According to art 14, the enjoyment of this right is to be secured without discrimination on any ground.

Facts

The appellant, EM, is a 36 year old Lebanese national who came to the UK seeking asylum in 2004 with her son, AF, now aged 12. In Lebanon, EM was married to a man who beat her, attempted to throw her off a balcony and on at least one occasion tried to strangle her. Her first pregnancy was terminated by her then husband striking her in the stomach with a vase, ostensibly due to the fact that he did not want children. When AF was born, the former husband attempted to remove the infant from hospital and take him to Saudi Arabia, however, he was prevented from doing so and has not made any contact with AF since. At some stage, AF's father spent time in prison for theft and, on another occasion, for not supporting AF. EM suffered a breakdown and divorced her husband on the grounds of violence.

According to Shari'a law as applied to Muslim couples in Lebanon, following a divorce the father retains legal custody of the child at all times. The mother is permitted to retain physical custody of the child until age seven, at which time physical custody passes to the father or another male member of the father's family. Even prior to age seven the father has the right to decide where the child lives and whether the child may travel with the mother. The Lebanese courts have no discretion in this process. The mother may or may not be allowed supervised visits thereafter.

AF remained in the care of EM until age seven. After AF's seventh birthday, EM went in to hiding to prevent his removal from her care. Her former husband issued court proceedings and commenced harassing EM's family. EM and AF then fled Lebanon for the UK. The House of Lords accepted that if EM were to return to Lebanon, she would be at risk of imprisonment on a charge of kidnapping AF.

The UK Secretary of State refused EM's claim to asylum, which decision was upheld by the Asylum and Immigration Tribunal and the Court of Appeal. EM appealed to the House of Lords on the grounds that her removal to Lebanon would constitute a violation of her right to respect for family life afforded her by art 8 of the *European Convention* read in conjunction with art 14. EM argued that the lower courts did not correctly understand and apply the relevant test and that the interests of AF should be taken in to account.

Decision

EM's case was that the treatment that she would receive in Lebanon, in particular the removal of AF from her custody, would be discriminatory on the basis of her gender. It was accepted that the Lebanese legal system was 'created by and for men in a male dominated society' (at 6). The transfer of children to a male parent or a male member of the male parent's family is automatic, irrespective of the interests of the mother or child. The only conduct by British authorities complained of was the removal of EM and AF to a country where such discrimination occurs. This was thus a 'foreign case', aimed at escaping the discriminatory effects of the system of family law in Lebanon rather than alleging discrimination by British authorities.

Having analysed relevant Strasbourg jurisprudence, the House of Lords deduced that, except in wholly exceptional circumstances, aliens who are subject to expulsion cannot claim an entitlement to remain in the UK in order to benefit from the equality of treatment that they receive there which would be denied them in their country of origin. Lord Hope noted that Islamic law is practised in much of the world and from a pragmatic point of view, Contracting States to the *European Convention* cannot be expected to return aliens only to countries whose family law is compatible with the principle of non-discrimination contained in the *Convention*. Moreover Lord Bingham propounded that the UK had 'no general

mandate to impose its own values on other countries who do not share them' (at 42). It was confirmed that the burden lying on a claimant in a foreign case is a 'very exacting one' (at 19).

The question before the court was whether, on the particular facts of the case, EM had established that if deported to Lebanon, she and AF would run a real risk of a flagrant denial of the right to respect for their family life such that this right would be completely denied or nullified. Cases where a denial would be considered flagrant are 'very exceptional' (at 17).

The House of Lords found that this was a very exceptional case. The decision confirmed that the parent/child relationship is a fundamental aspect of the family life referred to in art 8, between a child and both his mother and his father. However AF had not had any contact with his father or any member of his father's family in his lifetime, therefore in reality the only family that existed consisted of EM and AF and it is the life of that family that was in issue (at 39). Lord Bingham observed that the relationship between the two was one of deep love and mutual dependence and was not capable of being replaced by a new relationship with AF's father given his history of violence, crime and neglect, nor an unknown member of his father's family.

The risk of imprisonment if charged with kidnapping AF meant that EM would lose any chance of visitation rights. Even if allowed supervised visits, it was found that this could in no meaningful sense be described as family life (at 41). Importantly, the earlier hearings of this matter had not benefited from evidence from AF. The House of Lords noted with approval that this appeal had underscored the importance of ascertaining and communicating to the court the views of the child.

Relevance to the Victorian Charter

This decision is relevant to the scope and content of ss 13 and 17 of the Victorian *Charter*. Section 13 protects, *inter alia*, the right not to have one's family arbitrarily interfered with. Section 17 goes even further than the correlating articles of the *European Convention* and states that one's family is 'entitled to be protected by society and the State' and further that 'every child has the right, without discrimination, to such protection as is in his or her best interests'. There is clearly scope to utilise these provisions of the *Charter* to ensure that the right to family life and the rights of a child are given due consideration, particularly in the context of asylum seekers and family law disputes.

The decision is available at <http://www.bailii.org/uk/cases/UKHL/2008/64.html>.

