



INDEX

OPINION 1

NEWS..... 2

NATIONAL CHARTER OF RIGHTS DEVELOPMENTS.... 7

VICTORIAN CHARTER OF RIGHTS DEVELOPMENTS.... 8

VICTORIAN CHARTER CASE NOTES 9

COMPARATIVE LAW CASE NOTES 11

HRLRC POLICY WORK..... 21

HRLRC CASEWORK..... 25

SEMINARS AND EVENTS... 26

HUMAN RIGHTS RESOURCES 27

FOREIGN CORRESPONDENT 27

IF I WERE ATTORNEY-GENERAL... 29

Human Rights Law
Resource Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000
P: + 61 3 8636 4450
F: + 61 3 8636 4455
W: www.hrlrc.org.au
ABN: 31 117 719 267

The Human Rights Law
Resource Centre Ltd aims to:

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

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

Opinion

Global Efforts to Combat Racism are Essential for Local Responses

It is often the case that discussions about racism are heated and controversial; the recent Durban Review Conference and my participation in it was no exception. In reflecting on this Conference, I would like to convey some important context for my attendance as Race Discrimination Commissioner and highlight some of the key outcomes.

It is telling that at the time when the Iranian President, Mohmoud Ahmadinejad, addressed the plenary session and the polarised debate surrounding the Conference reached its peak, I was participating in a panel discussion on the role of National Human Rights Institutions ('NHRIs') in implementing the Durban Declaration and Programme of Action at another venue. This panel discussion was extremely significant because the role of NHRIs, the Australian Human Rights Commission included, is to create a space where mutual understanding prevails. It enables issues such as the role of local government in combating racism and diversity in the workplace to be discussed and examines the different strategies that various nations have taken to address such issues.

While the debate around the Durban Conference forced some to take sides on a range of political issues, the role of NHRIs became even more important in ensuring that the Conference remained focused on the substantive issues around racism and the implementation of standards of equality at the global, national and local levels. These substantive racism issues, such as the rights of Indigenous peoples and migrants' rights, are the bread and butter of my role at the Australian Human Rights Commission. These issues constitute the basis for our daily work under the *Racial Discrimination Act*. Exchanging data and analysis of programs attempted in other countries is not only necessary for me to carry out my functions as Race Discrimination Commissioner, but it is also the most effective way of ensuring that the Australian public gets access to the most sophisticated and successful anti-racism strategies.

National Human Rights Institutions, such as the Australian Human Rights Commission, have emerged in the last decade as major contributors to the development of international standards and treaties. They play, and indeed are meant to play, a critical role in helping to translate these standards into local practices, policies and laws.

In its statement to the Durban Review Conference, the International Coordination Committee (ICC) of National Institutions

for the Promotion of and Protection of Human Rights outlined precisely the emerging role of NHRIs as being to: 'provide a human rights framework for addressing contentious issues. They achieve this through dispute resolution services, advocacy, the development of networks - including networks with NGOs and civil society at large, community capacity building, human rights monitoring, and development of training and education'. It is with these issues in mind that I attended the conference and participated in its deliberations and activities.

A majority of NHRIs, the Australian Human Rights Commission among them, must adhere to the Paris Principles which require human rights institutions to be independent from states in fulfilling their role in promoting human rights and combating discrimination.

It is on the basis of this independence that the Australian Human Rights Commission as a national human rights institution had observer status at the conference.

The Commission was one of 39 NHRIs which attended the conference, including New Zealand and Germany whose governments, like Australia, boycotted the Conference.

One activity that was particularly useful was my collegiate role in developing a position on the role of NHRIs in implementing the Durban Declaration and Programme of Action. This position, prepared as a paper, available at www.humanrights.gov.au, identifies the following priorities for NHRIs:

- promoting the development of national action plans against racism;
- exercising their mandates in relation to the rights of Indigenous peoples;
- monitoring racism at the national, regional and global levels by such means as annual and special reports on racism and cultural diversity; and
- reviewing the performance of public institutions and national strategies to combat racism.

In general, the Durban Declaration and Programme of Action, along with the Outcome Document of the Durban Review Conference, provides a comprehensive framework for Australia, the Australian Human Rights Commission and civil society to work together to combat racism. These tools focus particularly on racism against Indigenous peoples, ethnic minority groups, migrants and refugees.

The Conference also provided me and my staff with the opportunity to learn about how countries like Ireland and South Africa have developed and implemented their national action plan against racism. The Conference cemented links for us with the UNESCO Innovative Cities Against Racism initiative and we have begun discussions about how we might move towards implementing the initiative in Australia as part of the Coalition of Cities Against Racism and Discrimination in the Asia Pacific region program.

The Conference has also been invaluable for me for research I have been undertaking since last year into modernisation of the *Racial Discrimination Act* in Australia. This research is examining the many ways in which the RDA needs to remain responsive to the changing makeup, needs and attitudes of Australian society. The Conference provided me with the chance to look at comparative jurisdictions and proactive, positive legislative models to combat discrimination, particularly in the employment area.

These are just some of the important issues discussed at the Durban Review Conference which are of pressing concern and direct relevance to Australia and the way we tackle racism.

Tom Calma is Australia's Aboriginal and Torres Strait Islander Social Justice Commissioner and Race Discrimination Commissioner

News

Australia Signs Optional Protocol to Torture Convention and Commits to Enact Federal Offence of Torture

On 19 May 2009, the Federal Government signed the *Optional Protocol to the Convention against Torture*. The *Optional Protocol* obliges parties to allow periodic international inspections of its places of detention, and to establish formal mechanisms to enable regular examination of the treatment of persons in places of detention. The Government has not yet indicated when it will accede and thereby become party to the *Optional Protocol*.

In a speech to the Lowy Institute on 22 May 2009, the Federal Attorney-General, the Hon Rob McClelland MP, also announced that, consistent with recent recommendations from the UN Committee against Torture, the Government proposes to introduce legislation to create a specific torture offence in

Commonwealth law. According to the Attorney, the Government is further 'contemplating giving the offence extraterritorial application to make torture an offence with respect to acts both within and outside Australia.'

Aboriginal and Torres Strait Islander Social Justice Commissioner Releases 2008 Report

On 30 April 2009, the *Social Justice Report 2008* of the Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, was tabled. The report discusses the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders, and includes recommendations as to the action that should be taken to ensure the exercise and enjoyment of human rights by those persons.

Areas of Reform

The *Social Justice Report* identifies six main areas where reform is needed to ensure full protection for Indigenous peoples and to modernise Australia's human rights system. These are as follows:

1. Commonwealth Government to formally declare its support for and implement the *UN Declaration on the Rights of Indigenous Peoples*

At the time this Report was prepared, Australia had not yet formally endorsed the *UN Declaration on the Rights of Indigenous Peoples*. However, on 3 April 2009, the Australian Government announced its formal support for the Declaration, representing an important acknowledgement of the rights of Indigenous Australians to self-determination and freedom from discrimination.

2. A national Human Rights Act to be enacted in Australia that includes protection of Indigenous rights

Australia remains the only democratic country in the world without a national Bill of Rights or Charter of Rights in some form. However, Australia is currently engaging in a broad-ranging community consultation on whether human rights should be better protected in Australia and, if so, how they should be protected.

Indigenous people will benefit from having formal protection of their human rights in a national Human Rights Act. While all human rights apply generally to all members of the Australian community, they have a particular importance for Indigenous peoples, many of whom face extreme levels of disadvantage and poverty.

For this reason, the Report suggests that the Commonwealth Government commit to comprehensive support for engagement with Indigenous peoples in the consultation process for a National Human Rights Act. The Report also argues that a national Human Rights Act must be comprehensive in its scope and include: the recognition of Aboriginal and Torres Strait Islander peoples in the preamble; the right to self-determination; economic, social and cultural rights and civil and political rights; specific protections for Indigenous peoples where required; and the *UN Declaration on the Rights of Indigenous Peoples* scheduled as a relevant international instrument.

3. Constitutional reform

The historical injustices that marked the framing of the Constitution affected many sectors of Australian society, including Aboriginal and Torres Strait Islander peoples. The Report contends that providing recognition of Indigenous people in the preamble of the Constitution would be of great symbolic importance.

The Report recommends that the Commonwealth Government undertake national consultations and begin a constitutional process for the recognition of the special place of Aboriginal and Torres Strait Islander peoples in the preamble to the Constitution. Particular emphasis should be placed on the need for an inclusive, consultative process in drafting a revised preamble prior to a referendum.

The Report also recommends that, in recognition that existing protections against racial discrimination have been overridden in relation to Indigenous peoples, the Commonwealth

Government begin a constitutional process for the removal of s 25 of the Constitution and replacement with a clause guaranteeing equality before the law and non-discrimination.

