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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.

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Opinion

The Role of Human Rights Charters in Addressing Disadvantage and Improving Public Services

Much recent debate regarding the *need* in Australia for legislative Charters of Human Rights fails to take into account the *value* added by such instruments.

Charters of Human Rights have great potential to enhance public services and address disadvantage. They can improve lives.

It is too early to evaluate whether the Victorian *Charter of Human Rights and Responsibilities* is achieving its lofty but worthwhile ambition of entrenching a 'democratic and inclusive society that respects the rule of law, human dignity, equality and freedom'. Looking further abroad, however, there is a growing body of evidence that the United Kingdom's *Human Rights Act 1998* – on which the Victorian Charter is modeled – has at least improved public policy and public services, particularly for marginalized and vulnerable groups.

The UK HRA, like the Victorian Charter and the ACT Human Rights Act, enshrines a body of rights that are derived from common sense principles of freedom, respect, equality and dignity. The right to life, to be protected from discrimination, to freedom from cruel or degrading treatment, to liberty, to a fair trial, to freedom of thought and expression, to respect for privacy and family life; these rights are fundamental to ensure that all people have the capacity and equal opportunity to fully participate in and contribute to our community.

Each of the UK, Victorian and ACT Acts establish a range of mechanisms to ensure that human rights are taken into account by parliament, the courts and public authorities when developing, interpreting and applying law and policy. The 'dialogue model' adopted by the Victorian Charter promotes a conversation between the three arms of government about how best to protect human rights in Victoria.

In the UK context, the Department of Constitutional Affairs, the Audit Commission and the British Institute of Human Rights have each concluded that the institutionalization of a human rights dialogue through legislation leads to better public services and outcomes.

In a major evaluation of the first five years of the UK HRA, the Department of Constitutional Affairs concluded that human rights had exerted a 'powerful', 'positive and beneficial' impact on the development and delivery of public policy and services. The UK HRA has enhanced scrutiny, transparency and accountability in government and 'led to a shift away from inflexible or blanket policies towards those which recognize the circumstances and

characteristics of individuals'. Services are required to be – and have become – more consumer-focused, integrated and efficient.

The British Institute's research focused on the role of human rights legislation in addressing disadvantage and discrimination. Drawing on qualitative research and case studies, it concluded that the UK HRA has encouraged 'new thinking' and assisted decision-makers 'see seemingly intractable problems in a new light'.

The British Institute's further conclusion – that human rights legislation can assist disadvantaged people "to challenge poor treatment and improve their own and others' quality of life" – is also supported by substantial quantitative evidence. In 2002-03, a review of all judicial review cases citing the UK HRA found that it was most frequently engaged in matters concerning homelessness, mental health, education, prisoners, immigration, aged care and disability services. In all of these areas – the common feature of which is vulnerability to ill-treatment or arbitrary exercise of power – human rights are making a positive difference.

A snapshot of recent cases is illustrative. Over the last three years, UK courts have held that the right to life is breached where the state fails to provide support to vulnerable persons so as to leave them destitute. They have held that the right to freedom from cruel treatment requires authorities to act to prevent children from ongoing abuse and neglect. And they have held that the eviction of a disabled woman from public housing in circumstances where the public authority had not ensured that she had adequate alternative accommodation violated the right to respect for private life and the home. These are common sense decisions that have improved lives. It is no surprise then that Victorian advocates and practitioners are already exploring the ways in which the Charter can promote the dignity and equality of the homeless, women in prison, people with mental illness and children with disabilities.

Charters of Human Rights have the potential to improve public services, promote more responsive and accountable government, and address disadvantage. As Sir Gerard Brennan, former Chief Justice of Australia, stated in a recent speech in Melbourne, Charters bring the various arms of government into a 'constructive dialogue' about human rights 'and thus enhance the quality of good government'. With Victoria and the ACT leading the way, the focus now shifts to the federal sphere to realize this value.

Philip Lynch is Director of the Human Rights Law Resource Centre

News

Disability Convention to Enter into Force on 3 May

The UN Convention on the Rights of Persons with Disabilities will enter into force on 3 May 2008 following the 20th ratification of the Convention on 3 April 2008. The Optional Protocol to the Convention will also enter into force on 3 May 2008.

It is well recognized that people with disabilities are more vulnerable than the broader community to a range of deprivations and disadvantages, including poverty, social exclusion, discrimination, poor health, unemployment and low educational attainment.

The Disabilities Convention enshrines the civil, political, economic, social and cultural rights that are necessary to ensure that people with disabilities have the capacity and opportunity to fully participate in and contribute to our community. It sets out a detailed code for the implementation of human rights for persons with disabilities. The Optional Protocol provides a mechanism by which individuals and groups may submit a complaint to the Committee on the Rights of Persons with Disabilities that a State has breached its obligations under the Convention, provided the complainant has first exhausted domestic remedies.

The Centre considers that Australia's ratification of the Convention would have a range of legal, political, social, cultural and economic benefits. The Centre also considers that Australia should move to ratify the Convention as soon as possible. Only States that have ratified the Convention are entitled to nominate and select members of the Committee on the Rights of Persons with Disabilities, which must occur within six months of the treaty entering into force.

Australia, including Australian civil society, played an important role in the negotiation of the Convention and was among its first signatories. With the commitment of the Rudd Government to a more constructive engagement with the UN and the international community, ratification of the Convention

would demonstrate that Australia will once more play a leading role in the development, implementation, realization and enforcement of fundamental human rights standards.

Victorian Charter of Rights Developments

Victorian Commission Releases Human Rights Report Card

On 15 April 2008, the Victorian Equal Opportunity and Human Rights Commission released its first report on the operation of the *Charter of Human Rights and Responsibilities*.

Commission Chairperson, Fiona Smith, said that while the Commission was generally satisfied with the progress on *Human Rights Charter* operation, there was room for improvement.

'Some government departments and local councils have actively embraced the *Charter* and its principles and are changing the way they operate to reflect their new human rights obligations,' Ms Smith said. 'But it is clear that we have a long way to go. This is understandable given that this is a new consideration for public authorities and we do not expect to change the world overnight.'

The report raises some concerns about the apparent lack of action by almost one third of local councils.

'We recognise that local councils have been inadequately resourced to prepare for the implementation of the *Charter* and trust that this will improve.'

At the time of reporting, the Commission had not received any response from the Department of Treasury and Finance regarding its *Charter* related activities.

The report also highlights a lack of transparency around decisions about the compatibility of new laws with the *Charter*. In 2007, while the Parliamentary Scrutiny of Acts and Regulations Committee raised concerns about the compatibility with the *Charter* for 23 Bills, only one was amended.

'The Commission is monitoring this more closely this year – we want to ensure that human rights compliance is not relegated to a tick and flick exercise,' Ms Smith said.

Under the *Charter*, the Commission has a number of responsibilities including reporting on the operation of the *Charter* every year.

'The *Charter* means government must give equal weight to human rights – alongside economic, social and environmental considerations – in making decisions and delivering services.'

The 2007 *Report on the Operation of the Charter of Human Rights and Responsibilities: First steps forward*, provides an overview of how well State and local government agencies, Parliament and the courts and tribunals have prepared themselves for the *Charter's* introduction, and their responsibility to comply with it.

Copies of the Report and a summary are available at

<http://www.humanrightscommission.vic.gov.au/publications/annual%20reports/>.

Statements of Compatibility under the Victorian Charter

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

Police Integrity Bill 2007

The *Police Integrity Bill 2008* seeks to establish a scheme for the investigation of corruption and serious misconduct by members of the Victoria Police. In particular, the Bill aims to:

- re-establish the Office of Police Integrity ('OPI'), an investigative and a review body separate to the Victoria Police which reports directly to the Victorian Parliament; and
- prescribe the functions of the OPI and the Director of Police Integrity ('DPI').

The Bill is the second part of a three-stage process to replace the legislative regime controlling Victoria Police, following the *Police Regulation Amendment Act 2007* which was assented to on 11 December 2007 (reported in the March 2008 edition of the Bulletin).

Human rights issues are raised by a number of the provisions of the Bill, including:

- the compulsory information gathering powers to be granted to the DPI and other officers; and

- the testing of OPI personnel for alcohol and drugs of dependence.

Compulsory information gathering powers

Several provisions of the Bill give the DPI and the Special Investigations Monitor compulsory information gathering powers and abrogate the common law privilege against self-incrimination. These provisions directly engage the right of a person charged with a criminal offence 'not to be compelled to testify against himself or herself or to confess guilt' conferred by s 25(2)(k) of the *Charter*.

The Government acknowledged in the Statement of Compatibility that the relevant provisions require persons to answer questions or produce documents, even if such action may incriminate them.

However, the Government maintained that the compulsory information gathering powers can be compatible with the right against self-incrimination, provided that there is a 'use' immunity which restricts the use of the answer, document or thing provided in response to the information gathering exercise (the Statement cited the Hong Kong Court of Final Appeal decision in *HKSAR v Lee Ming Tee* [2001] HKFCA 14). The Bill provides such immunity, in that the answer, document or thing produced under compulsory information gathering is inadmissible in any criminal proceedings against that person (except for certain specific proceedings, such as perjury and disciplinary actions).

Although the Scrutiny of Acts and Regulations Committee agreed with the Government's analysis in this specific respect, it found other uses of information derived from compulsory information gathering to be potentially incompatible with the right against self-incrimination. In particular, the Committee noted that answers obtained from a person under these powers may be used by law enforcement agencies to identify and obtain other evidence that can then be used against that person in a prosecution.

The Committee concluded that the following matters remained unclear under the Bill:

- why the 'use' immunity is limited to the use of information in a subsequent criminal prosecution of the witness; and
- in circumstances where the DPI compulsorily examines a person in relation to whom other proceedings are on foot, whether information derived from that questioning would be available to State agencies involved in, or a party to, those other proceedings.

