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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

Equal Access to Quality Education is a Human Right

Equal access to quality education is a human right. It is also a global imperative if we all are to achieve the Millennium Development Goals by 2015. But worldwide, minority and Indigenous children are disproportionately denied this right with drastic consequences for us all.

This is as true in Australia as in other countries. According to Australian government statistics, over 50% of Indigenous children drop-out of secondary school before completion. For girls, the figure jumps to 80%. More than twice as many Indigenous adult women than non-Indigenous women never attended school at all. Upwards of 660 additional teachers are needed to meet full-attendance needs in the Northern Territory alone. Disaggregated data is harder to find that would reveal the educational needs of the African and Muslim minorities in Australia.

Something is desperately wrong. The government admits that more money is needed to close education gaps. While this may be an explanation, it is not a defence. While the principle of 'progressive realization' applies to implementation of the right to education in general, the right to non-discrimination is immediate and non-derogable. And, disparities in drop-out rates between Indigenous and minority students, on the one hand, and children of the majority culture, on the other, must be seen as a failure of the government to guarantee these rights.

But Australia is certainly not unique. Worldwide, minority and Indigenous children suffer disproportionately from unequal access to quality education. They are likely to be the poorest of the poor in every country and are far more likely to receive an inferior education than a good one. Minority and Indigenous children are more likely to start school later than the prescribed age, if at all; they are less likely to be ready or well prepared for school; and more prone to drop out or fail to achieve in school. That perpetuates the cycle of poverty leaving them unable to later fulfil their human potential, to gain meaningful employment and to become respected members of society.

Girls may face particular barriers to education based on traditional or religious customs or practices, including those governing their freedom to leave the home without a male escort. Their exclusion from education has a profound impact on their ability to later claim other rights, such as economic independence and freedom from domestic violence.

These were some of the issues discussed at the recent UN Forum on Minorities and the Right to Education held in Geneva in December under my mandate as UN Independent Expert on

Minority Issues. The Forum sought to go beyond the traditional focus of minority rights which situates the importance of education primarily in the context of preserving the distinct languages and cultures of minority groups. These are imperatives that minority populations share with Indigenous peoples, despite the fact that minorities, unlike Indigenous peoples, do not have a right to self-determination which underscores the demands of Indigenous peoples to control their educational institutions.

The recent adoption of the *UN Declaration on the Rights of Indigenous Peoples* by the General Assembly and a General Comment on the rights of indigenous children by the Committee on the Rights of the Child (see CRC, *General Comment No 11: Indigenous children and their rights under the Convention* (2009)), have strengthened standards which place Indigenous children's right to education, within the broader context of the realization of their collective rights.

The Forum on Minorities, however, also focused on a second imperative shared by minorities and Indigenous peoples, which is the right to equal quality educational outcomes and the right to participate in determining the content and the implementation of those standards. With respect to minorities and Indigenous children their right to be taught in their mother tongue is an essential element in their accessing quality education and, when implemented, it enhances their ability to gain fluency in other languages. Barriers to education caused by language remain among the greatest obstacles to the right to education for minorities.

For many children from minorities, the language and culture of the classroom are unfamiliar. Curriculum materials may neglect the cultures, histories and contributions to society of minorities. Classroom interaction and instruction may be in a language they do not speak at home and teaching methods may be unrelated to cultural learning styles. Mother tongue instruction, in conjunction with culturally inclusive curricula, seeks to provide learners with the opportunity to contribute to and benefit from national society without forcing them to sacrifice their linguistic and cultural heritage.

Minority and Indigenous children also often find that the classroom or school is a hostile environment where there are gross disparities in the treatment, and consequently the educational performance and relative success, of minority students. In some countries, minority boys face disproportionately harsh disciplinary actions as compared to non-minority boys who commit the same offences. In other countries minority children face unwelcoming environments, racist attacks and hate speech.

Teachers are a key component in the learning experience. The actions of teachers can do much to overcome discrimination; equally their practices may have an adverse effect on the experiences of education by minorities. Teachers, administrators and the student body must be trained to actively work toward the elimination of prejudices and must be held accountable for conduct that conflicts with that overall objective.

Guaranteeing equality in educational outcomes to minorities will have budgetary implications that must be seen as an integral part of meeting the state's international legal responsibilities. The special needs of these communities that have been neglected or denied for long periods will require extra resources and extra efforts. And no argument should be advanced that, in these situations, 'extra' violates the principle of non-discrimination.

To achieve high quality education for all children will require special attention to those children who have been neglected. In order to create an even playing field, targeted, specialized programmes must be employed that take into account the existence of structural factors that have impeded the full participation of minorities. The principle of non-discrimination does not require uniform treatment in the field of education regardless of circumstances, but rather that differential treatment of individuals and groups is justified when circumstances warrant it.

Gay McDougall is the United Nations Independent Expert on Minority Issues and a former member of the UN Committee on the Elimination of Racial Discrimination and the UN Sub-Commission on the Promotion and Protection of Human Rights.

News

UN Human Rights Committee Releases Concluding Observations on Australia

The UN Human Rights Committee has released its Concluding Observations following a review of Australia's compliance with the *International Covenant on Civil and Political Rights*. The Committee's

recommendations on Australia are the first since 2000 and an important test for the Rudd Government in light of its Security Council bid and its stated commitment to 'human rights leadership'.

The Committee comments on a number of positive human rights developments in Australia, including the National Human Rights Consultation and the Apology to the Stolen Generations. However, the Committee also raises a number of serious concerns and makes concrete recommendations for reform.

The Committee's recommendations consider:

- the lack of legal protection of human rights at the national level – the Committee recommends the enactment of comprehensive human rights and equality legislation, such as a Human Rights Act;
- the incompatibility of aspects of Australian counter-terrorism law, policy and practice with fundamental human rights – the Committee recommends amendment of the Criminal Code, the Anti-Terrorism Act and ASIO legislation;
- the continued suspension of the *Racial Discrimination Act* in relation to the Northern Territory Intervention – the Committee calls for re-design of the Intervention in direct consultation with Indigenous peoples and conformity with international human rights obligations;
- the need to establish an adequately resourced national Indigenous representative body;
- the need to make adequate reparations to the Stolen Generations - the Committee urges Australia to establish a national compensation scheme;
- the need to take further steps to address ongoing issues of violence against women and homelessness;
- the need to take 'urgent and adequate measures, including legislative measures, to ensure that nobody is returned to a country where there are substantial grounds to believe that they are at risk of being arbitrarily deprived of their life or being tortured or subjected to other cruel, inhuman or degrading treatment or punishment';
- the co-operation of Australian law enforcement officials with overseas agencies, which may expose Australians to the real risk of the death penalty – the Committee urges Australia to enact legislation to ensure that no person is extradited to a country where they may face the death penalty and also to ensure that Australian law enforcement officers do not provide assistance in the investigation of crimes (such as the Bali 9) which may expose people to the death penalty;
- the excessive use of force by police without adequate oversight, including the use of Taser guns and lethal force;
- the continued policy of mandatory immigration detention and the use of Christmas Island as a remote detention facility – the Committee urges Australia to abolish mandatory immigration detention, close Christmas Island and enact new migration legislation which respects fundamental rights;
- the need to increase access to justice and legal aid, particularly for Indigenous Australians; and
- the importance of establishing a comprehensive national human rights education program.

The Committee's recommendations are available at:

<http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO5-CRP1.doc>.

The Australian Government is yet to announce its response to the recommendations.

An opinion piece on the Committee's Concluding Observations and their implications for Australia by Phil Lynch, Director of the HRLRC, is available at www.theage.com.au/opinion/australia-can-regain-aaa-human-rights-rating-20090412-a3zr.html.

National Charter of Rights Developments

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

The Human Rights Law Resource Centre continues to collect real life case studies which illustrate how human rights laws can be used to encourage common-sense policies and decisions that promote human dignity and addresses disadvantage. The case studies demonstrate the ways in which

legislation such as the Victorian *Charter*, the ACT *Human Rights Act 2004* and the UK *Human Rights Act 1998* are being used in areas such as disability, aged care, education, mental health and homelessness.

There are now more than 25 case studies available at <http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/case-studies/>.

Below is a selection of new and recent case studies provided by the ACT Welfare Rights and Legal Centre as real life examples of how the ACT's *Human Rights Act* has been used to achieve positive outcomes for their clients.

Privacy for a Vulnerable Female

A vulnerable female client who was being intimidated by a neighbour sought permission from her landlord, a public housing authority, to erect a fence around her rented property. The submission to the public housing authority relied on, amongst other things, the client's right to privacy. Permission to erect the fence was granted.

Family Allowed to Live Together

Following the death of her mother, a client found that she and her children were not entitled to remain in her mother's public housing property, as the lease had been in her mother's name. The children had always lived in the house and had close contacts with the local community, especially through their school and nearby friends. The client was in contact with care and protection services and there was a risk that her children would be taken from her care if she did not have a home for them. In submissions to the public housing authority, the right to protection of family life was raised. The client was given a lease over the property.

Flexible Housing Policy Protects Family Life

A client was homeless and temporarily living with one of her children in a caravan without electricity in NSW. The client's other child was living with her grandmother in the ACT in order to attend school. The client was not eligible for priority housing as she had outstanding debts to the public housing authority from a previous tenancy. The client's advocates invoked the right to protection of family life to advocate for flexibility in applying the allocation rules. The client was housed with both of her children as a priority candidate prior to arranging repayments of debts.

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

Materials and Resources for the National Human Rights Consultation

The Human Rights Law Resource Centre website has now been comprehensively updated to provide a diverse range of materials and resources to assist individuals and organizations to engage in the National Human Rights Consultation.

The following materials are now available at <http://www.hrlrc.org.au/our-work/focus/national-consultation/>.

- Overview of the Consultation
 - About the National Human Rights Consultation
 - Why Australia Needs a Human Rights Act
 - Myths and Misperceptions about a Human Rights Act
- What You Can Do
 - Make a written submission
 - Attend a workshop or roundtable
 - Join the Australian Human Rights Group
 - Join the campaign email list
 - Make a donation to the Human Rights Law Resource Centre

- Materials and Resources
 - *Engaging in the Debate* Report
 - Case Studies: How a Human Rights Act can promote dignity and address disadvantage
 - Right-specific fact sheets on: Right to Equality and Non-Discrimination; Right to Life; Freedom from Forced Work; Freedom from Torture and Other Ill-Treatment; Freedom from Arbitrary Detention; Right to Humane Treatment in Detention; Right to a Fair Hearing; Rights in the Criminal Process; Rights of Children in the Criminal Process; Prohibition on Double Punishment; Protection From Retroactive Criminal Laws; Right to Privacy; Freedom of Movement; Protection of Families and Children; Right to Property; Freedom of Thought, Conscience and Religion; Freedom of Expression; Freedom of Assembly and Association; Right to Take Part in Public Life; Right to Social Security; Right to Work; Right to an Adequate Standard of Living; Right to Health; Right to Education; Right of Self Determination; Cultural Rights; and Right to a Healthy Environment.
 - Thematic fact sheets on: Mental Health; People with Disability; Women; Aboriginal peoples; Young people; Migrants and Asylum Seekers; LGBTIQ Community; Older People; Prisoners (not yet available); Environment; and Muslim people.
- Other Resources, including useful reports and speeches
- HRLRC Workshops and Submission Toolkits

Victorian Charter of Rights Developments

Statements of Compatibility under the Victorian Charter

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

Below is an analysis of recent significant Statements.

