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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

60 Years On: How Universal is the *Universal Declaration of Human Rights*?

10 December 2008 is the 60<sup>th</sup> anniversary of the adoption of the *Universal Declaration of Human Rights* by the UN General Assembly, the first general catalogue of the rights of individuals to be made the explicit subject of international standards. A 60<sup>th</sup> birthday is usually the moment to celebrate a life well-lived, success in public and private life, and perhaps to anticipate a comfortable retirement. But these are not apt measures for the *UDHR*. It was and remains a controversial document.

Many of the debates that surrounded the Declaration sixty years ago are still alive today, particularly the question whether it can claim universal application in a world marked by religious and cultural differences. Although experts from many cultures were involved in drafting the *UDHR*, some countries argued that it was a Western enterprise. For example, Saudi Arabia criticised the reference to the equality of the rights of men and women in relation to marriage under Article 16 and the right to change one's religion in Article 18 as a form of colonialism.

Recent debates at the United Nations show that the issue of universality is still contested. Last year, the UN Human Rights Council adopted a resolution, introduced by Pakistan, entitled 'Combating defamation of religions'. The resolution encourages states to prohibit criticism of religion and focuses on Islam in particular. The religious defamation issue was framed as one of Western rights against Islamic values.

The resolution conflicts with the protections of freedom of thought, belief, opinion and expression set out in the *UDHR* and later human rights treaties. It contains no criteria to determine when freedom of speech crosses over into unacceptable religious defamation. While international human rights standards accept the possibility of limitations on freedom of opinion and expression, for example to protect public order or public health, it is not clear why religions should be protected against criticism. Although it is clear that there has been inadequate attention given to understanding Islam in the West, the resolution offers a crude solution. By implying that states have a duty to prevent criticisms of and debates about religions, particularly Islam, the resolution seems more intent on protecting religious ideas rather than the rights of individuals to religious freedom.

Attacks on the universality of human rights are also common in the West, although they are not usually pitched in these terms. Western governments often find international human rights norms as irksome and confronting as non-Western governments.

The conduct of the 'war of terror', in particular, has led Western governments to resist the universal application of the *UDHR*. Indeed, across the globe the post-September 11 era has generated laws that attempt to reduce the threat of terrorism. One local example is the 2005 amendments to the Commonwealth Criminal Code, enacted in the wake of the London bombings. These amendments rest on a very broad definition of terrorism and introduced preventative detention orders, control orders and expanded the definition of sedition.

The Australian laws raise serious human rights questions: both preventative detention and control orders are mechanisms that are inconsistent with the rule of law and with human rights principles such as the right to a fair trial and the right not to be arbitrarily detained. The sedition provisions are inconsistent with international guarantees of freedom of speech.

Professor Conor Gearty pointed out in his 2006 Oxford Amnesty Lecture that the war against terrorism is built on a division of the world into 'good' and 'evil' camps. This goes against the main element of the idea of human rights developed over the last 60 years -- human rights attach to every person, regardless of whether we label them good or bad.

The universality of human rights then remains controversial sixty years after the adoption of the *UDHR*. All types of governments tend to stake out areas in which recourse to human rights standards is suspect. In this sense, the *UDHR* remains a radical document. It is difficult to imagine that the economically drafted text of the thirty articles of the *Universal Declaration* could emerge from a 21<sup>st</sup> century United Nations process. Today, the formulation of the rights contained in the *UDHR* would be much more qualified. They would be hedged by the language of exception and special circumstances.

We should hold onto the ideal of universality in the human rights area and resist attempts from all sides to water it down. Universal principles can accommodate pluralism and cultural diversity while embodying a commitment to a flourishing human life. The idea of universal human rights is valuable also in that it makes us scrutinise opposing claims of culture carefully. Whenever exceptions to human rights based on cultural difference are proposed, we should investigate the political agenda of the culture claim.

The future of the *Declaration* involves balancing the power of universal ideals with the inevitable specificity of their translation in particular local contexts. Claims that human rights do not acknowledge cultural difference are overplayed and indeed are regularly used as a gambit to avoid human rights scrutiny by governments of all shapes and sizes.

*Hilary Charlesworth is Professor of International Law and Human Rights in the ANU College of Law*

## News

### Centre Coordinates Major NGO Report on Australia to UN Human Rights Committee

In October 2008, the Human Rights Law Resource Centre, together with the National Association of Community Legal Centres and Kingsford Legal Centre, submitted a major non-government report to the Human Rights Committee regarding Australia.

The report, *Freedom, Respect, Equality, Dignity: Action – NGO Submission to the Human Rights Committee on Australia's Compliance with the ICCPR*, was compiled with the assistance of over 50 NGOs across Australia. It is endorsed, in whole or in part, by over 200 NGOs.

The report provides a comprehensive overview of, and makes targeted recommendations regarding, the realisation of civil and political human rights in Australia, including:

- the lack of constitutional or legislative recognition and protection of civil and political rights;
- groups within society that remain vulnerable to discrimination, such as Indigenous peoples, women and children, people with disability, asylum seekers and gay and lesbian couples;
- Australia's counter terrorism laws and measures;
- Australia's immigration law, policy and practice; and
- the treatment of people in detention, including prisoners and people in involuntary psychiatric detention.

The report will be considered by the Human Rights Committee in New York in March 2009.

The Centre would like to acknowledge the substantial pro bono assistance of Mallesons Stephen Jaques, a leading commercial law firm, in assisting to research, edit and print the Report.

The NGO Report is available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under Policy Work>International Submissions>Civil and Political Rights: Major NGO Report on Australia to UN Human Rights Committee (Sept 2008).

### Parliamentary Committee Recommends Ratification of OP-CEDAW and Disability Convention

In a report tabled on 16 October 2008, the parliamentary Joint Standing Committee on Treaties has recommended that Australia ratify the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*.

Expanding on an earlier report on ratification of the *Convention on the Rights of Persons with Disabilities*, the Committee also recommended that 'the Government consider expanding the role of the Human Rights and Equal Opportunity Commissioner to enable the Commissioner to provide Parliament with an annual report on compliance and implementation of the Convention and, if also ratified, the Optional Protocol'.

The JSCOT report is available at

<http://www.aph.gov.au/house/committee/jsct/4june2008/report1/fullreport.pdf>.

### ICJ Releases Major Report on Corporate Complicity in International Crimes

In recent years, the question of when a corporation may be considered to have impacted on human rights has received increased attention in the civil, political and legal spheres. While corporations have allegedly been directly responsible for human rights violations, the more frequent allegation is that corporations have been *complicit* in human rights violations inflicted by the State or other actors. The circumstances in which this can be said to have occurred, however, and the legal standards attached to such alleged complicity, have been a source of ongoing contention.

#### The ICJ's Expert Panel

As a result, in 2006, the International Commission of Jurists formed its Expert Legal Panel on Corporate Complicity in International Crimes. The Panel, comprising eight leading jurists from different jurisdictions and fields of expertise, was asked to explore when companies and their officials could be held responsible under criminal and/or civil law for complicity in human rights violations. The focus of the Panel was on egregious human rights abuses, recognised as international crimes. The Panel was also asked to provide guidance on situations that companies should avoid.

#### The Expert Panel's final report

The Panel delivered its final report in September 2008. In three volumes, the report addresses:

1. standards of complicity under domestic criminal and civil law, and the kind of activities a company should aim to avoid;
2. when international or domestic criminal law may hold companies or their officials criminally responsible for involvement in international crimes; and
3. how civil liability may arise for companies and/or their officials that are allegedly complicit in human rights violations.

#### What is 'complicity'?

The report aims to clarify both the legal and policy meaning of 'complicity'. It differentiates between the policy meaning, where complicity is used to describe the different ways in which one actor becomes involved in an undesirable manner in the negative activities of another; and the specific and technical legal meaning, denoting the position of the criminal accomplice, which is closely linked to the concept of 'aiding and abetting'. The report explains that, as the criminal law concept of complicity does not necessarily correspond to the full remit of the policy concept, the Panel chose to focus on other headings of criminal and civil responsibility in addition to 'aiding and abetting' in order to properly reflect the zone of potential legal risk that exists for corporations.

### Preventing complicity

Based on the research submitted to and undertaken by the Panel, the report offers an approach that the Panel considers will assist business to assess whether it could face liability for complicity in egregious human rights violations, and will help companies to identify behaviour they should avoid. This approach is based on:

- *causation or contribution*: the extent to which corporate conduct enabled, exacerbated or facilitated the human rights violations alleged;
- *knowledge and foreseeability*: the extent to which the corporation knew, or should have known, that its conduct would be likely to contribute to the human rights violations alleged; and
- *proximity*: the closeness (geographically, in duration, frequency or intensity of interactions) of the corporation to the principal perpetrator of the alleged human rights violations or the victims.

The situations in which corporations commonly face allegations of complicity were identified as including: provision of goods and services to actors who use them to commit human rights violations; provision of public or private security for company operations; perpetration of human rights violations in corporate supply chains; and formal business partnerships with entities that carry out human rights violations.

### Corporate liability under domestic and international criminal law

The second volume of the report outlines the Panel's findings on when a corporation and/or its officials may be found responsible as an accomplice under international or national criminal law. This includes an analysis of accomplice liability for aiding and abetting, and common purpose liability, under international and national criminal law. It also provides an analysis of available defences to allegations of liability, and the fora in which prosecution for crimes under international law can take place.

### Corporate liability under domestic civil law

The third volume of the report outlines the Panel's findings, through a comparative analysis of the law of tort in common law countries and the law of non-contractual obligations in civil law jurisdictions, of how civil liability may arise for corporations allegedly complicit in human rights violations. This includes an analysis of the parallels between criminal complicity and civil corporate intention or negligence, and the role of causation. It also provides an overview of a number of relevant legal procedures and company law rules, including statutes of limitations, separate legal personality of parent and subsidiary companies, and issues of jurisdiction.

### **Conclusion**

The ICJ Expert Panel's report is an excellent summary of the current status of criminal and civil law concerning indirect corporate involvement in allegations of human rights violations. It is also an accessible and effective guide for corporations – particularly multinationals – faced with these potential legal risks as a result of the sectors and/or countries in which they operate.

*Rachel Nicolson is a Senior Associate in the Allens Arthur Robinson Corporate Responsibility Group*

### **Lander & Rogers makes Significant Pro Bono Contribution to Centre**

The Centre is delighted that Lander & Rogers, a fast growing and innovative Australian law firm, has made a major contribution to the Centre by extending its secondment program. As part of its commitment to human rights and pro bono, Lander & Rogers has continued the secondment of Melanie Schleiger to December 2008. Melanie, who practices in anti-discrimination and workplace relations, has been seconded to the Centre since July 2008 and has made an outstanding contribution to our casework and law reform activities, particularly in relation to the right to equality and non-discrimination.

We are also very pleased to welcome Jessica Zikman on secondment from Lander & Rogers for 3 months from November 2008. Jessica is a lawyer in the Corporate & Commercial group, where she is developing specialisation in corporate governance and transactional work. She is a member of Lander & Rogers' Pro Bono and Community Support Committee and, through the firm, has assisted a number of charitable organisations with their legal requirements in a pro bono capacity.

For further information about Lander & Rogers pro bono program, see [www.landerson.com.au](http://www.landerson.com.au).