Testing OPI personnel for alcohol and drugs of dependence

The Bill allows the DPI to test members of the OPI where the DPI reasonably believes that the member:

- is incapable of, or inefficient in, performing their duties, due to the consumption of alcohol or a drug of dependence;
- has been involved in a critical incident; or
- ought to be tested for drug or alcohol dependence, to enable the DPI to manage the member's performance of their duties or to take disciplinary action against the member.

The results of such tests will be inadmissible in court, except in certain specified proceedings.

In introducing the Bill, the Government acknowledged that this provision could potentially impact upon several Charter rights of individual OPI members, including the rights to liberty and security, the right not to be subjected to medical treatment without consent, the right to freedom of movement, and the right to privacy.

However, in the Government's opinion, any limitation on the rights of individual members is reasonable and justifiable under s 7(2) of the Charter. The Government emphasised that the powers to test OPI personnel for alcohol and drugs of dependence would allow the DPI to:

- effectively investigate cases where actions of an OPI member has resulted in death or serious injury; and
- identify members with alcohol or drug problems, so that the performance of OPI members is optimised and to facilitate treatment and rehabilitation.

In commenting upon the proposed inadmissibility of the tests in court proceedings, the Committee recalled its comments on a similar provision in the *Police Regulation Amendment Act 2007*. In that instance, the Committee had expressed concern that such a rule of evidence may unjustly restrict the *Charter* right of criminal defendants to a fair hearing, if they would be prevented from using the results of drug or alcohol testing of an OPI member as part of their defence case (thus excluding potentially relevant evidence). In response to the Committee's concern, the Minister for Police and Emergency

Services, Bob Cameron, stated that without this provision the underlying treatment and rehabilitation program would be put at risk, and therefore it was necessary for it to remain.

Edwina Chin and Sam Porter, Human Rights Law Group, Mallesons Stephen Jaques

Other Charter of Rights Developments

Bill of Rights: The Northern Ireland Experience

The Multi-Party Agreement of 10 April 1998 that ended the violence in Northern Ireland (often called the Good Friday Agreement or the Belfast Agreement) provided for consideration of a Bill of Rights for Northern Ireland. The Northern Ireland Human Rights Commission was given responsibility for advising the UK Government on this topic. However, in the years following the 1998 Agreement, the bill of rights process, along with the broader peace process, became deadlocked.

In October 2006, the St Andrews Agreement revived the peace process as a whole. One part of this Agreement led to elections for the Northern Ireland Assembly and the establishment of the power-sharing executive among the five major political parties. Another part provided for the establishment of the Northern Ireland Bill of Rights Forum to progress the Bill of Rights process. The Secretary of State for Northern Ireland moved quickly to appoint the Forum's members and gave it a fixed deadline, one year, to report.

The Forum comprised 28 members; 14 members representing the five main political parties (the Democratic Unionist Party, Sinn Fein, the Ulster Unionist Party, the Social Democratic and Labour Party and the Alliance Party) and 14 members representing a broad range of civil society (churches, trade unions, business, human rights organisations and organisations from sectors for women, children and young people, ethnic minorities, disability, sexual orientation and ageing).

The Forum was to be chaired by 'an independent, international human rights expert', the position to which the Secretary of State appointed me. I had responsibility for securing the highest level of agreement among the 28 diverse members of the Forum, representing all the elements of Northern Ireland's vexed past and challenging present and future.

The Forum was committed to working for consensus but it had difficulty reaching it. In fact, it achieved this goal on only a few of its recommendations. It was split by both general ideological divisions and specific divisions related to Northern Ireland's situation. There were two principal areas of divide.

The first concerned economic and social rights. Here, the debate was similar to what would be found in almost any Western country on this issue. The majority of civil society representatives, though not all, saw economic and social rights as key parts of human rights law (as they are) and so argued strongly for their inclusion in the Bill of Rights. They were supported by the nationalist parties (Sinn Fein and the SDLP), which drew on the experience of inequality and disadvantage in Northern Ireland. The unionist parties (the DUP and the UUP), generally with the support of the cross-community Alliance Party, were opposed to the inclusion of these rights, arguing that they concerned issues properly within the ambit of the political process and so within the authority of the legislature. These arguments are heard regularly in many countries, including Australia.

Far more difficult to resolve were differences in the understanding of what the 'particular circumstances of Northern Ireland' were. The Forum's terms of reference required that its recommendations relate to better protection of rights 'to reflect the particular circumstances of Northern Ireland'. However, there is no agreed history in Northern Ireland, no shared understanding of what had happened and why. So there could be no common position on what the past and present require in better human rights protection.

The nationalist parties, with the support of most community representatives, interpreted the terms of reference widely as they saw the fundamental political and economic issues in Northern Ireland as rights matters that needed to be addressed, particular to Northern Ireland even if not unique to it. Unionist parties, on the other hand, and other community sector representatives took a narrow view of the phrase, arguing almost that the circumstance had to be unique to be able to be addressed.

On 31 March, having completed what it was mandated to do, the Forum handed its recommendations to the Human Rights Commission. Its report reflects the spirit and content of the discussions over the year. It sets out views on more than 50 principal areas of human rights and many other views

on particular issues in relation to these principal areas. Its coverage, therefore, is broad and comprehensive on the range of human rights considered by the various members of the Forum necessary to be addressed in the particular circumstances of Northern Ireland. In relation to each matter and often in relation to many quite specific issues, the range of views expressed by the political parties and sectors on the Forum are fully reported.

The Forum had hoped for far more consensus on a number of topics but, in retrospect, more than it achieved was too much to expect of the process at that stage. The Human Rights Commission had still to deliberate and advise; there had to be debate in the Assembly; the Secretary of State still had to express his views; there would have to be public consultation; proposals must still be submitted to Parliament. These outstanding processes meant that it was too early to go to induce anyone to enter into final stage negotiations and to make concessions during the Forum's year. Nonetheless, discussions, even negotiations, have well and truly begun and the process is now well advanced.

Over the year that I worked in Northern Ireland on this process, I became convinced that there were deficiencies, serious deficiencies, in the existing levels and procedures for the protection and promotion of human rights in Northern Ireland. Those deficiencies need to be addressed and should be addressed, in the interests of all the people of the region. The work of the Forum contributed to that but it did not finish the task.

A Bill of Rights for Northern Ireland has been debated for decades. It has received extensive, formal consideration for the ten years since the 1998 Agreement. The Forum devoted itself to the task for the past year. The baton is now passed to the Human Rights Commission and it will be then handed to the Secretary of State. But none of this is enough. The people of Northern Ireland are entitled not merely to a process. They are entitled to a product. And that product is legislation that ensures far better protection and promotion of human rights than is possible at the moment.

For further information, including the Forum report, see www.billofrightsforum.org.

Chris Sidoti chaired the United Kingdom Government's Northern Ireland Bill of Rights Forum. He has previously been the Foundation Director of the Australian Human Rights and Equal Opportunity Commission (1987-1992), Australian Law Reform Commissioner (1992-1995), Australian Human Rights Commissioner (1995-2000), and Director of the International Service for Human Rights (2003-07).

Victorian Charter Case Notes

Supreme Court considers Role of Commission and Court in Promoting Human Rights under the Charter

Kortel v Mirik and Mirik [2008] VSC 103 (4 April 2008)

In this case, the Supreme Court was asked to consider the proper construction of s 6(2)(b) of the *Charter*, which provides that the '*Charter* applies to courts and tribunals to the extent that they have functions under Part 2'. Part 2 of the *Charter* enshrines a body of civil and political rights largely derived from the *ICCPR*. The issue arose in the context of the obligations of the Court to ensure a fair hearing to unrepresented litigants. The Court also considered the scope of the power of the Victorian Equal Opportunity and Human Rights Commission to intervene in a proceeding pursuant to s 40(1) of the *Charter*.

Facts

Cetin Mirik and Metin Mirik were convicted of serious crimes against Refik Kortel in February 2007. Mr Kortel subsequently applied for compensation under s 85B of the *Sentencing Act 1991* (Vic). Although the Miriks were represented by Victoria Legal Aid in respect of their criminal charges, legal aid was refused in relation to the compensation application and they were therefore unrepresented. Mr Kortel was represented by senior and junior counsel.

In the context of the Miriks being unrepresented, a question arose as to whether, in hearing an application under the *Sentencing Act*, s 6(2)(b) of the *Charter* obliged the Court to take positive steps to ensure that the respondents received a fair hearing consistent with s 8 (right to equality before the law) and s 24 (right to a fair hearing) of the *Charter*.

On 28 March 2008, the Commission sought to intervene in the proceeding pursuant to s 40(1) regarding the proper construction of ss 6(2)(b), 8 and 24. Section 40(1) confers on the Commission a statutory right to intervene as a party in any proceeding in any court or tribunal 'in which a question of law arises that relates to the application of this *Charter*'. The Attorney-General also sought to intervene pursuant to s 34(1), which is expressed in identical terms to s 40(1).

Following the filing of the notices of intervention, and by the time the matter came back on before Bell J, a grant of legal aid was made to the Miriks and they were represented by both Victoria Legal Aid and counsel at the hearing.

Decision

Justice Bell concluded that neither the Commission (under s 40(1)) nor the Attorney-General (under s 35(1)) had a right to intervene in the proceeding on the basis that the issue as to the 'proper construction of s 6(2)(b) does not presently arise'. His Honour considered that, by consequence of the Miriks obtaining legal representation:

the potential application of the *Charter* to the court in this proceeding has no present practical implications... As the matter presently stands before me, I can see no respect in which the determination of the question advanced by the Commission – whether the *Charter* applies to the court in this proceeding by reason of s 6(2)(b) – will have any operative affect.