Major Sporting Events Bill 2009

The *Major Sporting Events Bill 2009* aims to support the acquisition, retention, staging and management of major sporting events in Victoria, combining all provisions that may be required to control and protect an event within a single Act.

The Bill consolidates existing generic legislation relating to major events, including the *Major Events (Aerial Advertising) Act 2007*, the *Major Events (Crowd Management) Act 2003* and the *Sports Event Ticketing (Fair Access) Act 2002* and includes provisions relating to:

- the control and management of major sporting events;
- the protection of commercial interests of those events, including control of advertising other than aerial advertising;
- protections from claims for economic loss; and
- regulation of the application of other laws to major sporting events.

Legislating for the staging of public events raises a number of human rights issues. In particular, the Bill engages the following rights protected under the *Charter of Human Rights and Responsibilities Act 2006* (Vic): freedom of movement (s 12 of the *Charter*); privacy (s 13); freedom of expression (s 15); rights relating to property (s 20); and liberty and security of person (s 21).

Freedom of expression

The Bill prohibits unauthorised use of event logos and images and the unauthorised broadcasting of events. Authorities have the power to seize goods related to unauthorised advertising material and equipment used in unauthorised broadcasting where there are reasonable grounds to believe that a contravention has occurred. The Statement of Compatibility accompanying the Bill concluded that these prohibitions are reasonable means to 'capture behaviour which undermines the ability of an event organiser to profit from their labours'.

However, in its report on the Bill, the Scrutiny of Acts and Regulations Committee noted that overseas courts have held that events or venues attended by large numbers of people are often significant forums for political speech, especially for people and causes without media access, so that measures to protect property rights may impose an unreasonable limitation on the right to freedom of expression. The Committee expressed concern that official discretion may not be sufficient to avoid these concerns.

The Committee also expressed concern about clause 62 of the Bill, which makes it a criminal offence to possess 'prohibited items' at an event area or venue without authorisation. The definition of 'prohibited item' under clause 3 includes a flag or banner larger than 1 square metre, or with a handle longer than 1 metre. There is no equivalent provision in the *Major Events (Crowd Management) Act 2003*, which the provisions are intended to replace. The Committee is concerned that criminalising the possession of large banners in all parts of sporting arenas may be an unreasonable limit on the rights to freedom of expression and public life.

Freedom of movement

Clause 84 of the Bill provides that an authorised officer may exclude a person from an event venue or area for 24 hours if the officer reasonably believes the person is:

- disrupting or interrupting a sporting event;
- risking the safety of that person or other spectators; or
- causing unreasonable disruption or interference to spectators or works.

The Bill provides that the removal cannot be arbitrary; authorised officers need to have reasonable grounds to believe the person was involved in unlawful violence and/or damage to property before they can be removed. The Statement of Compatibility contended these limitations are reasonable, as they are enacted in the interests of public safety.

The Committee expressed concern that people may be expelled without realising their behaviour was unsafe, disturbing or interfering, or that they may instead avoid expressing themselves in legitimate ways to avoid risking expulsion. The Committee also questioned whether a less restrictive alternative (such as only empowering officials to expel a person if they persist in behaviour after being asked to stop) could instead have been adopted to avoid any unreasonable limitations on the rights to freedom of expression and public life.

John So and Charlotte Beeny, Human Rights Law Group, Mallesons Stephen Jaques

Charter Assists Man with Disability to Access Support Services

A man with a physical disability was living independently with the support of a personal attendant carer, funded through a government department. As the man's disability support dollars dried up, his ability to take part in community activities was whittled away to the point that he had been unable to leave his house for several months. The department told the man he had already used more than his allocated resources and could not access any more, but after his advocate raised human rights concerns a more senior person within the department offered additional resources to enable the man to leave his house and participate in the community.

Relevant *Charter* sections: s 10 protection from cruel, inhuman or degrading treatment; s 12 freedom of movement; s 18 taking part in public life

Source: Victorian Equal Opportunity and Human Rights Commission

Public Housing Resident Avoids Possible Eviction after Death of Tenant

People living in public housing who are not tenants (on the lease) can apply in certain circumstances to have the tenancy created in their own name, but this requires an application to VCAT. One person applied for such an order after the actual tenant, with whom they had been living for some time, passed away. The person's advocates raised a range of human rights concerns with the relevant government department, which subsequently granted the tenancy on the day before the case was due to be heard by the tribunal, thereby saving the person the unnecessary stress of having to appear in court.

Relevant *Charter* sections: s 9 right to life; s 13 privacy and reputation

Source: Tenants' Union of Victoria and the Victorian Equal Opportunity and Human Rights Commission

Victorian Charter Case Notes

Failure to Review Involuntary Treatment a Breach of Human Rights

Kracke v Mental Health Review Board [2009] VCAT 646 (23 April 2009)

On 23 April 2009, Justice Bell, President of the Victorian Civil and Administrative Tribunal, handed down a significant decision which discussed in detail important aspects of the application and operation of the *Charter*.

Facts

The case concerned the compulsory medical treatment of a man, Mr Kracke, without his consent, and without this treatment having been reviewed by the Mental Health Review Board as required by the *Mental Health Act 1986* (Vic).

The Mental Health Act establishes a regime for 'involuntary treatment orders' ('ITOs') and 'community treatment orders' ('CTOs'), and prescribes time limits within which such orders (which are made by an authorised psychiatrist) 'must' be reviewed by the Board. ITOs must be reviewed within 12 months. CTOs must be reviewed within 8 weeks. In Mr Kracke's case, the ITO was not reviewed for over two years and the CTO was not reviewed for over one year. However the Act is silent as to the consequences of a failure to review the order within the time limits specified. Mr Kracke submitted that the Board's failure to complete the necessary reviews meant that the orders became invalid.

Because the application was in many respects a test case, the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission exercised their rights of intervention under ss 34(1) and 40(1) of the *Charter*. Leave was also given to the Human Rights Law Resource Centre to appear as amicus curiae and to the Secretary to the Department of Human Services to intervene as the contradictor.

Decision

Interpreting and Applying the Charter

Justice Bell commenced the decision by setting out the proper approach to interpretation and application of the *Charter*, which he referred to as 'historic legislation' which seeks to 'enhance our system of government by protecting and promoting those human rights which are fundamental to the rule of law in a democratic society'. Having regard to this, Bell endorsed the following principles of human rights interpretation:

- the *Charter* should be interpreted generously to give individuals the 'full measure of the fundamental rights and freedoms referred to'; and
- the *Charter* should be interpreted as a 'living instrument', capable of growth and expansion, and applied in the context and in the light of present day conditions.

He held that the scheme of the *Charter* must be interpreted as a whole and that there are four broad steps to be followed when applying the *Charter* in cases such as the present:

- Engagement: Does the legislation limit human rights, having regard to its interpretation using standard interpretation principles and the scope of the human rights?
- Justification and proportionality: If legislation does limit human rights, is the limitation proportionate and justified under the general limitations provision in s 7(2)?
- Reinterpretation: If the limitation is not justified, is it possible to interpret the legislation compatibly with the human rights under the special interpretive obligation in s 32(1)? and
- Declaration of inconsistency: If it is not possible to reinterpret the legislation, should the Supreme Court make a declaration of inconsistent interpretation under s 36(2)?

In relation to each of these steps, Justice Bell referred extensively to international jurisprudence, including that of the UN Human Rights Committee, the European Court of Human Rights, and domestic jurisprudence from countries such as the United Kingdom, New Zealand, Canada and South Africa.

Engagement

Justice Bell used the term 'engagement' to refer to situations where a statutory provision 'apparently' limits human rights; that is, it imposes a limit that needs to be justified under s 7(2). To decide whether

a provision engages a human right, it is necessary to interpret the provision according to the standard principles of interpretation and interpret the right in issue so as to identify its scope, then compare the two. At the stage of identifying the scope of a human right, the criteria for 'justification' are not relevant. The scope of the right is identified broadly and not legalistically in a way that fulfils its purpose and secures for individuals the full benefit of its protections. The onus of establishing whether human rights are engaged rests on the party making that assertion.

Justification and Proportionality

Once it has been determined that a right has been engaged, the next question is to examine whether the limits placed on the right are justified and proportionate under s 7(2). The onus of establishing that a limitation is justified rests on the party making that assertion.

Section 7(2) incorporates two requirements: legality and proportionality. For a limitation to be legal or 'under law', it must be accessible, of sufficient precision and not arbitrary. For a limitation to be proportionate it must be 'reasonable and demonstrably justified in a free and democratic society', which is to be determined with reference to the specified criteria set out in s 7(2). Determining whether a limitation is proportionate requires a global judgment and not a mechanical, check-list approach. The specific factors are given to help in making the judgment but they are inclusive and other criteria may be considered. On the specific factors, Bell J stated:

- Nature of the right: All of the human rights in the *Charter*, without exception, express and protect fundamental values and interests. The task here involves identifying those values and interests.
- Importance of the purpose of limitation: The limitation must relate to societal concerns which are 'pressing and substantial' and should be identified with clarity and evidence if necessary.
- Relationship between limitation and purpose: The limitation must be rationally and reasonably connected to its purpose. If the limitation on the right is not rationally connected, it is not justified however important the purpose may be.
- Less restrictive means: The limitation should impair the right 'as little as possible'. It is not necessary for the limitation to be the least restrictive means available to achieve the ends, but that it 'fall within a range of reasonable alternatives'.

Reinterpretation

One of the central issues to be determined in this case was the application of the special interpretative provision contained in s 32 of the *Charter*. Justice Bell emphasised that the interpretive obligation in s 32(1) is 'very strong and far reaching'. With reference to international jurisprudence, he laid out a series of principles to be employed when undertaking the task of reinterpretation. These included that:

- the application of the obligation is mandatory;
- it applies where the legislation is clear and unambiguous and may even require the court to depart from the legislative intention of parliament;
- it may require the court to depart from pre-*Charter* interpretations of legislation;
- the purpose of the legislation must be viewed 'at the appropriate level of abstraction';
- it may require the court to read in words to legislation, read legislation down or narrowly, or read legislation broadly to achieve compatibility; and
- generally, s 32(1) will not operate retrospectively to pre-*Charter* events, although it does apply to the interpretation of legislation, whenever enacted.

Justice Bell also clarified that s 32(1) applies to anyone who is required to interpret or give effect to legislation. This means that legislation conferring an open-ended discretion must be interpreted as allowing the discretion to be exercised only in a manner which is compatible with human rights, assuming that is not inconsistent with its purpose. Consequently, disputes concerning the compatibility of a public authority's actions will largely turn on questions of engagement and justification rather than the interpretation of the enabling provision itself.

Declaration of Inconsistent Interpretation

The decision did not discuss this issue as the power is conferred on the Supreme Court and, at least in the United Kingdom, has been observed to be a 'measure of last resort'.