Briohny Coglin is a lawyer with Minter Ellison

DNA Testing, Right to Private and Family Life and Limitations on Rights

S and Marper v United Kingdom [2008] ECHR 30562/04 [Grand Chamber] (4 December 2008)

The case of *S and Marper v United Kingdom* considered whether the retention of DNA and fingerprints from innocent people is consistent with human rights law.

This case will be particularly informative for the interpretation and application of s 13 (privacy) and s 7 (limitations) of the Victorian *Charter*.

Facts

The first applicant, Mr S, was charged with attempted robbery at the age of eleven. His fingerprints and DNA samples were taken and he was subsequently acquitted.

The second applicant, Mr Marper, was arrested and charged with harassment of his partner. His fingerprints and DNA sample were taken. The charge was not pressed and the case was formally discontinued.

Both applicants asked for their fingerprints and DNA samples to be destroyed, but in both cases, the police refused.

Decision

In making its decision, the Grand Chamber of the European Court of Human Rights considered the following:

1. whether the retention by the authorities of the applicants' fingerprints, DNA profiles and cellular samples constituted an interference in their private life; and

2. if so, whether the interference was: (a) in accordance with the law; (b) in pursuit of a legitimate aim; and (c) necessary in a democratic society.

The Grand Chamber decided that the retention of both cellular samples and DNA profiles constituted an interference with the right to respect for the private lives of the applicants within the meaning of art 8 of the *European Convention on Human Rights*. The mere storing of data relating to the private life of an individual amounts to an interference.

Further, the Grand Chamber found that the interference was not justified. In this regard, the Grand Chamber stated:

the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, fails to strike a fair balance between the competing public and private interests. Accordingly, the retention constituted a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society.

Relevance to the Victorian *Charter*

This decision may be significant to the the interpretation and application of s 13 (privacy) and s 7 (limitations) of the *Charter*, particularly in the context of the retention of cellular samples, DNA profiles and fingerprinting.

Section 13 – Right to Privacy

Section 13(a) of the *Charter* states that 'a person has the right not to have his or her privacy, family, home, or correspondence unlawfully or arbitrarily interfered with'.

In interpreting the corresponding 'right to private life' protected by art 8 of the *European Convention*, the Grand Chamber stated that the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers:

- the physical and psychological integrity of a person, embracing multiple aspects of the person's physical and social identity;
- elements such as ethnic identity, gender identification, name, a person's right to their image, sexual orientation and sexual life;
- a person's name, other means of personal identification and of linking to a family;
- information about the person's health; and
- the right to personal development, and the right to establish and develop relationships with other human beings and the outside world.

Section 7 – Limitations on Human Rights

Section 7(2) presents a notion of proportionality and states that a human right may be subject *under law* to reasonable *justified limits*, taking into account factors which aim to balance competing public and private interests.

It is complex to make an assessment of whether a restriction on rights is justified or not by applying the test prescribed by s 7(2) of the *Charter*. The Grand Chamber's assessment of the 'justification for interference' principle presents as a particularly useful guide in this regard.

Was the interference justified because it was in accordance with the law (or under law)?

The Grand Chamber recalled well established case law that the wording 'in accordance with the law' requires the impugned measure both to have some basis in domestic law and to be compatible with the rule of law. The law must be formulated with sufficient precision to enable the individual to regulate his or her conduct.

The Grand Chamber further commented that it was necessary for the legislation to have clear, detailed rules governing the scope and application of measures. In looking at the relevant legislation in this case, which dealt with the retention and storage of DNA profiles and fingerprints, the Grand Chamber stated that, the legislation should also have minimum safeguards concerning, among other things, duration, storage, usage, access of third parties and procedures for its destruction. Legislation must provide sufficient guarantees against the risk of abuse and arbitrariness.

Did the interference serve a legitimate aim?

The Grand Chamber stated that the retention of fingerprint and DNA information pursues the legitimate purpose of the detection and therefore prevention of crime.

This is relevant when considering the importance of the *purpose* of the limitation (s 7(2)(b) of the *Charter*) and the relationship between the limitation and its purpose (s 7(2)(d)).

Was the interference necessary and proportionate in a democratic society?

According to the Grand Chamber, an interference will be considered 'necessary in a democratic society' for a legitimate aim if it answers a 'pressing social need' and in particular, if it is proportionate to the legitimate aim. The onus is on national authorities to provide 'relevant and sufficient' reasons and evidence for any interference. The margin of appreciation conferred on competent national authorities in this assessment will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights.

In this case, the Grand Chamber commented that the protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life. The domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with art 8 of the *Convention*. The domestic law should notably ensure that such data are relevant and not excessive in relation to the purposes for which they are stored; and preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.

The Grand Chamber considered that the relevant law did not conform with this criteria and found a breach of art 8.

The decision is available at <http://www.bailii.org/eu/cases/ECHR/2008/1581.html>

Maryam Minai is on secondment to the Human Rights Law Resource Centre from Mallesons Stephen Jaques

Homelessness and Discrimination

RJM, R (On The Application of) v Secretary of State For Work and Pensions [2008] UKHL 63 (22 October 2008)

The *Social Security Contributions and Benefits Act 1992 (UK)* provides for a 'disability premium' for people receiving welfare payments, except where the person is 'without accommodation'. In this case the House of Lords decided that discrimination in the distribution of welfare payments can be justified under the *European Convention on Human Rights*.