4. The establishment of a National Indigenous Representative Body

The Report contends that sustained progress in Indigenous policy making can only occur when there is a genuine partnership between government and Indigenous peoples. This partnership requires two elements. The first is the involvement of Indigenous peoples in the development of policies and programs that affect them. The second is a permanent mechanism to ensure that there is clear government accountability to Indigenous peoples for the progress that is being made.

5. The establishment of a framework for negotiations

The Report contends that the Commonwealth Government should commence negotiations of a framework for the negotiation of a social justice package to address the unfinished business of reconciliation.

The Report also recommends that the new National Indigenous Representative Body, once established, be funded and tasked with consulting with Indigenous peoples and representing their interests in the negotiations of a social justice package. The social justice package should be finalised within three years of the establishment of the National Indigenous Representative Body.

6. A focus on human rights education and the building of a culture of human rights recognition and respect

In addition to the formal protection mechanisms outlined above, the Report contends that the final significant step that should be considered by both government and the community sector in developing an Indigenous human rights framework is to build a culture of respect for human rights in Australia. This can be achieved through a substantial focus on human rights education.

The Report suggests that the Commonwealth Government resource the Australian Human Rights Commission to develop and implement a comprehensive community development and community education programs on human rights for Aboriginal and Torres Strait Islander peoples.

Conclusion

The Report has set out an agenda for the protection of the human rights of Indigenous peoples in Australia. It contains a mix of mechanisms to ensure sufficient legal safeguards (including at the constitutional level); recognition of the place of Indigenous peoples in the Australian story; participatory processes and frameworks to negotiate unfinished business; and a substantial focus on human rights education to ensure that human rights are fully understood among our communities.

The Report is available at http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/index.html.

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

Business and Human Rights: Operationalising the 'Protect, Respect, Remedy' Framework

The four years that have elapsed since Professor John Ruggie was appointed the UN Secretary-General's Special Representative for Business and Human Rights have witnessed a marked transition in the direction and focus of the human rights and corporate responsibility discourse.

Having established a framework for the business and human rights debate, Professor Ruggie is now in the process of operationalising that framework.

The 'Protect, Respect and Remedy' Framework

In his 2008 report to the UN Human Rights Council, Professor Ruggie presented the 'protect, respect and remedy' framework, addressing what he identified as the core issue for the inter-relationship of business and human rights, namely: the governance gaps between the impact of corporations on human rights and the ability of states and societies to manage the adverse consequences.

In that report, Professor Ruggie acknowledged discrete initiatives that have been taken to address these governance gaps, but felt that 'they do not cohere as parts of a more systematic response'. His answer to that need for a systematic response, the 'protect, respect and remedy' framework, rests on three elements: the state duty to protect from human rights violations, including those involving business; the corporate responsibility to respect human rights; and access to remedies for human rights impacts.

The Special Representative's 2009 report to the UN Human Rights Council discusses the key features of the 'protect, respect and remedy' framework in the context of the current economic climate, and outlines Professor Ruggie's progress in putting the framework into operation.

The State Duty to Protect

Although the state duty to protect human rights is generally well understood, the manner in which it may be fulfilled with respect to business activities is less clear. In his 2008 report, Professor Ruggie recommended that states:

- foster a corporate culture respectful of human rights;
- align their policies to reduce the current policy incoherence; and
- receive assistance from the international community to achieve greater policy coherence.

He particularly noted the challenges posed by international investment agreements and corporate activity in conflict zones.

In his 2009 report, Professor Ruggie recognises recent developments addressing policy incoherence, and notes the increasing adoption of corporate social responsibility policies by states. Assisting governments to recognise the connections between human rights and policy domains that shape business practices is a major objective of his renewed mandate.

To progress the operationalisation of the framework, Professor Ruggie is surveying states and exploring the policy domains of corporate law, investment and trade agreements, and international cooperation.

He has engaged the assistance of 19 law firms to consider the extent to which corporate law in 40 jurisdictions addresses human rights. Allens Arthur Robinson is contributing to this research by providing an analysis of Australian corporate law, and the relevant corporate laws of a number of other jurisdictions in the Asia Pacific region.

In relation to international investment agreements, Professor Ruggie is exploring the feasibility of developing guidelines to address the continued use of stabilisation provisions that protect investors from new laws in host government agreements with non-OECD states.

He is further continuing outreach efforts to encourage human rights forums to engage in intergovernmental dialogue to increase international cooperation to reduce policy incoherence, and is exploring the possibility of working with an informal group of states to generate problem-solving ideas with respect to corporate activity in conflict zones.

The Corporate Responsibility to Respect

Presenting the framework in his 2008 report, Professor Ruggie posited that 'due diligence' is the key means by which a company can discharge its responsibility to respect human rights. He addressed and clarified companies' spheres of influence and the notion of corporate complicity, acknowledging the difficulty of precisely defining these concepts.

In his 2009 report, Professor Ruggie's discussion of the corporate responsibility to respect is focused on clarifying the nature of the responsibility, including identifying areas of continuing confusion and elaborating on issues related to human rights due diligence that emerged from stakeholder discussions. He confirmed that human rights due diligence should be understood in a broad sense and that its principles should be internalised by all businesses, although he will continue to explore the impact of a company's size and nature on the discharge of its responsibilities. He proposes to use practical experiences and engagement with stakeholders to further clarify both the integration of human rights policies and the potential liability that may flow from human rights due diligence requirements.

Access to Remedy

The final element of Professor Ruggie's 'protect, respect and remedy' framework is access to remedy. In his 2008 report he observed that in the absence of effective mechanisms to investigate, punish and

redress abuses, any system of human rights protection will be ineffective. Consistent with the practical and comprehensive focus of the framework, Professor Ruggie characterised access to remedy as an inextricable element of both the state duty to protect and the corporate responsibility to respect human rights.

In his 2009 report, Professor Ruggie sought to clarify states' obligations in relation to the provision of grievance mechanisms and address the relationship between judicial and non-judicial mechanisms. He described the two mechanisms as interactive and potentially complementary, as well as being reinforcing, sequential and preventative.

According to the Special Representative, the scale and complexity of effective grievance mechanisms at the company level will depend on the extent of the company's likely impacts. Professor Ruggie is hopeful that the decision by the International Organisation of Employers, the International Chamber of Commerce and the Business and Industry Advisory Committee to the OECD to pilot grievance mechanism issues with companies will provide useful lessons. He also continues to explore models related to the contribution of national human rights institutions and other bodies to the provision of access to remedy at the national level. Finally, having identified a number of barriers to the efficacy of grievance measures at the international level, Professor Ruggie launched a global wiki: Business and Society Exploring Solutions – A Dispute Resolution Community (see www.baseswiki.org). BASESwiki is an interactive online forum to facilitate the sharing, access and discussion of non-judicial mechanisms. Professor Ruggie has urged all stakeholders to assist with its development, viewing it as a precursor to the exploration of promising proposals and institutional innovation.

Operationalizing the Framework

Although the response to the 2008 report and the framework was generally positive, there was some criticism that a more robust framework and action is needed. Professor Ruggie has acknowledged this, speaking of the need for action by States, national institutions, companies and the international community.

The 2009 report outlines the progress of the Special Representative's efforts to further clarify the multitude of grey areas within the business and human rights discourse and engage with all stakeholders. It conveys both the enormity of the challenge of successfully operationalising the framework, and the necessity of stakeholder commitment and action to achieve it.

Catie Shavin is a lawyer and member of Allen's Corporate Responsibility Group

Centre Receives Significant Support from Reichstein Foundation and Victoria Law Foundation

The Human Rights Law Resource Centre is delighted to announce recent grants from the Reichstein Foundation (\$20,000) and the Victoria Law Foundation (\$4500).

A significant grant from the Reichstein Foundation will increase the Centre's capacity to support and facilitate the strategic use of the Victorian *Charter of Human Rights and Responsibilities* and international human rights monitoring and complaints mechanisms, both by the Centre itself and the community and legal sectors more broadly.

A grant from the Victoria Law Foundation will enable the Centre to fully maintain and update its free online Human Rights Case Law Database (see www.hrlrc.org.au/resources/hrlrc-caselaw-database/). It will also enable entries in an accessible format for people with disability. The Database provides fully searchable access to domestic, comparative and international human rights cases. Each entry contains:

- a link to the full-text decision where available;
- a detailed case note; and
- a summary and analysis of the relevance of the decision to Victoria.

The Centre is greatly appreciative of these contributions from the Reichstein Foundation (www.reichstein.org.au) and the Victoria Law Foundation (www.victorialaw.org.au), both of which have been significant supporters of the Centre since its establishment.