Application of the Charter to Courts and Tribunals

Another important question to be determined was the application of the *Charter* to courts and tribunals and in particular, the question of whether the Board and VCAT were bound to act compatibly with all, or only some, of the *Charter* rights. In order to answer this question it was necessary to determine the circumstances in which a court or tribunal will be considered to be also acting as a public authority. Justice Bell recognised that there were three approaches that could be taken to this question: narrow, intermediate and broad. He felt that the broad approach, which held that courts and tribunals were bound by all rights in the *Charter*, gave best effect to the purpose of the *Charter*. However, he concluded that this approach was inconsistent with the structure of the *Charter* and that the intermediate approach should be adopted.

This means that courts and tribunals are bound to act compatibly with *all* of the human rights in the *Charter* when deciding cases that are administrative in nature in the public law sense. When acting in a judicial capacity, courts and tribunals are bound to act compatibly only with certain human rights. These are the particular rights concerning the powers exercised by the court or tribunal specifically in respect of the proceeding before it; namely ss 10(b), 21, 23, 24, 25, 26 and 27. When VCAT reviews government decisions, such as the present decision of the Board, it is exercising its review jurisdiction which is administrative in nature. It is therefore bound to act compatibly with all *Charter* rights. When the Board is reviewing treatment orders it is also acting in an administrative capacity and is wholly bound by the *Charter* as a public authority.

Breach of the Right to Fair Hearing

After determining that the Board and VCAT were bound by each of the *Charter* rights as public authorities, Justice Bell applied his four step approach to each of the rights which Mr Kracke argued had been limited, beginning with the right to a fair hearing. It was argued by the Attorney-General that this right applied only to judicial proceedings and not to administrative proceedings in courts and tribunals. This argument was dismissed by Bell J who held that the right applied to both.

Justice Bell held that the Board had breached Mr Kracke's human right to a fair hearing. As part of the human right to a fair hearing, hearings must be conducted within a reasonable time. What is reasonable will depend on such factors as the complexity of the case, the importance of the case to the applicant, any delay caused by the applicant and the explanation for the delay. On the evidence, Mr Kracke's case was not unusually complex and was very important to the protection of his human rights. While Mr Kracke had requested adjournments, the primary reason for the delay was administrative oversight and consequently the failure to review was a breach of Mr Kracke's right to a fair hearing.

Validity of the Treatment Orders

Mr Kracke argued that the failure to conduct the mandatory reviews made his treatment invalid. He made this argument based on ordinary principles of statutory interpretation (relying on international human rights jurisprudence) and on the basis of the special interpretative obligation in s 32(1) of the *Charter*. In deciding whether the orders were invalid, Bell J was required to apply his four steps of engagement, justification, reinterpretation and declaration of inconsistent interpretation. As noted above, determining the meaning of a provision on ordinary principles of statutory interpretation is a necessary component of the first step 'engagement'.

Engagement: Scope of Human Rights and Standard Interpretation

After considering the scope of each of the relevant rights, including by extensive reference to international and comparative human rights jurisprudence, Bell J found that several of Mr Kracke's rights were engaged by his involuntary treatment. Making the community treatment order engaged Mr Kracke's rights to freedom from medical treatment without his full, free and informed consent (s 10(c)), to freedom of movement (s 12) and to privacy (s 13(a)). Making the involuntary treatment order engaged those rights as well as the right to liberty (s 21). Reviewing (or failing to review) the treatment orders engaged all of these rights and the right to a fair hearing (s 24(1)).

Justice Bell did not consider that the right to be free from cruel, inhuman or degrading treatment had been engaged as he was not satisfied that the minimal level of severity had been reached. He also did not consider that the right to liberty was engaged by a community treatment order as the right is concerned with liberty in a traditional, physical sense and is not engaged in the absence of detention.

Justice Bell held that on ordinary principles of statutory interpretation, the failure by the Board to conduct the reviews of Mr Kracke's treatment orders within the specified times did not render the orders invalid. This conclusion was reached because, while the failure to review was unacceptable, the purpose of the legislation was to ensure that mentally ill people receive such care, treatment and protection as is medically necessary.

Justification and Proportionality

After identifying the rights engaged, Bell J undertook a proportionality inquiry to determine whether the limits placed upon those rights engaged were justifiable with reference to s 7(2). The key question was whether holding an unreviewed treatment order to be valid was an unjustifiable limit on the patient's human rights.

Justice Bell held that the limit was proportionate and met the requirements of s 7(2). The purpose of the limitation was to ensure that necessary medical treatment was given to people who are mentally ill. This was a very important purpose which was not reduced by the fact that Mr Kracke disputed the necessity of the treatment. Justice Bell recognised that there may be cases where a safeguard, such as independent review, is indispensable to the proportionality of a limitation; however this was not one of them. The system contained a range of safeguards of which reviews, though important, were only one part.

Because the limit was a justifiable one, Justice Bell did not need to consider reinterpretation.

Remedies

Mr Kracke adopted the submissions of the Human Rights Law Resource Centre as amicus in relation to remedies and submitted that Bell J should make a declaration that the Board violated his human rights. Justice Bell accepted this submission in relation to the right to a fair hearing. In doing so he commented that 'the *Charter* is not a toothless tiger'; it expressly preserves the existing powers of courts or tribunals to grant relief or remedies including declarations of unlawfulness in respect of the acts or decisions of public authorities. In making a declaration that the Mental Health Review Board breached Mr Kracke's human right to a fair hearing under s 24(1) of the *Charter* by failing to conduct the reviews of his involuntary and community treatment orders within a reasonable time, Bell J concluded [at 820]:

When a human right is breached, the individual is injured. Because of the broader role of human rights, society is injured as well. Human rights protect interests and values which society in Parliament considers to be fundamental, both to the individual and to the maintenance of democratic society based on the rule of law. Where human rights are breached, both the individual and society have a strong interest in the remedy of a declaration, in which inheres their final vindication.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VCAT/2009/646.html>.

Lisa Mortimer is a lawyer with Allens Arthur Robinson and a member of the legal team which acted for the Human Rights Law Resource Centre, as amicus, on a pro bono basis

Courts and Tribunals Directly Bound by *Charter* Rights

De Simone v Bevnol Constructions and Developments Pty Ltd (2009) (Unreported, Supreme Court of Victoria, Court of Appeal, Neave JA and William AJA, 3 April 2009)

The Court of Appeal held that courts and tribunals are bound by ss 24 (right to a fair hearing) and 25 (rights in criminal proceedings) of the Victorian *Charter* when they exercise functions engaging those rights.

In this case, there was a possibility that VCAT had erred by not taking ss 24 and 25 into account when refusing to stay civil proceedings. However, no substantial injustice was caused by the refusal and the Court of Appeal therefore declined to overturn VCAT's decision.

Facts

In proceedings before VCAT, De Simone had asked for a stay of civil proceedings on the basis that there was a police investigation on foot. He was likely to be charged in relation to the same facts that founded the civil claim. De Simone argued that a failure to stay the civil claim would jeopardize his rights in relation to the criminal matter (for example, the right to remain silent). In November 2008, VCAT refused to stay the civil claim and held that:

- VCAT was not bound by the *Charter* because it was acting in a judicial capacity;
- the rights in ss 24 (right to a fair hearing) and 25 (rights in criminal proceedings) did not modify the existing common law test for determining whether a matter should be stayed; and
- the rights under ss 24 and 25 in respect of the criminal proceedings only applied to persons charged with a criminal offence and, since De Simone had not yet been charged, those rights were not engaged.

De Simone appealed VCAT's decision to the Court of Appeal. He argued that VCAT 'had wrongly disregarded the effect of the civil hearing on his right to silence in criminal proceedings'. He argued that the VCAT fair procedure provisions apply only to civil proceedings in VCAT, therefore they must be read subject to the fair trial requirements applicable to a person who may become a defendant in criminal proceedings.

Decision

The Court of Appeal found the *Charter* applied to VCAT and there was a 'real argument' that ss 24 and 25 should have been taken into account when deciding whether to stay civil proceedings. However, since there was no substantial injustice caused by the refusal to stay the proceedings, the Court of Appeal declined to overturn VCAT's decision.

The Court of Appeal looked at whether VCAT was bound by the *Charter*, and apparent tensions within the *Charter*. Section 6(2)(b) of the *Charter* provides that the *Charter* applies to courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3. Section 4(i)(j) excludes courts and tribunals from the definition of public authority except when they are acting in an administrative capacity. The Court of Appeal said of this apparent tension:

Given that s 6(2)(b) refers to both the interpretive functions of courts and tribunals in Part 3, Division 3, and to their functions under Part 2, it appears that s 6(2)(b) implicitly reads down s 4(1)(j), so that Part 2 applies directly to courts and tribunals. It follows that ss 24 and 25 apply directly to courts and tribunals, when they exercise their functions.

This passage of the Court of Appeal has since been relied upon by Bell J in *Kracke v Mental Health Review Board* [2009] VCAT 646 (23 April 2009).

The Court of Appeal doubted whether the *Charter* rights necessarily required any modification to the relevant common law test. However, they went on to say that 'the applicant has a real argument that the [common law test] should be modified in light of ss 24 and 25 of the *Charter*.'

However, even if VCAT erred in holding that ss 24 and 25 did not modify the common law test, allowing the error to go uncorrected 'would not cause substantial injustice on the facts of this case'. This was because VCAT had already made orders prohibiting the disclosure of De Simone's evidence to any person not a party to the civil proceedings.

This case is significant in that the Court of Appeal held that courts and tribunals are bound by the *Charter* when they are exercising functions relevant to the rights in ss 24 and 25. This aspect of the decision has since been cited with approval in *Kracke v Mental Health Review Board*.

This case is also significant in that it clarified the scope of the rights in ss 24 and 25 in respect of criminal proceedings. The previous decision of VCAT, that the rights were not engaged until charges were laid, was at odds with case law in other jurisdictions. The comments of the Court of Appeal have expanded the application of ss 24 and 25 to situations where criminal charges are 'threatened or actual'. This is a positive development and is in accord with the spirit of the rights, which are designed, inter alia, to protect a person's right to silence and the presumption of innocence.

The case is also important in that it confirms that there may be situations in which common law principles should be modified to be consistent with rights in the *Charter*. The Court of Appeal stopped short of making a definitive statement to this effect, instead stating that there was a 'real argument' that the common law test in this case should be modified in light of the *Charter*. However, the *Charter* will generally not require that the common law rules be modified.

At time of publication, this decision was not available online.

Helen Conrad is on secondment to the Human Rights Law Resource Centre from Mallesons Stephen Jaques

Comparative Law Case Notes

Stay of Eviction into Homelessness Required to Prevent Violation of Human Dignity and Rights

Machele and 67 Others v William Marofane Mailula and Others [2009] ZACC 7 (26 March 2009)

The Constitutional Court of South Africa held that eviction will 'always' be a constitutional matter. The court further held an interim execution order for eviction was appealable where irreparable harm would result, were leave not granted. The applicants established irreparable harm largely on the basis that eviction involves the indignity and trauma of losing one's home.

Facts

In November 2008, the South Gauteng High Court in South Africa made a series of orders in relation to premises known as Angus Mansions ('the premises'). The premises were occupied by 62 families (the applicants) and ostensibly owned by the first respondent Mr William Mailula ('the respondent'), although this issue is still to be determined.

On 5 November 2008, the High Court granted an eviction order in favour of the respondent. Amongst those to be evicted were six people with disabilities, seven elderly people, 79 children (22 of these in receipt of state child support grants) and 31 woman-headed households. The High Court made further orders permitting the applicants leave to appeal to the Supreme Court of Appeal.