Facts

RJM suffered from mental health problems and as a result was incapable of working. He received income support which initially included a disability premium. Payment of the disability premium ceased when RJM became homeless and was forced to sleep rough.

RJM brought the matter to the House of Lords on the basis that removal of the premium was incompatible with art 14 of the *Convention* which provides for the enjoyment of rights without discrimination. The right involved was contained in art 1 of the First Protocol to the *Convention* which protects the right to possessions.

Decision

The House of Lords decided in favour of the Secretary of State. Although the House of Lords agreed with the appellant that the Regulations were discriminatory, they accepted that the Government could adequately justify this discrimination.

Right or legitimate expectation to possessions

The Secretary of State argued that a claim under art 1 of the First Protocol could not succeed as there is no right or legitimate expectation to the possession of state benefits – provision of benefits is discretionary. The Court rejected this argument on the authority of *Stec v United Kingdom* (2005) 41 EHRR SE295 which held that rights protected by the *Convention* include things 'which the state has

voluntarily decided to provide.' Therefore RJM had sufficient 'possession' to bring his claim within the First Protocol.

Homelessness as a 'status'

Article 14 of the *Convention* lists personal attributes that would constitute a basis for discrimination. Homelessness is not specified directly, but the appellant argued that it fell within the final words of the article, 'or any other status.' The Court of Appeal had rejected this argument and found that homelessness was a voluntary choice. The House of Lords accepted the appellant's argument, pointing out that religion, political opinion and even sex can also be a matter of choice. It therefore found that homelessness was a 'status' or personal attribute and there had been discrimination.

Justified discrimination

The Secretary of State justified the discrimination against those without accommodation on two grounds:

1. The preference to direct money to resources that will provide accommodation instead of providing money through a disability premium that may be misused;
2. The homeless disabled are less likely to need a disability premium designed, in part, to pay for expenses such as heating and household bills.

Despite noting the opposing arguments, the House of Lords ultimately decided that 'callous though it may seem, the Government is entitled to form the view that assistance should be given to them by other means'. The Lords expressed reluctance to interfere with the views of the executive and found that the policy was adequately justified.

Relevance to the Victorian Charter

Section 8(2) of the *Charter* states that 'every person has the right to enjoy his or her human rights without discrimination.' Discrimination is defined in the *Charter* by reference to s 6 of the *Equal Opportunity Act 1995* (Vic). Section 6 lists personal attributes that are protected by the EO Act – social status and homelessness are not currently among those protected attributes. Under the Victorian *Charter*, an argument about justification may not arise as initial discrimination may be difficult to categorise. It is noted, however, that Julian Gardiner's Final Report of the Victorian Equal Opportunity Review recommended that homelessness be included in Victoria's equal opportunity legislation as a protected attribute.

The decision is available at <http://www.bailii.org/uk/cases/UKHL/2008/63.html>.

Saie Neal is a Summer Clerk with DLA Phillips Fox

Right to a Fair Hearing and Pre-Trial Access to Legal Assistance

Salduz v Turkey [2008] ECHR 36391/02 [Grand Chamber] (27 November 2008)

The Grand Chamber of the European Court of Human Rights has overruled a lower chamber decision, finding that the right to a fair trial (prescribed in art 6 of *European Convention on Human Rights*) includes access to legal assistance during the investigation stage of a suspect by the police.

Facts

In late May 2001, 17 year old Turkish national Yusuf Salduz (the applicant) was taken into custody by Anti-Terrorism Branch police officers suspected of having been involved in an unlawful demonstration supporting an illegal organisation, the PKK (Workers' Party of Kurdistan), and for hanging an illegal banner from a bridge in April 2001.

No lawyer was present at his interrogation. The applicant signed a statement which included the charges against him and notifying him of his right to remain silent. In accordance with Turkish security laws, the applicant was not provided with legal representation.

In the applicant's statement during this interrogation, he admitted his involvement in the youth branch of HADEP (the People's Democracy Party) and his participation in the demonstration organised by HADEP in support of the PKK. He also admitted to having written the banner in April 2001.

Medical reports, written a few hours after arrest and after his interrogation, stated that there were no traces of ill-treatment on the applicant's body.

The day after the interrogation, the applicant was brought before public prosecutor where he explained that he wasn't a member of a political party, had not participated in the illegal demonstration nor made the illegal banner. Before the investigating judge, the applicant retracted his initial statement to the police, alleging that the statement was extracted under duress after being beaten and insulted whilst in police custody. The applicant again denied that he had been involved in the illegal demonstration, and instead had been visiting a friend. After being remanded in custody, the applicant was then allowed access to a lawyer.

The applicant was convicted at trial and sentenced to four and half years imprisonment, reduced to two and half as he had been a minor at the time of the offence. The court did not accept the applicant's denial of involvement, and held his confession to police to be substantiated.