His Honour did acknowledge that the situation was different when the respondents were not represented, stating that:

At that time, a concrete question arose whether s 6(2)(b), properly construed, together with ss 8 and 24(1), put a positive obligation on the court to ensure a fair hearing by giving due assistance to the respondents as unrepresented litigants. If that question was answered in the affirmative, a question also arose as to the scope of that obligation. The argument (I say no more than that) is that the obligation that arises by reason of those provisions of the *Charter* is statutory and separate to the one that arises under the court's general powers and duties. The resolution of the question turns on the proper construction of the expression 'to the extent that they have functions under Part 2 and Division 3 of Part 3' in s 6(2)(b), considered in the context of the objects and scheme of the *Charter* as a whole. As the respondents are now being legally represented, that question no longer arises.

Analysis

Application of the Charter to the Courts under s 6(2)(b)

According to Bell J:

The question concerning the proper construction of s 6(2)(b) is one of fundamental importance, as counsel for all parties acknowledged. It lurks under the surface of the present case and may arise again depending on the course the proceeding takes.

As discussed above, s 6(2)(b) provides that the *Charter* applies to courts and tribunals 'to the extent that they have functions under Part 2 (Human Rights) and Division 3 of Part 3 (Interpretation of Laws)'.

The view sought to be advanced by the Commission was that s 6(2)(b) of the *Charter* 'requires the Court to give effect to any rights under Part 2 of the *Charter* in so far as those rights arise in relation to the matter the subject of the proceeding before the Court'.

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

Narrower readings of s 6(2)(b) should be rejected. As Evans and Evans note in *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act* (2008), 'if courts do not have direct obligations with respect to rights such as the right to a fair trial or the presumption of innocence, there could be serious gaps in the protection of human rights' (see also *R v Williams* [2007] VSC 2, [51]-[57]).

Commission's Right to Intervene under s 40(1)

Although Bell J considered that the Commission had no right to intervene in the present proceeding, he did acknowledge the 'fundamentally important' role of the Commission in the protection and promotion of human rights under the *Charter*. In particular, he noted the independence of the Commission from government and that the 'Commission's statutory right to intervene in s 40(1) does not depend on the position taken by the parties in their submissions on this subject'; rather, 'under the *Charter*, the court has an obligation to determine for itself whether such questions arise.' His Honour also indicated that, had the question arising under the *Charter* remained live, he would have granted leave to the Human Rights Law Resource Centre to intervene in the proceeding.

There are very good policy reasons for this position. Human rights derive from the inalienable and inherent dignity of the human person; their enjoyment should not be conditional on whether a person or his or her representative seeks to invoke such rights. Indeed, as Bell J noted, 'there may be all sorts of reasons why a party to a proceeding does not take advantage of human rights designed for their protection and therefore not raise such a question, or even dispute that one has arisen'. As examples, His Honour stated that a 'party may be trying to juggle conflicting interests, may be vulnerable or may be subject to imperfect advice or improper influence'.

In the present case, for example, there was a potential conflict between Victoria Legal Aid in its capacity as solicitor for the respondents (in which capacity it may have advanced arguments under ss 8 and 24 of the *Charter* on behalf of the respondents) and in its capacity as a publicly funded statutory authority (with an arguable interest in limiting the scope of legal representation required to give effect to ss 8 and 24). Indeed, during the course of hearing, counsel for Victoria Legal Aid indicated that if the Court was disposed to considering the application of the *Charter* and the proper construction of s 6(2)(b), it would seek to be separately represented and intervene on the side of the Attorney-General against the Commission and the respondents. Ultimately, this issue did not arise as the change of circumstances 'brought about by the grant of legal aid to the respondents' rendered 'the question whether s 6(2)(b) makes the *Charter* applicable to the court in the proceeding...purely theoretical and really not a positive issue at all.'

It is notable that this is the first case in which the Commission sought to exercise its power to intervene under s 40(1) and encouraging that, in light of the importance of the construction of s 6(2)(b), it was not deterred from intervening notwithstanding the serious convictions against the respondents. The enjoyment of human rights, and the Commission's role in protecting human rights, must not be contingent upon how the issue may be depicted in the *Herald Sun*.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VSC/2008/103.html>.

Phillip Lynch is Director of the Human Rights Law Resource Centre

Conditions of Detention and Transportation and the Right to a Fair Trial

R v Benbrika & Ors (Ruling No 20) [2008] VSC 80 (20 March 2008)

The applicants had been charged with terrorism-related offences under the Commonwealth Criminal Code.

They applied to have the trial stayed on grounds of unfairness, arguing the conditions of their incarceration and of their transport to and from Court each trial day were increasingly affecting their capacity to properly defend the charges against them.

Facts

The applicants had been incarcerated for more than 2 years (bail having been refused) in the Acacia Unit of HMP Barwon, a maximum security prison 60 kilometres south-west of Melbourne. For the first year, they spent up to 23 hours per day in their cells and had very severe visitor restrictions. Several changes were made to these conditions after March 2007 and before the application was brought.

At the time of the application, the applicants were housed in single cells. When out of their cells, they were permitted to mix in groups of 3. On court days, they were woken before 6am and offered breakfast, which some did not eat. They were thoroughly strip-searched, handcuffed and shackled, and then placed in a van. The trip to court usually took 65 to 80 minutes. The vans were divided into small

box-like steel compartments with padded steel seats, lit only by artificial light. They were under video surveillance at all times.

When court proceedings finished for the day, the applicants were transported back to Acacia by the same method, returning between about 6pm and 7pm, and thoroughly strip-searched again. They were given an evening meal, then at 9pm locked in their cells for the night. Upon their return, the applicants were fatigued, which was observed to negatively affect their ability to focus, concentrate or stay awake.

Bongiorno J accepted expert evidence that, in these conditions, the applicants would:

- be likely to become depressed, irritable and anxious, and would suffer fatigue, which would affect their concentration and memory; and
- be more likely than an ordinary person to experience significant psychological and emotional difficulties, the burden of which would be cumulative and would be likely to impact significantly on the cognitive mental functions required to appropriately attend to the long and complex trial process they faced.

The applicants argued that the conditions of their incarceration and transportation denied them their right to a fair trial. The effect of these conditions upon their powers of memory and concentration was, among other things, to reduce their ability to follow the evidence against them. The issue was whether in these circumstances the applicants were being subjected to an unfair trial, such that the Court could exercise its jurisdiction to stay the proceeding.

Decision

Bongiorno J found that the trial was unfair and should be stayed unless the unfairness was remedied.

His Honour cited Privy Council and High Court authority for the proposition that at common law a superior court has inherent jurisdiction to make and enforce rules of practice in order to ensure fairness and convenience to both sides, including a general power to prevent unfairness to an accused, and a duty both to protect its process from abuse and to protect those who are brought before it from oppression or injustice. This included taking action to prevent an unfair trial.

His Honour noted that the High Court in *Dietrich v R* (1992) 177 CLR 292 drew upon international instruments, including the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as enshrining a basic minimum right of an accused in a criminal trial. His Honour applied the law about the right of an accused to a fair trial as stated and developed by the High Court in favour of relying on the *International Covenant on Civil and Political Rights* or an earlier Supreme Court decision in which it was applied.

His Honour set out the minimum alterations to the applicants' conditions of incarceration and transportation necessary to remove the unfairness affecting the trial. These were that the applicants:

- be incarcerated for the rest of the trial at the Metropolitan Assessment Prison;
- be transported to and from court directly from and to the MAP without any detour;
- not be shackled or subjected to any other restraining devices other than ordinary handcuffs not connected to a waist belt;
- not be strip searched in any situation where they have been under constant supervision and have only been in secure areas;
- have not less than 10 out-of-cell hours on days when they did not attend court; and
- otherwise be subjected to conditions of incarceration not more onerous than those normally imposed on ordinary remand prisoners, including conditions as to professional and personal visitors.

Justice Bongiorno ordered that the Secretary of the Department of Justice or her nominee file an affidavit by 31 March 2008 (11 days after the decision date), deposing as to the conditions under which the accused were then incarcerated and the conditions under which it was proposed they would be incarcerated and transported for the remainder of the trial. His Honour ordered the trial be adjourned to that day. If the affidavit were not filed or if the proposed conditions did not meet the minimum alterations set out above, his Honour indicated the trial would be stayed until further order and the Court would list bail applications for as soon a date as possible.

Analysis

Procedural

The *Charter* was raised by the applicants but found not to apply for three reasons:

- s 49(2) of the *Charter* operated to exclude the relevant proceedings, which had commenced in December 2006;
- the requirement in s 35(1)(a) of the *Charter* that notice be given to the Attorney-General and Equal Opportunity and Human Rights Commission had not been complied with; and
- the *Charter's* application to a trial in Federal jurisdiction might raise constitutional issues requiring notices to be issued under s 78B of the *Judiciary Act 1903* (Cth).

Justice Bongiorno also noted that s 35 of the *Charter* contained no severance provision or urgency exception, such as are found in s 78B of the *Judiciary Act 1903*, and said the lack of such provisions were 'major impediments to the operation of the *Charter* which need the urgent attention of the Legislature'. Interestingly, this paves the way for a declaration of inconsistent interpretation under s 36(2) of the *Charter* if it is not possible to read s 35 consistently with the right to a fair trial (his Honour effectively made a non-statutory declaration to this effect through his *dicta*).

Substantive

The decision expands the content of the right to a fair trial at common law. It is an interesting overlap of several *Charter* rights, including s 10(b) (right to protection from cruel, inhuman and degrading treatment); s 13(a) (right to privacy); s 22(1) (right of persons deprived of liberty to be treated with humanity and respect for human dignity); and s 24(1) (right to a fair hearing).