On 13 November 2008, the High Court granted the respondent leave to execute the eviction order ('the interim execution order') on 15 December 2008. This interim execution order was made even though the applicants had appealed the eviction order.

On 20 November 2008, the applicants appealed the interim execution order to the Constitutional Court of South Africa. The appeal was made to the Constitutional Court because the applicants believed interim orders could not be appealed to the Supreme Court of Appeal.

A hearing was held in the Constitutional Court on 3 December 2008. At this hearing the Court ordered that the interim execution order be suspended pending the applicants appeal to the Supreme Court of Appeal. The reasons for this decision were handed down on 26 March 2009.

Decision

The Constitutional Court noted the eviction order was made without regard to the Constitution, in particular to section 26 (right to adequate housing, provisions against illegal/arbitrary evictions) or to the provisions of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998* (PIE). The Constitutional Court referred to the High Court's failure to consider the PIE as 'inexcusable.'

The Constitutional Court identified 3 issues to be considered in the appeal: whether an interim execution order could be appealed; whether a constitutional issue had been raised; and whether the applicants could establish they would suffer irreparable harm.

The Court noted that in general it is not in the interests of justice for a litigant to be granted leave to appeal an interim order of execution. The decision of *Minister of Health v Treatment Action Campaign (No 1)* established that, to be granted leave to appeal an interim order of execution, the applicant would need to show irreparable harm would result were leave not granted.

As to whether the matter raised a constitutional issue, the Court referred to a past in which Parliament made laws which discriminated against entire communities and involved the widespread removals of people from one area to another. The Court noted that the Constitution specifically protects against arbitrary evictions and stated 'an eviction from one's home will always raise a constitutional matter.' Accordingly the relief sought by the applicants was held to be a constitutional matter.

In relation to the issue of 'irreparable harm', the respondent argued the applicants were not the 'poorest of the poor' and would be able to immediately find other premises to rent following eviction. The Court dismissed this argument on the basis that the Constitution applied regardless of socio-economic status. In any event the court noted that the applicants were recipients of housing subsidies and therefore were a group of society in need of protection. Finally, the Court referred to the indignity and trauma of losing one's home, aside from the issue of whether alternative premises were available.

The respondent argued he would suffer irreparable harm if the interim execution order were to be suspended. He contended a utility debt to the City of Johannesburg (fifth respondent) would result in possible foreclosure, however the Court found it was unlikely this would occur. As such, the harm to the respondent would be both minimal and repairable. Ultimately the interim execution order was suspended and the decision granting leave to execute the eviction order was referred back to the Supreme Court of Appeal.

Relevance to the Victorian Charter

The Victorian *Charter* does not contain explicit provisions about the right to adequate housing or about arbitrary or illegal evictions, as found in the South African Constitution and the PIE. Nonetheless, in circumstances where vulnerable people are to be evicted (similar to the circumstances above), the *Charter* does contain provisions which may be engaged by eviction processes, including the right to life (s 9), the right of a person not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with (s 13) and the right to protection of families and children (s 17).

It is also notable that, in their recent Concluding Observations on Australia, the UN Human Rights Committee identified that the fact of homelessness itself raises significant human rights issues, including in relation to the rights to equality and non-discrimination, enshrined in arts 2 and 26 of the *ICCPR* and s 8 of the Victorian *Charter*.

The decision is available at <http://41.208.61.234/uhtbin/cgiisirs/20090402233722/SIRSI/0/520/J-CCT99-08>.

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South African Constitutional Court Considers the Right to Sufficient Water and a Dignified Life

City of Johannesburg and Others v Mazibuko and Others (489/08) [2009] ZASCA 20 (25 March 2009)

In this case, the Supreme Court of South Africa considered whether a local authority had a duty under the South African Constitution to provide free water to Phiri residents who could not afford to pay for such water themselves. The Court confirmed that all people in South Africa have the right to access sufficient water pursuant to s 27 of the South African Bill of Rights. It was held that 'sufficient water' is the quantity of water required for dignified human existence. On the facts of this case, Phiri residents were found to be entitled to 42 litres of water per person per day. Water metres which restricted Phiri residents' access to water were held to be unlawful.

Facts

Until 2004, the residents of the Phiri township in Soweto had access to an unlimited supply of water which was not metered and for which they were charged on the basis of a deemed consumption of 20kl per household per month. In 2004, the deemed consumption was discontinued and payment metres were installed which dispensed 6kl of water per household per month for free. Additional water had to be pre-paid for.

The respondents argued that s 27 of the South African Bill of Rights gave them the right to access 50 litres of water per person per day. That quantity of water, they contended, had to be provided free to each resident in Phiri who could not afford to pay for such water themselves. In response, the City of Johannesburg ('the City') maintained that the Constitution only required them to provide Phiri residents with 25 litres of free water per person per day.

Decision

Right to sufficient water

The Court confirmed that all people in South Africa have the right to access sufficient water pursuant to s 27 of the South African Bill of Rights. They held that a purposive approach should guide the interpretation of this right. The Court emphasised that the principles of dignity, freedom and equality lay at the heart of the South African constitutional order. It therefore followed that the right to 'sufficient' water referred to the quantity of water required for dignified human existence.

It was held that the amount of water required for dignified human existence will depend on the circumstances of the individual concerned. Therefore, what constitutes a 'sufficient' level of water may differ from case to case. In this case, the evidence before the Court indicated that, on average, Phiri residents required 42 litres of water per person per day. Therefore, the City's policy of providing only 25 litres of free water per person per day fell below that of a sufficient level.

Progressive realisation of rights

It was acknowledged by the Court that the constitutional right to water did not provide for the immediate fulfilment of that right. Rather, the Constitution only required the City to act reasonably and to progressively fulfil its obligation to ensure that everyone had access to sufficient water. In this case, the City was obliged to supply free water to residents who could not pay for such water *if* it was reasonable to expect them to do so. Factors pertaining to reasonableness included the availability of resources and the cost implications of providing residents with 42 litres of free water each day. It was decided that it was neither possible nor appropriate for the Court to revise the City's free water policy. Therefore, the Court instructed the City to formulate a revised water policy in light of the finding that it was constitutionally obliged to grant each Phiri resident who could not afford to pay for water with access to 42 litres of free water per day, in so far as this could reasonably be achieved. Pending the reformulation of the water policy, indigent Phiri residents were to be provided with 42 litres of free water each day.

Prepaid water metres

The Court emphasised that procedures for restricting access to water must be fair and equitable and must provide residents with reasonable notice that their water services were going to be limited or discontinued. Therefore payment metres must not be used to deny a person access to basic water services where that person is able to prove that he or she is unable to pay for water. For these reasons, the payment metres which restricted Phiri residents' access to free water were unlawful. However, the finding of unlawfulness should be approached with a note of caution. Having concluded that the water metres were unlawful, the Court went on to decide that, in light of the significant capital that had already been invested in this infrastructure, it was not appropriate to order the water metres to be removed. The Court therefore ordered that the finding of unlawfulness should be suspended for a period of two years to enable the City to take steps to legalise the use of prepaid water metres.

Relevance to the Victorian Charter

Unlike the South African Constitution, the Victorian *Charter* does not expressly provide for socio-economic rights. Therefore the right to water is not provided for in the *Charter*. However, access to water is an issue that may be relevant to some of the rights that are prescribed by the *Charter*, particularly the right to life. As South African case law establishes, access to sufficient water represents an important aspect of the right to live a dignified human existence. In Victoria, the relationship between access to water and the right to life is one that may become increasingly significant in light of issues such as water shortages and climate change.

The decision is available at <http://www.saflii.org/za/cases/ZASCA/2009/20.html>.

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State Obligation to Conduct Public Investigation into Potential Violations of the Right to Life and Prohibition against Ill-Treatment

AM & Ors, R (on the application of) v Secretary of State for the Home Department & Ors [2009] EWCA Civ 219 (17 March 2009)

The UK Court of Appeal has affirmed that the government has an obligation to conduct an independent investigation where there is credible evidence of a potential breach of arts 2 (right to life) and 3 (prohibition against ill-treatment) of the *European Convention on Human Rights*.

Facts

In November 2006, a disturbance broke out at the privately-operated Harmondsworth Immigration Detention Centre regarding the treatment of detainees. Detainees not involved in the disturbance were

allegedly subject to ill-treatment amounting to a breach of art 3 of the *European Convention* due to the manner in which the disturbances were managed and controlled.

In May 2007, the Appellants wrote to the Home Secretary alleging that the Centre's operators had infringed their art 3 rights during the management of the disturbance, and calling for a 'full public inquiry' into the underlying cause and the treatment of detainees. The state has a well-established obligation to instigate an official investigation where there is credible evidence of a breach of art 2, or credible evidence that one or more individuals have been subjected by, or with the connivance of, the state to treatment sufficiently grave to fall within art 3.

At first instance it was held that, but for the fact that the state had been alerted too late, the Home Secretary's investigatory obligation would have been engaged and unsatisfactorily discharged. The Appellants appealed. The Home Secretary and the Centre operator cross-appealed against the finding that they had not fulfilled their duty of investigation.

Decision

By majority, the Court of Appeal held that the Home Secretary ought to have conducted an independent public inquiry when the Appellants alerted him to the possibility that their art 3 rights may have been infringed. The Court of Appeal held that the High Court had erred in finding that the claim had been made too late and granted declaratory relief.

Purpose and scope of investigation

Fulfilling the obligation to investigate must involve informing the public of 'what may have gone wrong' in order to maximise future compliance with art 2 and 3. Here, the Court was divided as to whether the scope of the investigation extended beyond the particular allegations brought by the Appellants so as to require a broader inquiry into the circumstances leading up to the disturbance and its underlying causes.

Sedley LJ held that the obligation should extend to include an appraisal of the Centre's management, institutional culture and systems. Such issues were not reserved for public and political debate only.

By contrast, Longmore and Elias LJ held that the obligation did not extend to wider investigation as sought by the Appellants. Elias LJ agreed that although the purpose of the investigation was to learn lessons for the future, the focal point of the investigation must still be on 'the immediate reasons surrounding the death or ill-treatment' (at [108]). His Honour nevertheless concluded that the obligation was triggered in this instance, based on the wide range of mistreatment alleged by the Appellants.

Ambit of issues to be considered in determining whether to conduct public inquiry

Whether a public inquiry is required is a fact-sensitive question that must be determined on a case-by-case basis. Civil and/or criminal proceedings *may* sufficiently discharge the obligation. The question in this case was whether the state, in making that determination, should consider the full circumstances of the incident of which it had knowledge (including previous reports of a culture of oppression), or only the specific allegations of art 3 breach brought by the Appellants.

Sedley LJ suggested that the state should consider the full circumstances of the breach in determining whether a public inquiry is required. In his Honour's view:

The degree of involvement or suffering of the particular claimants — unless they were to found a submission that they are mere meddlers who lack standing — are largely irrelevant. What matters is whether the entirety of what they have brought to the court's attention requires, or at least at some point required, the Home Secretary to set up an inquiry. (at [35])

Elias LJ disagreed that the individuals' particular suffering is irrelevant and emphasised that the obligation 'is parasitic on alleged substantive breaches of the Article ... The nature of that obligation is inextricably linked to the specific nature of the alleged breaches' (at [91]). In this case, however, his Honour characterised the alleged substantive breach as comprising the whole range of treatment of which the state had notice (at [88]).