The applicant appealed to Turkey's highest court, alleging breaches of arts 5 and 6 of the *Convention*. The appeal was dismissed and the applicant appealed to the European Court.

Decision

The Court found that art 6 was applicable to pre-trial proceedings, as the fairness of a subsequent trial can be seriously prejudiced by failure to comply with the provisions in art 6.

One of these provisions, art 6(3)(c), enumerates the right to legal assistance in criminal proceedings as 'one of the fundamental features of a fair trial'.

The Court highlighted the importance of recognising this right in the investigation stage of criminal proceedings, as evidence and preparation during this stage determines 'the framework in which the offence charged will be considered at the trial', and emphasised this importance given the particular vulnerability of the accused during the investigatory proceedings and the complexity of evidentiary laws.

The Court considered its previous case of *Imbrioscia v Switzerland* (24 November 1993, Series A no. 275) to support the application of art 6 to pre-trial investigations; in that case the Court held that the *Convention* is designed 'to guarantee, not rights that are theoretical or illusory, but rights that are practical and effective'.

In this case, the Court provided an exception to the scope of art 6 for cases where the particular circumstances provide compelling reasons to restrict this right. However, the Court further qualified that, in these circumstances, regardless of the justification, the rights of the accused under art 6 must not be unduly prejudiced. The Court noted that this occurs where 'incriminating statements made during police interrogation without access to a lawyer are used for a conviction.'

Article 6 does not preclude a person from waiving their rights if they have been fully informed of their rights.

A salient feature of this case was the applicant's age. The Court considered numerous international law materials in determining the requirements of legal assistance to minors in police custody. It was held that providing access to a lawyer for minors in custody is fundamentally important, even though the law restricting legal access in this particular case was systematic.

Relevance to the Victorian Charter

Under s 25(2)(b) of the Victorian *Charter*, a person charged with a criminal offence is entitled to 'have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her'. Further provision for legal assistance is made under ss 25(2)(e)-(f). The *Salduz* decision potentially solidifies the scope for a right to legal representation in pre-trial investigation and the inadmissibility of evidence which is provided by these sections.

Currently, under s 464C(1) of the Victorian *Crimes Act*, police must inform a suspect of his or her right to communicate with a legal practitioner, except in situations of urgency concerning the safety of others. However, evidence collected without regard to this section is not expressly excluded from proceedings, and only covers the period 'before any questioning or investigation' begins. *Salduz*, however, indicates that the right to receive legal assistance commencing from the point of being detained is encapsulated within the right to a fair hearing.

The impact of the proposed changes to the *Evidence Act* are yet to be fully seen. Sections 135(a) and 137 provide that evidence which is unfairly prejudicial may be rendered inadmissible. Although not expressly provided for, the interpretation of what is unfairly prejudicial may now be required to follow the reasoning in *Salduz*. This application is provided for in s 138(3)(f), which disallows the admission of evidence obtained contrary to the *International Covenant on Civil and Political Rights*. Although *Salduz* deals with the *European Convention*, the ICCPR, to which Australia is party, has a corresponding provision in art 14.

Alexandra Phelan and Peter Henley, Human Rights Law Group, Mallesons Stephen Jaques

HRLRC Policy Work

Australia's Role in Promoting Human Rights in Asia and the Pacific

In line with the Australian Government's commitment to reclaim its 'reputation as a leader in the international protection of human rights', particularly in the Asia-Pacific, the Joint Standing Committee of Foreign Affairs, Defence and Trade is conducting an inquiry on human rights mechanisms in the Asia-Pacific.

The Centre has made a submission to the inquiry which sets out a framework for regional engagement and dialogue around human rights. The submission focuses on Australia's engagement with Pacific Island countries.

The submission emphasises that Australia's unilateral promotion of a model of human rights protection which pays insufficient attention to the needs and priorities of Pacific Island governments and civil society would not only be unsuccessful; it would potentially alienate key stakeholders and detract from the promotion of human rights in the region.

Rather, the Centre recommends that Australia make a constructive and collaborative contribution to the promotion of human rights in the Pacific through:

- human rights education and capacity-building programs;
- support for national human rights institutions;
- the provision of technical and financial assistance for increased engagement with the international human rights system; and
- support for Pacific-lead initiatives promoting the development of a regional mechanism.

The Centre's submission is available at www.hrlrc.org.au under Policy Work>Domestic Submissions>Asia-Pacific: Australia's Role in Promoting Human Rights in the Pacific (Dec 2008).

The Centre's opinion piece on this issue, published in *The Age*, is available at www.theage.com.au/opinion/australia-has-a-role-to-play-in-promoting-justice-20081209-6uv8.html.

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

Australia Moves to Promote and Protect Disability Rights

On 3 December, the Government tabled its National Interest Analysis on the *Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities*. The NIA proposes that Australia accede to the Optional Protocol.

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

Consistently with a submission made by the Human Rights Law Resource Centre, the NIA advises that accession to the Optional Protocol would:

- render Australia more accountable for its obligations under the Convention;
- promote disability rights within Australia; and

- present Australia as an international leader committed to protecting the rights of people with disability.