Bongiorno J noted that that the common law 'right to a fair trial' is actually a right not to be tried unfairly, and is an exercise by the court of its inherent jurisdiction to protect its own processes. However, section 24(1) of the *Charter* provides a right which is a positive right to a fair trial belonging to an individual.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VSC/2008/80.html>.

Emrys Nekvapil, Human Rights Law Group, Mallesons Stephen Jaques

Comparative Law Case Notes

Positive and Procedural Obligations Arising from the Right to Life

Budayeva v Russia [2008] ECHR 15339/02 & Ors (20 March 2008)

The European Court of Human Rights held that the Russian Federation violated its positive obligation to protect the right to life under art 2 of the *European Convention on Human Rights* by failing to:

- establish legislative and administrative frameworks to deter any threat to the right to life; and
- provide an adequate judicial response following alleged infringements of the right to life.

Facts

The town of Tyrnauz, with a population of 25,000, is situated in the mountain district near Mount Elbrus. Documentary evidence dating from 1937 indicates the region is prone to mudslides. Because these mudslides occasionally hit the town, authorities built a retention collector in 1965 and a retention dam in 1999 to protect the town's citizens.

On 20 August 1999, a mud and debris flow hit the dam, seriously damaging it. On 17 January 2000, the Prime Minister was warned about the increased risk of mudslides in the coming season. Reconstruction of the dam appeared unfeasible at that stage. Consequently, the only way to avoid casualties was to establish observation posts to warn civilians of the threat of an impending mudslide. This measure was never implemented.

On 18 July 2000, a flow of mud and debris hit the town and flooded some of the residential quarters. Tyrnauz was then hit by a succession of mudslides until 25 July 2000. Eight people died, including the first applicant's husband, Vladimir Budayeva. The lives of a number of other residents were threatened.

Decision

Article 2 of the *Convention* imposes a positive obligation on the State to safeguard the lives of people within its jurisdiction. It carries substantive and procedural aspects.

Positive Obligations Arising from the Right to Life

The Court held that states must establish legislative and administrative frameworks to deter any threat to the right to life. The scope of this obligation depends on the origin of the threat and the extent to which it can be mitigated. The obligation applies to imminent, clearly identifiable natural hazards. It applies especially to recurring calamities affecting a distinct area developed for human habitation.

Authorities received several warnings in 1999 about the increased risk of mudslides in Tyrnauz. One specifically stated that record casualties would result if recommended measures were overlooked.

There was no ambiguity in the scope or timing of the work needed to prevent such losses. However, despite these clear warnings, steps were not taken to prevent harm coming to the citizens of Tyrnauz, and no reason was given as to why.

The Court concluded that there was no justification for authorities' failure to implement land-planning and emergency relief policies in Tyrnauz. Moreover, it found a causal link between administrative flaws which impeded implementation of relief policies and the death of Vladimir Budayeva, as well as the injuries sustained by other applicants. Therefore, the authorities failed to discharge the positive obligation to establish a legislative and administrative framework to deter threats to the right to life required as required by the substantive aspect of art 2.

Procedural Obligations Arising from the Right to Life

The Court held that legislative and administrative frameworks must be properly implemented.

Authorities administering these frameworks must:

- ascertain the circumstances under which the incident took place and any shortcomings in the operation of the regulatory system; and
- identify State officials or authorities involved in the chain of events.

Where lives are lost, the judicial system must conduct an independent, impartial investigation that ensures appropriate penalties are applied to those who are responsible for failure of these legislative and administrative frameworks.

Within a week of the incident, the prosecutor's office commenced a criminal investigation into the circumstances of Vladimir Budayeva's death. However, it confined the investigation to establishing the immediate cause of death, which was found to be the collapse of the building. It failed to consider safety compliance and the authorities' responsibility. Importantly, those questions were not the subject of any enquiry, whether criminal, administrative or technical. In particular, no action was taken to verify numerous media allegations and victims' complaints concerning inadequate maintenance of the mud-defence infrastructure or the authorities' failure to set up the warning system. Therefore, for failing to investigate shortcomings in the operation of the regulatory system and identify State officials or authorities involved in the chain of events, the Court concluded that there was a violation of the procedural aspect of art 2.

Relevance to the Victorian *Charter*

Section 9 of the *Charter* provides that every person has the right to life and has the right not to be arbitrarily deprived of life. This case is a useful illustration of the obligations any state must abide by in maintaining the safety and wellbeing of its citizens, and should that obligation fail, the measures that must be exercised in determining how the failure came about.

Louise Fahy is a Lawyer with DLA Phillips Fox

Wind Turbines and the Right to Privacy

Fägerskiöld v Sweden [2008] ECHR 37664/04 (25 March 2008)

The European Court of Human Rights has considered a case of nuisance caused by a wind turbine, based on the right to respect for private and family life (art 8) and the right to protection of property (art 1 of Protocol No 1) of the *European Convention on Human Rights*.

Facts

The applicants were Swedish nationals who bought a holiday home in the municipality of Ödeshög in the mid-1980s.

In 1991 and 1992 two wind turbines were erected on a neighbouring property. In April 1998 a third wind turbine was erected. The applicants complained to their local municipality about the continuous noise emitted by the turbines and the light-effect on the rotor blades. According to noise tests carried out, the noise level at the applicants' property was found to be 39.4 decibels. The Environment Protection Authority recommends 40 decibels as the maximum noise level at any residential property.

The municipality's Environment Committee evaluating the turbines found that they did create some noise, however that noise was not sufficient to justify their removal. The Committee further noted that if the applicants considered measures to minimise the noise insufficient they were free to request further measures be taken, or appeal to the environment courts.

The applicants complained to the European Court of Human Rights that the wind turbines interfered with their peaceful enjoyment of their property and that the value of their property had decreased as a result of the nuisance.

The Government submitted that the complaint should be declared inadmissible on the following basis:

- non-exhaustion of domestic remedies;
- the property was used for recreational purposes and therefore could not fall within the art 8 definition of 'home'; and
- no evidence had been provided that the turbines had adversely affected the applicants' physical or mental health.

The Government further contended that the interference with the rights of the applicants was in accordance with the law and was justified by the contribution to sustainable development provided by the wind turbine.

Decision

To establish a complaint under art 8, the consequences of the nuisance must be sufficiently severe. The Court stated that:

Specifically, art 8 ... applies to severe environmental pollution which may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely.

The Court accepted that the applicants were affected by the presence of the wind turbines, however, the nuisance did not constitute 'severe environmental pollution' and insufficient evidence was brought to establish that the applicants had been physically affected by the nuisance.

The Court further held that:

- The complaint regarding the light reflections caused by the turbines was not substantiated.
- The complaint under art 1 of Protocol No. 1, that the nuisance interfered with the applicant's peaceful enjoyment of their property, was found to be manifestly ill-founded. The permit to build the turbines was granted in accordance with national law and the operation of the turbines was found to be in the general interest of the community as a source of sustainable power. Ultimately, it was found that a fair balance had been struck between the community as a whole and those who would be affected by the noise.
- With regard to the argument that the property did not fall within the definition of 'home', the Court found that the couple had relied on their right to 'private and family life', not their 'home'. Art 8 is designed to protect against arbitrary interference from public authority, thus the Court determined that 'home' should be interpreted expansively.
- The applicants had failed to provide evidence of housing prices to establish that the wind turbines had decreased the value of their house.
- The Court determined that it did not need to decide the issue of non-exhaustion of domestic remedies, as the complaint was held to be inadmissible for other reasons.

Relevance to the Victorian *Charter*

This decision may well have implications for s 13 and s 20 of the Victorian *Charter*, which are similar to art 8 and art 1 of protocol No. 1 of the *Convention* respectively. This decision indicates a high threshold may be required to invoke protection from a breach of *Charter* rights in the environmental context.

This decision is also important as it highlights the balancing exercise of the competing rights of the right to peaceful enjoyment of property with the competing community rights to sustainable development.

This decision suggests that what could potentially amount to a breach of sections 13 and 20 of the Victorian *Charter* may be justified if deemed to provide a significant community benefit.

The decision is available at:

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=829981&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

Carly Robertson is a Lawyer with Blake Dawson

Public Authorities Must Consult with People before Evicting Them

Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg CCT 24/07 [2008] ZACC 1 (19 February 2008)

‘Human beings are required to be treated as human beings.’

A simple statement. A self-evident truth?

In a landmark judgment of the South African Constitutional Court, the Court’s key message was that human beings must be treated as such. The judgment affirms the basic principle that where people face homelessness due to an eviction, public authorities should engage seriously and in good faith with the affected occupiers with a view to finding humane and pragmatic solutions to the dilemma. Respectful, face to face engagement gives meaningful enjoyment of the right to adequate housing in the South African Constitution.

The judgment, handed down on 19 February 2008, marked the end of an epic struggle of around 400 occupiers of so-called ‘bad-buildings’ in the inner city of Johannesburg to resist the City of Johannesburg’s attempt to evict them for health and safety reasons under the *National Building Regulations and Standards Act*. The authority had not consulted with the occupiers nor considered the probability that the occupiers would be made homeless.

The Constitutional Court ordered the parties to engage meaningfully such that the public authority could ascertain the consequences of an eviction and whether:

- the City could help in alleviating those dire consequences;
- the buildings could be rendered relatively safe and conducive to health for an interim period; and
- the City had any obligations to the occupiers in the prevailing circumstances and when and how the City could or would fulfill these obligations.

The requirement of face-to-face dialogue with people living in conditions of dire poverty and facing homelessness if evicted is both principled and pragmatic. It affirms the foundational value of respect for each person’s inherent dignity. It also enables public authorities and those affected to participate actively in finding solutions which are tailored to the circumstances of each case. The parties reached consensus that the City would not eject the occupiers, that it would upgrade the buildings and provide temporary accommodation.