Longmore LJ did not agree that a public inquiry was required whenever allegations of *systemic* breach were made. The state must be able to exercise discretion, particularly given the resources required for a full scale inquiry. His Honour held that in this case the state was entitled not to hold a public inquiry as the obligation was discharged by 'ordinary processes of law'. It is unclear, however, to what extent

Longmore LJ considered that prior allegations of systemic violation of art 3 should inform the state's consideration of whether a public inquiry is required.

Minimum requirements of an investigation

The Court confirmed earlier formulations of the minimum requirements of any investigation — namely, the investigation should:

- identify and punish those responsible;
- be independent and impartial;
- be effective in the sense that it is capable of leading to a determination of whether force was justified;
- be thorough; and
- permit access by complainants to the procedure.

The state should consider these minimum requirements in assessing whether a public inquiry is required.

In light of these minimum requirements and the scope of issues which, in their view, the Home Office should have taken into consideration, Sedley and Elias LJ held that neither civil or criminal proceedings, nor the Home Office's independent inquiry, were sufficient to discharge the obligation in the present case.

Differences between procedural obligation under Articles 2 and 3

The Court found there were no substantive differences between the content of the procedural obligation under arts 2 and 3. The only practical difference is that victims of a breach of art 2 are unable, by definition, to advance their own case, whereas art 3 victims may seek direct recourse to law. As a consequence, it is more likely that a public inquiry will be required to discharge the obligation in art 2 cases.

Relevance to the Victorian Charter

The right to life and prohibition against ill-treatment are protected by ss 9 and 10 of the Victorian Charter. This decision assists in defining the nature and scope of the state's obligation to investigate alleged breaches of these rights and the scope of issues which should be considered when determining whether to instigate a full public inquiry. The majority judgments will offer particular guidance on this question where there are allegations of systemic breaches of these rights.

The decision is available at <http://www.bailii.org/ew/cases/EWCA/Civ/2009/219.html>.

Stephanie Chu, Human Rights Law Group, Mallesons Stephen Jaques

Detention and Treatment in Government-Run 'Sobering Up' Centre may Amount to Ill-Treatment

Wiktorko v Poland [2009] ECHR 14612/02 (31 March 2009)

The European Court of Human Rights has held that the treatment of a Polish national, whilst detained at a government-run 'sobering-up centre', constituted degrading treatment in violation of the substantive protection of art 3 of the *European Convention on Human Rights*. The applicant in this case was forcibly undressed by two male employees and was immobilised by restraining belts for a period of ten hours. Further, the Court held that subsequent investigations and proceedings carried out by Polish authorities were inadequate, in violation of the procedural limb of art 3 of the Convention.

Facts

Ms Wiktorko is a Polish national who was detained in a sobering-up centre in her home town of Olsztyn in December 1999, after refusing to pay a taxi fare.

At the sobering-up centre, Ms Wiktorko was placed in restraining belts, tied to a bed and locked in a cell for approximately ten hours, after which she was released from the centre. Ms Wiktorko also claimed that she was brutally manhandled and beaten, insulted, forcibly stripped naked by two men and a

woman and forcibly put into a disposable gown. The Polish Government submitted that the applicant had been aggressive towards and had verbally insulted the centre's staff, leaving the staff with no choice but to undress her and put her into a disposable gown by force.

Ms Wiktoro submitted a formal complaint to the district police, in which she alleged that she had not been intoxicated at the time of detention and that the detention had infringed her personal rights. In October 2000, after numerous investigations and appeals, the Olsztyn Regional Court upheld the decision of the district prosecutor to discontinue the proceedings. The Olsztyn Regional Court found that the applicant had been intoxicated and therefore her detention in the sobering-up centre and the use of force had been justified.

Decision

The European Court of Human Rights found that there had been both a substantive and procedural violation of art 3 of the Convention. Article 3 provides that no person shall be subjected to torture or to inhuman or degrading treatment or punishment.

Substantive violation of Article 3

The Court reiterated the following general principles in relation to art 3:

- the article enshrines one of the most fundamental values of a democratic society and contains an absolute prohibition, irrespective of the circumstances or the victim's behaviour;
- to fall under art 3, ill-treatment must be of a minimum level of severity, determined in light of the circumstances of the case. Such circumstances include the duration of the ill-treatment, its physical and mental effects and, in some cases, the gender, age and state of health of the victim;
- where the ill-treatment occurs in a situation amounting to a 'deprivation of liberty' within the meaning of art 5 of the Convention, any recourse to physical force will, in principle, infringe art 3 where the force has not been made strictly necessary by the victim's own conduct; and
- the mere fact that domestic courts have found that the use of force did not amount to a criminal offence does not, in itself, absolve the government from its responsibility under the Convention.

The Court found that in this case, the conduct of the staff of the sobering-up centre amounted to degrading treatment, contrary to art 3, for the following reasons:

- the fact that the applicant was stripped naked by three employees, including two men, showed a clear lack of respect for the applicant and, in effect, diminished her human dignity. This was especially so given that the two male members of the staff undressed the applicant forcibly, as opposed to merely ordering her to undress; and
- the fact that the applicant was placed in restraining belts for a period of ten hours, which, in the Court's opinion, amounted to an excessive period of time.

Procedural violation of Article 3

The Court stated that art 3 also contains a procedural requirement, being an obligation on national authorities to carry out 'an effective official investigation' when an individual makes a credible assertion that they have suffered treatment infringing art 3 at the hands of agents of the State. The investigation must be capable of establishing the relevant facts and identifying and punishing those responsible. The Court noted that this procedural requirement was essential for maintaining the public's confidence in the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts by government authorities.

The Court found that there had been a violation of the procedural requirement contained in art 3 in this case, as the Polish authorities had investigated the applicant's allegations 'in too narrow a framework'. The investigations and proceedings by the Polish government focussed on the justification for the applicant's deprivation of liberty and for the use of force against her, namely the applicant's intoxication. Because of this, the Court found that the Polish authorities had deprived themselves of the possibility of assessing the proportionality of the force applied to the applicant, as required by art 3 standards. These standards included consideration of the justification for the forced removal of the applicant's clothing by two male employees, and the use of restraining belts to immobilise the applicant for ten hours.

Relevance to the Victorian Charter

The Court's decision has implications for the interpretation of s 10(b) of the *Charter*, which provides that a person must not be treated or punished in a cruel, inhuman or degrading way. The decision suggests that this section should be interpreted broadly, particularly where the alleged ill-treatment occurs at the hands of employees of the State and in the context of the deprivation of the victim's liberty.

The decision is also of interest for its consideration of the procedural aspect of the prohibition on inhuman or degrading treatment or punishment. Although the Victorian Courts do not appear to have considered whether s 10(b) of the *Charter* contains a similar procedural requirement, the decision of *Wiktorko* suggests that, where the alleged ill-treatment occurs by government officials, the nature of any investigation or proceedings carried out by government authorities may be a relevant consideration.

Edwina Chin, Human Rights Law Group, Mallesons Stephen Jaques

Discrimination on the Ground of Poverty

Boulter v Nova Scotia Power Incorporation, 2009 NSCA 17 (CanLII) (13 February 2009)

This decision of the Nova Scotia Court of Appeal considered whether discrimination on the grounds of poverty is contrary to the right to equality under the Canadian *Charter of Rights*. The Court held that poverty is not a prohibited ground of discrimination under the *Charter of Rights* and it is therefore lawful to discriminate against low income earners.

The decision also confirms that the comparator test must be used when determining whether conduct is directly or indirectly discriminatory under the *Charter of Rights*.

Facts

Under the *Public Utilities Act*, the Utility and Review Board is required to set the same power rates for all consumers of power, regardless of income. Boulter, the Affordable Energy Coalition and others ('the appellants') claimed that this requirement prevents the Board from setting lower rates for low income earners and so discriminates based on poverty. The appellants claimed that poverty is an analogous ground under s 15(1) of the *Charter*, which provides that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Alternatively, the appellants argued that the failure to set a lower rate for low income earners indirectly discriminates against certain minority groups that are disproportionately represented among the poor, such as women, racial minorities, recent immigrants, the aged, people with disability, and single mothers and their children.

The individual appellants were representative of these groups and testified to the hardship caused by expensive electricity rates. One appellant, a single mother of one, gave evidence that she spends approximately 14% of her income on electricity. Further expert evidence showed that almost all people who rely on minimum wage earnings and all people who receive income assistance are unable to meet their basic needs, such as food, shelter and essential services, placing their health at risk.

Decision

The Court of Appeal followed the two-part test for showing discrimination under s 15(1) that was established in *R v Kapp*, 2008 SCC 41, which in turn restates the test in *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497. The test is:

1. Does the law create a distinction based on an enumerated or analogous ground?
2. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

In considering whether 'poverty' is an analogous ground, the Court of Appeal applied the test in *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203, which is to consider whether the ground is 'a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity' and which 'we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law'.

Applying this test, Fichaud J held that poverty is not an analogous ground, as it is neither immutable nor

is it something that the government should not expect us to change or which 'is changeable only at unacceptable cost to personal identity'. To the contrary, Fichaud J held that:

Economic status is not an indelible trait like race, national or ethnic origin, color, gender or age. As to the second test, the government has a legitimate interest, not just to promote affirmative action that would ameliorate the circumstances attending an immutable characteristic, but to eradicate that mutable characteristic of poverty itself. That objective is shared by those living in poverty.

The Court then considered the appellants' complaint that the fixed power rate disproportionately disadvantages certain minority groups and so discriminates on listed and recognized analogous grounds under the *Charter of Rights*; namely, the grounds of sex, age, race, national or ethnic origin, disability or marital status.

To do this, the Court applied the 'comparator test'. That is, the Court identified and compared the claimant groups to comparator groups which

mirror the characteristics of the claimant or claimant group relevant to the benefit or advantage sought, except for the personal characteristic related to the enumerated or analogous ground listed as the basis of the discrimination.

The appellants argued that the element of poverty should be removed from the comparator group. However, given that the Court had already decided that poverty is not an analogous ground under s 15(1), the Court refused to do so. As a result, the comparator group was held to simply be a power consumer without the enumerated or analogous trait. For example, when considering the disability claim the Court compared a disabled consumer with a non-disabled consumer of residential power.

On that basis, the Court held that the power rating process does not discriminate because it disadvantages all low income earners equally, regardless of sex, race, national or ethnic origin, age, disability or marital status. As stated by the Fichaud J, '[i]n each case, the claimant group and the comparator group both have substantial numbers living in poverty'.

The Court of Appeal held that the comparator test applies generally to claims for either direct or adverse effect (indirect) discrimination. The appellants had argued that if legislation perpetuates an existing disadvantage, then this is sufficient to prove that it indirectly discriminates (or causes an 'adverse effect distinction') under s 15(1). However, Fichaud J held that such an approach 'would afford simply a freestanding duty of affirmative action instead of what the *Charter* intends, a remedy for differential treatment (on protected grounds) that is discriminatory.'