### UN Expert Mechanism on the Rights of Indigenous Peoples Holds Inaugural Session

The Human Rights Council's recently established Expert Mechanism on the Rights of Indigenous Peoples held its inaugural session in Geneva from 1 to 3 October.

The Expert Mechanism, which is charged with providing thematic advice on the rights of Indigenous peoples to the Human Rights Council, developed a number of proposals, including in relation to the right of self-determination, the right of Indigenous people to education, and the participation of Indigenous peoples in UN human rights processes. Other issues raised during the session included the situation of Indigenous women, the effects of the global food crisis on Indigenous communities, access to education in Indigenous languages and the implementation of the *Declaration on the Rights of Indigenous Peoples*.

The meeting was attended by a significant number of leading Indigenous advocates, including Prof James Anaya, UN Special Rapporteur on the Rights of Indigenous peoples, and Australia's Prof Mick Dodson, member of the UN Permanent Forum on Indigenous Issues.

The Expert Mechanism will hold its second session in 2009. The date will be decided at the 10th regular session of the Human Rights Council to be held in March 2009. For more information about the Expert Mechanism, see [www2.ohchr.org/english/issues/indigenous/ExpertMechanism/index.htm](http://www2.ohchr.org/english/issues/indigenous/ExpertMechanism/index.htm).

### Victorian Charter of Rights Developments

#### From Principle to Practice: Implementing the Human Rights Based Approach in Community Organisations

The Victorian Equal Opportunity & Human Rights Commission has developed a new 57-page human rights guide, specifically tailored for community organisations.

*From Principle to Practice* provides practical assistance to help develop and implement a rights framework in your organisation and build a culture of respect for human rights.

*From Principle to Practice* contains:

- a detailed description of the human rights based approach;
- a solid case outlining the benefits of the approach;
- a roadmap for implementation across all areas of organisational operation;
- case studies and examples of good practice;
- multiple implementation tools; and
- comprehensive additional resource listing.

For further information, see [www.humanrightscommission.vic.gov.au](http://www.humanrightscommission.vic.gov.au).

#### Application of the Charter in a Planning Context

A recent decision of a planning panel appointed under the *Planning and Environment Act 1987* (Vic) to recommend a planning scheme amendment to facilitate the construction of a mosque demonstrates the potential significance and relevance of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) to planning and environment law.

#### Background

In 2004, Hobsons Bay City Council resolved to sell a parcel of public use-zoned land owned by the Council to the Islamic Society of Newport Inc for the purpose of building a new mosque to replace an existing mosque in Newport that was too small and provided substandard facilities for worship.

Since the proposal involved selling land to a private entity, as well as the use of that land for what was not a 'public purpose', rezoning was necessary to facilitate the construction of the mosque.

An application was made for an amendment to the Hobsons Bay Planning Scheme to rezone a larger parcel of land incorporating the site earmarked for the mosque in Blenheim Road in Newport from Public

Use to part Special Use and part Public Park and Recreation. The 'special use' contemplated the construction of the mosque, and the 'public park and recreation' envisaged the development of an adjoining park site (in consultation with the local community), using funds set aside for that purpose by the Council.

### **The Panel's consideration of the Victorian *Charter***

Before turning to consider the application for a permit to construct the mosque under the planning scheme (as amended), the Panel needed to consider the proposed rezoning of the subject land. It endorsed the rezoning by reference not only to the relevant planning policy framework, but also to the *Charter*.

The planning principles cited by the Panel included the recognition of social needs by providing land for cultural facilities, and the policy to support the provision of facilities which will meet the needs of the community throughout the municipality. The Panel noted:

The Hobsons Bay community comprises people from diverse backgrounds with many different religious beliefs and practices. We are of the view that it is an important function of planning to facilitate the provision of community infrastructure to meet the diversity of community needs, including accommodating various requirements for religious observance.

Interestingly, the Panel took the analysis a step further, recognising the human rights protected by the *Charter* – in particular ss 14 and 19 (dealing with freedom of thought, conscience, religion and belief and cultural rights, respectively) – in the context of its consideration of the planning scheme amendment. The Panel also referred to s 38 of the *Charter*, which makes it unlawful for public authorities (including local councils) to (a) act incompatibly with protected rights and (b) when making a decision, to fail to give proper consideration to a human right. In relation to s 38, the Panel stated that:

We are conscious that the *Charter of Human Rights and Responsibilities* seeks to protect and promote certain human rights by placing obligations on all public authorities, including local councils, to act in a way that is compatible with human rights and to give proper consideration to relevant human rights when making decisions.

In this regard, the Panel perceived a positive obligation on the part of the local council to act in a way that was compatible with the protected rights.

The Panel then considered whether rezoning the land was strategically justified to facilitate the development of a new mosque. Again, the Panel noted that: 'the *Charter of Human Rights and Responsibilities* establishes an obligation to ensure that people can practice their religious beliefs, including communal religious observance'.

Having considered a number of submissions and undertaking its own inspections, the Panel determined that it was clear that the existing mosque served an established religious community, but was too small to meet their needs. Further, according to the Panel, the existing dwelling provided substandard facilities for worship. Some of the reported inadequacies included insufficient and impractical space, poor ablution arrangements, and the effective exclusion of women from worship at the mosque.

The Panel concluded:

The *Charter of Human Rights and Responsibilities*, the policy predisposition in favour of meeting needs for community facilities, and the conspicuous need for a new mosque support approval of the [planning scheme amendment].

On one reading, the Panel seems to have proceeded on the basis that the *Charter* creates an *obligation* on local government to provide people with places of worship. While it might be doubtful that the *Charter* extends this far, the Panel's reasoning does provide a good example of how established planning policy considerations can be considered in an integrated manner with rights and freedoms promoted by the *Charter*. While the *Charter's* recognition of the rights and freedoms is unlikely to be of itself determinative of an issue, this case demonstrates that it can be persuasive when considered in conjunction with the typical planning considerations.

The Panel decision is available at

[http://www.dse.vic.gov.au/Shared/ats.nsf/\(attachmentopen\)/2C8EE5D347A98937CA2574E10072D5D0/\\$File/Hobsons+Bay+C58+Panel+Report.pdf?OpenElement](http://www.dse.vic.gov.au/Shared/ats.nsf/(attachmentopen)/2C8EE5D347A98937CA2574E10072D5D0/$File/Hobsons+Bay+C58+Panel+Report.pdf?OpenElement).

*Natalie Wilkinson is a lawyer on secondment to the Environment Defenders Office from Deacons*

## 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.

### **Public Holidays Amendment Bill: Are Religious Public Holidays in Breach of the Charter?**

The Public Holidays Amendment Bill 2008 (Vic) amends the Victorian *Public Holidays Act* to provide greater certainty around public holidays in Victoria. In particular, the Bill provides a Melbourne Cup Day holiday for non-metropolitan regions or, at an individual community's choosing, another day in lieu of Cup Day. However, the Bill also sets out a further ten public holidays, including Good Friday, Easter Saturday, Easter Monday, Christmas Day and Boxing Day. These days, which celebrate important events on the Christian calendar, may raise a question as to whether the determination of public holidays on this basis discriminates against people who identify with a different religion or do not hold Christian beliefs.

The Government's Statement of Compatibility, delivered to Parliament on 26 June 2008, asserts the Bill is compatible with the *Charter*. It admits the Bill may engage ss 8 (recognition and equality before the law) and 14 (freedom of thought, conscience, religion and belief) of the *Charter*, but concludes that to the extent the Bill limits these freedoms, the limitations are reasonable under s 7(2). A number of reasons are offered to support this view.

First, the Statement makes an economic argument in favour of prescribing certain religious events as public holidays. The Bill maintains consistency with the Commonwealth's and the other states and territories' public holidays. Common enjoyment of leisure time facilitates social and family cohesion and builds social capital, leading to faster economic growth and improved health. The Statement refers to a Canadian Supreme Court case, *R v Edwards Books and Art*, which upheld a prohibition on Sunday trading on the grounds that such a ban could be justified on a secular basis to provide a common day of rest for all workers. Similarly, the Christian public holidays can be said, arguably, to have a secular basis in prescribing economically beneficial common days of rest for the entire community.

Arguably this rationale only justifies uniform public holidays, but not necessarily on days of importance to Christians. One alternative to legislating specific public holidays would be to allow people further holiday entitlements to be used on days of their choosing, thereby allowing the freedom to elect holidays of religious importance to them, irrespective of their denomination.

The second argument the Statement puts forward, however, refers to census data indicating 63.9 per cent of Australians identify as being Christian.

Taking both arguments together, the Statement contends that it is reasonable to assume that, given the choice, most Christians — and by extension, a majority of the population — would elect to take their public holidays on significant dates in the Christian calendar, and that it follows that the Bill goes no further than is required to achieve the economic and social objectives of common and certain public holidays, and it is reasonable to select dates that are historically based upon Christian holidays.

Importantly, it should be noted that employers have obligations under legislation such as the *Equal Opportunity Act* to allow employees to take leave in order to observe their own religious holidays. The Bill does not interfere with these obligations. However, such obligations do not necessarily require employers to make available to employees with varying religious beliefs a uniform set of leave entitlements.

*Andrew Rodger is a member of the Mallesons Stephen Jaques Human Rights Law Group*

### **Stalking Intervention Orders Bill 2008 (Vic)**

The Stalking Intervention Orders Bill 2008 restates the current system of stalking intervention orders provided under the *Crimes Act 1958* (Vic) and *Crimes (Family Violence) Act 1987* (Vic), but is not intended to make substantive changes to the law. The Victorian Government intends to conduct a review of the intervention order system for non-family members and this review will likely lead to more substantive changes to the stalking intervention orders regime. One potential change foreshadowed by Attorney General Rob Hulls is the use of alternative dispute resolution service to resolve some non-family matters currently subject to applications for intervention orders.

Charter rights engaged

The Bill's subject matter means that a wide range of rights under the *Charter* are engaged, including the right to equality before the law, freedom of movement, freedom of religion, right to liberty and security, privacy, freedom of expression, freedom of association, property rights, right to a fair hearing. The rights which are most significantly limited under the Bill are those relating to the freedom of movement (s 12) and right to liberty (s 21).

Compliance with *Charter*

The Bill is consistent with the existing legislation for stalking intervention orders under the *Crimes Act 1958* (Vic) and *Crimes (Family Violence) Act 1987* (Vic). If a Court is satisfied on the balance of probabilities that the respondent has stalked another person and will continue to do so or is likely to do so again, then under s 7 of the Bill a Court may impose any restrictions or prohibitions that appear necessary or desirable in the circumstances. Although s 8(1) of the Bill provides examples of restrictions which may be included in an intervention order, this list is non-exhaustive and, consequently, the range and scope of restrictions on a person's freedom of movement are potentially very wide. The right to liberty is also engaged because under clauses 32 and 33 of the Bill, a police officer may arrest a person without a warrant if the officer reasonably believes that they have contravened an intervention order.

Relevantly, s 8(2) of the Bill states that before making an intervention order restricting a respondent's access to premises, a court must take into account the need to protect the affected person from stalking, the welfare of any children affected by the order and the accommodation needs of all persons affected by the order. However, the clause requires a court to give paramount consideration to the need to protect the affected person from stalking and does not require the court to consider the limitation on the respondent's right to freedom of movement and to liberty, which could be significantly limited by the broad powers to make an order under s 7 of the Bill.