In requiring the local authorities to consider suitable alternative accommodation in deciding whether to proceed with an eviction, the Court effectively said that public authorities must function in a systemic, integrated manner: the relevant departments of a municipality cannot function in isolation from each other with “one department making a decision on whether someone should be evicted and some other department in the bureaucratic maze determining whether housing should be provided.”

Relevance to the Victorian *Charter*

While the *Charter* does not enshrine a right to adequate housing, this decision is significant in regards to ss 7(2) and 38 of the *Charter* as to how and when a public authority can limit a human right.

Specifically, the judgment means that public authorities cannot embark upon a process that limits a

human right (such as the right to housing) – whatever the justification – without first considering the values and purposes underlying that right. This consideration requires that people are heard in relation to decisions which impact on their rights and analysis of alternative solutions to the dilemma. Further, public authorities cannot hide behind the decisions of other departments to justify a limitation on human rights. Rather, departments must interact and work together to design flexible solutions which best protect the relevant rights.

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

Mental Illness, Legal Capacity and Human Rights

Shtukaturov v Russia [2008] ECHR 44009/05 (27 March 2008)

In this case, the European Court of Human Rights considered human rights issues arising from involuntary admission and treatment on the ground of mental illness.

Facts

Pavel Shtukaturov (the applicant) is a Russian national with a history of psychiatric illness.

On 3 August 2004, his mother lodged an application with the District Court of St Petersburg to have him declared legally incapable. A court-commissioned psychiatric examination was conducted by Hospital No 6, and a hearing was held which was attended by the district prosecutor, a representative of the hospital, and the judge. It lasted only ten minutes. Mr Shtukaturov was not notified of the hearing and his mother declined to attend. The judge declared Mr Shtukaturov fully legally incapable and appointed his mother as his guardian.

In November 2005, Mr Shtukaturov's mother arranged for him to be admitted to Hospital No 6 (against his will). For the purposes of Russia's civil code, because his guardian consented to the admission, it was classed as 'voluntary'.

Two days before he was admitted to hospital, Mr Shtukaturov engaged a lawyer from the Mental Disability Advocacy Centre.

From December 2005, he was prevented from having any contact with his lawyer, using a telephone or keeping writing equipment. He attempted to escape, but was brought back to the hospital. He alleged that he was tied to his bed for 15 hours after the attempted escape. He further alleged that he was given Haloperidol and Chlorpromazine.

His lawyer brought an application before the European Court of Human Rights alleging that:

- by depriving him of his legal capacity without his participation and knowledge, the domestic courts had breached his rights under arts 6 (right to a fair hearing) and 8 (right to private life) of the *European Convention on Human Rights* and
- his detention in a psychiatric hospital infringed art 3 (freedom from cruel treatment) and 5 (right to liberty and security) of the *Convention*.

Decision

Article 6 – Right to a Fair Trial

The Court held that Mr Shtukaturov's right to a fair trial had been violated. In particular, the Court commented on the following:

- Mr Shtukaturov was not notified of his mother's application, was not informed of the hearing and was not able to participate in the hearing;
- his absence from the hearing meant that the judge was unable to personally assess Mr Shtukaturov's capacity, and had to rely solely on the medical report;
- the hearing was not 'truly adversarial';
- the hearing was extremely short; and
- Mr Shtukaturov's appeal was rejected without examination (because he had no legal capacity).

Article 8 – Right to Private Life

The Court found that the decision to deprive Mr Shtukatorov of legal capacity interfered with his right to respect for his private life, and was disproportionate to the State's legitimate aim of protecting the interests and health of others.

The Court noted that 'as a rule, in such a complex matter as determining somebody's legal capacity, the authorities should enjoy a wide margin of appreciation'. The extent of the margin will depend on 'the nature of the issues and the importance of the interests at stake' and 'the quality of the decision-making process'.

Article 5 – Right to Liberty and Security

The Court held that Mr Shtukatorov's hospitalization was an unlawful violation of his right to liberty and security of person, on the basis that it was not 'reliably shown' that Mr Shtukatorov's mental condition warranted his confinement. The Court rejected the State's argument that Mr Shtukatorov's confinement was voluntary because it had been consented to by his guardian, favouring a broad construction of the term 'lawful' for the purposes art 5(1)(e). The Court also held that, under the circumstances, Mr Shtukatorov's inability to bring judicial proceedings on his own behalf to challenge the validity of his continued detention amounted to a violation of art 5(4) of the *Convention*.

Other complaints rejected, not examined or reserved

The Court held that there was no need to examine the applicant's complaints under art 13 and 14 of the *Convention* (regarding effective remedies and discrimination, respectively). Further, the Court rejected Mr Shtukatorov's argument that his compulsory medical treatment amounted to inhuman and degrading treatment on the basis that that portion of his application was 'manifestly ill-founded'. The Court reserved the question of compensation (Mr Shtukatorov sought 85,000 Euros in non-pecuniary compensation, pursuant to art 41 of the *Convention*).

Relevance to the Victorian Charter

The *Convention* rights invoked by Mr Shtukatorov are also protected under the *Charter*, specifically:

- s 24 (right to a fair hearing);
- s13 (right to privacy and reputation);
- s 21 (right to liberty and security of person, including the right to challenge the lawfulness of detention);
- s 10 (protection from torture and cruel, inhuman or degrading treatment); and
- s 8 (recognition and equality before the law).

The Court's approach to interpreting and applying equivalent articles of the *Convention* may provide some guidance as to the likely interpretation of the relevant provisions of the *Charter*, particularly in the context of involuntary admission to medical facilities.

Jessica Moir and Rachel Nicholson are lawyers with the Allens Arthur Robinson Corporate Responsibility Group

ACT Supreme Court Considers Right to a Fair Trial under ACT Human Rights Act

R v DA [2008] ACTSC 26 (31 Mar 2008)

In an *ex tempore* judgment delivered by Higgins CJ, the ACT Supreme Court has stated that s 21 of the *Human Rights Act 2004* (ACT) confers a positive right to a fair trial and thereby modifies the common law which merely provides for the right to be free from an unfair trial.

The decision arose from an application by an accused to vacate a trial date. In the context of this application, Higgins CJ drew a distinction between the common law right to not have an unfair trial (see, eg, *Dietrich v The Queen* (1992) 177 CLR 292) and the positive right under s 21 of the *Human Rights Act 2004* (ACT) to a fair trial. In Higgins CJ's view, this is 'a very different emphasis'. His Honour compared the ACT position with Kirby J's minority decision in *Nudd v The Queen* [2006] HCA 9, where, drawing on human rights conventions such as the *ICCPR*, Kirby J had argued the common law should confer a positive right to a fair trial. The majority considered that the common law merely conferred a right to be free from unfairness. Higgins CJ noted that, 'We do not have to have that debate in this

Territory because that right is conferred by the *HRA 2004*, thereby modifying the common law accordingly.' (at [7]).

Having regard to this positive right, to which his Honour gave 'decisive weight', together with factors such as there being 'no prejudice to the Crown or to any Crown witness, or to the trial, the efficiency or otherwise of the trial', Higgins CJ granted the application to vacate the trial date.

The decision is available at <http://www.courts.act.gov.au/supreme/judgments/da.htm>.

This case note was provided by the ACT Human Rights Act Project at ANU (<http://acthra.anu.edu.au/>)

Ban on Political Advertising Consistent with the Right to Freedom of Expression

Animal Defenders International, R (On The Application of) v Secretary of State For Culture, Media and Sport [2008] UKHL 15 (12 March 2008)

In this decision, the UK Court of Appeal held that a ban on political advertising can be compatible with art 10 of the *European Convention on Human Rights*.

Facts

In 2005, Animal Defenders International (ADI) launched a campaign with the object of drawing attention to the use of primates by humans. The campaign was to include a television advertisement.

Section 321(2) of the *Communications Act 2003* prevents any advertisement showing that (a) is inserted by or on behalf of a body whose objects are wholly or mainly religious or political; (b) is directed towards a political end; or, (c) has a connection with an industrial dispute ('political advertising').

The Broadcast Advertising Clearance Centre declined clearance for ADI's advertisement on the basis that transmission would breach the prohibition on political advertising in s 321(2) because the appellant was a body with mainly political objectives as defined by the Act.

ADI sought a declaration that the ban on electronic political advertising in s 321(2) was incompatible with art 10 of the *European Convention on Human Rights* because it imposed an unjustified restraint on freedom of political expression.

Decision

The Court of Appeal dismissed the appeal and permitted the ban on political advertising on the basis that the ban is necessary in a democratic society to ensure a level playing field for public debate. Without the ban, financially powerful groups who are not political parties may use 'the power of the purse' to give enhanced prominence to their views. As television is a subversive medium with great immediacy and impact, there is a risk that the public will accept views 'by dint of constant repetition' rather than considering the merits of views expressed in public debate.

The court considered whether the ban should operate where the content of the political advertisement is wholly inoffensive. It determined that political advertising should be banned regardless of the content of the views promoted, as the line between inoffensive and injurious material is blurred. The issue is to be tested with reference to objects with which one may not be sympathetic; for example, well-endowed multi-nationals seeking to thwart or delay action on climate change or adverts by wealthy groups seeking to ban abortion. The court determined that the right to free expression includes a right to be protected from the influence of partial political advertising regardless of its content.

The court considered the judgment of the Swiss court in *VgT*, which ruled that the ban on political advertising was incompatible with art 10. This case had similar facts, although the advertisement sought to be aired was a response to a meat industry advertisement that promoted eating meat. The court in *VgT* looked at the specific circumstances of the case, and ruled that the advertisement did not endanger the equality of opportunity between different forces in society; rather, allowing the advertisement would strike a balance between competing interests.