The Joint Standing Committee on Treaties is currently calling for submissions on Australia's possible accession to the Optional Protocol by 23 January 2009.

For further information, see www.aph.gov.au/house/committee/jsct/3december2008/tor.htm.

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

Senate Recommends Overhaul of Sex Discrimination Act to Eliminate Discrimination and Promote Equality

On 12 December 2008, the Senate Legal and Constitutional Affairs Committee tabled a major report entitled *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*.

The Report recommends an innovative new approach to equal opportunity and anti-discrimination laws, including a focus on the elimination of systemic discrimination and a shift away from the current reactive, complaints-based system.

For the last 25 years, Australia's sex discrimination legislation has been criticised for its gaps and inadequacies. The Report promises a progressive, strengthened regime which would promote equality for women and assist in the realisation of Australia's international human rights obligations.

The Human Rights Law Resource Centre made a major and highly influential submission to the inquiry, with the majority of our recommendations being accepted. The Centre's submission is cited approvingly over 20 times in the Senate report.

The report makes some very significant recommendations which, if implemented, would substantially contribute to equality in Australia, including that:

- the Act be amended by inserting an express requirement that the Act be interpreted in accordance with relevant international conventions Australia has ratified including CEDAW, ICCPR, ICESCR and the ILO conventions which create obligations in relation to gender equality;
- the definitions of direct discrimination in ss 5 to 7A of the Act be amended to remove the requirement for a comparator and replace this with a test of unfavourable treatment;
- the Act be amended to replace the reasonableness test in relation to indirect discrimination with a test requiring that the imposition of the condition, requirement or practice be legitimate and proportionate;
- the Act be amended to include a general prohibition against sex discrimination and sexual harassment in any area of public life equivalent to s 9 of the *Racial Discrimination Act 1975*;
- the Act be amended to include a general equality before the law provision modelled on s 10 of the *Racial Discrimination Act 1975*;
- the Act be amended to impose a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements, to accommodate family or carer responsibilities;
- a provision be inserted in the Act so that, where the complainant proves facts from which the court could conclude, in the absence of an adequate explanation, that the respondent discriminated against the complainant, the court must uphold the complaint unless the respondent proves that he or she did not discriminate;
- the remedies available under s 46PO(4) of the HREOC Act where a court determines discrimination has occurred be expanded to include corrective and preventative orders;
- increased funding be provided to the working women's centres, community legal centres, specialist low cost legal services and legal aid to ensure they have the resources to provide advice for sex discrimination and sexual harassment matters;
- further consideration be given to removing the existing permanent exemptions in s 30 and ss 34 to 43 of the Act and replacing these exemptions with a general limitations clause;

- the Act be amended to require the Sex Discrimination Commissioner to monitor progress towards eliminating sex discrimination and achieving gender equality, and to report to Parliament every four years; and
- HREOC conduct a public inquiry to examine the merits of replacing the existing federal anti-discrimination acts with a single Equality Act.

Congratulations to Rachel Ball, a Human Rights Lawyer with the Centre, and Melanie Schleiger, a lawyer on secondment to the Centre from Lander & Rogers, for their outstanding work in drafting the Centre's submission and giving oral evidence to the Committee.

The Committee report is at www.aph.gov.au/senate/committee/legcon_ctte/sex_discrim/index.htm.

Philip Lynch is Director of the Human Rights Law Resource Centre

HRLRC Casework

Disability Advocates Achieve Assistance for Victorians with Autism

The Centre is delighted by the Victorian Government's recent decision to recognise Autism Spectrum Disorders as neurological impairments under the *Disability Act 2006* (Vic).

As discussed in the November edition of this Bulletin, the Centre has been assisting a young client before VCAT regarding how the *Charter* impacts on the proper interpretation of the term 'disability' under the Act. The client has Asperger Syndrome but was ineligible to receive disability support services because, until recently, the Department of Human Services did not consider Asperger Syndrome to be a 'disability' for the purpose of the Act. The Centre advocated that an inclusive and contextual interpretation of 'disability' should be adopted pursuant to the *Charter*.

Since the November edition of the Bulletin, the Centre and PILCH have assisted another young client with Asperger Syndrome, who has made a similar application to VCAT.

On 12 December 2008, the Victorian Government issued a media release advising that it has decided to acknowledge Autism Spectrum Disorders (including Asperger Syndrome) as a disability under the Act and 'Victorians with autism will now be able to request disability assistance'. This is a fantastic outcome, not only for our client but for many other people in the community who are in desperate need of assistance. The Government's announcement will be backed by \$2.75 million in additional funding.

The announcement reflects the hard work of many people who have advocated for change in this area. Meredith Ward, President of the Autistic Family Support Association, who referred the clients to the Centre, said that the VCAT proceedings were critical to the State Government's change in policy and, in her view, the policy change would not have occurred but for the contributions of the lawyers and barristers involved.

David O'Callaghan SC and Penny Neskovicin of Counsel, together with Johnathan Quilty, Elon Zlotnick and Zara Durnan of Lander & Rogers have provided and continue to provide outstanding and significant pro bono assistance in both of these matters.