The conclusion in the Statement of Compatibility, that the limitations under the Bill on the rights to freedom of movement and liberty are reasonable and that no less restrictive means are available, is therefore not necessarily accurate. It would be preferable for the Bill to also require a Court to have regard to the effect on the respondent's freedom of movement and liberty (and his or her other rights under the *Charter*) when making a stalking intervention order, consistent with ensuring that the imposition of the order is the least restrictive means available to limit those rights.

Adequate restriction of a Court's power to limit these rights is particularly important because stalking intervention orders potentially remain in force indefinitely under clause 10 of the Bill, subject to revocation or reversal by a Court on appeal.

*Lachlan McMurtrie is a member of the Mallesons Stephen Jaques Human Rights Law Group*

**Research Involving Human Embryos Bill 2008**

The Research Involving Human Embryos Bill 2008 seeks to implement a regulatory scheme in Victoria consistent with the *Research Involving Human Embryos Act 2002* (Cth). The Commonwealth Act was introduced to regulate the use of human embryos created by assisted reproductive technology ('ART') or by other means during the conduct of research.

The Commonwealth Act was initially implemented in Victoria by Part 2A of the *Infertility Treatment Act 1995* (Vic). However, following a recommendation from the Victorian Law Reform Commission in June 2007, Parliament has decided to present Part 2A as a separate, stand-alone bill.

The purposes of the Bill are to set out:

- the offences and associated penalties for particular uses of human embryos;
- the licensing system for embryo research and the functions and powers of the National Health and Medical Research Council Licensing Committee; and
- the powers available to inspectors who monitor compliance with the Bill.

The Statement of Compatibility identifies the following *Charter* rights as being engaged by the Bill:

- the right to protection from medical or scientific experimentation or treatment without consent;

- the right to privacy and reputation;
- the right to freedom of expression;
- the right not to be deprived of property other than in accordance with the law; and
- rights in criminal proceedings.

#### Protection from medical or scientific experimentation or treatment without consent

The Bill provides that the Licensing Committee must not issue a licence to carry out medical experimentation unless the Committee is satisfied that the applicant has appropriate protocols to ensure 'proper consent' is obtained before undertaking the experimentation. 'Proper consent' is defined as consent obtained in accordance with the guidelines issued by the NHMRC.

The relevant guidelines of the NHMRC set out detailed requirements for the conduct of human and ART research, including ensuring that donors are sufficiently and independently informed of all known and potential risks of the procedure, and that clinics provide information in a way that avoids coercion or inducement.

The Bill also provides that:

- ART providers must ensure that the full, free and informed consent of participants is obtained before research is undertaken; and
- licences are subject to the condition that use of the eggs or embryos must be in accordance with the relevant NHMRC guidelines.

#### Privacy and reputation

The Bill contains a number of provisions which arguably interfere with a person's privacy, family, home or correspondence, including provisions:

- requiring the provision of information in a licence application;
- requiring applications to be assessed by the Human Research and Ethics Committee;
- requiring the Licensing Committee to maintain a publicly available licensing database;
- allowing inspectors to enter any premises for the purpose of assessing compliance with the Bill; and
- allowing inspectors to search, inspect, examine, take samples and operate equipment at the premises, and to direct people to produce documents or records.

The Statement concluded that none of these provisions constituted an unlawful or arbitrary interference with a person's privacy, family, home or correspondence, as:

- the gathering of information in licence applications is appropriate for determining the applicant's suitability to hold a licence;
- the sensitivity of conducting research on human eggs or embryos warrants the involvement of the Human Research and Ethics Committee;
- it is questionable whether there is any real expectation as to the privacy of the information made publicly available by the licensing database;
- the power of inspectors to enter premises would be restricted in practice to accredited laboratories (as opposed to residential premises) and is subject to a number of requirements designed to ameliorate the intrusiveness of the power; and
- other powers of inspectors (such as the power to search, inspect and examine) enable inspectors to monitor compliance with the bill and are reasonable in the circumstances.

#### Freedom of expression

As mentioned above, the Bill requires the Licensing Committee maintain a public database containing prescribed information about issued licences. The Statement considered that disclosure of information about issued licences fell within the exception contained in s 15(3) of the *Charter*, which provides that the right to freedom of expression may be subject to lawful restrictions reasonably necessary for the protection of, among other things, public health. The Statement found that the purpose of the public database was to ensure community access to information about the use of embryos in medical

research. As this research addressed the causes of infertility and thus promoted and protected public health, the database did not infringe the right to freedom of expression.

#### Property rights

Under the Bill, inspectors are able to secure a human egg, embryo or other thing that may afford evidence of the commission of an offence during a search of premises pending the obtaining of a warrant. The Statement considered that this did not amount to an arbitrary deprivation of property otherwise than in accordance with the law, as the power is subject to certain restrictions and constitutes a lawful exercise of statutory power for a specified purpose.

#### Rights in criminal proceedings

The Bill requires persons to answer questions put by an inspector who has entered the premises. The Statement found that this provision did not infringe the right to be free from compulsory self-incrimination as, while the purpose of the questions may be to determine compliance with the Bill, the relevant person has not been charged with a criminal offence.

*Edwina Chin is a member of the Mallesons Stephen Jaques Human Rights Law Group*

## **Other Charter of Rights Developments**

### **Liberal, Democrat and Labor Voices Urge PM to Announce Human Rights Consultation as a Priority**

Three prominent former politicians have called on the Government fulfil its election commitment and announce a consultation into human rights in Australia.

The Hon Fred Chaney AO, Natasha Stott Despoja and Professor Michael Lavarch have jointly written to the Prime Minister urging him to announce a public consultation into a federal Charter of Human Rights as a matter of priority. The cross party letter outlines the authors' views on the benefits of human rights protections and Australia's reputation as an international citizen and regional leader.

- The three commended the Government's commitment to a process of national consultation stating it 'would enable Australians to reflect on common values and assist in the articulation of a shared national vision.'
- Recognising the strengths and limitations of government and existing mechanisms, Chaney, Stott Despoja and Lavarch wrote, 'the time is right for Australia to adopt a statutory Charter of Rights' as 'institutions need to evolve to meet the aspirations of the society in which the institutions exist to serve.'
- As former parliamentarians from all sides of politics, they acknowledged the importance of a human rights framework operating in a way 'which respects and buttresses the sovereignty of Parliament and its role in determining policy and resource allocations.'
- They recommended the Victorian *Charter* as a 'worthwhile model' which achieves the correct balance by placing the onus on the Executive and the Parliament to identify and decide if a proposed law is consistent with the rights of the Charter.
- Adoption of the Victorian model at the federal level would enable 'Australia to properly recognise human rights consistent with our role as a good international citizen and regional leader while recognising the features and strengths of Australia's Parliamentary democracy and legal traditions.'

Chaney, Stott Despoja and Lavarch concluded by urging the federal 'Government to proceed with the consultation process as a matter of priority.'

*Phoebe Knowles is on secondment to the Human Rights Law Resource Centre from Minter Ellison*

### **Australian Human Rights Group calls for Improved Legislative Protection of Rights**

The Centre is continuing its work on the campaign for a federal Charter of Human Rights. The Government made an election commitment to conduct an inquiry into the legal recognition and protection of human rights. This presents a real opportunity to enhance the protection of human rights in Australia. The Centre is working with the newly established Australian Human Rights Group – a

network of organisations committed to human rights protections. Susan Ryan AO is the Group's Chair. Members come from the legal, music, disability, arts, academic and CLC sectors. The Group's aims and beliefs include:

1. Australia needs better legislative protection of human rights.
2. The AHRG aims to enable the community to share their views on how best to protect human rights in Australian law.
3. The Australian Parliament should pass a comprehensive Human Rights Act.

There are three ways of becoming involved either as an individual or as an organisation.

1. You can **join our email list** to keep informed on developments and get access to the Campaign wiki. Email list membership is confidential. To join the AHRG email list, simply send an email to [majordomo@explode.unsw.edu.au](mailto:majordomo@explode.unsw.edu.au) with the subject line blank and only 'subscribe charter-campaign' in the text of the email.
2. You can nominate to be **involved in campaign activities** such as running grass roots consultations, submission-writing, assisting others draft submissions, lobbying government, administration and polling. These lists will remain confidential.
3. You can nominate to be on a **public list of supporters**. This means signing up to the AHRG's list of aims. When the AHRG issues a press release or is participating in the public debate, the AHRG would be able to publicly say that you support the AHRG's aims.

If you are interested in becoming involved, please contact Phoebe Knowles on [secondee1@pilch.org.au](mailto:secondee1@pilch.org.au) or (03) 9225 6648.

## Victorian Charter Case Notes

### Balancing the Right to Free Speech with the Right to a Fair Trial

*X v General Television Corporation Pty Ltd & Ors* [2008] VSC 344 (8 September 2008)

In this case Vickery J decided that it was appropriate in a free and democratic society to temporarily curtail freedom of media expression to guarantee X the right to a fair trial.

#### Facts

X sought orders against General Television Corporation Pty Ltd prohibiting the publication, broadcasting or exhibition of the television show *Underbelly* until X's criminal trials were complete. *Underbelly* was based on the Gangland Wars in Melbourne between 1995 and 2004. X brought the application over concerns about the effect *Underbelly* would have on his trials.

An edited version of the show was produced for the Victorian audience to address concerns raised by the Victorian Director of Public Prosecutions. Vickery J viewed the six episodes before making the judgment.

#### Importance of a fair trial

Vickery J considered X's right to a fair and unprejudiced trial, which is 'a touchstone of the existence of the rule of law' (*Hinch v Attorney-General (Victoria)* (1987) 164 CLR 15, 58 per Deane J). He also drew on s 24 of the *Charter*, which deals with the right to a fair hearing and art 14 of the *ICCPR* which provides for the right to a fair trial. Article 14 includes the right to have the press or the public excluded from all or part of a trial to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

#### Right of free speech

Vickery J also considered the right to freedom of speech, which is entrenched in s 15 of the *Charter* and set out in art 19(2) of the *ICCPR*. However, this right is not absolute; an important caveat that finds expression in ss 15(3) and 7 of the *Charter* and art 19(3) of the *ICCPR*.

## Decision

Vickery J concluded that the Victorian public has a very limited public interest in the information and the ideas in *Underbelly*. As such, X's right to a fair trial outweighed General Television's right to free speech.

In support of this Vickery J considered television's persuasive power, which arises from its compelling images, music and dramatic narrative, in leading viewers to a particular conclusion. While a book, newspaper and even the internet have to be read and processed by the mind before the information contained in them can be assimilated, what is seen on television enters directly into the mind of the audience with little opportunity for analysis.

Vickery J also drew on the decision of King J in *R v A* [2008] VSC 73, stating: 'This is not the reporting of an event, this is a television series made for entertainment. Channel 9's interests are commercial...they seek to air this at an appropriate ratings period to ensure they get good ratings. From those good ratings they would hope to receive good advertising revenue. In my view it is far more important that the criminal justice power works, than that a channel make a profit.'