In considering *VgT*, the Court of Appeal acknowledged that it will be difficult to justify banning an advertisement that is a response to another political advertisement. A body with political aims seeking to counter the effect of commercial advertising relating to a controversial issue would have strong grounds for seeking an opportunity to put its case.

The ban on political advertising protects the democratic process by ensuring a level playing field for public debate by preventing financially powerful bodies from disproportionately influencing public opinion through television advertising.

Relevance to the Victorian Charter

In the Victorian context, this decision may affect the interpretation and application of art 15 which protects freedom of expression.

Following *Animal Defenders*, it is likely that a ban on electronic political advertising will be compatible with art 15. This is particularly likely given that art 15(3) specifically contemplates restrictions on the freedom of expression to protect other people's rights and for the protection of public order and morality.

However, given the court's consideration of *VgT*, it is unlikely that the ban will be justified for advertisements that respond to other political advertisements that have already aired. In fact, allowing such advertisements to show may in fact be necessary to ensure both views receive equal exposure in the public domain.

The decision is available at <http://www.bailii.org/uk/cases/UKHL/2008/15.html>

Adrienne Lyle, Human Rights Law Group, Mallesons Stephen Jaques

HRLRC Policy Work

Freedom Respect, Equality Dignity: Action – Centre Submits Report to UN regarding Economic, Social and Cultural Rights in Australia

In April 2008, a major NGO Report was submitted to the UN Committee on Economic Social and Cultural Rights regarding Australia's implementation of the *International Covenant on Economic, Social and Cultural Rights*.

The Report, entitled *Freedom, Respect, Equality, Dignity: Action* was jointly prepared by the Human Rights Law Resource Centre, the National Association of Community Legal Centres and Kingsford Legal Centre. A further 30 NGOs with specific human rights and subject matter expertise made substantial contributions to the Report. The Report is supported, in whole or in part, by over 100 NGOs.

The Report is intended to assist the Committee to prepare a List of Issues for Australia during the Pre-Sessional Working Group meeting from 19 to 23 May 2008. It is also intended to ensure that the Committee is equipped to engage in a rigorous and constructive dialogue with Australia when it is reviewed by the Committee in 2009.

The Report is a comprehensive and constructive analysis of the state of ESC rights in Australia and makes a range of targeted recommendations to address disadvantage and poverty. The Report documents a number of areas in which Australia is falling short of its obligations under the *International Covenant on Economic, Social and Cultural Rights*.

It focuses on areas that have been the subject of extensive NGO activity and research in Australia. Subjects detailed in the report include:

- the lack of legal recognition and protection of economic, social and cultural rights;
- the nature and extent of poverty in Australia and the need for a comprehensive national poverty reduction strategy;
- Indigenous self-determination and disadvantage;
- the current housing crisis and the significant problem of homelessness;
- 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;
- violence against women;
- the inadequacy of income and social security supports;
- the regression of workers' rights under Work Choices;
- the crisis in mental health in Australia and the inadequacy of mental health care;
- the chronic under funding of both public health care and education; and

- the deleterious impacts of Australia's immigration law and policy on families and children.

The Report includes recommendations as to concrete steps that Australian authorities should take to bring Australia more fully into compliance with its obligations under the *International Covenant on Economic, Social and Cultural Rights*; an Australia in which all persons can live with freedom, respect, equality and dignity.

The Report is available at www.hrlrc.org.au under Policy Work>International Submissions> FREDA: NGO Report to UN Committee on Economic, Social and Cultural Rights (April 2008).

Centre submits Major Report to UN Committee against Torture regarding Australia

The UN Committee against Torture will review Australia's implementation of and compliance with the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment* at its 40th Session in April and May 2008.

The Human Rights Law Resource Centre has prepared a major 'Report on Australia's Compliance with the Convention against Torture' (April 2008) to assist the Committee to constructively review and make recommendations regarding Australia.

The HRLRC Report considers and makes recommendations regarding the following areas of Australian law, policy and practice which may raise issues of incompatibility with the *Convention against Torture*:

1. the inadequate protection of human rights, including the prohibition against torture and other cruel, inhuman or degrading treatment or punishment, under Australian domestic law;
2. immigration and asylum-seeker law, policy and practice;
3. Australia's law and policy in relation to refoulement, extradition and expulsion;
4. the impact of the criminal justice system on Indigenous Australians;
5. Australia's treatment of prisoners and conditions of detention, including in particular the lack of access to adequate health care;
6. Australia's counter-terrorism law and practice, including in relation to incommunicado detention, and the use of preventative detention and control orders;
7. the use of evidence obtained under torture or pursuant to other cruel, inhuman or degrading treatment or punishment;
8. Australia's failure to investigate and remedy allegations of torture; and
9. Australia's failure to adequately protect its citizens from the death penalty and other forms of ill-treatment.

The Report makes a range of recommendations to ensure that Australian law, policy and practice in each of these areas is consistent with Australia's obligations under the *Convention*.

The HRLRC Report consolidates and updates two previous submissions made jointly by the Human Rights Law Resource Centre and the National Association of Community Legal Centres to the Committee to assist its scrutiny of Australia.

The HRLRC Report, together with other NGO Reports and thematic Fact Sheets, are available at www.hrlrc.org.au under Policy Work>International Submissions>NGO Reports to UN Committee against Torture regarding Australia.

The Right to Equality and Non-Discrimination under Victorian Law

The Victorian Government is currently undertaking a broad review of the *Equal Opportunity Act 1995* (Vic) to 'better promote the right to equality and improve protection from discrimination' ('EOA Review'). It is also separately reviewing exceptions and exemptions in the Act with a review to ensuring consistency with the *Charter of Human Rights and Responsibilities Act 2006* ('Exceptions Review').

In January 2008, the Centre made a major submission to the EOA Review, focusing on issues including systemic discrimination and the compatibility of the Act with international human rights standards and the *Charter*. The EOA Review has now published an Options Paper, which details findings from consultation and research and sets out options for reform. The Centre is in the process of preparing a response to the Options Paper, due by 12 May 2008.

On 18 April 2008, the Centre also made a submission to the Exceptions Review. The Centre's submission proposes that all of the exceptions and exemptions under the Act be repealed and that, instead, any differential treatment that may constitute discrimination be assessed to ensure compatibility with s 7 of the *Charter*. Section 7 recognises that human rights, including the right to non-discrimination, are not absolute but may only be limited so far as is reasonable, demonstrably justifiable, proportionate and adapted.

The Centre's submissions, together with further information about the Reviews, are available at www.hrlrc.org.au at Policy Work>HRLRC Submissions>Submissions to Equal Opportunity Act Reviews. Further information is also available at <http://www.justice.vic.gov.au/equalopportunityreview>.

HRLRC Casework

The Right to a Fair Trial and the Functions of a Court

As discussed in the 'Victorian Charter Case Notes' section, the Centre sought leave to intervene in a proceeding in which the Supreme Court was asked to consider the proper construction of s 6(2)(b) of the *Charter*, which provides that the '*Charter* applies to courts and tribunals to the extent that they have functions under Part 2'. The issue arose in the context of the obligations of the court to ensure a fair hearing to unrepresented litigants. According to Bell J:

The question concerning the proper construction of s 6(2)(b) is one of fundamental importance, as counsel for all parties acknowledged. It lurks under the surface of the present case and may arise again depending on the course the proceeding takes.

Ultimately, the Centre was denied leave to intervene, however, as the litigants were granted legal representation and the Court therefore concluded that the issue as to the 'proper construction of s 6(2)(b) does not presently arise'.

The Centre was provided with outstanding pro bono assistance in this matter by Mallesons Stephen Jaques, together with Ron Merkel QC and Kristen Walker of Counsel.

Seminars and Events

LIV Human Rights Conference

Date: 9.00am – 4.00pm, Friday, 30 May 2008

Venue: RACV Club, 501 Bourke St, Melbourne

Cost: \$290 early bird (before 9 May 2008) and \$370 thereafter

Registration is essential. Further details at <http://www.cpd.liv.asn.au/product.asp?plD=1460&cID=15>.

Human Rights Law and Policy Conference

Shaping the National Stage for a New Era of Rights

Date: 16 and 17 June 2008

Venue: Marriott Hotel, cnr Exhibition and Lonsdale Streets, Melbourne

Cost: \$1560 (discounts available for NGOs and Indigenous organisations)

Human Rights Law & Policy 2008 is a highly interactive groundbreaking conference addressing human rights legislation, case law and policy changes. Ensure you are fully informed of the recent developments and how this will affect you by exploring:

- the Victorian Charter
- Equal employment opportunity and industrial relations
- Indigenous human rights
- Complexities of Criminal Process and Human Rights
- Boundaries between individual rights and legislation
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Speakers include:

- Graeme Innes AM, Human Rights Commissioner and Commissioner Responsible for Disability Discrimination, Human Rights and Equal Opportunity Commission
- Anne Deveson AO, Patron SANE Australia & Author *Tell me I'm here*
- Phil Lynch, Director, Human Rights Law Resource Centre
- Michael Jackson QC, Director, Lawyers Rights Watch Canada and Professor of Law, University of British Columbia, Vancouver BC
- Fiona Smith, Chairperson, Victorian Equal Opportunity & Human Right Commission
- Simon Rice OAM, Director of Law Reform & Social Justice, ANU College of Law; Judicial Member, NSW Administrative Decisions Tribunal
- Susan Ryan AO, Former Senator, Hawke Government Cabinet

For further information, see www.thomson.com.au/humanrights.