Leading Australian Law Firms Continue Sponsorship of the Centre

The Centre is also very pleased to announce recent significant donations from Mallesons Stephen Jaques (\$15,000), Allens Arthur Robinson (\$5000) and Blake Dawson (\$5000). Mallesons, Allens and Blake Dawson have been very significant supporters of the Centre since its establishment. All three firms were involved in the development of the Centre, have undertaken substantial pro bono work in domestic and international human rights litigation, and provided significant assistance with policy submissions and publications. Since 2006, Mallesons, Allens and Blake Dawson have also made very valuable annual donations to the Centre.

The Centre would like to thank these leading firms for their significant donations and assisting us to work towards ensuring freedom, respect, equality and dignity for everyone.

Centre Lawyer Conferred with Australian Leadership Award

We are delighted that Rachel Ball, a lawyer with the Human Rights Law Resource Centre, has been awarded a 2009 Australian Leadership Award by the Australian Davos Connection. The Awards are made annually to people aged 25 to 45 years who are 'recognised as leaders in their fields', have a 'vision for Australia' and 'promote economically, socially and culturally important issues'.

National Charter of Rights Developments

Law Council, Charter of Rights Experts Make Submissions to the National Human Rights Consultation

Over the last month, there have been a number of high quality submissions to the National Human Rights Consultation calling for the enactment of a comprehensive Human Rights Act.

These submissions include:

- Human Rights Law Resource Centre at www.hrlrc.org.au;
- Law Council of Australia at www.lawcouncil.asn.au/initiatives/bill-of-rights.cfm;
- Edward Santow, Director of the Charter of Human Rights Project at the Gilbert + Tobin Centre of Public Law, UNSW, at www.gtcentre.unsw.edu.au/news/docs/NHRC_Submission.pdf;
- Professor George Williams, Foundation Director of the Gilbert + Tobin Centre of Public Law, UNSW, at www.gtcentre.unsw.edu.au/News/docs/2009_Charter.pdf;
- Human Rights Act for Australia Campaign at www.humanrightsact.com.au; and
- Professor Spencer Zifcak and Alison King at www.australiancollaboration.com.au/booksreports/Wrongs_Rights_Remedies.pdf.

The deadline for submissions to the National Human Rights Consultation is **15 June 2009**.

The Centre has prepared extensive materials to assist individuals and organisations to make a submission at www.hrlrc.org.au/content/topics/national-human-rights-consultation/.

Experts Consider Constitutional Validity of a National Human Rights Act

On 22 April 2009, the Australian Human Rights Commission convened a meeting of leading Australian constitutional and human rights lawyers to discuss the constitutional implications of an Australian Human Rights Act. The experts, including the Hon Sir Anthony Mason, the Hon Michael McHugh and the Hon Catherine Branson, unanimously agreed that a Human Rights Act for Australia can be drafted that would be constitutionally valid.

The experts' Statement on the Constitutional validity of a Human Rights Act is available at <http://www.humanrights.gov.au/letstalkaboutrights/roundtable.html>.

National Human Rights Consultation Moves Online

The National Human Rights Consultation Committee has opened an online discussion forum, providing people with the opportunity to post any thoughts, ideas or questions they might have about human rights

in Australia. The National Human Rights Online Consultation closes 26 June 2009 and is at <http://openforum.com.au/NHROC/>.

Victorian Charter of Rights Developments

Statements of Compatibility under the Victorian Charter

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

Below is an analysis of recent significant Statements.

Crimes Amendment (Identity Crime) Bill 2009

The *Crimes Amendment (Identity Crime) Bill 2009* seeks to create new identity crime offences and allow victims of identity crime to obtain court-issued certificates to assist them in remedying the effects of crime.

The Bill amends the following Victorian legislation:

- the *Crimes Act 1958*, to create offences relating to identity crime;
- the *Sentencing Act 1991* to provide for the issue of certificates to victims of identity crime; and
- the *Children, Youth and Families Act 2005* and the *Sentencing Act 1991*, to make amendments concerning sentencing procedures where an offender pleads guilty and receives a reduced sentence. The procedure allows a court to record a statement regarding the sentence it would have imposed but for the guilty plea.

Clause 3 of the Bill makes it an offence to make, use or supply identification information, or to possess equipment capable of making identification documentation, in certain circumstances. The new offences engage a number of rights protected under the Victorian *Charter*, most significantly in seeking to balance the alleged offender's right to freedom of expression (s 15(2) of the *Charter*) with the privacy and property rights of victims (ss 13 and 20 of the *Charter*). Relevantly, the offences are restricted by a requirement to prove an intention to commit an indictable offence.

The Scrutiny of Acts and Regulations Committee were particularly concerned by clauses 4 and 6 of the Bill, which engage a number of *Charter* rights including a defendant's right to be informed promptly as to the nature of the charge (s 25(2)), a person's right not to have their reputation unlawfully attacked (s 13(b)) and the right to a fair hearing (s 24).

Alternative verdict provisions (clause 4)

Clause 4 of the Bill amends the *Crimes Act*, providing that a jury may find a person charged with one offence (making, using or supplying identification information) guilty of an alternative offence (possession of identification information).

The Statement of Compatibility accompanying the Bill notes the New Zealand decision in *R v K* (1995) NZLR 440, in which it was held that the right to be promptly informed as to the nature of a charge refers to charges actually laid, rather than charges the police could make at a later stage. The Statement concludes that, by analogy, clause 4 of the Bill does not infringe this right.

However, there appears to be a distinction between charges which have not been laid, and charges which have been laid and automatically allow for a finding of guilt on a lesser charge. The Committee observed that under clause 4 of the Bill, a defendant will be in peril of being found guilty of possessing identification information whenever they are charged with making, using or supplying identification information. The Committee concluded that the alternative verdict provisions limit an accused's right to be properly informed promptly as to the nature of the charge.

Identity crime certificate (clause 6)

Clause 6 amends the *Sentencing Act 1991* to provide that after a person has been found guilty of an identity crime offence, the Court may issue a certificate to the victim of the offence. The Committee observed that issuing the certificate requires the court to make additional findings about the offence the defendant committed, including finding that the use of identification information was a necessary element of the offence, that the victim's information was used in connection with the commission of the

offence and that the victim did not consent to that use. Accordingly, the Committee is particularly concerned that no provision is made for the defendant to have any input into a hearing in respect of issuing such a certificate, nor are they given any appeal rights.

Charlotte Beeny, Human Rights Law Group, Mallesons Stephen Jaques

Victorian Charter Case Notes

Vexatious Litigants and the Rights to a Fair Hearing, Access to a Court and Legal Aid

Kay v Victorian Attorney-General & Anor (Victorian Court of Appeal, Unreported, 19 May 2009)

In this case, the Victorian Court of Appeal considered whether the making of a vexatious litigant order was compatible with the right to a fair hearing under s 24 of the Victorian *Charter*. The Court held that while the right to a fair hearing subsumes a right to access the courts and, in certain cases, a right to legal aid, these rights are not absolute and may be subject to reasonable limitations. In the circumstances, the Court considered the vexatious litigant order to be a reasonable limitation.

Facts

The applicant, Ian Kay, had previously been declared a vexatious litigant. In the present case he sought, inter alia, to have the vexatious litigant order revoked.

Section 21 of the *Supreme Court Act 1986* (Vic) sets out the test for declaring a litigant vexatious. Pursuant to s 21(2), a person may be declared vexatious if the person has 'habitually and persistently and without reasonable grounds instituted vexatious legal proceedings'. Section 21(5) empowers the court to revoke an order declaring a person vexatious if it considers it proper to do so. An application to set aside a vexatious litigant order will not be allowed unless the court is satisfied that there has been such a change in relevant circumstances since the making of the order as to make it appropriate that the order be set aside.

The present application was made on the grounds that the vexatious litigant order denied the applicant natural justice by rendering him unable to present his case in accordance with normal court procedures. Mr Kay also contended that the matter should not be heard until he had been supplied with all of the documents requested to prove the required 'relevant change of circumstance'.

In oral argument, Mr Kay contended, among other matters, that the vexatious litigant order breached his right to access the courts and his right to legal aid in violation of the right to a fair hearing under s 24 of the Victorian *Charter*.

Decision

The Court of Appeal refused the application. Nettle JA commented that the applicant's repeated submissions to the courts and the repeated provision of reasons by the courts for the rejection of his applications evidenced that the applicant had not been denied natural justice and access to normal court procedures. According to the Court, the applicant 'was given yet another hearing, he was permitted to put his submission yet again and was provided with yet another set of reasons for the rejection of his application'. The Court further held that there was no relevant change of circumstances justifying the revocation or variation of the order and that 'most if not all of his contentions are simply a regurgitation of arguments previously advanced and rejected'.

Consideration of the Victorian Charter

Section 24(1) of the Victorian *Charter* provides that 'a person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing'.