## Consideration of the Victorian Charter

Justice Vickery's judgment highlights the difficulties which can arise where rights under the *Charter* conflict with one another. In this case, Vickery J addressed the inherent tension between the right to a fair trial and the right to freedom of speech, which is particularly acute where pre-trial publicity is concerned.

Superior Courts have always had the inherent jurisdiction to ensure that the right to a fair trial is respected, and this fundamental common law right is further 'reinforced' by s 24 of the *Charter* which protects the right to a 'fair hearing'. The right to freedom of speech (in this case freedom of the press) is also protected under s 15 of the *Charter*. However, his Honour notes that the right to freedom of speech is by no means absolute. It can, and should, be limited in certain circumstances. In balancing competing rights under the *Charter*, Vickery J noted that s 7 is 'also instructive', in that it provides guidance on when human rights may be limited.

In this case, a material factor was, in the words of Vickery J, the 'very limited public interest' in the screening of the series. The balancing of the two rights might have been differently determined had there been a greater 'public interest' in the disclosure of the relevant material or information.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VSC/2008/344.html>.

*Louise Fahy is a lawyer and Natasha Stojanovich is an articled clerk with DLA Phillips Fox*

## Supervised Treatment under the Charter

*LM (Guardianship)* [2008] VCAT 2084 (9 October 2008)

### Facts

LM is a 25 year old woman with a borderline to mild intellectual disability and a history of psychological and behavioural problems dating back to her childhood.

In 2004 LM was placed on a two year community based order following various convictions. In 2007 LM was charged with a number of offences and was released on bail to Furlong House in Parkville. While resident at Furlong House LM had a number of incidents which included non-epileptic seizures on roads, walking into oncoming traffic, physical aggression towards other people, threatening self-harm or suicide, and assaulting staff at Furlong House. In February 2008 LM was convicted of a number of offences relating to these incidents.

Since February 2008 LM has been living at a residential service operated by the Department of Human Services. While living at the residential service LM has continued to display the behaviour pattern outlined above. LM's workers at the residential service found it was frequently necessary to lock the door of the house in order to stop LM from leaving. They were unable to control her behaviour by less restrictive means.

LM's Authorised Program Officer applied to the Victorian Civil and Administrative Tribunal on 25 January 2008 for a supervised treatment order ('STO') for LM pursuant to s 191 of the *Disability Act 2006* (Vic).

## **Decision**

The Tribunal found that LM satisfied all of the requirements of s 191(6) of the *Disability Act* and that detention at the residential service was necessary in order that she be treated in accordance with the STO.

## **Consideration of the Victorian *Charter***

The Tribunal of its own accord raised the issue of whether LM's rights under the *Charter* were limited by the *Disability Act*.

The Tribunal found that the Charter rights potentially affected by the STO were: s 8 (the right to recognition and equality before the law); s 12 (the right to freedom of movement); s 21 (the right to liberty and security of person); and s 26 (the right not to be tried or punished more than once).

The question facing the Tribunal was whether these limitations could be justified under s 7 of the *Charter*. Section 7 of the *Charter* recognises that human rights may be subject to limitations that are demonstrably justifiable in a free and democratic society.

### Section 8 – Right to recognition and equality before the law

The Tribunal noted that the STO appeared to limit LM's rights under s 8 in that it discriminated against a person with an intellectual disability. Section 191(1) of the Act gives the Tribunal the power to detain a person with an intellectual disability who poses a significant risk of serious harm to others. There is no other legislation in Victoria which gives the State the right to detain a person who does not have an intellectual disability in the same situation.

Given LM's history and the risks that she posed to members of the public and herself, the Tribunal found that it was demonstrably justifiable that LM be detained subject to an STO.

The Tribunal also found that another justification was the protection of LM from the legal consequences of her actions. Because LM's history demonstrated that she had already been convicted of a number of serious offences it was necessary to detain her in order to protect her from the consequences of re-offending.

### Section 12 – Right to freedom of movement

The Tribunal found that the same considerations which applied to s 8 also applied to this section so that the STO was justified to limit LM's freedom to choose where to live.

### Section 21(3) – Deprivation of liberty

This section prohibits deprivation of liberty except on grounds and in accordance with procedures established by law. Because LM's detention under the STO was in compliance with the provisions of the Act the Tribunal found that the *Charter* right was not limited.

### Section 26 – Right not to be tried or punished more than once

The section of the Act allowing the STO appeared to be incompatible with the *Charter* right against 'double jeopardy' given that LM had already been convicted of a number of offences and had been released on a good behaviour bond. The Tribunal found that this was not the case because one of the purposes of the STO was, as noted above, the protection of members of the public, as well as the protection of LM herself. In addition to this, the Tribunal found that the STO is a treatment regime, not a punishment.

## **Conclusion**

This case raises issues in relation to the scope of human rights and the contradictions which will necessarily exist between statutory provisions such as s 191 of the *Disability Act* and the *Charter*. It is ultimately the case that decisions made under many of these provisions will be considered under the test for demonstrably justified and reasonable limits provided in s 7 of the *Charter*.

*David Drummond is an Articled Clerk at DLA Phillips Fox*

## Comparative Law Case Notes

### Lack of Shelter for Homeless People may Breach Right to Life, Liberty and Security

*Victoria (City) v Adams* 2008 BCSC 1363 (14 October 2008)

The Supreme Court of British Columbia in Canada has made declarations that certain by-laws, enacted by the City of Victoria, violated s 7 of the *Canadian Charter of Rights and Freedoms* as they deprived homeless people of their right to life, liberty and security. The effect of this declaration was that those by-laws are of no effect insofar as they prevent homeless people from erecting temporary shelters.

#### Facts

The defendants, including Ms Natalie Adams, were a group of homeless people who erected a 'tent city' in a park maintained by the plaintiffs, the City of Victoria. Relying on two by-laws which prevented loitering and taking up a temporary abode in public parks, the City commenced proceedings by way of a civil injunction to enforce the City's by-laws and remove the 'tent city' and sought a declaration that the 'tent city' contravened the relevant by-laws.

The defendants opposed the application and sought to raise the *Canadian Charter* as a defence, claiming that the City's by-laws prohibiting sleeping overnight in any public space in the City violated the defendants' rights pursuant to ss 2(b), 7, 11(d), 12 and 15 of the *Canadian Charter*. The defendants also claimed that the by-laws could not be justified pursuant to s 1 of the *Canadian Charter*.

It was accepted by the parties that the practical effect of the City's by-laws was that homeless people were only permitted to create shelter for themselves using simple, individual, non-structural weather repellent covers that could be removed when the person was awake, and the by-laws prevented the erection of a temporary 'abode' which may consist of a tent, tarps that are attached to trees or otherwise erected, boxes or other structures.

#### Decision

The Supreme Court of British Columbia made declarations that these by-laws violated s 7 of the *Canadian Charter* as they deprived homeless people of life, liberty and security of the person in a manner not in accordance with the principles of fundamental justice.

In reaching this conclusion, the Court made the following factual findings:

- there are at present more than 1,000 people sleeping rough in the City;
- the City has approximately 104 shelter beds, expanding to 326 in extreme weather conditions. Consequently, hundreds of people have no option but to sleep outside in the public spaces of the City;
- the by-laws do not prohibit sleeping in public spaces, but do prohibit homeless people from erecting any form of overhead protection including a tent, a tarp strung up to create a shelter or a cardboard box, even on a temporary basis;
- the expert evidence establishes that exposure to the elements without adequate protection is associated with a number of significant risks to health including the risk of hypothermia, a potentially fatal condition; and
- the expert evidence also establishes that some form of overhead protection is part of what is necessary for adequate protection from the elements.

The Court found that the by-laws breached s 7 of the *Canadian Charter* which provides that 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'

The Court found that the by-law breached the right to life as the ability to provide oneself with adequate shelter is a necessity of life that falls within the ambit of the s 7. In particular, the Court relied on the expert evidence of a doctor and a survival expert, which established that exposure to the elements without adequate shelter, and in particular without overhead protection, can result in a number of serious and life threatening conditions. The Court found that the by-laws prohibiting the erection of such overhead protection as is necessary to protect an individual from this risk breached s 7 of the *Canadian Charter*.

The Court accepted the defendants' submission that creating shelter to protect oneself from the elements is a matter critical to an individual's dignity and independence. The Court found that City's intrusion in this process interfered with the individuals' choice to protect themselves and was a deprivation of liberty within the scope of s 7.

The Court also found that the by-laws interfered with a person's right to security, both physical and psychological. It was particularly relevant to this case that the City did not have sufficient shelter spaces for the homeless, effectively forcing them to find shelter on public property. The Court found that City's by-law constituted a deprivation of the security of the person.

The City argued that, even if the by-laws infringed on a homeless person's right to life, liberty and security, they were otherwise consistent with the principles of fundamental justice, and therefore, s 7 of the *Canadian Charter* was not breached. Canadian case law has established that this process requires a consideration of the fairness of the balance struck between the interests of the individual and the protection of society. The Court concluded that, in this instance, the by-laws were arbitrary and overbroad and therefore inconsistent with the principles of fundamental justice. In reaching this conclusion, the Court noted that many of the reasons for making the by-laws related to homeless people sleeping in parks, and not specifically to the erection of shelters. Further, the by-laws could have been less restrictive in their operation, for example, by limiting the areas of the City's parks where people could erect shelters, or by limiting the times that people could erect shelters.

The Court then considered whether the by-laws were justifiable under s 1 of the *Canadian Charter* which provides that 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

The Court found that although the purpose of the by-law, to protect public parks, was an important objective, by restricting the type of shelter that homeless people were permitted to erect, the by-laws were not rationally connected to their stated objective. Also, the Court found that they did not meet the proportionality requirement of 'minimum impairment'. Rather, by restricting all 'overhead protection including that which could be taken down and removed each morning, the by-laws impaired the rights of homeless people to a greater degree than was required to meet their objectives'.

The Court also concluded that the impact of these by-laws on homeless people would be extensive. The Court again referred to the expert evidence, finding that the prohibition against overhead protection put the lives and health of homeless people at risk. The Court concluded that the impact of these by-laws on the health of homeless people was disproportionate to the advantages in protecting public spaces and that they were not able to be justified as a reasonable limit on the rights set out in the *Canadian Charter*.

#### **Relevance to the Victorian Charter**

This decision may assist in the interpretation of ss 9 and 21 of the Victorian *Charter of Human Rights and Responsibilities Act 2006*. Section 9 of the *Charter* deals with the right to life, providing that 'Every person has the right to life and has the right not to be arbitrarily deprived of life.' Section 21 of the *Charter* contains provisions relating to the right to liberty and security of person. Section 21(1) provides that 'Every person has the right to liberty and security' and s 21(3) provides that 'A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law'. The remainder of that provision relates to arrest, detention or being held in custody. Although there are differences in the relevant Victorian and Canadian provisions, this case is likely to influence the interpretation of ss 9 and 21 in Victoria.

The decision is available at: <http://www.Courts.gov.bc.ca/Jdb-txt/SC/08/13/2008BCSC1363.htm>.

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#### **Right to Life and Access to Medical Treatment**

*R (on the application of Ross) v West Sussex Primary Care Trust* [2008] EWHC B15 (Admin) (10 September 2008)

This case deals with the difficult issue of determining funding priorities in the provision of health care. In this matter, the England and Wales High Court held that the decision of a health service not to fund a

relatively new cancer drug was unreasonable. The Court held that where a decision of a public authority involves a substantial interference with human rights, substantial justification is required before a court will be satisfied that the decision is reasonable.