Human Rights Resources

Review of *Law and Liberty in the War on Terror*

A Lynch, E Macdonald and G Williams (eds), Federation Press, 2007

How has the world changed since 11 September, 2001? How have liberal democracies responded to the threat of terrorism? How can national security be ensured against people unafraid to kill themselves along with their victims? Can the criminal justice system accommodate preparatory terrorism offences? What is the role of human rights in times of emergency?

Law and Liberty in the War on Terror asks these questions and more. This book is the outcome of a three-day symposium held in July 2007 to examine the role of law in responding to the threat of terrorism. The purpose of the symposium, and now this book, was to bring together varied perspectives on the relationship between law and security. Proponents of the new anti-terrorism laws seek to justify their provisions and opponents argue that the laws go too far, depriving individuals of – among other things – fundamental human rights.

Firmly in the proponents' camp, the debate opens with former Attorney-General Philip Ruddock defending the laws which he administered under the Howard Government. A 'strongly preventative approach, underscored by robust but fair laws, is the best way forward for Australia and her interests', he states.

Secretary of the Attorney-General's Department, Robert Cornall, similarly espouses the new laws as 'essential to provide an adequate legal basis to deal with this unprecedented terrorist threat'. New, and sometimes extreme, measures are called for to achieve a purpose that has not previously informed the criminal law: the laws are designed primarily to forestall the commission of a terrorist crime, not to inhibit its commission by prescribing a penalty for a crime committed. One reason for the change is that some would-be terrorists are willing to die for their cause and deterrence by punishment would have no effect.

Other contributors to this book argue that this so-called 'preventative' approach carries with it serious implications for the rule of law. While they purport to protect citizens, these laws are often at the expense of our most fundamental liberties. Wide powers to detain or to restrict a person's freedom of movement, or to compel submission to questioning are conferred on law enforcement agencies. A wide range of conduct which might assist terrorism or which is peripheral to the commission of a terrorist act is swept into the ambit of terrorism offences, exposing to penalty persons who would not otherwise be treated as being party to an offence. Principles of natural justice and the open administration of the law are, or may be, compromised.

Dr Patrick Emerton, lecturer at Monash University, raises concerns about the broad scope of terrorism offences. He submits that the discretionary power exercised by executive regulation to declare a group a 'terrorist organisation' has not been exercised even-handedly, and Waleed Aly, lecturer and researcher at Monash University, notes that in Australia, unlike other countries, only Islamic organisations have been proscribed. This being so, Aly regrets the ineffectiveness of a Muslim voice in anti-terrorism debates: 'in the political domain Muslims are an inhumane abstract; a singular political entity: nameless and faceless, except where punctuated by the image and speech of some villainous radical caricature who shoots rapidly to symbolic infamy'.

Neil James and Sarah Joseph in their respective essays explore the concept of torture and interrogation. Both question the universal prohibition on torture, arguing in its favour because torture is a negation of the human dignity of both the victim and the perpetrator. James, himself a professional interrogator, argues that torture is illegal, immoral and unnecessary. He explains 'it is... counter-productive, that given the right conditions the same information can almost invariably be gained by legal and morally acceptable means of investigation, and the theoretical scenarios cited as justifying the use of torture are generally so unrealistic and unlikely not to warrant serious consideration.'

This book engages a lively and sophisticated debate on issues that affect the lives and aspirations of all Australians. The prevailing view calls for the preservation of individual rights and constitutional constraints on government. Human rights should not be traded off against the threat of terrorism. Ultimately, as Andrew Lynch states in the concluding essay, '[s]afeguarding our defining civil liberties and the presumption of innocence ... is neither a hindrance nor a luxury, but instead the only certain way to ensure that in responding to the threat of terrorism we do not allow those who would do us harm to dictate what kind of people we are and our relationship with the state'.

Cecilia Riebl and Kate Botten, Blake Dawson

Review of Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act

Carolyn Evans and Simon Evans, LexisNexis Butterworths, 2008

At a recent Victorian Bar breakfast meeting, the speaker claimed that in the new environment in which Victorian lawyers find themselves – an environment where public authorities have to act compatibility with the rights set out in the *Charter* and all Victorian legislation has to be interpreted compatibility with these rights – two key texts must find their way into the court book: Carolyn Evans and Simon Evans' *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* and Pound and Evans' *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities*.

The Evans' text considers the development of statutory bills of rights in Australia – the *Charter* and the *Human Rights Act 2004* (ACT), and explores how the Victorian and ACT parliaments set out a vision of rights protection and created the mechanisms by which such protection would occur. The Acts require lawyers, government agencies and all those whose rights are protected to 'rethink the role of human rights in law and in government action'. The Evans' text is a useful tool to assist in this rethinking process. It details the technicalities and philosophy of the Victorian and ACT statutes, dealing with both in tandem across the different topics.

Chapter 1 describes the rights and duty holders under both Acts. This chapter assists the lawyer to determine the scope of the Acts' relevance and application. Chapter 2 goes on to analyse the way in which the Acts will impact on the legislature and executive government. The Chapter explores the effect of human rights legislation across the spectrum of the legal process: from the law making function, to the application of the law by government and the consequences when such application occurs in a way which breaches the human rights set out in the Acts. This involves a discussion of the obligations placed on government and public authorities and the role of the human rights commissions and ombudsmen in overseeing the Acts.

At the interpretation end of the spectrum, Chapter 3 assists the reader in the new task that will be human rights based interpretation of once familiar statutes. Evans' demand our attention by noting that the obligation to prefer an interpretation of legislation that is consistent with human rights attaches to all interpreters of legislation. Our human rights reading glasses are brought into focus. Evans' describe their preferred (due to the lack of domestic authority yet available on the question) method of statutory interpretation available under the Acts: that a human rights based approach is only necessary where the ordinary principles of statutory interpretation produce an outcome which would involve an unjustified limit on the rights.

This discussion is perhaps most easily understood following a review of Chapter 5 and its analysis of permissible limitations on human rights. The new exercise of determining how human rights interact and may be limited in a free and democratic society is one of challenge and critical analysis. The competence with which this exercise is carried out by lawyers, in presenting Charter or HRA arguments to clients or the bench, will be critical to the Acts' credibility and legitimacy. Accordingly, the text's utility

is heightened by its accessible and well organised discussion of permissible limitations on human rights and the relevant case law from other jurisdictions.

Given the youth of the Acts and thus lack of judicial guidance on their operation, the Evans' text routinely and usefully draws on international and comparative jurisprudence relevant to the rights set out in the Acts. The result is a book which is both introductory in nature and yet provides clear guidance to the lawyer wanting to develop human rights based arguments in their practise.

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What's New on the HRLRC Website?

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

- Philip Lynch, 'Impacts and Implications of the Victorian Charter of Human Rights and Responsibilities', Presentation to the Victorian Bar, 8 April 2008
- Tom Calma (National Race Commissioner and Aboriginal and Torres Strait Islander Social Justice Commissioner), 'Indigenous Rights and the Debate over a Charter of Rights in Australia', Speech to Human Rights Law Resource Centre Annual Dinner, 4 April 2008
- Priyanga Hettiarachi, 'Simple and Complex: Interactions between the Common Law, Private Sphere and Human Rights Legislation in Australia'

Human Rights Jobs

Community Care Consultant with DLA Phillips Fox

A fantastic new opportunity exists for an experienced community legal sector professional to oversee the DLA Phillips Fox Community Care Program across our Australian and New Zealand offices. The role would ideally suit someone with:

- A passion for driving outcomes for people in our community who are most disadvantaged.
- Strong project management and implementation skills.
- The ability to effectively engage with stakeholders at all levels.

To learn more about the role please go to <http://www.dlaphillipsfox.com/search/jobs-nonlegal> or contact either Nicolas Patrick, Pro Bono Director at Nicolas.Patrick@dlaphillipsfox.com or Senka Coulton, HR Manager, on 9286 8190 or senka.coulton@dlaphillipsfox.com.

Foreign Correspondent

Human Rights at the UN

March and April are traditionally the busiest time in the UN human rights calendar, and this year was no exception. Besides the conclusion of another exhausting three week session of the Human Rights Council, the highlight of this period was the first ever session of the new Universal Periodic Review. Seen as the shining hope of the new Council's mechanisms, and the key distinction between the former Commission on Human Rights and the new Council, all eyes have been on the UPR – and unfortunately not everyone has been impressed.

Success – A New Optional Protocol to the ICESCR!

The good news from over the last month is that the UN Working Group on the Optional Protocol to the *International Covenant on Economic, Social and Cultural Rights* (OP-ICESCR) finished its negotiations and agreed to transmit the text of this instrument to the Human Rights Council – this is a great result for people seeking access to justice for victims of ESC rights violations! The OP-ICESCR provides a comprehensive mechanism which will allow for the UN Committee on Economic, Social and Cultural Rights to adjudicate *all* ESC rights, and provides also for an inquiry procedure for gross or systematic violations of ESC rights (although unfortunately only if a country 'opts-in').

The Human Rights Council will hopefully adopt this instrument at its June session, and the action will then move to New York where it will hopefully be adopted by the General Assembly, in time for the celebration of the 60th anniversary of the UDHR.

Seventh Session of the Human Rights Council

The Seventh Session of the Human Rights Council was spent mostly hearing the reports from many Special Rapporteurs and other independent experts mandated with studying particular thematic or country situations. In the resolutions that were adopted after this interactive reporting process, a new mandate was created, an Independent Expert on Water and Sanitation, and previous mandates were reaffirmed, with a number of new experts appointed to replace those ending their terms. The Council also elected the members of its new Advisory Body, comprising of 18 experts who will undertake studies on a variety of human rights issues that will feed into the Council's work. Other new resolutions adopted included one on climate change and human rights, which included a request to the Office of the High Commissioner for Human Rights to conduct a study to be presented to the Council at the end of the year. One of the issues that drew particular comment from Australia was the resolution on the situation of human rights in Sudan, on which Australia raised concerns about the failure of the resolution to condemn those responsible for human rights violations and the associated problem of impunity.