Melanie Schleiger is on secondment to the Human Rights Law Resource Centre from Lander & Rogers

Caring for Young People with Acquired Brain Injuries

The Centre was approached by a disability advocate acting on behalf of several young people with acquired brain injuries. The rehabilitation centre where the young people were residing (which operated as part of a public hospital) was seeking to discharge the young people because their two year contractual period had ended. However, the only alternative care facilities available were aged care facilities, which would not provide the social environment, or support services (such as speech therapy), needed for the young people to continue their recovery.

With the assistance and advice of the Centre, together with pro bono lawyers from Mallesons Stephen Jaques, the disability advocate raised the *Charter* with a representative of the rehabilitation centre. The facility subsequently agreed not to move the young people until the rehabilitation centre had considered its obligations under the *Charter*.

Jessica Zikman is on secondment to the Human Rights Law Resource Centre from Lander & Rogers

Seminars and Events

2009 Human Rights Seminar Series

The Human Rights Law Resource Centre is in the process of finalizing its 2009 Human Rights Seminar program. Confirmed speakers to date include Prof Ron McCallum (UN Committee on the Rights of Persons with Disabilities), Prof Andrew Harding (University of Victoria, Canada) and Justice Yvonne Mokgoro (Constitutional Court of South Africa). Further details will be released in early 2009.

Human Rights Resources

What's New on the HRLRC Website?

The following full-text articles have been posted to the Centre's website over the last month:

- Philip Lynch and Rachel Ball, 'Australia has a Role to Play in Promoting Justice', *The Age* (Melbourne), 10 December 2008
- Lena Bell, 'Responsibility Writ Large', *Business Spectator*, 10 December 2008
- Karen Kissane, 'Bill of Rights: Do We Need one of These?', *The Age* (Melbourne), 12 December 2008

Human Rights Translated: A Business Reference Guide

A new publication has been released — *Human Rights Translated: A Business Reference Guide* — that examines how human rights are relevant in a business context and ways that human rights issues can be managed by corporations. The authors of the publication are the Castan Centre for Human Rights Law, the International Business Leaders Forum, the Office of the United Nations High Commissioner for Human Rights and the UN Global Compact Office.

Earlier this year, the UN Human Rights Council reiterated the important role and responsibility that corporations have to respect human rights. The *Business Reference Guide* is an important and useful reference tool that explains the relevance of universally recognised human rights and explains their relevance in a business context.

The publication focuses on a number of different management functions, including in the areas of: human resources; supply chain management; security; community engagement; and research and development.

The *Business Reference Guide* contains a summary of each human right, including case studies of real corporate experiences in relation to each right and suggested practical actions.

The publication also highlights the importance of businesses adopting basic human rights due diligence processes, including adopting a human rights policy, undertaking human rights impact assessments, integrating human rights policy across all business functions, and tracking human rights performance through monitoring and auditing processes.

The guide is at www.law.monash.edu.au/castancentre/publications/human-rights-translated.html.

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

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Foreign Correspondent

Human Rights Month – Too Many Activities and Too Little Space to Report!

In Geneva, December should be a shorter working month than many others, with so many Christmas lunches to attend and the extra time it takes to get to work when you need to spend time scraping the winter snow and ice off the car/tram etc. Yet it seems that we pack more human rights action into this month than most others. Of course the main reason for this is that 10 December is Human Rights Day, and this sets the tone for lots of activities. Indeed, this month has been so full of things to report that I'm hoping you'll forgive the brevity as I give you a condensed update on just some of the key international human rights events and issues of concern (in no particular order) ...

If you're interested in human rights you would not have missed the fact that 10 December was the **60th anniversary of the Universal Declaration of Human Rights**. The **Human Rights Council held a Commemorative Session** for this on 12 December at which high level representatives of governments, UN agencies and a handful of permitted civil society representatives joined with the Secretary-General, the High Commissioner for Human Rights, and the President of the Human Rights Council, in speaking about the importance of the UDHR in today's world, and the need for human rights approaches to be implemented in response to the many crises the world currently faces, including poverty. Amongst the statements, school children were invited to read the UDHR in different languages, and a number of films produced by the UN for this occasion were shown.

10 December was also the **10th anniversary of the Declaration on Human Rights Defenders** and the day prior marked the **60th anniversary of Genocide Convention**.

Also on 10 December the **Optional Protocol to the International Covenant on Economic, Social and Cultural Rights was adopted by consensus at the General Assembly** in New York. High Commissioner Navi Pillay announced this was a success, 'closing a historic gap in human rights'. The 36 UN Special Procedures issued a joint statement welcoming how economic, social and cultural rights are now finally recognized as 'legal entitlements rather than charity'. The OP now needs only 10 States to ratify it before it comes into full operation – the official signing ceremony in Geneva in March 2009 will be the first opportunity for governments to formally commit to this new instrument. Hopefully the Australian Government comes with pen in hand.

Earlier, on 3 December a **new international treaty banning the use of cluster munitions was opened for signature** in Oslo. The Convention on Cluster Munitions prohibits the use, production, transfer, and stockpiling of cluster munitions.