Relevance to the Victorian *Charter*

Section 8(3) of the Victorian *Charter* protects the right to equality before the law and equal protection of the law without discrimination. However, 'discrimination' under the *Charter* is defined to mean discrimination on the basis of an attribute listed in s 6 of the *Equal Opportunity Act 1995* (Vic) ('EO Act'). Poverty is not a listed attribute and, unlike the Canadian *Charter of Rights*, the Victorian *Charter* contains no scope for establishing 'analogous' grounds of discrimination in addition to those that are explicitly listed in the EO Act. As a result, the right to equality under the *Charter* is more limited than that under the Canadian *Charter of Rights*, and a *Charter* claim of discrimination on the basis of poverty would be unlikely to succeed.

The decision is available at <http://www.canlii.org/en/ns/nsca/doc/2009/2009nsca17/2009nsca17.html>.

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Right to Fair Hearing and Legal Representation in Disciplinary Proceedings

Lam Siu Po v Commissioner of Police [2009] HKCFA 24 (26 March 2009)

In a case relating to the validity of a statutory bar to legal representation in police disciplinary proceedings, the Court of Final Appeal of Hong Kong established the following principles:

- the right to a fair hearing in art 10 of the *Hong Kong Bill of Rights* can apply to disciplinary proceedings; and
- the right to a fair hearing requires that a disciplinary tribunal consider permitting the respondent to be legally represented. Excluding the possibility of a tribunal from exercising such discretion will be inconsistent with art 10.

Facts

Lam Siu Po, a Hong Kong police constable, engaged in stock market dealings. He lost heavily, found himself deeply in debt, petitioned for his own bankruptcy, and was adjudicated bankrupt in September 2000. Consequently, in December 2000, he was charged with the disciplinary offence of contravening Police General Order 6-01(8) ("PGO 6-01(8)") which at that time read:

A police officer shall be prudent in his financial affairs. Serious pecuniary embarrassment stemming from financial imprudence which leads to the impairment of an officer's operational efficiency will result in disciplinary action.

Lam Siu Po pleaded not guilty. Regulation 9 of the *Police (Discipline) Regulations* lays down the procedure to be followed when a defaulter (a police officer charged with a disciplinary offence) pleads not guilty. Paragraphs (11) and (12) of reg 9 read:

(11) A defaulter may be represented by –

- (a) an inspector or other junior police officer of his choice; or
- (b) any other police officer of his choice who is qualified as a barrister or solicitor,

who may conduct his defence on his behalf.

(12) Subject to paragraph (11), no barrister or solicitor may appear on behalf of the defaulter.

Two sets of disciplinary proceedings then took place with Police Superintendents sitting as the adjudicating officers. The first took place in January 2001 and, pursuant to reg 9, Lam Siu Po, the defaulter, was represented by a Police Inspector and found guilty of a disciplinary offence. This conviction was set aside and a second proceeding began in December 2001. The Police Inspector who had represented Lam Siu Po in the first proceeding was not available and as Lam Siu Po had difficulty in finding replacement representation, he represented himself throughout the second proceedings. Lam Siu Po was again found guilty and the penalty imposed was compulsory retirement and deferment of pension benefits. Lam Siu Po then appealed on the applicability and operation of art 10 in connection with police disciplinary proceedings.

Decision

The Court unanimously allowed the appeal on the grounds that depriving the disciplinary tribunal of any discretion to permit legal representation, via the operation of regulations 9(11) and 9(12), prevented Lam Siu Po from having a fair hearing and was in contravention of art 10. Article 10 provides the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The Applicability of Article 10 to Disciplinary Proceedings

The Court held that art 10 was engaged in respect of the appellant's disciplinary proceedings. Article 10 protections come into play when a person is subject to a determination of his or her rights and obligations in a suit at law, meaning a determination of his or her civil rights and obligations. Since the engagement of art 10 depends on whether an individual's civil rights and obligations are to be determined in a specific instance, art 10 may be engaged only in relation to some, but not all, the matters dealt with by a particular administrative authority or administrative tribunal. In this case, the court found that the appellant undoubtedly faced a determination of his rights and obligations. This conclusion was reached by adopting the approach of the European Court of Human Rights developed in *Rigisen v Austria (No 1)* (1971) 1 EHRR 455; namely, that the disciplinary proceedings had a direct and highly adverse impact on the appellant's civil rights and obligations, the Court recognising that the right to practice one's profession is a civil right.

The Right to a Fair Hearing

Where art 10 becomes engaged, as in the present case, the person concerned becomes entitled to 'a fair and public hearing by a competent, independent and impartial tribunal established by law.'

Article 10 does not require every element of the protections conferred to be present at every stage of the determination of a person's right and obligations. Rather, such protections should be effective when the determination is viewed as an entire process, including such appeals or judicial review as may be available. For example, in many situations, it is inevitable and not improper that the initial administrative determination of a person's civil rights and obligations should be taken by someone who is part of the

administrative body concerned and so is plainly not independent. In reaching this conclusion, the Court approved the principle in the *Runa Begum Case* [2003] 2 AC 430 that in certain circumstances, the requirement of independence is met by the availability of judicial review. The Court also noted that although publicity is an important aspect of a fair trial, it does not mean that there must be publicity at the original hearing or at every stage.

The Court also noted that although it was never suggested that either of the disciplinary tribunals convened were lacking in competence or impartiality, when the process was viewed as a whole, the protections of independence and publicity were achieved through recourse to judicial review.

The Court had to determine whether the disciplinary proceedings were unfair because of the exclusion of legal representation in circumstances where fairness demanded such representation. The Court found that there is no absolute right to legal representation in disciplinary proceedings, this right being a matter to be dealt with in the tribunal's discretion in accordance with principles of fairness on a case-by-case basis. However, as regs 9(11) and 9(12) imposed a blanket restriction on professional legal representation in police disciplinary proceedings, the Tribunal was prevented from complying with art 10 and its duty of fairness where such duty calls for legal representation to be permitted. As such, regs 9(11) and 9(12) were systemically incompatible with art 10. In the present case, the Tribunal, believing in the footing of regs 9(11) and 9(12), never considered whether the case called for legal representation. This omission made the proceedings inherently unfair and the appellant was deprived of a fair hearing.

Relevance to the Victorian Charter

The Court's decision has implications for s 24 of the Victorian *Charter*, which contains the right to a fair hearing in similar terms to that found in art 10 of the *Hong Kong Bill of Rights*.

Although s 24 is limited in its application to parties to a 'civil proceeding' rather than persons 'subject to a determination of his or her rights and obligations in a suit at law', the better view is that s 24 applies to at least those disciplinary proceedings that involve a determination of a person's civil rights and obligations. The requirement of a fair hearing requires that these tribunals consider permitting legal representation. Failure to do so may violate the right to a fair hearing under s 24.

The decision is available at http://www.hklii.org/hk/jud/eng/hkcfa/2009/FACV000009_2008-65003.html.

Rhiannon Reid is a volunteer with the Human Rights Law Resource Centre

Indefinite Detention Violates the Right to Liberty and Security of Person

Canada (Citizenship and Immigration) v Li, 2009 FCA 85 (CanLII) (17 March 2009)

The Federal Court of Appeal of Canada ('FCA') has held that indefinite detention is a violation of the right to liberty and security of person.

Facts

The Respondents are brothers Dong Zhe Li and Dong Hu Li, citizens of and fugitives from China. The Respondents entered Canada as visitors on temporary resident visas in December 2004. In January 2005, the Chinese authorities issued arrest warrants for an alleged fraud estimated at over \$136 million CDN (of which \$100 million CDN remained unaccounted for). The alleged fraud involved the transfer of funds from certain companies to the bank accounts of companies controlled by the Respondents. When the Respondents' visas expired in June 2005, they remained in Canada illegally. They were arrested by Canadian authorities in February 2007. They were detained and the Immigration Division of the Immigration and Refugee Board of Canada ('Division') determined that they were unlikely to appear for removal from Canada if released, thus their detention was continued. The Appellant is the Canadian Minister of Citizenship and Immigration, who sought judicial review of a decision by the Division (confirmed at first instance by the Federal Court) that ordered the release of the Respondents from detention.

As required by Canadian domestic legislation, specifically s 57 of the *Immigration and Refugee Protection Act*, S.C 2001, c. 27 ('IRPA'), the detention of the Respondents was reviewed every 30 days. At each review throughout 2007, it was determined that detention should continue due to the

Respondents' high flight risk and the likelihood of the Respondents making efforts to avoid Canadian authorities if released.

On two occasions, the Division noted that the Respondents faced potentially long-term detention, but not indefinite detention. Indefinite detention would be in breach of s 7 of the Canadian *Charter of Rights and Freedoms*, which protects the right to liberty and security of the person. At the June 2008 review, the Division ordered the release of the Respondents under electronic surveillance because it concluded that they were then facing indefinite detention, however the Appellant successfully filed an application for judicial review and the release orders were set aside.

In September 2008, the Division again ordered the release of the Respondents under electronic surveillance. Up to this point, the Respondents had exercised their avenues to recourse under the *IRPA* at almost every juncture, thereby delaying their removal.

The Division's decision in September to release the Respondents was based on an estimate of the length of future detention including federal court judicial review and appeal processes. The Division noted that any possible number of steps could be taken by either side and the time for each step was unknown, thus the continued detention of the Respondents until their removal would be for an indefinite amount of time and therefore constitute a breach of their right to liberty under s 7 of the *Charter of Rights*.

The Minister for Citizenship and Immigration appealed this decision.

Decision

The case is illustrative of the 'legal quagmire' faced by the authorities when addressing the issue of detention. Létourneau JA noted that when embarking on the exercise of determining and quantifying what constitutes acceptable long-term detention, the authorities are confronted with 'a number of legal constraints often pulling in different, if not opposite, directions'.

For example it was noted that the *IRPA* empowers the authorities to arrest and detain foreign nationals illegally remaining in Canada, however it also affords the foreign nationals a wide array of proceedings to challenge (as demonstrated in this case). As noted by the FCA

there is at each stage of the process a possibility of challenging the decision by way of judicial review and appealing to the [FCA]. Obviously, the multiplicity of challenges increases the length of the foreign nationals' detention.

That said, where delays are caused by either party's legitimate pursuit of redress as provided for by the legislation, such delays 'should not count against either party'.

Another set of competing considerations lay in Canada's domestic law on the one hand, including the right to not be detained indefinitely, and its international obligations to cooperate in the enforcement of criminal law on the other, including the Rome Statue of the ICC and a treaty signed with China promising to provide mutual legal assistance in criminal matters.

In addition, the FCA stated that the merits of keeping someone in detention must be balanced against that person's rights to liberty and security of the person and to protection against cruel and unusual treatment as well as the guarantee against arbitrary detention (all protected by the *Charter of Rights*). The FCA held that where there is an effective and meaningful process of ongoing review of the detention, as well as meaningful opportunities given to detainees to challenge their continued detention or the conditions of their release (as there are in Canada in accordance the provisions of the *IRPA*, in particular the 30-day reviews) then there is no breach of the *Charter of Rights*. However the FCA confirmed that the *Charter of Rights* does not authorise indefinite detention.

The question for the court was: 'Does lengthy detention become "indefinite" detention, and consequently a breach of s 7 of the *Charter of Rights*, where the tribunal estimates future length of detention on a detainee's anticipated pursuit of all available processes... including Federal Court proceedings?'