At international law, the right to a fair hearing subsumes a right of access to, and equality before, the courts, and a right to legal advice and representation. In its General Comment on art 14 of the *ICCPR* (on which s 24 of the *Charter* is modelled), the UN Human Rights Committee stated that the administration of justice must 'effectively be guaranteed in all cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice': HRC, *General Comment No 32: Article 14 Concerning the Right to Equality before Courts and Tribunals and to a Fair Trial*, (2006), [2].

Right of Access to Courts

In the present case, the Court of Appeal implicitly recognised that s 24 of the *Charter* enshrines a right to access the court but that such access may be 'subjected to reasonable restrictions aimed at achieving legitimate objectives if the means used to achieve those objectives are proportionate thereto' (see, eg, *Golder v United Kingdom* (1975) 1 EHRR 524). Relying on UK and European Court jurisprudence, the Court further held that, 'since a right of access of the kind enshrined in s 24 of the *Charter* is informed and limited by the "needs and resources of the community and individuals" it is recognised that it is in the interest of justice and thus a legitimate aim to restrict the access of vexatious litigants'.

Right to Legal Aid

The Court of Appeal also recognised that vulnerable litigants may require free legal representation to give effective and practical meaning to s 24 of the *Charter*, stating 'the right to a fair hearing may require legal aid in some cases, especially criminal cases'.

Again relying on UK and European jurisprudence, the Court accepted that a right to legal aid in civil cases may arise where 'the withholding of legal aid would make the assertion of a civil claim practically impossible, or where it would lead to an obvious unfairness of proceedings' (see, eg, *X v United Kingdom* (1984) 6 EHRR 136). The right to legal aid is, of course, not absolute and a legal aid scheme may distinguish between cases on merit. In the present case, the Court was not satisfied that the lack of legal aid compromised Mr Kay's ability to establish a relevant change of circumstances; rather his problem was that there was no evidence of such a change.

Ali Shahverdi is a volunteer with the Human Rights Law Resource Centre

Right to Equality and Exemptions under the *Equal Opportunity Act*

YMCA - Ascot Vale Leisure Centre (Anti-Discrimination Exemption) [2009] VCAT 765 (4 May 2009)

This case explores the relationship between human rights and equal opportunity legislation. It was decided by VCAT that the YMCA should be granted a temporary exemption from the *Equal Opportunity Act 1995* to enable it to conduct women-only swimming sessions and related programmes. This exemption was held to conform with the rights to equality and non-discrimination set out in the *Charter*.

Facts

The applicant, the YMCA, applied for an exemption from the *Equal Opportunity Act 1995* (Vic) ('the Act') to allow it to conduct women-only swimming sessions and related programmes at the Ascot Vale Leisure Centre (a facility managed by the applicant on behalf of the local Council). This case was brought under s 83 of the Act, which authorises the Victorian Civil and Administrative Appeals Tribunal to grant temporary exemptions to facilitate equality of opportunity and the elimination of discrimination. In deciding this issue, VCAT was required to consider the relationship between the Act and the rights to equality and non-discrimination enshrined in s 8 of the *Charter*.

The evidence before VCAT indicated that both the YMCA and the Ascot Vale community had identified the need for women-only swimming sessions. VCAT was informed that women make up about half of the Ascot Vale population. More than 25 per cent of these women were born overseas and a significant proportion of them are Muslim. The applicants explained to VCAT that, due to their cultural and religious values and beliefs, Muslim women in the community were not able to participate in mixed male/female swimming sessions. These women were therefore unable to attend the Centre during public opening hours. VCAT was told that the only way to provide accessible opportunities for these women to swim and learn to swim was to provide women-only sessions at the Centre. The proposed sessions were to operate outside of normal opening hours and would be staffed only by women during these times.

Decision

Equal opportunity law

Deputy President Cate McKenzie first considered whether the proposed exemption was allowable under the Act. She pointed out that the Act does not expressly limit the discretion given to VCAT to grant or

refuse exemptions. The Deputy President indicated that the proper approach was to consider whether the proposed exemption invoked a ground of prohibited discrimination under the Act. In this case, the proposal involved a possible form of prohibited discrimination against men. It was therefore necessary to weigh the interests served by the proposed exemption against the interests served by the prohibitions under the Act. Deputy President McKenzie pointed out that this assessment should have reference to the broader objectives of the Act. These objectives included promoting acceptance and recognition of every person's right to equality of opportunity, and limiting prohibited discrimination as far as possible.

In this case, the purpose of the proposed exemption was to give Muslim women the same opportunities that were currently available to men and women who did not hold these beliefs and were therefore able to access the Centre during public opening hours. In this sense, the exemption was designed to promote equality of opportunity for a particular group of women. The aim of the proposed exemption could not be achieved in a less restrictive way and was designed so as not to interfere with the public operation of the Centre. Therefore the proposed exemption was compatible with the terms of the Act. The next issue to consider was whether the proposal was in harmony with the rights and principles proscribed by the *Charter*.

Charter rights to equality and non-discrimination

Deputy President McKenzie confirmed that s 32 of the *Charter* requires all statutory provisions to be interpreted in a way that is compatible with human rights, so far as this is possible. Therefore the discretion given by s 83 of the EO Act must be interpreted and exercised by VCAT in a way that is compatible with the *Charter*.

The Deputy President went on to consider which *Charter* rights were possibly engaged in this case. In her view, the relevant rights included: non-discrimination; equality before the law; protection of the law without discrimination; and equal and effective protection against discrimination (ss 8(1)-(3)).

The next question was whether the granting of the exemption in this case represented a reasonable limit on the *Charter* rights under s 7. The Deputy President confirmed that the proposed exemption did represent such a reasonable limit. She said that the aim of the proposed exemption was to redress a disadvantage currently suffered by a certain group of women due to their religious or cultural beliefs. Deputy President McKenzie pointed out that this disadvantage was not suffered by people without those religious or cultural beliefs. She said that the activities at the Centre would provide women with the opportunity for recreation, enable the women to engage with broader community services, and build social connections between different sectors of the community. In light of these considerations, the proposed exemption was compatible with the *Charter* rights to equality and non-discrimination.

VCAT granted the applicant an exemption for a period of three years. Deputy President McKenzie held that the exemption was designed to combat discrimination and promote social inclusion for women in the Ascot Vale community. The exemption was therefore deemed to be a measure that was allowable under the EO Act and which was in harmony with the rights proscribed by the *Charter*.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VCAT/2009/765.html>.

Magdalena McGuire is a volunteer with the Human Rights Law Resource Centre

Comparative Law Case Notes

Canadian Supreme Court Considers Right to Privacy

R v Patrick, 2009 SCC 17 (CanLII) (9 April 2009)

The Supreme Court of Canada has held that no privacy interest exists in the contents of garbage bags placed out for collection. Police had seized garbage bags from an individual's property, and used their contents to justify obtaining a warrant to search his home. The individual was subsequently convicted of possessing, producing and trafficking ecstasy. He unsuccessfully argued in the Supreme Court that the police's actions breached the *Canadian Charter of Rights and Freedoms*.

Facts

The police accessed Russell Patrick's garbage by reaching into his property from a publicly accessible back alleyway and taking bags of garbage that had been placed out for collection. Patrick argued that

this was unreasonable within the meaning of s 8 of the Canadian Charter, which protects against unreasonable search or seizure.

Upon searching Patrick's garbage, the police found a number of objects which could have been used to make drugs, some of which were contaminated with ecstasy. This was the primary basis on which they sought and obtained a search warrant for Patrick's home. Patrick was ultimately convicted of possessing, producing and trafficking ecstasy.

Patrick argued that without the unreasonable seizure of his garbage the police would not have been able to obtain the search warrant. Consequently, this evidence should have been excluded pursuant to s 24(2) of the Canadian Charter, on the basis that it would bring the administration of justice into disrepute.

The trial judge held that Patrick had no reasonable expectation of privacy in his garbage and that the search warrant was therefore valid. Patrick appealed to the Court of Appeal for Alberta, and then to the Supreme Court of Canada.

Decision

The majority of the Supreme Court of Canada found that the police did not breach the appellant's right to be free from unreasonable search and seizure, protected under s 8 of the Canadian Charter. The majority judgment assessed Patrick's conduct objectively and decided that he abandoned any privacy interest in his garbage when he placed it at the rear of his property for collection. At this point he had done everything necessary to dispose of the items in his garbage and they were accessible to any member of the public, including the police.

The majority decided that these actions were inconsistent with a subsisting privacy interest in the garbage, and emphasised that the relevant question was not whether Patrick subjectively believed that his garbage would remain private, but whether he had forfeited any reasonable expectation (assessed objectively) that it would remain so. The majority stated that this would depend on the totality of the circumstances, including the nature of the interest in question, the circumstances in which the breach of privacy took place, and the rationale for the breach.