### **Facts**

Colin Ross had a multiple myeloma that required treatment with a relatively new cancer drug, Lenalidomide. It was accepted that without this treatment, Mr Ross had a limited life expectancy. However, Lenalidomide was not a treatment that was funded by the West Sussex Primary Care Trust.

Mr Ross applied to the Trust for funding of his treatment with Lenalidomide under the Trust's Individual Cases Policy ('ICP'), which allowed for non-funded treatment to be funded in exceptional circumstances. Under the ICP, three factors were to be considered when determining such applications: the exceptionality of the patient's situation; the clinical efficacy of the treatment; and the cost effectiveness of the treatment.

The cost of this treatment per 'Quality Adjusted Life Year' was calculated to be £28,980 (although the Court held that this figure was an overestimate).

The ICP provided guidance on the meaning of 'exceptionality'. It indicated that a patient is not exceptional if they are representative of a group of patients, as opposed to having an 'unusual or unique clinical factor'. The Trust considered Mr Ross to fall into this category of patients and refused to fund his Lenalidomide treatment.

Mr Ross sought judicial review of the Trust's decision to refuse funding of his Lenalidomide treatment.

### **Decision**

Judge Grenfell indicated that 'each Trust is entitled, provided it does so rationally, logically and lawfully, to set its own policy for making such difficult decisions' about exceptional funding of medical treatment. His Honour recognised that the allocation of resources 'will involve difficult and agonizing judgments as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients.'

Judge Grenfell applied the following test to determine whether the refusal of the Trust was lawful.

The Trust has acted irrationally if it reached a conclusion which no reasonable authority could have made; the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable; the Courts must subject their decision to anxious scrutiny because the Claimant's life is at stake.

His Honour held that the ICP was unlawful because patients were automatically disqualified under the ICP if they could be likened to another patient, so the requirement was one of uniqueness rather than exceptionality. In a case such as Mr Ross's, Judge Grenfell considered it is impossible to show uniqueness because there can always be another comparable patient. Judge Grenfell therefore held that 'the decision to refuse funding on the ground of exceptionality was logically flawed and on the evidence before the panels ought to have been upheld on an ordinary reading of the term "exceptional"'.

His Honour accepted that clinical efficacy and cost effectiveness are considerations that should be taken into account. However, if a patient can demonstrate that their case is exceptional, then the Trust should take a less restrictive approach to the issue of cost effectiveness, particularly if the treatment sought would extend the patient's life. His Honour also considered that the Trust miscalculated the cost effectiveness of the treatment.

His Honour considered the funding requirements of exceptionality, cost effectiveness and clinical efficacy to be met in Mr Ross's case. His Honour quashed the decision on the basis that 'the decision of the Trust was one which no reasonable authority could have made'.

### **Relevance to the Victorian Charter**

The right to life is protected by s 9 of the *Charter*. This provision is modelled on art 6(1) of the *ICCPR* and imposes a positive obligation on the State to adopt measures to ensure that the right to life is protected, respected and fulfilled. The right to life has generally been interpreted broadly by international courts and tribunals, given the supremacy of this right and its relationship with all other human rights and fundamental freedoms.

It may be argued that the right to life subsumes the right to access life-saving medical treatment. However, there will be instances where the refusal to provide exorbitantly expensive medical treatment will be a justified limitation on the right to life. For example, in a decision regarding the provision of kidney dialysis treatment, the South African Constitutional Court has confirmed that the right to life does not always bestow the right to 'evade death': *Thiagraj Soobramoney v Minister of Health (Kwazulu-Natal)* (Constitutional Court of South Africa, 1997); see also *Minister of Health and Others v Treatment Action Campaign and Others (1)* (Constitutional Court of South Africa, 2002).

Nonetheless, *R (on the application of Ross) v West Sussex Primary Care Trust* supports the position that any decision of a public authority that interferes with the right to life, or which significantly interferes with any other right, must be carefully considered and clearly justified – even if the treatment would cost tens of millions of dollars.

The decision is available at <http://www.bailii.org/ew/cases/EWHC/Admin/2008/B15.html>.

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### Treatment of Prisoners with Mental Illness

*Renolde v France* [2008] ECHR 5608/05 (16 October 2008)

On 16 October 2008, the European Court of Human Rights held that the suicide of a mentally ill prisoner in France was attributable to the authorities' failure to provide adequate medical care. This failure was a breach of the deceased's right to life and right to be free from inhuman or degrading treatment.

#### Facts

Joselito Renolde was arrested for assault on 12 April 2000 and remanded in prison. On 2 July 2000, he attempted suicide. He was treated by a Rapid Crisis Intervention Team after he reported hearing voices, who reported:

Patient who made an SA [suicide attempt] by cutting his forearm with a razor. This act took place in the context of a hallucinatory delusional state observed since yesterday by the prison duty staff. On being interviewed, the patient displays incoherent, dissociative speech, a listening attitude, mentions verbal hallucinations, [illegible], persecutory delusional statements ... The patient mentions his psychiatric history, says that he has already been admitted to hospital and has already taken Tercian ... Conclusion: acute delirious episode.

The Crisis Team prescribed antipsychotic medication, and Mr Renolde was referred to the Regional Medical and Psychological Service ('SMPR'). He was placed in a cell under special supervision, and seen by the SMPR ten times in the next eighteen days. He was also given his medication every few days by the SMPR.

On 4 July, Mr Renolde threatened a trainee warder and threw a chair in her direction. An investigation into the incident found that Mr Renolde was a 'very disturbed prisoner who had already wanted to go to the SMPR at 7.50 am, received by the SMPR in the afternoon'. As to the action to be taken, the report stated: 'Very disturbed prisoner, being monitored by the SMPR, will need to go before the disciplinary board.'

Mr Renolde faced a disciplinary board hearing on 5 July, and was penalised with 45 days in the punishment cell, where he was detained for 23 hours a day without any television or other activities. This was the maximum penalty allowed.

On 12 July, Mr Renolde's lawyer and family requested a review of his punishment, on the basis of his psychological illness. On 20 July 2000, while this request was being processed by the authorities, Mr Renolde hanged himself.

Mr Renolde's sister made application to the European Court of Human Rights, alleging breaches of arts 2 (right to life) and 3 (protection from torture or ill-treatment) of the *European Convention of Human Rights*.

#### Decision

##### Right to life

The Court reiterated that the right to life requires the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its

jurisdiction. The Court then determined whether, given the circumstances of the case, the State did all that could have been required of it to prevent Mr Renolde's life from being avoidably put at risk.

The Court acknowledged that the State's obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind 'the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources.'

However, the Court concluded that the authorities knew that Mr Renolde was suffering from psychotic disorders capable of causing him to commit acts of self-harm. The Court suggested that the authorities, faced with a prisoner known to be suffering from serious mental disturbance and to pose a suicide risk, should 'take special measures geared to his condition to ensure its compatibility with continued detention'. In this respect, the Court stated that, 'in the case of mentally ill persons, regard must be had to their particular vulnerability'. The Court considered that, by failing to consider admitting Mr Renolde to a psychiatric institution and failing to supervise him taking his medication, the State had failed to satisfy its positive obligation to take preventive operational measures to protect an individual whose life is at risk.

Lastly, the Court has had regard to the fact that, three days after his suicide attempt, the applicant was 'given the most severe disciplinary penalty, namely forty-five days' detention in a punishment cell'. The Court observed that 'placement in a punishment cell isolates prisoners by depriving them of visits and all activities, and that this is likely to aggravate any existing risk of suicide'. The Court reiterated that:

the vulnerability of mentally ill persons calls for special protection. This applies all the more where a prisoner suffering from severe disturbance is placed, as in the instant case, in solitary confinement or a punishment cell for a prolonged period, which will inevitably have an impact on his mental state, and where he has actually attempted to commit suicide shortly beforehand.

#### Inhuman or degrading treatment

The Court reiterated that ill-treatment must attain a minimum level of severity if it is to fall within the scope of art 3:

The assessment of this minimum level is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.

In the context of detained persons, the Court emphasised the right of all prisoners to conditions of detention 'which are compatible with human dignity, so as to ensure that the manner and method of execution of the measures imposed do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention'.

The Court further observed that measures to protect against ill-treatment must, in the case of mentally ill persons, 'take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment'.

The Court concluded that Mr Renolde's severe penalty may well have threatened his physical and moral resistance, particularly given his mental illness, and considered that such a penalty is not compatible with the standard of treatment required in respect of a mentally ill person and constitutes inhuman and degrading treatment and punishment.

#### **Relevance to the Victorian Charter**

It should be noted that arts 2 and 3 of the *Convention* are substantially similar to ss 9 and 10 of the Victorian *Charter*.

The *Renolde* case continues to develop a long line of international human rights jurisprudence which imposes positive obligations on States to protect the lives of citizens (see eg *LCB v United Kingdom*, 9 June 1998, § 36, Reports 1998 III; *Tanribilir v Turkey* [2000] ECHR 21422/93; *Keenan v United Kingdom*, [2001] ECHR 27229/95; *Ataman v Turkey* [2006] ECHR 46252/99). The onus on States is to do all that could have been required of them to prevent a citizen's life from being avoidably put at risk, so long as this does not impose an impossible or disproportionate burden.

This obligation is now imposed on the State of Victoria, and compels public authorities to do all that could have been required of them to prevent a person's life from being put at risk – even if that risk is

self-imposed. The *Renolde* case, and the line of authorities which it joins, compels public authorities to take these steps to protect lives.

Additionally, the *Renolde* case reiterates that punishments, including imprisonment and other forms of detention, must be compatible with human dignity. This requires that the manner and method of execution of the measures do not subject the detainee to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. This case, and previous international jurisprudence, states that detainees' health and well-being has to be adequately secured, given the practical demands of imprisonment.

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### Obligation to Investigate Allegations of Ill-Treatment

*Kalamiotis v Greece*, Communication No 1486/2006, CCPR/C/93/D/1486/2006 (5 August 2008)

The Human Rights Committee has found that the State party breached art 2(3) (adequacy of remedy), when read with art 7 (torture and other prohibited treatment), of the *ICCPR*, by failing to ensure that complaints about mistreatment by police officers were adequately and satisfactorily investigated by competent authorities.

#### Facts

The author, a Greek national of Romani ethnic origin, alleged contraventions by Greek police of arts 2(3) and 7, art 2(1) and art 26 of the *ICCPR* in a communication under the First Optional Protocol to the *ICCPR*. Only arts 2(3) and 7 (read together) of the *ICCPR* were considered by the Committee on its merits, the author's other claims being found inadmissible or irrelevant.

The author claimed that his rights under arts 2(3) (inadequate remedy) and 7 (torture and inhuman or degrading treatment) of the *ICCPR* were violated as a result of threats made against him; his beating and arrest; and the subsequent lack of meaningful remedy offered by the police after he made a formal complaint. The State party denied the author's version of the facts and implied that the author's failure to bring his complaints immediately was evidence that the complaints were false.

The State party argued that the communication was inadmissible for the following reasons:

1. the author had failed to exhaust domestic remedies in a timely and consistent manner; and
2. the evidence in the case did not 'show the minimum level of cruelty required to establish a violation of article 7 of the Covenant.'