The key controversy at the March/April Human Rights Council session was the resolution on the mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. An amendment to the mandate of the Special Rapporteur was requested to add to the expert's traditional functions by further requiring the Special Rapporteur report on any instances of 'abuse of the right to freedom of expression that constitutes an act of racial or religious discrimination'. This amendment, proposed by the Organisation of the Islamic Conference (the bloc representing Islamic states), and a subsequent further change requiring 'all media to deliver information (...) in a fair and impartial manner', proposed by Cuba, were highly criticised by a many States and NGOs. Many argued that these amendments ran counter to the spirit of the mandate, fundamentally changing the way in which the Council, and the Special Rapporteur, would consider the concept of right to freedom of expression, altering the nature of this right in a way that was not compliant with international human rights instruments. The change brought about by this amendment was seen as so offensive to the protection of the right in issue that almost all of the co-sponsors of the resolution withdrew their support. The resolution was nonetheless adopted by a vote, marking the first time that the Human Rights Council or its predecessor the Commission on Human Rights, had been unable to reach its much strived for consensus on the topic of freedom of opinion and expression. NGOs have been lamenting this as an indication of the Council's inability to effectively uphold the true meaning of human rights.

First Session of the Universal Periodic Review

The first 16 countries were reviewed under the new Universal Periodic Review (UPR) during a two week session in Geneva. This new procedure provides a forum for all UN member states to be reviewed on the basis of their human rights commitments, including their treaty obligations and all the rights contained in the *Universal Declaration of Human Rights*. There is scope for input from NGOs, and UN agencies, experts and bodies, although the focus of the review is on states questioning and formulating recommendations regarding each other's performance.

The first UPR session began under a cloud of uncertainty regarding the exact modalities of how the process was to operate. Whether or not the process would be webcast (as the plenary sessions of the Council are) was just one issue, but a vital one when it comes to transparency and maintaining the relevancy of the process for those human rights advocates on the ground in the countries being examined. On that note, a useful new online resource as been established by a coalition of NGOs: www.upr-info.org.

During the first session, the countries to be examined were Bahrain, Brazil, Ecuador, Philippines, Tunisia, Algeria, Morocco, Poland, Indonesia, Netherlands, Finland, South Africa, the UK, Czech Republic, India and Argentina. Of these, perhaps the most notable was the second country to be examined, Ecuador, as it was the first to accept all recommendations proposed (Tunisia and Brazil later followed this example). This led, however, to objections from Egypt, as one of the recommendations included a reference to sexual orientation. Egypt challenged that this should be an issue covered in the UPR, as it claimed it was not a human right, and only finally capitulated when it was established that this

had clearly been the subject of one of Ecuador's 'voluntary pledges' to the Council. Although Egypt received no support for its objection, and in fact was admonished by a number of States who questioned what right Egypt had to interfere with a country's acceptance of the recommendations being made about them, this set an extremely bad precedent for how sexual orientation and gender identity (SOGI) issues may be considered in the UPR process in the future.

This first session was a historic opportunity to witness many countries engaging in questioning each other over their human rights commitments. Yet for some of the countries being reviewed, there were relatively few challenging questions and recommendations made by other governments. This has attracted some criticism, for example from NGOs in the Asia Pacific region concerned about the relatively light treatment Indonesia was subjected to (Bahrain, as the first state examined, was perhaps faced with the easiest examination of all). The challenge of the UPR will be to take the hesitancy of the first session and create an effective mechanism which welcomes challenging dialogue and interaction and useful recommendations. The reports of the UPR Working Group will next be adopted by the Council, and it is as yet unclear how simple that process will be, and to what extent the Council will play an active role in following up the recommendations made by the UPR. This will be another key factor in the much hoped for success of the UPR.

Australia, consistent with its long-standing obsession, raised questions throughout the review process regarding National Human Rights Institutions and good governance in the countries being examined. While these are important issues, it is hoped Australia can play a more active role in encouraging other countries, particularly those in its region, to submit to a rigorous and all-inclusive review, and can participate in the questioning and formulation of recommendations on a range of substantive human rights concerns. Australia itself won't be examined under the UPR until 2011.

The Global Food Crisis

An inescapable issue on the global agenda, which is currently occupying the minds of many in the UN human rights system, is the global food crisis. The astronomical increase in world food prices, making basic foodstuffs unaffordable in many parts of the world, is affecting millions and has led to protests in countries such as Bangladesh, Cameroon, Egypt, Ethiopia, Indonesia, Ivory Coast, Madagascar and Mauritania, amongst others. In Haiti, the government was overthrown after a week of violent protests due to hyperinflation in food prices. All of these incidents have made this issue one which cannot be ignored, and one which is very important from a human rights perspective.

The causes of this increase in world food prices are multiple – climate change affecting global food producers such as Australia (diminishing its wheat exports); the growing middle class in India and China and their expanding appetites and levels of consumption; the high price of oil; and the increasing use of food producing resources (including food crops) for biofuel production. All of these factors lead to food unaffordability – and violations of the right to food in many countries. The International Monetary Fund has joined the Food and Agriculture Organisation and others, in supporting the UN Special Rapporteur on the Right to Food's call for a moratorium on the use of food crops for biofuel production, as one measure to address the structural causes of this problem.

In the UN world, the food crisis is being given top priority. Ban Ki-moon, the UN Secretary-General, will chair an annual meeting of UN agencies later this month to focus on the food crisis, and there is talk of a world summit on the topic. The UN Economic and Social Council will convene a special debate in May, and the FAO is organising a summit in June to discuss how to alleviate the suffering. At the Human Rights Council in March, it was decided the Council would convene a panel discussion on the realization of the right to food during the its main session of 2009, a 'better late than never' reaction from the main human rights body to this global crisis which has profound human rights implications for the majority of the world's population.

Claire Mahon is an Australian international human rights lawyer based in Geneva, Switzerland. She works as a consultant for NGOs and the UN, and as a research associate at the Graduate Institute of International and Development Studies.

If I Were Attorney-General...

The Rights of Children and Young People

As the recent report from the National Youth Commission showed, children and young people in Australia are over-represented in the homelessness figures. Young people also face a disproportionate level of unemployment and disadvantage. A large proportion of young people are prohibited from voting, yet they are often simultaneously criticized as apathetic and disengaged. Across the country, their everyday interactions are often subject to heavy-handed laws: move-on notices and curfews when they try to use public spaces; punitive probation requirements when they try to get their drivers licenses; increasingly serious sanctions for not attending school; and in some cases, even withholding of benefits from their families. The list of punitive legal measures that are either directed at, or in practice disproportionately affect, young people is growing.

If I were Attorney-General, I would recognize that the way in which we treat children and young people today will shape the Australia of the future, without being all Whitney Houston. There is an undeniable correlation between recognition of a person's rights and their inclusion and participation. So how do we recognize children and young people's rights? How do we protect those rights and nurture in young Australians a sense of social justice? I am glad you asked....

I would start from a rights-based framework, one that fully recognizes the human rights of children and young people. I would keep in mind that civil and political rights, such as freedom of association and assembly and the right to participation, are rights that children, as humans, hold. They also hold economic, social and cultural rights, such as the right to adequate housing and an adequate standard of living. Children also have some further rights that recognize their vulnerability, but these rights to protection should not be used to undermine more fundamental human rights.

I would reach for the *Seen and Heard* report, blow the dust off it and take another look. This report, commissioned by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission in 1997, is a comprehensive analysis of the legal system and the ways in which it serves (or fails to serve) children and young people. A very clear message emerged that young people across Australia felt they were not listened to and that neither judicial officers nor other adult participants in legal processes took account of, or cared about, their views. Drawing on the recommendations that were made by the report, I would start by convening a National Summit on Children and Young People and from the summit I would ensure that a small taskforce was convened.

I would ensure that there is supported and effective participation of children and young people within the Summit. This would entail a fully resourced lead-up process which engaged children and young people of various ages and backgrounds and fed into the formation of the taskforce.

I would then step back and broaden the focus by commissioning a white paper on the ways in which children and young people's rights are protected in Australia. This could form the basis of the Australian report to the United Nations Committee on the Rights of the Child, which is already overdue, and would draw on the dedicated and amazing work being done by NGOs across the country around monitoring the implementation of the rights of children and young people.

I would place youth homelessness at the top of the agenda for the next COAG meeting. The last census showed that those under 24 years represented 46% of all homeless people in Australia, while the recent inquiry by the National Youth Commission has found that youth homelessness has doubled in the last two decades. As Attorney General, I would make sure that the \$1 billion this report calls for to tackle the problem is made available and I would follow-up by making it an ongoing agenda item for COAG and a priority issue for the newly established taskforce.

I would fully fund a youth affairs peak body. Australia has not had one since 1998 and, frankly, 'roundtables' have not filled the gap. What the peak body would look like would only become clear after a wide consultation of young people lead by the taskforce. I would also appoint a National Children and Young Peoples' Commissioner, independent of both the Government and Human Rights and Equal Opportunity Commission, and one that reports directly to parliament. The Commissioner would work closely with the taskforce to ensure that children's and young people's voices are being heard by Government.

Finally, I would introduce a bill to lower the voting age, making it possible (though not compulsory) for young people to enrol to vote once they reach the age of 15 years. I would hope that the mere possibility

that they would enrol would produce a new political sensitivity to the issues faced by young people across Australia.

Anna Copeland is currently at the Human Rights Law Resource Centre until July when she returns to the SCALES community legal centre and the Clinical Legal Education Program at Murdoch University in Western Australia.