In this case, Patrick placed his garbage out for disposal in the customary way near the edge of his property. The physical intrusion by the police reaching into his property to take the garbage was incidental. However, if the garbage had been placed on the porch and he retained a greater degree of control over it, the issue would have been more difficult to determine.

When examining the totality of the circumstances, the majority held that a relevant consideration was the balance between 'the public's interest in being left alone by government' and 'the government's interest in intruding on an individual's privacy in order to advance its goals, notably those of law enforcement.'

Justice Abella concurred with the majority, but characterised the issues in this case differently. Abella J reasoned that household garbage is abandoned for the specific purpose of being removed and dealt with by the waste disposal system. Therefore, an individual should not be assumed to have abandoned their privacy interest in items in their garbage.

Where the state wishes to interfere with such a privacy interest, her Honour held that 'there should be, at the very least, a reasonable suspicion that a crime has been or is likely to be committed'. In this case, the evidence supported such a reasonable suspicion and therefore the interference was valid. Abella J stated that 'most individuals do not intend that their personal information will ever be disclosed without a countervailing legitimate state interest.'

Relevance to the Victorian Charter

The Victorian *Charter* does not expressly provide for a right against unreasonable search and seizure. However, the reasoning in this case may be applicable to interpreting s 13 of the Victorian *Charter*, which protects the right of persons not to have their privacy, family, home or correspondence arbitrarily interfered with. This case may also be relevant when Courts are considering s 20 of the *Charter*, which prevents a public authority from depriving Victorians of their property other than in accordance with law. The decision is available at <http://www.canlii.org/en/ca/scc/doc/2009/2009scc17/2009scc17.html>.

Meg O'Brien, Human Rights Law Group, Mallesons Stephen Jaques

Right to Privacy and Tenancy Rights

Vojnovic v Croatia, UN Doc CCPR/C/95/D/1510/2006 (28 April 2009)

The Human Rights Committee held that a lawful termination of tenancy rights under Croatian law amounted to an arbitrary interference with the right to home and violated art 17 of the *International Covenant on Civil and Political Rights*. The termination of the tenancy was held to be arbitrary as it was exercised in an unfair and discriminatory way.

Facts

From 1986 to 1992, Mr Vojnovic ('the author') and his wife and son occupied a State owned apartment in Zagreb, Croatia. Under Croatian legislation, their tenancy rights in most aspects amounted to ownership. The government could only terminate those rights in certain circumstances, for example, if the tenant ceased occupying the premises for period of more than six months.

In June 1991, the author and his son moved to Serbia after receiving death threats. The author's wife remained in the apartment until October 1992, when she also fled to Serbia. The author and his family escaped to Serbia as they feared for their lives as Croatian Serbs during the period leading up to the Bosnian War. The author claimed that he did not inform the authorities of the threats and intimidation he, and his family, experienced as other tenants in the apartment building who had reported such threats to the police had been forcibly evicted.

In 1995, the Zagreb Municipal Court held that the author and his wife were no longer entitled to their tenancy rights as they had not used the apartment for longer than six months and did not provide 'justified reasons' for their absence from the property. However, the author and his wife were not given adequate opportunity to provide reasons for their absence. Although the authorities had knowledge of the author's temporary residence in Belgrade, they did not summons the author and his wife to participate in the proceeding. Instead, the author and his wife were represented at the hearing by an appointed trustee.

Following the conclusion of the Bosnian War, the author and his family sought to return to Croatia and the apartment where they had previously lived. Between 1998 and 2005 the author and his family were involved in court action to regain their tenancy rights, which had been extinguished by the 1995 decision of the Zagreb Municipal Court. In a review hearing, which was initiated in 1998, the author's key witnesses were refused an opportunity to be heard by the Court. In 2004, the Court upheld its previous decision that the author's tenancy rights were terminated. The author was unsuccessful in subsequent complaints brought before the Croatian Courts.

In 2006, after exhausting all domestic avenues available to him, the author made a complaint to the United Nations Human Rights Committee under the *ICCPR* against the Croatian government regarding its treatment of him and his family.

Decision

The Committee held that the author's complaint was admissible in so far as the factual circumstances raised issues under:

- art 2(1) – right to equality and non-discrimination;
- art 14(1) – right to a fair hearing;
- art 17 – right not to have one's privacy, home and family unlawfully or arbitrarily interfered with; and
- art 26 – right to equality before the law and equal protection of the law.

The Committee held that the State party was in breach of the author's rights under arts 14(1) and 2(1) for two reasons. First, the Committee considered that the decision of the Court not to hear from the author's witnesses was arbitrary and violated the principles of a fair trial and equality before the courts. Secondly, the Committee considered that the review proceedings (initiated in 1998 and decided in 2004) were not conducted expeditiously, and the overall length of the proceedings of almost 7 years could not be justified by the State party. In this regard, the Committee held that 'in light of the author's diligent conduct and of the negative effects the delay has on the author's and his family's return to Croatia, as well in the absence of an explanation by the State party justifying the delay, the overall length in the

proceedings for the determination of the author's specially protected tenancy was unreasonable and in breach' of arts 14(1) and 2(1).

Finally, the Committee considered whether the termination of the author's specially protected tenancy constituted a violation of art 17, which requires that any interference with the home be lawful and not arbitrary. As the termination of the author's tenancy was in accordance with Croatian law, the issue before the Committee was whether the termination was arbitrary. The Committee emphasised that the concept of arbitrariness under art 17 is intended to ensure 'that even interference provided for by law should be in accordance with the provisions, aims and objects of the *ICCPR* and should be, in any event, reasonable in the particular circumstances.'

On the basis of the threats and intimidation experienced by the author and his family by virtue of belonging to the Serb minority, and having regard to the armed conflict occurring in and around Croatia during the relevant period of time, the Committee formed the view that the departure of the author and his family from Croatia 'was caused by duress and related to discrimination.' The Committee concluded that in these circumstances the deprivation of the author's tenancy rights was arbitrary and amounted to a violation of art 17. The Committee did not consider the question of a separate violation of art 26.

Relevance to the Victorian Charter

While the findings of the Committee in this Communication are specific to the unique facts and social context within which the complaint arose, the Committee's comments regarding the 'concept of arbitrariness' may be particularly helpful for lawyers considering the scope and application of the rights under s 13(a) of the Victorian *Charter*.

A person's right not to have their home unlawfully or arbitrarily interfered with is protected under section 13(a) of the *Charter*. This decision of the Committee highlights very clearly that any interference with the home must not only be 'lawful', but must also not be arbitrary. For an interference to satisfy the requirement that it not be arbitrary, it should accord with the provisions, aims and objects of the Victorian *Charter* (including respect for human dignity) and be reasonable in the particular circumstances.

Amy Barry-Macaulay is a lawyer with the PILCH Homeless Persons' Legal Clinic

UN Human Rights Committee Rules on Family Contact with Prisoners

Tornel v Spain, UN Doc CCPR/C/95/D/1473/2006 (24 April 2009)

The UN Human Rights Committee has held that the rights of a prisoner's relatives to protection from arbitrary interference with their family life, protected under art 17 of the *International Covenant on Civil and Political Rights*, will be infringed if prison authorities adopt a 'passive attitude' to keeping them informed of significant changes in the prisoner's health.

Facts

Diego Morales Tornel died in a Spanish prison in January 1994, having been continually incarcerated since 1984. He was diagnosed with HIV in April 1989 and subsequently received treatment in prison between July and August 1991. However, records suggested he received no further medical care, or HIV medication, until March 1993, when he was hospitalised due to a worsening condition and diagnosed with AIDS, tuberculosis, probable pneumonia and an intestinal infection.

He was returned to the prison's general population on in April 1993, but was hospitalised again the next month. Following his second discharge, the Prison's Treatment Board applied to the Directorate General of Penal Institutions for his conditional release, but received no response. In October 1993, the Prison's Treatment Board repeated its request for his conditional release, with the added observation that Tornel was likely to die soon. The Directorate General refused this second request, but stated that a further application should be filed if Tornel's condition worsened significantly.

When his condition deteriorated, the prison failed to alert the Directorate General and did not inform his family. Tornel was readmitted to hospital on 13 December 1993 and died on 1 January 1994, before his family could arrange a visit.

Tornel's family filed a petition complaining about his treatment. This petition and several appeals were all unsuccessful. His family then applied to the Constitutional Court alleging violations of his right to life, to be free from inhumane treatment, and to family life. His family also argued that their right to family life

had been affected. The Court rejected their application. Having exhausted domestic remedies, his family submitted a communication to the Human Rights Committee in April 2006.

In their communication, Tornel's family alleged that Spain had violated:

- Tornel's right to life under art 6(1) of the *ICCPR*,
- their rights, as his family, to be free from inhumane treatment under art 7,
- both their rights, and Tornel's right, to protection from arbitrary interference with family life under art 17,
- their rights to justice under art 14, as the Constitutional Court had found they effectively did not hold the rights invoked in their Court argument.