The **International Day of Persons with Disabilities** was also commemorated on 3 December. The day provided a timely reminder that the newest core human rights treaty (and communications mechanism), the Convention on the Rights of Persons with Disabilities and its Optional Protocol, is now in force, with more than 130 countries signatories to the Convention and some 40 ratifications.

Meanwhile, at the Human Rights Council, the **3rd Session of the Universal Periodic Review** was held from 1-15 December, with 16 States being reviewed (Bahamas, Barbados, Botswana, Burkina Faso, Burundi, Cape Verde, Colombia, Israel, Liechtenstein, Luxembourg, Montenegro, Serbia, Turkmenistan, Tuvalu, United Arab Emirates, and Uzbekistan). For those who are interested and not already aware, the International Service for Human Rights provides excellent reports on each State under review, published promptly on a rolling basis: see www.ishr.ch. The UPR recommendations will be adopted by the Human Rights Council in March 2009.

The **Eastern Democratic Republic of the Congo** has regrettably continued to be a focus of concern in our human rights work. A **Special Session of the Human Rights Council** was convened on 28 November – 1 December. The resolution adopted by the Council 'expresses its serious concern at the deteriorating human rights and humanitarian situation in North Kivu'. The violence currently being experienced by thousands of people in the DRC was noted repeatedly, with many of the statements made by government representatives from all regions of the world expressing particular concern about the killings, rapes and overall level of sexual violence, as well as other issues such the recruitment of child soldiers. The resolution passed also emphasises the importance of strengthening the mandate of the UN mission in order to increase its capacity to protect civilians. A number of UN Special Rapporteurs were requested to address the situation in the DRC in their reports to the Council in March 2009. Also noteworthy is a **report issued by Human Rights Watch – 'Killings in Kiwanja: The UN's**

Inability to Protect Civilians’ on 11 December, which details the killing of an estimated 150 people in the town of Kiwanja on 4 and 5 November. In particular, the report calls on the European Union to urgently send a ‘bridging’ force to eastern Congo to help UN peacekeepers stop further attacks on civilians.

On the somewhat related issue of **Women’s Rights in post-conflict situations**, a fascinating expert panel on the prosecution of sexual violence was organized by the Office of the High Commissioner for Human Rights on 15 December, to support OHCHR’s work on promoting effective prosecution of sexual violence by reviewing relevant laws, procedures and applications, as well as the ways in which economic, social and cultural rights should guide efforts to facilitate women’s access to justice in post conflict situations.

Climate Change has been a topic gaining more and more attention in the human rights world (as well as elsewhere). At the Poznan Climate Change Conference, from 1 to 12 December, High Commissioner Navi Pillay drew particular attention to how ‘a wide range of universally recognized rights, such as the right to food, to adequate housing and water, and indeed the right to life itself, are under direct threat as a result of climate change.’ The Poznan Conference aims to agree on a plan of action and programmes of work for the final year of negotiations in the run up to the UN Framework Convention on Climate Change in Copenhagen, December 2009, at which time it is hoped the human rights dimension can be fully integrated. Given the overlapping concerns with how human rights are impacted by climate change, in March this year the Human Rights Council mandated OHCHR to conduct an analytical study on the subject. The study has been informed by expert consultations held in October, and it will be presented to the Human Rights Council next March, and made available to the Copenhagen conference next December.

The inaugural session of the new **UN Forum on Minority Issues** was held on 15 and 16 December in Geneva. The thematic focus of this session was ‘the right to education for minority communities and groups’, and various papers addressing this topic were distributed at the Forum. The key function of the Forum is to ‘identify and analyze best practices, challenges, opportunities and initiatives for the further implementation of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities’.

A **Questionnaire on a new Declaration on Human Rights Education and Training** is being distributed, addressed to civil society organizations, as part of the consultations with all relevant stakeholders undertaken by the Human Rights Council Advisory Committee (the former Sub-Commission), on the possible elements for a draft declaration on human rights education and training. Anyone wanting to complete the short and simple questionnaire (deadline 31 December) should download it from http://www2.ohchr.org/english/bodies/hrcouncil/advisorycommittee/HR_education_training.htm.

As this is ‘human rights month’, it’s an opportune moment to share information about further resources that help us in our work of monitoring implementation of the UDHR – such as the **Universal Human Rights Index** (www.universalhumanrightsindex.org). This online resource tool is like a one-stop-shop for the concluding observations and recommendations of all UN Treaty Bodies and Special Procedures.

Lastly, I mentioned last month that one of the projects related to the UDHR 60th anniversary celebrations is The Swiss Initiative, which will result in **The Agenda for Human Rights** (www.udhr60.ch), drafted by a Panel of Eminent Persons, and accompanied by a series of important research projects. At the launch of the Agenda on 5 December it was announced that one of the 10 research projects selected as part of this initiative is that of Paula Gerber from Monash University, who will study ‘Prevention is Better than Cure: Using Human Rights Education as a Tool to Prevent Human Rights Violations’. Another of the most notable of the 8 issues the Agenda will address is the development of a Human Rights Court – a proposal which although has been discussed in human rights circles for decades, always seems to evoke a lot of controversy, so something to watch as the shaping of the Agenda progresses!