#### Decision

The Committee expressed views on the following issues regarding admissibility:

- There are no fixed time limits for the submission of communications under the Optional Protocol. The delay in bringing the communication is not a ground supporting a finding of inadmissibility but should properly be considered when considering the merits of the case.
- With regard to the author's failure to exhaust domestic remedies, the Committee noted that the State party did not identify any additional remedies which should have been sought prior to the author initiating his communication.

On the merits of the case, the Committee expressed the following views:

- The Committee found that the author's rights had been violated, reading art 2(3) in conjunction with art 7. The Committee reiterated its jurisprudence that complaints against maltreatment must be investigated promptly and impartially by competent authorities, and that expedition and effectiveness are particularly important in the adjudication of cases involving allegations of torture and other forms of mistreatment.
- The only investigation conducted after the complaint was a preliminary police investigation - a forum where the author was not permitted to participate in the inquiry and 'the concerned police officer's statement was used as the principal basis for coming to a decision.'
- The Committee declined to determine the issue of a possible violation of art 7 on its own, having dealt with it in relation to art 2(3).

### **Relevance to Victorian Charter**

This view is significant, as the Committee declined to consider whether there was a 'possible violation' of art 7, having already found that there had been a breach of art 2(3) when read with art 7. This view may lead to the assumption that art 2(3)(a) does not relate to situations where 'rights or freedoms as herein recognised *are* violated' (emphasis added), but rather is engaged when rights are *alleged* to have been violated. The Committee declined to find that a breach of art 7 had occurred on its own, and made no reference to whether it considered a breach of art 7 had occurred at all on the merits of the Communication. The Committee was concerned more with the lack of opportunity afforded the author to have his allegations given a fair and impartial hearing by the State. As a result, the factual basis for establishing an art 2(3) claim, read together with art 7, was simply that a complaint had been made and not adequately heard, rather than also needing to establish that an act falling within the scope of art 7 had occurred.

Section 38 of the Victorian *Charter* requires that a public authority must not act in a manner that is incompatible with a human right, or fail to give proper consideration to a human right. It is drafted differently to the *ICCPR*, and arguably does not require that a breach of a particular human right is proven - merely that the action of the public authority is incompatible with a human right. This view of the HRC appears to bring the *ICCPR* closer to the application of the *Charter*.

*Rachel Guthrie is a member of the Mallesons Stephen Jaques Human Rights Law Group*

### **Court-Ordered Involuntary Medical Examination Violates the Right to Privacy**

*MG v Germany*, Communication No 1482/2006, CCPR/C/93/D/1482/2006 (2 September 2008)

The Human Rights Committee has held that a court-ordered medical examination to assess the competency of a party to participate in legal proceedings violated her right to privacy under art 17 of the *ICCPR*. The order violated the *ICCPR* because the German court based its decision solely on the author's procedural conduct and written submissions and did not hear from the author personally before making the order.

#### **Facts**

The Ellwangan Regional Court, without hearing or seeing the author in person, ordered her to undergo a medical examination to assess her capacity to take part in proceedings. The Court reasoned that her behaviour raised doubts about her capacity to participate in proceedings, particularly that the author:

- despite having legal representation, prepared extensively for the proceedings and made frequent and voluminous submissions to the court without sufficient cause and to the detriment of her health;
- forwarded her submissions to the presiding judges of various superior courts, the Minister for Justice and the European Court of Human Rights which indicated she was under stress and over-estimated the importance of the proceedings; and
- appealed every decision that she considered disadvantageous even where there were no comprehensible reasons for appeal.

The Regional Court considered the order was required to protect the 'proper functioning of the judiciary' and the author's mental health. The Federal Constitutional Court upheld this ruling, but failed to provide reasons.

The author claimed that the order amounted to degrading treatment and unduly interfered with her right to privacy, in violation of arts 7 and 17 of the Covenant. She further claimed that the absence of an oral hearing prior to issuing the order violated her right to a fair trial under art 14(1) of the Covenant.

#### **Decision**

The author's claims under arts 7 and 14 of the *ICCPR* were not sufficiently substantiated, and hence held inadmissible under art 2 of the Optional Protocol.

The Committee observed that to order a person to undergo a non-consensual medical examination interferes with their right to privacy and may amount to an unlawful attack on their honour or reputation under art 17 of the *ICCPR*. However, the Committee also noted that medical interference is permissible under article 17 if it is:

- provided for by law;
- made in accordance with the provisions, aims and objectives of the Covenant; and
- reasonable in the particular circumstances of the case.

The Committee held that the failure of the court to hear from or see the author in person and to base the decision purely on the author's procedural conduct and written submissions was unreasonable. The author's rights under art 17 were violated because the interference with her rights was disproportionate to the end sought, and hence 'arbitrary' for the purposes of art 17.

#### **Relevance for the Victorian Charter**

The case canvasses the tension between the need to ensure that the judicial process is unhindered by the behaviour of persons who are not competent to act, and the right of individuals not to have their reputation or honour questioned in proceedings to which they are a party. Section 13 of the Victorian Charter also protects a person from having his or her privacy interfered with or reputation attacked. An order for psychological assessment casts doubt on a party's capacity to act rationally or reasonably, undermining the credibility - and hence reputation - of the party to whom it is directed and the legitimacy of his or her submissions.

Physical evidence may give the court an apprehension of a party's incapacity to act. However, precisely what is sufficient physical evidence to justify an order for medical examination is unclear. Requiring a court to hear from a person prior to making an order for psychological assessment provides added protection for the party concerned: the Committee has effectively held that the relevant tribunal must witness a demonstration of the relevant person's psychological capacity to participate in the proceedings before making an order that casts doubt on their credibility, and their rationale for maintaining those proceedings.

The requirement to hear from a party before ordering assessment of his or her competence to act in legal proceedings ensures the cautious application of an order that carries with it legal and evidentiary doubt as to a person's capacity to participate in proceedings concerning them.

*Adrienne Lyle is a member of the Mallesons Stephen Jaques Human Rights Law Group*

#### **Right to Liberty and Periodic Review of Detention**

*R (on the application of George Loch) v Secretary of State for Justice* [2008] EWHC 2278 (Admin) (02 October 2008)

The England and Wales High Court (Administrative Court) has held that the Secretary of State's decision that the applicant's next Parole Board review should take place approximately 18 months after the last one, amounted to a violation of art 5(4) of the *European Convention on Human Rights* which entitles a person to challenge the lawfulness of their detention or deprivation of liberty.

#### **Facts**

This case concerned a prisoner, Mr Loch, who was sentenced to life imprisonment on 10 January 2003 after pleading guilty to robbery and possession of an imitation firearm. In passing sentence, the Recorder specified the period of detention which Mr Loch had to serve before his case could be referred to the Parole Board was one of five years less the time he had spent on remand.

On 29 August 2007, Mr Loch's tariff expired and he became entitled to periodic Parole Board Reviews to assess whether it was still necessary for the public's protection that he be confined. On 26 November 2007, the Parole Board reviewed Mr Loch's case and decided to transfer him to open conditions because he had made good progress and achieved a good understanding of the origins of his offending behaviour and its impact on his victims. Despite Mr Loch's good progress, the Parole Board declined to direct his release claiming that he required further testing in open conditions to assess whether or not the lessons he had learnt could be applied in practice.

On 21 January 2008, the Secretary of State informed Mr Loch that he had considered the Parole Board's recommendation and agreed to transfer Mr Loch to open conditions. He also informed Mr Loch that his next Parole Board hearing would take place on 1 June 2009 (approximately 18 months later).

## Decision

The applicant claimed that his art 5(4) rights would be violated if the next Parole Board review took place more than one year after his last review were completed. Article 5(4) provides that: 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'.

Mr Loch submitted that although there is no strict obligation to hold a Parole Board review one year after the last review, the Secretary of State's decision was unlawful because a gap of 18 months is excessive in the circumstances. The applicant relied heavily on the acknowledged fact that he was making progress and he also submitted that insufficient justification had been identified by the Secretary of State for deferring the next Parole Board hearing for 18 months.

The Secretary of State argued that the 18 month period was justified because each case is considered on its individual merit and due to Mr Loch's circumstances, including his serial offending in the past, this time period was appropriate. Furthermore, it was argued that there is no presumption that a period greater than one year breaches art 5(4).

The Court noted the importance of speedy periodic reviews by the Parole Board to eliminate, as far as reasonably practicable, the possibility of a prisoner remaining in detention when there is no longer a legal justification for the detention. The Court highlighted that the European Court of Human Rights has declined to prescribe a maximum time period between reviews to comply with art 5(4), and thus the question of whether periods comply with the requirement for speedy decisions must be determined in light of the circumstances of each case.

In this case, the Court emphasised the fact that Mr Loch had made good progress and that the Parole Board had not suggested more than 12 months would be needed to conduct further testing on Mr Loch in open conditions. Based on the circumstances of this case, the court held that the Secretary of State's decision to hold the next Parole Board hearing 18 months after the previous one, violated art 5(4).

## Relevance to the Victorian Charter

This decision is significant for the application of s 21(7) of the *Charter*, which provides that 'any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must (a) make a decision without delay; and (b) order the release of the person if it finds that detention is unlawful'.

It is, however, important to note that the Parole Board is currently exempted from the requirement to comply with the *Charter* (s 38). This exemption is found in the *Charter of Human Rights and Responsibilities (Public Authorities) (Interim) Regulations 2007* (Vic). However, the exemption is set to expire on 31 December 2008, and when this occurs, the principles established in this case will need to be considered by the Parole Board.

The decision is available at <http://www.bailii.org/ew/cases/EWHC/Admin/2008/2278.html>.

Zara Cooper is a lawyer at Minter Ellison

## Right to Private Life and Best Interests of Child in Child Protection Matters

*RK and AK v United Kingdom* [2008] ECHR 38000(1)/05 (30 September 2008)

The European Court of Human Rights has held that a UK decision of a public authority to remove a child from its family, on the basis of an incorrect diagnosis, was not a breach of art 8 of the *European Convention of Human Rights* which provides for the right to respect for private and family life. Rather, the Court held that there was a breach of art 13, the right to an effective remedy, in that there was no adequate remedy at the national level for an incorrect diagnosis.

## Facts

In 2001, the parents of a two month old baby, M, brought a claim against a hospital and paediatrician regarding a wrong diagnosis in 1999 that led to their baby being put into care. The paediatrician had concluded that baby M had sustained a non-accidental injury (ie, an inflicted injury) after she was brought into hospital by her parents with a fractured bone. The paediatrician came to this conclusion based on interviews with the parents, however the mother could not speak much English, and an

interpreter was not provided at the interviews. M was not tested for brittle bone disease. Further interviews were held by the police and social workers, and a child protection conference was held. It was decided that the baby be placed under an interim care order until a second medical opinion could be obtained.

A few months later, whilst in care, M sustained another injury. Further tests were undertaken and she was diagnosed with brittle bone disease. She was released from care.

In 2001 the parents bought a claim for breach of their art 8 right to respect family life in that M was unjustifiably subject to care proceedings. They also claimed a breach of their art 13 right to a remedy, because no remedy was available in the UK for a violation of their rights.