The FCA stated that factors to be taken into account when reviewing one's detention include (but are not limited to): the reasons for detention; the length of detention; the reasons for delay in deportation; the anticipated future length of detention; and the availability of alternatives to detention. Another important principle emphasised by the FCA was that detention on the basis that a detainee would not appear for removal should not be for as long as when a person is considered a danger to the public.

The FCA held that it was an error of law to speculate on potential proceedings or available processes that are not yet underway, rather the estimate of time should be based on actual pending proceedings as they exist at the time of each monthly review. Moreover the speculation was 'too far reaching, unwarranted, unreasonable and unnecessary'. The Division wrongly assumed that the Federal Court and FCA would entertain all of the Respondents potential applications and also failed to consider the possibility that proceedings could be expedited (as indeed they were). The FCA also found that the Division had failed to take into account and assess relevant factors including Canada's international undertakings to assist in the enforcement of criminal law. The appeal was allowed and the matter was referred back to the Division for a re-determination.

Relevance to the Victorian Charter

This decision is relevant to ss 10 and 21 of the Victorian *Charter*, which guarantee protection from torture and cruel, inhuman or degrading treatment and the right to liberty and security of person, respectively. In particular, s 21 states that every person has the right to liberty and security and must not be subject to arbitrary detention (sub-s 2) nor deprived of his or her liberty except on grounds and in accordance with procedures established by law (sub-s 3). In the eloquent opening words of Létoureau JA, 'this thorny appeal demonstrates the delicate balancing act required when issues of criminality, long-term detention and human rights collide'. This decision contains helpful discourse in respect of relevant factors to be considered in such circumstances.

Neither the Victorian *Charter* nor the Canadian *Charter of Rights* specifically prohibit indefinite detention. Section 7 of the *Charter of Rights* simply states: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.' This has been interpreted by the Canadian judiciary to render indefinite detention unlawful. A parallel argument could be made in respect of s 21 of the Victorian *Charter*. Moreover if such an argument were successful, Victorian authorities may be compelled to adhere to a meaningful process of ongoing review of the detention and the estimated duration thereof (such Canada's 30-day review system), failing which it could be held that the detention is indefinite and therefore in breach of the Victorian *Charter*.

The decision is available at <http://www.canlii.org/en/ca/fca/doc/2009/2009fca85/2009fca85.html>.

Briohny Coglin is a lawyer with Minter Ellison

Freedom of Expression and Public Participation in Decision-Making

Dixon v Powell River (City), 2009 BCSC 406 (CanLII) (26 March 2009)

This case held that the Canadian common law should, wherever possible, be interpreted and developed to accord with the rights in the Canadian *Charter of Rights and Freedoms*. Garson J declined to follow earlier defamation case law on the basis that it was inconsistent with the right to freedom of expression. Her Honour held that a government body cannot sue individuals for defamation when those individuals speak out about the conduct of its governmental functions.

Facts

Three members of the public posted comments online criticizing actions of the Powell River City Council. The City sent letters to these three objectors, claiming that the criticisms implied that the City was engaging in corrupt processes. The City threatened to sue the objectors for defamation of its reputation as a municipal government.

John Dixon, secretary of the British Columbia Civil Liberties Association and a resident of the City, sought declaratory relief to the effect that the City, as a government body, does not have the right to sue for defamation of its governing reputation.

The *Charter of Rights* contains the 'fundamental freedom' of 'thought, belief, opinion and expression'. Dixon argued that the actions of the City, in making the threat to sue for defamation, infringed the right to freedom of expression. Previous authorities on point indicated that the City could sue for defamation relating to its governmental functions.

A subsidiary issue was whether Dixon had standing to sue. The *Charter of Rights* does not give people standing to sue where the rights of a third party are violated. Therefore, Dixon argued that his own

rights were violated. He argued that the right to freedom of expression includes not only the right to make statements, but also the right to receive information regarding the conduct of government affairs. He argued that his right to receive information was curtailed by the defamation threat letters that the City sent to the objectors.

Decision

Garson J held that Dixon, as a ratepayer and voter in the City, had personal standing to sue. Her Honour found that Dixon's right to receive communications regarding his local government was infringed by the defamation threat letters, and granted declaratory relief accordingly.

Her Honour held that the common law principles of defamation should be interpreted consistently with the *Charter of Rights*, especially the right to freedom of expression. Her Honour endorsed the following statement from *R v Salituro* [1991] 3 SCR 654:

Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country ... Where the principles underlying a common law rule are out of step with the values enshrined in the Charter, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with the Charter values, without upsetting the proper balance between judicial and legislative action that I have referred to above, then the rule ought to be changed.

Pre-Charter authorities indicated that a government body could sue for defamation. However, Her Honour declined to follow earlier case law on the basis that the common law should be interpreted and applied, wherever possible, within the framework of the *Charter of Rights* and its right to freedom of speech. Garson J stated that

It is evident that the law of defamation and the constitutional law of freedom of speech ought not to develop in two separate streams incorporating different values. Rather, the two should accommodate each other.

Accordingly, Her Honour held that

The Charter enshrined value of freedom of expression is paramount and local governments have to resort to other means to protect their reputations from citizens who publish critical commentary about the government itself... It is antithetical to the notion of freedom of speech and a citizen's rights to criticize his or her government concerning its government functions, that such criticism should be chilled by the threat of a suit of defamation.

Relevance to the Victorian Charter

Using Charter rights to shape the common law

The Canadian *Charter of Rights* does not expressly provide that case law should be interpreted in accord with its rights. Notwithstanding this, Canadian courts have generally developed case law in line with the *Charter of Rights* (which is entrenched in the Canadian Constitution). Given the relatively young age of the Victorian *Charter*, it remains to be seen whether Victorian courts will be as willing to use Victorian *Charter* concepts to shape common law rights, particularly given the principles of comity and a unitary common law. However, the fact that the Victorian *Charter* is limited in application to public authorities (which do not include courts acting in a judicial capacity) and is legislative rather than constitutional may limit the extent to which the Victorian *Charter* will shape more general common law rights.

Freedom of expression and defamation

Defamation laws are an express exception to the right to freedom of expression in Victoria. The right to freedom of expression in the Victorian *Charter* is subject to an exception for laws necessary to 'respect the rights and reputations of other persons', where 'persons' means human beings. Therefore, the exception to freedom of expression would not cover laws to protect the reputation of government bodies. Moreover, according to Victoria's statutory defamation laws, government bodies cannot sue for defamation in relation to governmental or administrative actions.

Right to receive information

In order to establish standing, Dixon argued that the Canadian right to freedom of expression implicitly includes a right to receive information (see above). The Victorian *Charter* differs from the Canadian *Charter of Rights* in that the right to freedom of expression in the Victorian *Charter* expressly includes the right to receive information.

The decision is available at <http://www.canlii.org/en/bc/bcsc/doc/2009/2009bcsc406/2009bcsc406.html>.
Helen Conrad is on secondment to the Human Rights Law Resource Centre from Mallesons Stephen Jaques

HRLRC Policy Work

National Human Rights Consultation: Submission on Measures to Promote Human Rights

On 24 April 2009, the Human Rights Law Resource Centre made a submission to the National Human Rights Consultation entitled *Engage, Educate, Empower: Measures to Promote and Protect Human Rights*.

The submission considers a range of measures to strengthen the protection and promotion of human rights in Australia and responds primarily to the third 'key question' raised in the Committee's Terms of Reference, namely, 'how could Australia better protect and promote human rights?'.
The submission considers and makes recommendations for reform in the following areas:

The submission considers and makes recommendations for reform in the following areas:

- the role, power and resourcing of the Australian Human Rights Commission;
- human rights education;
- access to justice;
- support for and engagement with human rights NGOs;
- international engagement;
- monitoring and compliance;
- equality legislation; and
- business and human rights.

The submission does not consider the enactment of a Human Rights Act.

The Centre is also preparing a major submission which considers the current protection of human rights in Australia and legislative measures to strengthen the protection and promotion of human rights in Australia, including the enactment of a comprehensive Human Rights Act. We expect to make this further submission within the next two weeks.

The recommendations contained in the *Engage, Educate, Empower* submission are necessary complements to human rights legislation.

The submission is available at <http://www.hrlrc.org.au/content/topics/equality/engage-educate-empower/>.

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

Prisoners' Rights: Centre Secures Changes to Proposed Corrections Regulations

In February 2009, the Centre made a submission regarding proposed Corrections Regulations in Victoria. In preparing the submission, the Centre received very substantial assistance from Clayton Utz and Hugh de Kretser at the Federation of Community Legal Centres.

The submission addressed aspects of the Proposed Regulations that the Centre considers do not comply with established international and comparative jurisprudence relating to the treatment of prisoners, including in relation to the use of force, the use of restraints, classification and placement of prisoners, visitation rights and strip searching.

On 20 April 2009, the Centre was informed by the Department of Justice that provisions of the Proposed Regulations had been amended in response to the Centre's recommendations. Consequential changes include:

- requirements that restraints be applied for no longer than is necessary and the use of any restraint must be reported to the Prison Manager;
- mandatory consideration of a prisoner's medical and psychiatric condition when deciding placement or making a separation order;

- the introduction of a 'checklist' to promote the right to a fair hearing in prison disciplinary proceedings;
- amendments to improve prisoner access to visitors and correspondence; and
- a requirement that an officer 'believe on reasonable grounds' that a strip search is necessary in order for that search to be lawful.

The Centre's submission is available at: <http://www.hrlrc.org.au/our-work/law-reform/domestic/>.

Phil Lynch is Director of the Human Rights Law Resource Centre

Australia should Establish Parliamentary Mechanisms to Monitor Domestic Implementation of International Human Rights

Compliance with obligations arising under both international and domestic human rights laws requires effective monitoring systems.

Currently, Australia is subject to periodic review by UN treaty bodies established under each of the ICCPR, ICESCR, CAT, CRPD, CEDAW and CERD. These reviews provide an opportunity for a comprehensive analysis of the state of human rights in Australia and for a constructive dialogue as to how best to promote and protect these rights between the Government and independent international human rights experts. Australia has also accepted the jurisdiction of a number of UN human rights treaty bodies to hear and determine individual complaints regarding Australia.

In addition, the Special Procedures of the UN Human Rights Council may issue findings and recommendations on Australia under either country or thematic mandates.

While international scrutiny and accountability are important aspects of the promotion and protection of human rights, there are currently no formal domestic mechanisms to independently monitor and report on the implementation of the recommendations of UN treaty bodies or Special Procedures.

In light of this, the Human Rights Law Resource Centre has written to the Australian Government proposing that further parliamentary and executive mechanisms be established to monitor implementation of and compliance with Australia's human rights obligations.

In particular, the Centre considers that the Government should establish a Joint Parliamentary Committee on Human Rights to lead parliamentary engagement with and understanding of human rights issues and to monitor and report on the implementation of the Concluding Observations and Views of UN treaty bodies and the recommendations of the Special Procedures of the UN Human Rights Council.