Decision

Admissibility

The HRC found that the family's communication was admissible, although only in part. The HRC ruled there was insufficient evidence to substantiate a claim that Tornel had been denied his right to protection from arbitrary interference with family life, and therefore this aspect of the communication was inadmissible. However, in relation to the family's claim that Tornel's right to life had been violated, the HRC noted that its past jurisprudence and rules of procedure allow a deceased's relatives to make claims on the deceased's behalf. Therefore this aspect of the claim was admissible. The HRC also ruled admissible the family's claim of a breach of their right to family life and to be free from inhumane treatment.

Merits

The HRC did not uphold the claim that Tornel's right to life had been breached, as:

- he had already been diagnosed with a terminal illness, so there was no basis to support a causal relationship between his death and his continuing incarceration; and
- the HRC simply did not have enough evidence to find that Tornel's medical treatment was inadequate.

However, the HRC did rule that his relatives' rights to family life had been breached. The prison's 'passive attitude' to informing them of Tornel's worsening condition 'deprived them of information which had a significant impact on their family life' and amounted to an arbitrary interference with their family, which Spain failed to demonstrate was 'reasonable or [otherwise] compatible' with the *ICCPR*. The HRC noted that Spain was obliged under art 2 of the *ICCPR* to provide the family with an effective remedy, which would include appropriate compensation, and to ensure that similar violations do not occur in the future.

The HRC considered it unnecessary to determine whether there had been a breach of art 7 (right to be free of inhumane treatment) in respect of the same facts, and of art 14 given its ruling on the claim regarding the right to protection from arbitrary interference with family life.

Relevance to the Victorian Charter

The Victorian *Charter of Human Rights and Responsibilities* protects both the right to life (s 9) and the right to protection from arbitrary interference with family life (s 13) in similar terms to the *ICCPR*. This decision is significant as it clearly establishes that prison operators must be proactive in informing a detainee's families of significant changes in the detainee's health. A 'passive attitude' in such cases may constitute an arbitrary interference with their relatives' rights to the protection of family life.

This decision also suggests that detainees would need to establish that concrete steps had been taken to maintain a semblance of a family life (for example through repeated attempts to be relocated closer to their families, or attempting to contact them when ill) in order to establish a valid claim that the prison authorities have failed to protect their family life from arbitrary interference. In respect of a detainee's right to life, this decision indicates that the HRC will require a reasonable evidentiary standard to be made out before it is prepared to find that medical treatment while in detention was inadequate.

Sachini Mandawala, Human Rights Law Group, Mallesons Stephen Jaques

Meaningful Review Necessary to Justify Continued Detention

Secretary of State for Justice v James [2009] UKHL 22 (6 May 2009)

The House of Lords has confirmed that a breach of arts 5(1)(a) and 5(4) of the *European Convention on Human Rights* may occur in circumstances where a prisoner is detained for longer than is necessary for public protection or for a lengthy period without a meaningful review of the risk they pose to the public.

However, the House of Lords held that a violation is only likely to arise if:

- the review system breaks down entirely, such that meaningful review of a prisoner's case is rendered impossible; or
- a prisoner is detained for 'a period of years' without an effective review of their case.

Facts

In the United Kingdom, an indeterminate sentence for public protection ('IPP') can be imposed where:

- a person is convicted of specified offence; and
- there is a significant risk of the person committing further such offences, thereby causing serious harm to members of the public.

Once an IPP prisoner has served the minimum term (or 'tariff period') of their sentence, they are to be released if the Parole Board is satisfied that their detention is no longer necessary for public protection.

The three appellants, Mr James, Mr Lee and Mr Wells, were all sentenced to IPPs with tariff periods shorter than five years. However, they were unable to move from a local prison to a training prison, where treatment courses are offered, due to insufficient vacancies in the training prison.

Accordingly, the appellants were not able to attend courses which could assist in demonstrating to the Parole Board that their continued detention was no longer necessary for public protection.

The appellants argued that the conduct of the Secretary of State, in failing to provide for access to such programs, infringed their rights under arts 5(1)(a) and 5(4) of the *European Convention*.

Article 5(1) of the *European Convention* prohibits the deprivation of a person's liberty. One exception to this prohibition is 'the lawful detention of a person after conviction by a competent court': art 5(1)(a).

Under article 5(4), anyone who is deprived of their liberty is entitled to challenge the lawfulness of their detention, and to be released if their detention is not lawful.

Decision

The House of Lords unanimously dismissed all three appeals.

Article 5(1)

The House of Lords held that the Secretary of State's failure to provide access to the treatment courses did not breach the appellants' rights under art 5(1), as the detention of an IPP prisoner beyond the tariff period will generally be 'lawful' under article 5(1)(a). This is because the sentencing court, in passing the IPP, will have already decided that the prisoner would remain a danger at the time the tariff period expires.

However, their Lordships conceded that continued detention of an IPP prisoner could be 'unlawful' where:

- 'the system ... breaks down entirely, with the result that the Parole Board is unable to perform its function at all'; or
- a 'a period of years' has passed without an effective review of the case.

Article 5(4)

The House of Lords held that the Secretary of State's failure did not breach the appellants' rights under art 5(4). Their Lordships found that art 5(4) is concerned with procedure, not substance. Where an IPP prisoner has the opportunity to challenge their continued detention before the Parole Board, their art 5(4) right will not be violated. This will be the case even if their arguments are not persuasive due to, in this case, a failure by the Secretary of State.

Their Lordships suggested that an IPP prisoner's art 5(4) right will only be violated where:

- 'it has been impossible for the Parole Board to undertake any meaningful review of [the] risk' posed by the prisoner; or
- 'the system ... breaks down entirely because the Parole Board is denied the information that it needs for such a long period that continued detention has become arbitrary'.

Relevance to the Victorian Charter

This decision may have implications for the interpretation of ss 21(1) and 21(3) of the Victorian *Charter*, which are very similar to art 5(1) of the *European Convention*. It may also be relevant to s 21(7) of the *Charter*, which is very similar to art 5(4) of the *European Convention*.

If followed in Victoria, there may be a breach of ss 21(1), 21(3) or 21(7) of the *Charter* where a prisoner is detained for longer than is necessary for public protection, or for a lengthy period without a meaningful review of the risk that they pose to the public.

The decision is available at <http://www.bailii.org/uk/cases/UKHL/2009/22.html>.

Brinsley Saw, Human Rights Law Group, Mallesons Stephen Jaques

Right to Legal Aid and a Lawyer of One's Choice

Hakimi v Legal Aid Commission (ACT) [2009] ACTSC 48 (12 May 2009)

The ACT Supreme Court has ruled that there is no absolute right for a legally aided person to choose their own lawyer. This case was the first application made under amendments to the *Human Rights Act 2004* (ACT) creating a new cause of action for breach of human rights, which came into force on 1 January 2009.

Facts

Mr Hakimi, an Afghan refugee, was arrested and charged with a serious offence. Appearing for himself, he successfully applied for bail, and then met with a solicitor whose firm has acted for Mr Hakimi since that time. As Mr Hakimi could not afford to pay for legal representation, his solicitor advised him to apply to the ACT Legal Aid Commission for assistance.

The Commission granted legal aid on the basis that Mr Hakimi would be represented by one of the Commission's own lawyers. Mr Hakimi was not satisfied with the Commission's decision, as he wished his own solicitor to continue acting for him.

At the hearing, Mr Hakimi argued that s 22(2) of the *Human Rights Act* requires the Commission to pay for his choice of lawyer, even if that person is a private practitioner. The relevant provisions provide for anyone charged with a criminal offence to:

- be able to communicate with a lawyer they have chosen (s 22(2)(b));
- be able to defend themselves through legal assistance they have chosen (s 22(2)(d));
- be told about the right to choose legal assistance (s 22(2)(e)), and
- have legal assistance provided to them without payment if required by the interests of justice (s 22(2)(f)).

Mr Hakimi argued that the plain meaning of s 22(2) supported his position, and the Court was not required to look to any other authorities or principles. All he needed to show was that he qualified for legal aid and a lawyer of his choice was willing to act for the fees ordinarily paid by the Commission.

The Commission did not dispute it was a public authority, nor that it was bound to apply the provisions of s 22. It argued there was a significant difference between the wording of s 22(2)(f) and the other paragraphs of s 22(2) relied upon by Mr Hakimi. Significantly, para (f) did not refer to legal assistance 'chosen by him or her', which it submitted was a deliberate omission, recognising international jurisprudence in respect of similar provisions (see, eg, UN Human Rights Committee in *Teesdale v Trinidad and Tobago* [2002] UNHRC 17 considering art 14(3)(d) of the *ICCPR*). Therefore, it was not intended that legal aid funded representation necessarily be by a person's preferred private lawyer.