### Decision

The Court first considered whether there was a breach of art 8, which provides that:

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

Both parties agreed that the interim care order interfered with the applicants' right to respect for their family life. The question was whether that interference was justified within the exceptions listed in part 2 of art 8. The Court found that the hospital had acted in accordance with the law for the protection of rights and freedoms of M.

The Court held that public authorities cannot be held liable for a mistaken medical and/or social welfare assessment that led to child protection measures, where there was a genuine and reasonable concern for the safety of the child in the circumstances. As brittle bone disease is extremely difficult to diagnose in small children, and the (later) testimony of the mother was not convincing even with an interpreter, the Court found that the authorities had acted reasonably in the circumstances. The Court held that there was no breach of art 8, as there were valid reasons for the authorities to take measures to protect M, and these measures were proportionate to the aim of protecting M.

The Applicants also claimed that there had been a breach of art 13 of the *Convention*, which provides that:

Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

The Court held that an avenue must be available at the national level for applicants who have an arguable claim that their rights under the *Convention* had been violated. The Court determined that there was an arguable case, and that as there was no avenue available at the national level to claim a violation of the rights under the *Convention*, there had been a breach of art 13.

### Relevance to the Victorian *Charter*

Section 17 of the *Charter* provides that families should be protected by society and the State and that children have the right to protection in their best interest.

This case indicates that where public authorities, as defined by the Victorian *Charter* and working in health, give meaningful consideration to the rights engaged by their decisions and where those decisions are proportionate to their legitimate and evidenced-based concerns, the decision will be lawful. This case also indicates the importance of human rights-based decision making procedures to ensure that where decisions are made which infringe a right, that decision is justified and proportionate.

The decision is available at

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=38000&sessionid=14916704&skin=hudoc-en>

*Sarah Mount is a lawyer with Minter Ellison*

## Right to a Fair Hearing Requires Duly Reasoned Judgment

*Aboushanif v Norway*, Communication No 1542/2007, CCPR/C/93/D/1542/2007 (2 September 2008)

The author, Mr Aboushanif, lodged a Communication under the First Optional Protocol to the *ICCPR* claiming that Norway had violated his rights under art 14(5) of the Covenant. Article 14(5) states that: 'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.'

### Facts

The Author was convicted in the Sarpsborg District Court of fraud and several breaches of the Norwegian Act on Value Added Tax and the Norwegian Accounting Act in relation to restaurants he owned. He was sentenced to 20 months prison and ordered to pay damages to the State revenue and social security offices (which he was also convicted of defrauding).

The Author claimed that his rights had been breached because the Court of Appeal denied his appeal against the conviction without disclosing the reasons for doing so. Section 321 of the Norwegian Criminal Procedure Act provides that an appeal may be 'disallowed if the court finds it obvious that the appeal will not succeed'. The only reason disclosed by the Court of Appeal for disallowing the appeal in accordance with s 321 of the Act was that it was obvious that the appeal would not succeed.

### Decision

A majority of the UN Human Rights Committee noted that the decision to reject the appeal was unanimous, and subscribed to by three professional judges, and that the decision was itself later appealed and subjected to the scrutiny of the Supreme Court, albeit only on procedural grounds.

The Committee noted its previous view in *Reid v Jamaica* (Communication 355/1989), in which it held that while States parties are free to set the modalities of appeal, compliance with art 14(5) of the Covenant requires a court to review substantially any conviction and sentence against which an appeal has been lodged.

The Committee held that the failure of the Court of Appeal to provide any substantive reason for finding that the appeal would not succeed

puts into question the existence of a substantial review of the author's conviction and sentence ... in the circumstances of the case, the lack of a duly reasoned judgment, even if in brief form, providing a justification for the court's decision that the appeal would be unsuccessful, impairs the effective exercise of the right to have one's conviction reviewed as required by article 14, paragraph 5, of the Covenant. (at paragraph 7.2)

Prof Ivan Shearer provided a separate opinion which sought to clarify the meaning of '[a duly reasoned judgment] even in brief form' in the views of the Committee majority. Prof Shearer was of the view that although art 14(5) 'does not require courts of appeal ... to state reasons at length', the Court of Appeal should have '[h]owever briefly stated ... indicate to the appellant the main reasons why the Court cannot entertain the appeal'.

### Relevance to Victorian Charter

Article 25(4) of the Victorian *Charter* states that '[a]ny person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law', which largely mirrors the wording of art 14(5) of the *ICCPR*.

The opinion of the Committee in *Aboushanif v Norway* may affect the interpretation of s 25(4) of the Victorian *Charter*. Like art 14(5) of the Covenant, the Victorian *Charter* does not specify any procedural requirements. However, applying the decision in *Aboushanif v Norway* to the interpretation of the Victorian *Charter* would suggest that implicit in the right to review by a higher court is the right to receive reasons for the rejection of an appeal. However, it seems that brief reasons, so long as they set out the main reasons for a decision on appeal, will be sufficient, and Victorian courts of appeal may not need to state their reasons at length.

*Lachlan McMurtrie is a member of the Mallesons Stephen Jaques Human Rights Law Group*

## HRLRC Policy Work

### Women's Rights: Centre urges Ratification of Optional Protocol to CEDAW

The *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* was tabled in parliament on 26 August 2008.

In a September 2008 submission to the Joint Standing Committee on Treaties, the Human Rights Law Resource Centre unreservedly supported Australia's accession to the Optional Protocol. In addition, the HRLRC emphasised that the Optional Protocol should be ratified in its entirety to ensure the full benefit of accession is realised. In a report tabled on 16 October 2008, the Joint Standing Committee recommended that Australia should become a party to the Optional Protocol without reservation.

The HRLRC considers that accession to the Optional Protocol would:

- complement and strengthen existing domestic anti-discrimination mechanisms;
- foster and promote analysis (and change where necessary) of discriminatory laws and practices;
- strengthen Australia's role within the international community;
- be consistent with the Australian Government's commitment to constructive engagement with the UN human rights system and to the harmonisation of domestic laws, policies and practices with international human rights standards;
- be consistent with the Australian Government's commitment to the promotion of equality and the rights of women; and
- enhance public awareness and understanding of the particular rights and fundamental freedoms of women.

The HRLRC further considers that the Optional Protocol can be implemented with relative ease within Australia's existing political and legal structures and is unlikely to subject the Australian Government to a flood of complaints and investigations.

The Centre's submission is available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under Policy Work>Domestic Submissions>Women's Rights: Australia Should Ratify OP-CEDAW – JSCOT Submission (Sept 2008).

### Legal Nature and Effect of Views of the UN Human Rights Committee

During its 92<sup>nd</sup> and 93<sup>rd</sup> sessions held in March and July 2008 respectively, the Human Rights Committee initiated the drafting of a new General Comment on States parties' obligations under the first Optional Protocol to the *ICCPR*.

The Committee has sought comments on the Draft General Comment from interested parties, in particular State parties to the *ICCPR*, UN specialised agencies and non-governmental organisations.

In October 2008, with the generous pro bono assistance of Mallesons Stephen Jaques, the Centre made a submission to the Committee recognising and affirming the importance of the individual communication process in ensuring effective protection for individuals who may have suffered a violation of rights afforded them under the Covenant.

The Centre's submission addresses the following areas considered in the General Comment:

- the obligation of States parties to cooperate with procedures;
- the force, nature and effect of the Committee's views; and
- interim measures.

The Centre supports the position taken in the General Comment that the Committee's views are 'not merely recommendatory'. Rather, the obligation to respect, reconsider and act in good faith in relation to Committee procedures and views forms an essential element of States parties' legal obligations under both the Optional Protocol and the *ICCPR*.

The Centre's submission is available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under Policy Work>International Submissions>Civil and Political Rights: Draft General Comment on OP-ICCPR (Oct 2008).

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

## HRLRC Casework

### Definition of 'Disability' under the *Disability Act 2006* (Vic)

With the pro bono assistance of Lander & Rogers, the Centre is assisting a client before VCAT on the question of how the *Charter* impacts on the proper interpretation of the definition of 'disability' under s 3 of the *Disability Act 2006* (Vic). The Department of Human Services has determined that the client's disorder, Asperger Syndrome, does not constitute a 'disability' for the purpose of the Act. As a result, the client is ineligible to receive disability support services.

The Centre considers the *Charter* rights to privacy, protection of families and children, and equality before the law, in conjunction with s 32(1) of the *Charter* (which requires that all legislation be interpreted consistently with human rights), might impact on the interpretation of the definition of 'disability' under the Act.

The Centre advocates that an inclusive and contextual interpretation of 'disability' should be adopted.

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

### Provision of Medical Treatment for Rare Disease

The Centre is providing advice to the mother of a child who suffers from a rare genetic disease. There is government funded medical treatment available to treat persons who suffer the physical component of this disease. However, the child is being denied this government funded treatment because he also has an intellectual impairment.

This child is currently receiving treatment thanks to the generosity of a pharmaceutical company. If the child were to stop receiving this free treatment, it is expected that he would not live for more than 12 months. The lack of long term certainty regarding the provision of medical treatment to this child is of significant concern.

With the pro bono assistance of Freehills, the Centre is considering the various human rights issues involved in this matter, including the rights to life, privacy, non-discrimination, protection of families and children and the right of the child to enjoy a full and decent life, with the necessary assistance required to do so, as required by the *Convention on the Rights of the Child*.

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

## Seminars and Events

### 'Dignity, Fairness and Good Government: The Role of a Human Rights Act' with Lord Bingham, former Senior Law Lord of the United Kingdom

**Date:** 5.45 for 6.00pm, Tuesday, 9 December 2008

**Venue:** Mallesons Stephen Jaques, Level 50, 600 Bourke St, Melbourne

**Cost:** \$25 / \$15 concession

**RSVP:** By 2 December 2008 using Booking Form at [www.hrlrc.org.au](http://www.hrlrc.org.au) under 'Seminars and Events'

Lord Bingham of Cornhill retired after 8 years as Senior Law Lord of the House of Lords, the highest judicial office in the United Kingdom, in September 2008. Described recently by *The Times* as 'the pre-eminent lawyer of his generation with a brilliant, incisive mind', Lord Bingham is a leading human rights jurist. His landmark rulings under the *Human Rights Act 1998* (UK) and the *European Convention on Human Rights* have contributed significantly to promoting and protecting fundamental rights and freedoms and the rule of law in the UK and beyond.

### National Access to Justice and Pro Bono Conference

**Date:** 14-15 November 2008

**Venue:** Sydney Masonic Centre, 66 Goulbourn St, Sydney

**Cost:** \$380 for community organisations, \$440 (early bird before 30 Sept), \$660 (after 30 Sept)

This conference, jointly convened by the Law Council of Australia and the National Pro Bono Resource Centre, will discuss issues relating to access to justice, human rights, the rule of law and pro bono practice.

Key confirmed speakers include: the Hon Rob McClelland MP, Attorney-General for Australia; Robin Knowles CBE QC, Chairman of the England and Wales Bar Pro Bono Unit; Ron Merkel QC; and the Hon Jelena Popovic, Deputy Chief Magistrate of Victoria.

For further information, see <http://www.a2j08.com.au/index.html>.

### Human Rights and Comparative Disability Law

As part of its 'Practising Law in the Public Interest' program, La Trobe Law School is offering an intensive subject on 'Human Rights and Comparative Disability Law' on 4-5 and 8-10 December 2008.