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If I Were Attorney-General...

One Year On: Time for Reflection and Time for Leadership

I've been in office a year now and feeling pretty pleased with myself as we head into the summer break. So far, my government has not viewed human rights as a suspicious foreign influence which threatens Australian sovereignty or our freedom to make policy choices. Instead, we have re-engaged with the multilateral system for protecting human rights, and taken steps to strengthen their domestic protection.

We signed the Disabilities Convention and got an eminent, blind Australian, Professor Ron McCallum of Sydney Law School, elected to its monitoring committee. We've accepted the importance of the Optional Protocols to the Women's Convention and the Convention against Torture, and the Declaration on the Rights of Indigenous Peoples, though I must say we've been a little slow on some of these.

We've issued a standing invitation to the Special Procedures of the UN Human Rights Council to visit Australia, since constructive external criticism of the way we do business can only improve our system.

We've made considerable improvements in domestic policy: blunting the worst excesses of immigration law by improving detention, eliminating temporary protection, and abolishing the Pacific Solution; safeguarding equality rights and non-discrimination through same-sex entitlements; apologising to the Stolen Generations; beginning to act seriously on homelessness; and inching towards paid maternity leave.

Now to the main game: we've announced a six month consultation on how to better protect human rights. I regret to admit that we are pussy-footing around on this. Protecting human rights is not rocket science. In half-decent democracies, bills of rights have been around for centuries. We already know the issues. We know our treaty obligations. Six months of chit-chat will not tell us anything new. Sometimes I feel like we're living in a time warp, where we're obsessed by reprising stale debates which everybody else moved beyond long ago.

Personally I dislike the gruel-like version of a bill of rights which seems to be all the rage amongst NGOs – that is, the non-enforceable 'dialogue' model, without judicial remedies, and limited to civil and political rights. Human rights are more important than that. Rights should be treated as rights, not as wishy-washy suggestions which governments should think about but can override if they don't really like. The dialogue model is better than nothing, but it doesn't excite me. Unfortunately Kevin is not so keen to tie his hands; I think he's a bit worried that his intervention in the Northern Territory, might be racially discriminatory....

From a bill of rights flows great potential for structural improvements to a range of rights in Australia. For me, some specific matters need urgent attention. We must speak out consistently against the death penalty around the world, even to save the lives of terrorists, and even if it means that I have to contradict my Prime Minister, who unfortunately can be a bit of a fair-weather friend of human rights.

We need to criminalise torture as a new federal offence, to properly stigmatize it as a universal and specific harm. We should legislate to comprehensively preclude the admission in court of evidence obtained under torture. We should legislate to provide protection against returning a person to a country where they face torture, rather than relying on a limp ministerial discretion (no disrespect intended to my friend Chris Evans).

Rights remain threatened in the immigration context: we retain an unnecessary system of arbitrary mandatory detention, when community release would work well. We preclude judicial review of the grounds of detention. We put some people on the notorious Bridging Visa E, which denies basic welfare rights, leaving people homeless or destitute and amounting to inhuman or degrading treatment. The health test for disabled migrants is incompatible with Australia's non-discrimination obligations under the Disabilities Convention. We should be doing more to respond to the threat of the climate change-induced displacement of our Pacific neighbours.

In other areas, Kevin's apology to the Stolen Generations was terrific – but of course an apology is only one aspect of remedying those rights abuses, and providing compensation would signal that we are genuinely sorry. Sadly Kevin is also not too fond of the unions, so it is unlikely that I can persuade him to remove Australia's restrictions on the right to strike and freedom of association in the workplace, which have often been criticised by the International Labour Organisation.

On access to justice, I might have more luck. Already we've increased legal aid funding, but I am aware that 70 out of 200 community legal centres nation-wide still do not receive recurrent annual federal

funding. It is one thing to provide legal rights, but it requires more to adequately fund the realization of those rights through legal aid, particularly when my colleagues in the legal profession continue to charge such outrageous fees.

Finally, we need to review the counter-terrorism laws adopted in recent years. Some of them are unnecessary, confusing, disproportionate, and illiberal. We have sleep-walked into a state of exceptionalism and perpetual emergency, in which the prevention of speculative future attacks has justified the suppression of centuries-old freedoms. Now that the Haneef inquiry is out of the way, we have no excuse not to review all of the laws in earnest.

I wish you all a brilliant summer. Were I a Christian, I'd ask Santa to toss down the chimney a stunningly successful referendum which brings us all judicially enforceable civil, political, social, economic and cultural rights, with plenty of new causes of action and a big fat right to compensation. I'd be quite happy for any judge – even Justice Kirby – to order me and my fellow politicians not to torture Australians, or to respect their liberty, their freedom of movement, or their right to go to school or live in a house with a roof. I don't find that undemocratic, it hardly disturbs our liberal constitution, and I quite like the idea that my power as a politician would not be unlimited.

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