This recommendation is consistent with the recent observations of the UN Human Rights Committee on Australia, where the Committee stated:

8. The Committee notes that the Covenant has not been incorporated into domestic law and that the State party has not yet adopted a comprehensive legal framework for the protection of the Covenant rights at the Federal level, despite the recommendations adopted by the Committee in 2000. Furthermore, the Committee regrets that judicial decisions make little reference to international human rights law, including the Covenant. (art.2)

The State party should: a) enact comprehensive legislation giving de-facto effect to all the Covenant provisions uniformly across all jurisdictions in the Federation; b) establish a mechanism to consistently ensure the compatibility of domestic law with the Covenant; c) provide effective judicial remedies for the protection of rights under the Covenant; and d) organize training programmes for the Judiciary on the Covenant and the jurisprudence of the Committee.

...

10. While acknowledging the measures taken by the State party to reduce the likelihood of future communications regarding issues raised in certain of its Views, the Committee expresses once again its concern at the State party's restrictive interpretation of, and failure to fulfill its obligations under the First Optional Protocol and the Covenant, and at the fact that victims have not received reparation. The Committee further recalls that, by acceding to the First Optional Protocol the State party has recognized its competence to receive and examine complaints from individuals under the State party's jurisdiction, and that a failure to give effect to its Views would call into question the State party's commitment to the First Optional Protocol. (Article 2)

The State party should review its position in relation to Views adopted by the Committee under the First Optional Protocol and establish appropriate procedures to implement

them, in order to comply with article 2, paragraph 3 of the Covenant which guarantees a right to an effective remedy and reparation when there has been a violation of the Covenant.

Phil Lynch is Director of the Human Rights Law Resource Centre

HRLRC Casework

VCAT Makes Declaration of Breach of Human Rights in Major *Charter* Test Case

On 23 April 2009, Justice Bell, President of the Victorian Civil and Administrative Tribunal, handed down a much anticipated decision which discussed in detail important aspects of the application and operation of the *Charter*. The case concerned the compulsory medical treatment of a man, Mr Kracke, without his consent, and without this treatment having been reviewed by the Mental Health Review Board as required by the *Mental Health Act 1986* (Vic).

Because the application was in many respects a test case, the Human Rights Law Resource Centre sought and was granted leave to appear as *amicus curiae*. The Centre was represented on a pro bono basis by Allens Arthur Robinson, together with Mark Moshinsky SC and Chris Young of counsel.

In a landmark decision, and consistent with submissions of the HRLRC, Bell J made a declaration that the Mental Health Review Board breached Mr Kracke's human right to a fair hearing under s 24(1) of the *Charter* by failing to conduct the reviews of his involuntary and community treatment orders within a reasonable time.

In addition to being a significant *Charter* case, the decision should also result in systemic reform to the timing and conduct of review hearings. There was evidence in the case that a large number of reviews are conducted out of time. Responding to this, Bell J stated at paras 699-703:

Must means must. The time limits are not guidelines or aspirational. Conducting these reviews within the specified time is not optional. Doing so is mandatory and what the legislation expects to happen...

I reject the submission that commencement of a review within time is good enough... Conducting a review within 12 months or eight weeks means what it says. Since clarification is obviously needed, it means completing the review within that time. That interpretation is demanded by the protective function of reviews. They are a significant safeguard in the system for giving involuntary treatment to patients.

Everybody involved in making, administering and reviewing involuntary treatment orders and plans needs to work within that framework. The time limits in the legislation must be respected. Treating practitioners and other professionals must put the board in a position where it can fulfil its legislative responsibilities in this regard...

The legislation expects the board to carry out its review (and appeal) functions with positive vigour. That is the assumption underlying the time limits, which the legislation expects the board to drive. The board must be inquisitorial, proactive and oriented towards effective and timely case-management. It should arrange its administration accordingly...

Reviews are the responsibility of the board to commence, conduct and complete within the specified time limits. The terms of the legislation and the human rights of people with mental illness deserve nothing less.

Phil Lynch is Director of the Human Rights Law Resource Centre

Seminars and Events

Human Rights and the Environment: National Human Rights Consultation Workshop – 6 May 2009

Date: 2.00pm – 4pm, Wednesday, 6 May 2009

Venue: 60L Green Building, 60 Leicester Street, Carlton

RSVP: Bookings are essential. Call the EDO office on (03) 8341 3100 to register, or email edovic@edo.org.au, as soon as possible

Are you interested in finding out how human rights can protect the environment? In conjunction with the Environment Defenders Office and the Public Interest Law Clearing House, the Human Rights Law Resource Centre is running a workshop to explain how environmental rights could be protected through a federal Human Rights Act. The workshop will also help environmental groups to make a submission

to the National Human Rights Consultation, due 15 June 2009. We are opening this workshop to both environment organisations and individuals concerned with protecting the environment.

This national consultation process is a crucial opportunity to help the environment and make your voice heard. Numbers are strictly limited, to enable workshopping of submission ideas.

Castan Centre Annual Conference – ‘The Changing Human Rights Landscape’

The Castan Centre's 2009 conference *'The Changing Human Rights Landscape'* will be held on Friday, 17 July at the State Library of Victoria.

The following four sessions have been confirmed:

- **Session 1 - A National Consultation on Human Rights**

The Hon Robert McClelland, Australian Attorney General on *'Promotion and Protection of Human Rights'*

- **Session 2 - A Health Check on the Victorian Charter of Human Rights and Responsibilities**

Alistair Pound, Barrister, on *'The Victorian Charter of Rights and Responsibilities so far: A lawyer's perspective'*

The Hon Justice Chris Maxwell, President, Court of Appeal on *'The Victorian Charter of Rights and Responsibilities so far: A judge's perspective'*

- **Session 3 - Australian Re-engagement with International Law**

The Hon Robert Hill, Australian Ambassador and Permanent Representative to the United Nations (retiring April 2009) on *'Howard to Rudd: Australia's record of international engagement'*

Professor Hilary Charlesworth, Director, Centre for International Governance and Justice, Australian National University on *'Assessing Australia on the world stage'*

- **Session 4 - International Law Update**

Professor Chris Sidoti, former Australian Human Rights Commissioner, Visiting Professor Griffith University, Visiting Professor, University of Western Sydney on *'The UN Human Rights Council - The story so far'*

Professor Sarah Joseph, Director, Castan Centre for Human Rights Law on *'International Human Rights cases 2008-2009'*

For further details and to register, see

<http://www.law.monash.edu.au/castancentre/events/2009/conference-09.html> .

NSW Young Lawyers Charter of Rights Conference – 9 May 2009

NSW Young Lawyers is hosting a special Charter of Rights Conference on Saturday, 9 May at the State Library of NSW, Sydney.

Attendance at the Conference starts at \$99 for students, academics and community legal centre lawyers and \$149 for practitioners. Practitioners can also claim up to 5.5 CLE points for attending the event.

Speakers include: The Honourable Catherine Branson QC (President, Australian Human Rights Commission); Professor George Williams (Anthony Mason Professor and Foundation Director, Gilbert + Tobin Centre of Public Law); Ed Santow (UNSW Senior Lecturer and Project Director, Charter of Human Rights); Robin Banks (Public Interest Advocacy Centre and Public Interest Law Clearing House); Rev Elenie Poulos (National Director, UnitingJustice Australia); Professor Hilary Charlesworth AM (Professor of International Law and Human Rights, ANU College of Law); Professor David Kinley (Associate Dean (International) and Chair in Human Rights Law, Sydney University); Dr Ben Saul (Director, Sydney Centre for International Law and Barrister); Kristina Stern (Barrister, 6th Floor Selborne Chambers); Simeon Beckett (Barrister, Maurice Byers Chambers); Miiko Kumar (Barrister and Senior Lecturer, Sydney University); Kate Eastman (Barrister, St James Hall Chambers).

Register online at <http://cle.younglawyers.com.au>.

Human Rights Resources

www.hrlrc.org.au

The Human Rights Law Resource Centre is delighted to announce the launch of its new website, www.hrlrc.org.au. The new site aims to be significantly more accessible, navigable and comprehensive than our old site and contains significant new features and content.

We welcome any feedback on the new site at admin@hrlrc.org.au.

If I Were Attorney-General...

Respecting, Protecting and Fulfilling Economic and Social Rights through a Nation Charter of Rights

If I were Attorney-General I would enact a national Charter of Rights which enshrined all internationally recognized human rights, including economic, social and cultural rights.

Governments usually proffer a number of reasons for excluding economic and social rights from Charters of Rights: first, that the inclusion of such rights would breach separation of powers and, second, that they would refer to Courts questions they are not competent to decide. Economic and social rights are supposedly too indeterminate to be justiciable. Upon a closer analysis, each of these justifications is incoherent, but that is another debate. One effect of focusing on *whether* economic and social rights should be included in a Charter has been to stymie discussion about *how* they should be included.

So here is how I would include economic and social rights in an Australian Charter of Rights.

First I would ensure that economic and social rights are enforceable as opposed to merely aspirational principles. To deny the enforceability of such rights would undermine their inalienable character. Such essential values should not be left solely to the political process for their fulfilment, but rather should be guaranteed so that when they are violated, deprived individuals may seek judicial enforcement.

Second, my Charter would allow for the judiciary to review both negative and positive duties with respect to economic and social rights. That is, in relation to economic and social rights, Courts would monitor the Australian government's *duty to respect*, which requires that it refrain from violating rights; its positive *duty to protect*, which requires that it prevent individuals' rights from being breached by third parties; and the positive *duty to fulfil* which requires it to provide essential goods and services, such as food, housing, health or education, to those without the means to provide for themselves.

Third, in relation to the level of scrutiny by which government action is judged, I would adopt the South African threshold of 'reasonableness'. Pursuant to this principle, 'the precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable.' (see *Republic of South Africa v Grootboom*). Courts would defer to government policy decisions and respect its choice of means but would prod the legislature into action to realize economic and social rights.

Fourth, the level of scrutiny or standard of review should not be confused with the definition of the content of the right. According to a standard of review based on reasonableness, Courts would decide whether a government measure is reasonable in light of the objective and right it is seeking to uphold. However, such deference is not accorded to the government in defining the content of the right. The notion of minimum core obligation as elaborated under international law should be used to define the content of economic and social rights in the Charter. Courts could draw on the General Comments from the UN Committee on Economic, Social and Cultural Rights and the jurisprudence of other international bodies. Naturally, as with civil and political rights, it will take some time for the Courts to define the exact content of each economic and social right. Unlike international treaties, my Charter of Rights would not explicitly codify limitations as to resources and progressive realisation for economic and social rights. Instead, I would fold this into the general limitation clause which allows the government to limit rights in a reasonable, proportionate and justifiable manner. Issues of resource allocation and progressive realisation would be considered under the rubric of the limitation clause.

Finally, in relation to remedies, I would not create expansive new remedies for courts in relation to economic and social rights, as some jurisdictions have done in India and the United States. I would allow Courts to make a declaration that the government is in neglect of its duty to fulfil or protect with

respect to the economic or social right in issue and empower the judiciary to require that the government devise and implement a policy to fulfil the right in question. However, the exact formulation should be left to the government and the Court should not become embroiled in monitoring the implementation.

Although my Charter may appear to advocate an expansive role for the judiciary, it is actually a deferential standard, especially in relation to remedies. The framework merely attempts to apply usual judicial standards of review to all rights and to all government duties. Grudgingly, I would follow the current vogue for implementing a Charter according to the 'dialogue model', which would downgrade the above framework so that it is not binding on parliament. Ultimate sovereignty would reside with the legislature.

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