The Commission also argued that s 28 of the *Human Rights Act* permitted reasonable limitations on the rights provided by s 22. The Commission argued that its Work Allocation Guidelines, the policy for

determining to whom it can provide assistance in order to make the most efficient use of its money, constituted such reasonable limitations.

Decision

Justice Refshauge considered that identifying the content of the rights protected by s 22 of the *Human Rights Act* is properly assisted by international jurisprudence considering similar rights. However, this does not mean that the 'ordinary canons of statutory construction' can be ignored.

His Honour agreed with the Commission's argument that the omission of 'chosen by him or her' from the wording of s 22(2)(f) was deliberate, particularly given this is supported by international jurisprudence to which he assumed the legislature had regard when drafting the provision.

His Honour specifically referred to decisions of the New Zealand Court of Appeal and the European Commission on Human Rights, which have held that a provision of this type does not provide the right for legally aided parties to choose their lawyer.

Justice Refshauge further held that paras (b), (d) and (e) of s 22(2) do not provide an absolute right to representation by a lawyer chosen by the accused. In particular, the provisions could not force a lawyer to act for a person regardless of their wishes or availability, or if the accused's choice would lead to unreasonable delay. Accordingly, the right is not absolute and can be limited in certain circumstances.

Relevance to the Victorian Charter

Section 25 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides similar protection of an accused's rights in criminal proceedings to those set out in s 22 of the *Human Rights Act*. However, s 25(2)(d) of the Victorian *Charter* draws a distinction between the requirement that an accused be guaranteed the right to defend themselves through legal assistance of their choice **or** if eligible, through legal aid provided by Victoria Legal Aid.

Accordingly, the arguments relied upon by Mr Hakimi in this case would not seem to arise on the wording of s 25(2)(d). In any event, the Court would be unlikely to depart from the principle that there can be no absolute right for a legally aided person to choose their own lawyer.

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

Jonathan Kelp, Human Rights Law Group, Mallesons Stephen Jaques

House of Lords considers Right to Fair Hearing and Presumption of Innocence in Context of Confiscation Orders

R v Briggs-Price [2009] UKHL 19 (29 April 2009)

The House of Lords has unanimously held that a confiscation order can be validly made on the basis of matters established by evidence at trial, but in relation to which a defendant has not been charged. This practice does not infringe the defendant's right to the presumption of innocence or right to a fair trial under the *European Convention on Human Rights*.

Facts

The defendant, Mr Briggs-Price, was convicted of conspiracy to import heroin under the UK *Drug Trafficking Act 1994*. At trial, the prosecution also led evidence that he had imported and distributed cannabis, although he was not charged with any offences relating to cannabis.

After his conviction, Briggs-Price was subject to confiscation proceedings and a subsequent confiscation order under the *Drug Trafficking Act 1994*. Such orders permit the assets of a person convicted of a drug trafficking offence to be confiscated, to the extent that they benefited from the drug trafficking.

The judge in the confiscation proceedings based his assessment of the benefit Briggs-Price had received from trafficking on the proceeds of his cannabis importation and dealing (his plan to import heroin was never implemented), despite the fact that Briggs-Price had not been convicted of cannabis related offences. The judge held that the evidence at trial established Briggs-Price had dealt in cannabis, and imposed a confiscation order totalling £2,628,490.

The defendant appealed, arguing that by basing the confiscation order on offences of which he had not been convicted, the Court had violated his right to a fair trial and the presumption of innocence afforded by arts 6(1) and 6(2) of the *European Convention*.

Decision

The House of Lords unanimously dismissed the appeal, ruling that the appellant's art 6 rights had not been infringed.

The majority held that confiscation orders did not involve bringing new criminal charges against the defendant and were merely a part of the sentencing process. As a result, art 6(2) did not apply. Art 6(1) was satisfied in this case, as the appellant had received a fair original trial.

In finding that confiscation proceedings do not constitute new charges, their Lordships relied heavily on English and European Court of Human Rights jurisprudence which had found that confiscation proceedings are analogous to the determination of a penalty, such as a fine or term of imprisonment. The Court also considered that the purpose of the confiscation proceedings were not to obtain a criminal conviction.

Lord Mance noted that the European Court had found that confiscation proceedings do not amount to a new charge because, among other factors:

- an application for a confiscation order can only be made if the accused is convicted, not if they have been acquitted;
- the proceedings form part of sentencing procedure;
- the proceedings are not governed by ordinary rules of criminal procedure, and are not initiated by indictment; and
- the proceedings do not result in a verdict being handed down.

Lord Neuberger took into account matters of public policy in considering whether the proceedings amounted to new charges, stating:

it would be more than unfortunate if any criticism of the course taken in this case led to the prosecuting authorities feeling obliged to charge a defendant with every conceivable drug-trafficking offence they might be relying on in any contingent confiscation proceedings.

Lord Brown alone found that art 6(2), which guarantees the presumption of innocence, applied to the confiscation proceedings. However, his Lordship held that in this case the presumption had been satisfied. His Lordship noted that the trial judge had been convinced that Briggs-Price had been dealing cannabis, based on the evidence which had been led. Accordingly, the presumption of innocence had been satisfied.

The other Law Lords held that art 6(2) was not engaged as confiscation proceedings do not involve charging the defendant with a criminal offence, unless accusations raised during the initial sentencing are so serious as to amount to bringing a new charge.

Relevance to the Victorian Charter

The rights to a fair trial and the presumption of innocence are protected by ss 24 and 25 of the Victorian *Charter of Human Rights and Responsibilities*. The judgment in this case contains some principles on the nature of those rights and their application generally, as well as providing guidance on their possible interaction with confiscation provisions contained in the *Confiscation Act 1997* (Vic) and *Proceeds of Crime Act 2002* (Cth).

The decision is available at <http://www.bailii.org/uk/cases/UKHL/2009/19.html>.

Josh Underhill, Human Rights Law Group, Mallesons Stephen Jaques

Obligations of States to Citizens Detained Abroad

Khadr v Canada (Minister for Justice) [2009] FC 405

On 23 April 2009, the Federal Court of Canada handed down a decision which discussed in detail the right of citizens to request their government to provide protection against acts which violate accepted norms of international law during a period of detention in a foreign country.

Facts

Mr Khadr, a Canadian citizen, was arrested in Afghanistan in July 2002 when he was 15 years old. He is alleged to have thrown a grenade that caused the death of a US soldier. He has been imprisoned at Guantanamo Bay since October 2002 awaiting trial on charges of murder, attempted murder, conspiracy, support of terrorism and spying.

At the time of his arrest and his subsequent incarceration, Mr Khadr was given no special status as a minor. For the first two and a half years of his incarceration Mr Khadr had virtually no communication with anyone outside of Guantanamo Bay and did not have access to legal counsel.

As a means of making Mr Khadr more willing to provide intelligence, Mr Khadr was subjected to the so-called 'frequent flyer program'. This involved depriving Mr Khadr of rest and sleep by moving him to a new location every three hours over a period of weeks. In spring 2004, Canadian officials were knowingly implicated in the imposition of this practice.

Mr Khadr challenged the refusal of the Canadian government to seek his repatriation to Canada. He claimed his rights under the *Canadian Charter of Rights and Freedoms* were being infringed and sought:

- such remedy as the court considers appropriate and just in the circumstances under art 24(1) of the Charter;
- to have the respondent's decision not to allow his return to Canada quashed;
- a court order that the respondent request the US Government to repatriate Mr Khadr; and
- further disclosure of documents in the respondent's possession.

Decision

Justice O'Reilly of the Federal Court was satisfied that Mr Khadr's rights under *Charter* had been infringed. His Honour ordered that the respondent seek Mr Khadr's repatriation from the United States.

The legal duty to protect Mr Khadr

Justice O'Reilly cited case law which supports the proposition that there is no clear duty to protect citizens recognized under international law or under the common law. However, His Honour distinguished international jurisprudence from the situation where a Canadian citizen's constitutional rights under the *Charter* are engaged. In coming to his conclusion that Canada *did* owe Mr Khadr a duty to protect, O'Reilly J indicated his support for the South African approach to the legal duty to come to the aid of citizens who are at risk in other countries. In *Kaunda v President of South Africa* CCT 23/04, the Constitutional Court concluded that there is no right to diplomatic protection under international law. The South African Court ruled that States have 'the right to protect their nationals beyond their borders but are under no obligation to do so'. The *Kaunda* decision specified that citizens have a right to request that their government 'provide protection against acts which violate accepted norms of international law' and that the government must consider and respond to those requests. Further, the government's response is subject to judicial review under the Constitution. However, it is the court's responsibility to 'give particular weight to the government's special responsibility for and particular expertise in foreign affairs, and the wide discretion that it must have in determining how best to deal with such matters'.