The subject will be taught by Professor Marcia Rioux, Director of the York Institute of Health Research and Graduate Director of the Program in Critical Disability Studies, and will examine recent developments in international and comparative disability law.

Classes will be held at La Trobe University's City campus, 215 Franklin Street, Melbourne.

For further information, contact the Academic coordinator, Assoc Prof Lee Ann Bassler on 9479 2171 or at [l.basser@latrobe.edu.au](mailto:l.basser@latrobe.edu.au).

## 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:

- Phoebe Knowles and Rachel Ball, 'My Body: My Right', *Herald Sun* (Melbourne), 9 October 2008
- Melanie Schleiger and Hugh de Kretser, 'Victorian Prisoners Deserve Decent Treatment', *The Age* (Melbourne), 3 October 2008

### Victorian Charter of Human Rights Train-the-Trainer Materials Online

With the support of the Victoria Law Foundation, the Centre has developed an online package of materials to equip lawyers to educate workers in community organisations about the *Charter* to:

- understand human rights and how they are protected in the *Charter*;
- identify relevant human rights in real life scenarios;
- understand how the *Charter* can be used as an advocacy tool for the empowerment of clients and the achievement of social justice; and
- understand what organisations must do to comply with the *Charter*.

The materials include:

- Presenters' Manual
- PowerPoint Presentation
- 14 Case Studies (with Answer Guides included in the Presenters' Manual)
- 2 page Fact Sheet on the Rights in the Charter
- 20 Rights Specific Fact Sheets (which consider, in relation to each right: What does the right mean?; and How is the right relevant to my work?)
- 11 Themed Fact Sheets on: disability services; drug users; education; homelessness; mental health; older people; prisoners; public housing; rights in relation to the police; young people in the criminal justice system; and young people in care.

The materials are available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under Victorian Charter of Human Rights and Responsibilities>Train-the-Trainer Program.

## Foreign Correspondent

### Developments at the UN and in International Human Rights Law

#### Human Rights Council concludes 9th Session

From 8 to 24 September, the Human Rights Council met for its 9<sup>th</sup> Session. The highlights of the 9<sup>th</sup> Session included the adoption of a resolution highlighting the ongoing human rights concerns in the Sudan (controversially re-worded at the last minute to make it much weaker and remove references to violations of human rights), a resolution on transitional justice (the first since the former Commission on Human Rights addressed this topic back in 2005, reflecting new developments such as the UN Peace Building Commission), and the appointment of a new Independent Expert on the issue of human rights and safe drinking water (Mrs Catarina de Albuquerque from Portugal) which marks a great progression in the development of this important human right.

The Council also considered a number of particular country situations, reviewing the mandates of the experts appointed to report on the implementation of human rights in Burundi, Liberia, Cambodia and Sudan. These Special Rapporteurs play an important role in raising awareness about human rights issues in the countries they are mandated to report on, and they provide many recommendations to the governments on how to improve their human rights records. It was decided to extend the mandate of the Special Rapporteur on the situation of human rights in Cambodia, although the mandate on Liberia was terminated, and the expert mandated to focus on Burundi was asked to continue until an independent national human rights commission is established. The mandate on Sudan was continued for a limited period until June 2009 only. The move to discontinue or shorten the mandates of country-specific Rapporteurs reflects the trend in the Human Rights Council to shy away from directly identifying and shaming particular countries for their human rights performance.

Another interesting point raised by the Deputy High Commissioner on the final day of the Council Session was that the Office of the High Commissioner for Human Rights is looking into the possibility of permanent webcasting for various human rights mechanisms. This would make a huge difference to transparency and accountability of the UN system – making it possible for people around the world to see what their governments are saying in the UN, and enabling those local advocates who are unable to afford the expense of coming to Geneva to keep involved with what's going on. For those who are interested and haven't already subscribed, the Human Rights Council is already webcast live when it is in session, and the archives are freely available at [www.un.org/webcast/unhrc/index.asp](http://www.un.org/webcast/unhrc/index.asp).

#### UN General Assembly

In New York, the 3<sup>rd</sup> Committee of the General Assembly, the key body responsible for human rights issues, is meeting. During the approximately 2 months that it meets, the 3<sup>rd</sup> Committee is expected to adopt nearly 60 resolutions. As usual, controversial resolutions include the resolution on the death penalty. Singapore has already highlighted in the Human Rights Council its opposition to the 'imposition of foreign values' this resolution represents, and the USA is another country which traditionally votes against. Like in the Human Rights Council, country-specific resolutions are often problematic also. A number of Special Rapporteurs and Independent Experts who have been newly appointed by the Human Rights Council in 2008 will present their first reports to the General Assembly, which will be interesting as, given the short time frames between appointment and reporting, these will likely focus on setting the agendas for the work they intend to undertake during their mandates. One expected piece of good news is that by the end of October it is hoped the 3<sup>rd</sup> Committee will have approved the text of the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, bringing this new mechanism one step closer to being adopted by the plenary of the GA on Human Rights Day, 10 December 2008.

#### First Meeting of the Expert Mechanisms on the Rights of Indigenous Peoples

In June 2008, the 5 independent experts were appointed to the new expert mechanism focusing on the rights of indigenous peoples, and in early October these experts met for the first time to commence their work. Indigenous peoples' representatives claimed the historic first meeting was a success, with governments, Indigenous peoples and others participating in the discussions, and widely supporting the 5 Indigenous experts appointed to lead this mechanism. Although most of the time in this first session was spent agenda setting and finalizing the methods of work, it is hoped that this body will play an

important role in the future in promoting the concerns of Indigenous peoples in throughout the human rights system.

### **Preparatory Committee for Review of the Durban World Conference Against Racism**

From 6 to 17 October, the second session of the Durban Review Conference Preparatory Committee was conducted, against the same controversy and confusion that marred the first session. The Durban Review Conference will be held in April 2009 in Geneva, under the banner 'United Against Racism: Dignity and Justice for All'. The Preparatory Committee meets several times in the lead-up to discuss the details of what will happen in April. Essentially, the aim of the Durban Review Conference is to review progress and assess the level of implementation of the Durban Declaration and Programme of Action, for example, through discussing best-practice examples, and to promote the universal ratification of the *International Convention on the Elimination of All Forms of Racial Discrimination*. The aim is that the Review Conference will strengthen existing mechanisms and identify concrete measures and initiatives for combating and eliminating racism – given the very concept of racism is controversial for many countries, agreeing on the framework of a possible outcome document detailing concrete initiatives is proving to be problematic.

### **Relationship between the Global Economic Crisis and Human Rights**

While the international media has been obsessed with reporting the downfall in the global economy, in the human rights world attention has not been so much on the daily changes in the sharemarket, but rather focusing on how this global economic crisis signals the failure of the market to ensure human rights are protected for all. For example, the Special Rapporteur on the Right to Housing, Raquel Rolnik, issued a statement on 23 October highlighting how, for instance, the spate of foreclosures on mortgages in the USA will spiral into an increase in evictions and homelessness. She states that it is time to realize that the market, even if properly regulated, cannot on its' own provide adequate housing. She also recommends that the overdependence upon home-ownership as the way of securing housing should be questioned, and the state must have more of a role to play in increasing public assistance for housing for those in need, especially at times like this.

On a more general note, the global economic crisis raises grave concerns from a human rights perspective. Economic recession usually intensifies the gaps between rich and poor, further dividing societies and communities. Recently in South Africa, violence has been inflicted upon migrant communities who are seen as to blame for the downturn in economic well-being of others. This, and other similar forms of discriminatory responses, could easily happen in many other countries, with tragic consequences for the equal enjoyment of human rights. While our governments are busy 'acting decisively' to fix the economy and protect us from erosions in our standards of living, we will need to be mindful to ensure equality in the protection of human rights, including the rights of those most vulnerable and affected by economic crises.

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## **If I Were Attorney-General...**

### **Homelessness and Human Rights**

If I were Attorney-General, I would grab the opportunity that the Government's Homelessness White Paper presents to introduce legislative reforms to protect the rights of people experiencing homelessness. I would not be deterred by the current global financial crisis, and I would build on the Prime Minister's rhetoric around homelessness to convince my cabinet colleagues that tackling the issue of homelessness is increasingly urgent and long overdue.

Through this process, I would make myself available to hear the experiences and ideas of people experiencing homelessness and to try and comprehend the rights violations they experience on a daily basis. I would listen to this group, who remain among the most marginalised and powerless in our country, and heed their words:

Our human rights don't exist. We are homeless and it (is) looked upon as our fault. Sometimes it is, other times not, but if someone keeps falling should we pick them up or walk straight over them, which is what's being going on too much. (participant in Homelessness Consumer Forum, June 2008)

On the basis of my consultation, I would move that a Federal Charter of Rights be introduced to try to counter the stigma, disadvantage and social exclusion that people homeless people experience everyday. My discussions with people homeless people have taught me that a Charter of this kind has no meaning unless it incorporates economic, social and cultural rights. Crucially, I would push for the right to adequate housing to be translated into legislation in Australia.

In addition to a Federal Charter of Rights, I would demand that a national Homelessness Act be introduced as a demonstration of my government's commitment to the goal of ending homelessness in Australia. This Homelessness Act would take a broad and holistic approach to solving homelessness through a human rights framework. Where a Federal Charter of Rights failed to do so, this legislation would enshrine the right to adequate housing as it appears in international law. In particular, it would provide for an enforceable right including a right to shelter and crisis accommodation as well as longer-term housing options. It would also impose obligations on my government to realise peoples' right to adequate housing and commit to a long-term and sustainable response to homelessness.

In addition to an overarching Homelessness Act, I would also move to implement a number of immediate legislative reforms necessary to ameliorate social and living conditions for people experiencing homelessness. I would work with my state-based colleagues to try and ensure similar reforms were introduced in all state jurisdictions across Australia.

Regrettably, discrimination on the basis of a persons' social status, particularly in the provision of accommodation and goods and services, remains an endemic problem across Australia. I would use the important research and recommendations coming out of the Victorian Equal Opportunity Act Review to demonstrate the need to outlaw discrimination on these bases at the Federal level. Although the recommendations coming out of the Victoria Review refer to homelessness rather than social status more broadly, I would make the case that, at a Federal level, equal opportunity legislation must protect people against discrimination on the basis of their homelessness, their unemployment or their receipt of Centrelink benefits. I would argue that, if my government is serious about 'social inclusion', this type of protection is a base level requirement, and then make sure that equal opportunity legislation is amended accordingly.

Working with my state-based counterparts, I would advocate for significant changes to state laws that impact in a negative or discriminatory way against people experiencing homelessness. At the top of my list would be the public space laws which came in for criticism by the then UN Special Rapporteur on the Right to Adequate Housing who, after his official country visit to Australia in 2006, concluded that 'laws such as begging laws, public drinking laws and public space laws, should be revised and amended to ensure that fundamental human rights are protected'. These laws have the effect of criminalising poverty and homelessness and do nothing to address the root problems which relate to a critical lack of adequate income and housing for many Australians.

Finally, I would work to keep my government accountable to ensure that the White Paper we are about to publish moves beyond the rhetoric, recognises the rights of homeless people, and takes concrete legislative and funding steps towards the elimination of homelessness in Australia.

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