Breach of the *Charter*

Section 7 of the *Canadian Charter* specifies that 'Everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'

In earlier proceedings involving Mr Khadr, the Supreme Court of Canada found that Mr Khadr's liberty interest was engaged by virtue of the participation of Canadian officials in an unlawful process (the interrogation of Mr Khadr by Canadian officials whilst being unlawfully detained as well as their knowing involvement in his mistreatment).

In order to decide whether the Canadian Government was legally required to protect Mr Khadr, O'Reilly J had to determine whether the principles of fundamental justice applied as per s 7. To be recognized as a principle of fundamental justice, His Honour identified three criteria that must be met, namely:

- it must be a legal principle;
- for which there is a broad consensus about its fundamental character in respect of the fair operation of the legal system; and
- which is capable of being defined with sufficient precision to be used as a manageable standard for the measurement of deprivations of life, liberty and security of the person (*R v DB*, 2008 SCC 25).

In addition, the principles of fundamental justice are informed by Canada's international obligations as expressed in the various sources of international human rights law (ie. declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms, etc).

Justice O'Reilly determined that the Canadian officials' participation in conduct that failed to respect Mr Khadr's rights, as well as their failure to remove him from an extended period of unlawful detention amongst adult prisoners without contact with his family, resulted in breaches of Canada's obligations under the *Convention against Torture* (CAT), the *Convention on the Rights of the Child* (CRC), and the *Optional Protocol on the Involvement of Children in Armed Conflict* (OP-CRC-AC).

Justice O'Reilly held that the duty to protect is a principle of fundamental justice because: (1) it is expressed in clear and forceful language in the CAT, CRC and the OP-CRC-AC; (2) there is broad international support of those instruments; and (3) the scope of the duty to protect can be adequately identified and manageably applied to deprivations of life, liberty and security of the person.

In determining the scope of the legal duty to protect Mr Khadr under s 7 of the *Charter*, His Honour acknowledged the special circumstances present in Mr Khadr's case – namely, Mr Khadr's youth; his need for medical attention; his lack of education, access to consular assistance, and legal counsel; his inability to challenge his detention or conditions of confinement in a court of law; and his presence in an unfamiliar, remote and isolated prison, with no family contact.

Based on the reasons set out above, the Federal Court ordered that an application for judicial review be allowed, with costs. Justice O'Reilly also ordered the Canadian Government to request that the US return Mr Khadr to Canada as soon as possible. Mr Khadr's request for further disclosure of documents in the respondent's possession was denied as it was held that the discrete issue of disclosure was conclusively decided in previous proceedings before the Supreme Court of Canada and thus could not be re-litigated.

Relevance to the Victorian Charter

The *Khadr* decision plays an important role in defining the human right obligations of Governments whose citizens are detained in foreign countries, particularly where Government officials have been involved in or are aware of the mistreatment of the detainee. Although the Victorian *Charter* has limited application to Australian detainees in foreign countries, it is important to note the Court's willingness to consider human rights issues when looking at underage detainees. In particular, the *Khadr* decision may have implications for the interpretation of s 23 of the Victorian *Charter*, which provides obligations towards children in the criminal process. The Canadian decision highlighted the importance of consideration of the State's international obligations in deciding whether there has been an alleged departure from the *Charter*. Like Canada, Australia is a party to the CRC, which means that the duties contained in the CRC may shape the interpretation of the obligations contained in s 23 of the Victorian *Charter*.

The decision is available at <http://www.bccla.org/othercontent/09Khadrdecision.pdf>.

Melissa Gundrill is on secondment to the Human Rights Law Resource Centre from Clayton Utz

HRLRC Policy Work

A Human Rights Act for All Australians: Centre makes Submission to National Human Rights Consultation

On 15 May 2009, the Human Rights Law Resource Centre made a submission to the National Human Rights Consultation entitled, *A Human Rights Act for All Australians*. The submission calls for the enactment of a comprehensive Human Rights Act to enhance our democracy and protect fundamental values such as freedom, respect, dignity and a fair go.

Below is a brief summary of the submission.

Which human rights should be protected and promoted?

All of Australia's human rights obligations under international human rights law should be incorporated and protected under Australia's domestic law.

Comprehensive protection of civil, political, economic, social and cultural rights is vital because human rights are interdependent, indivisible and mutually reinforcing. Piecemeal recognition of human rights is inconsistent with basic human rights principles and threatens their effective implementation. Effective protection of all rights is necessary to ensure the conditions necessary for all people to live with dignity and participate fully and equally in the community.

Are these rights currently sufficiently promoted and protected?

The state of human rights for many disadvantaged groups in Australia remains vulnerable. Human rights are not given comprehensive and consistent legal protection in Australia. There is currently no comprehensive statement of rights in Australia that operates as a minimum standard for the protection of human rights. Many basic rights remain unprotected and others are haphazardly covered by an assortment of laws. There are numerous examples of violations that fall through the gaps in the current regime.

How could Australia better protect rights?

The Commonwealth Parliament should enact a Human Rights Act

A Human Rights Act would ensure that the human rights of all persons in Australia are protected. In addition to enshrining peoples' rights in law and providing redress for the existing gaps in human rights protection, a Human Rights Act would provide important social, economic and cultural benefits, including:

- improving law-making and government policy;
- improving public service delivery and outcomes;
- protecting marginalised Australians by addressing disadvantage;
- contributing towards the establishment of a human rights culture;
- creating and adding economic value;
- more fully implementing Australia's international obligations;
- promoting Australia's reputation as a good international citizen and regional and global human rights leader; and
- 'bringing rights home' by enabling complaints to be heard and determined domestically rather than requiring that complaints be heard in New York or Geneva.

Whose rights should be protected?

Human Rights Act should protect all human persons in Australian territory and subject to its jurisdiction. It should not protect corporations.

What would a Human Rights Act look like?

A Human Rights Act should be an Act of the Commonwealth parliament, aimed at establishing a dialogue between the three arms of government about human rights. This is referred to as a legislative/dialogical model.

A Human Rights Act should protect all the rights derived from the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

Recognising that a balance is required between protecting individual rights on the one hand and collective community values on the other, a Human Rights Act should specify which rights are absolute and which can be limited.

Under a Human Rights Act, the parliament, public authorities and the courts would all have obligations to protect and respect human rights.

A Human Rights Act would retain parliamentary sovereignty.

Parliament

Parliament would be affected in the following ways:

- a Statement of Compatibility would need to be tabled by any parliamentarian introducing a new Bill, describing whether and how the Bill is compatible with human rights;
- a specialist Joint Committee on Human Rights should be established to, among other things, scrutinise all Bills for compatibility with protected rights; and
- if the courts made a Declaration of Incompatibility (discussed below), the responsible Minister would prepare a written response for parliament.

Public authorities

Public authorities would be affected in the following ways:

- all Commonwealth and state public authorities should be bound, including where they are acting outside of Australia. This should include government departments, statutory authorities, police, and local government. It should also extend to all persons or bodies that perform public functions on behalf of the Commonwealth, when they are performing those public functions; and
- all public authorities would be required to:
 - act compatibly with human rights (a substantive obligation); and
 - give proper consideration to human rights when making decisions and implementing legislation (a procedural obligation).

Courts

Courts would be required to:

- interpret all Commonwealth legislation in a manner compatible with human rights;
- have regard to international and comparative human rights jurisprudence when interpreting and applying laws that impact on human rights; and
- issue a Declaration of Incompatibility where it is not possible for a law to be interpreted consistently with human rights. Courts would not be able to invalidate laws passed by parliament that breach human rights.

Remedies

A Human Rights Act should establish a free-standing cause of action. However, any application for a Declaration of Incompatibility should be required to be brought with another cause of action to minimise the chances of it being considered to be a request for an advisory opinion of the court.

A full range of judicial and non-judicial remedies should be available for breaches of all civil, political, economic, social and cultural rights, including all such remedies as are just and appropriate.

Accessing the submission

The Centre's submission on a Human Rights Act is available at

<http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/a-human-rights-act-for-all-australians/>.

In April 2009, the Centre made a separate submission to the NHRC, *Engage, Educate, Empower*. This submission makes a range of recommendations to strengthen and complement the human rights protection that would be afforded by a Human Rights Act, including in the areas of:

- 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.

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

Phil Lynch is Director of the Human Rights Law Resource Centre

Centre Briefs UN Committee on Economic, Social and Cultural Rights

On 4 and 5 May, a non-government delegation, comprising representatives from the Human Rights Law Resource Centre, the National Association of Community Legal Centres and Kingsford Legal Centre, briefed the UN Committee on Economic Social and Cultural Rights as part of its review of Australia's compliance with the *International Covenant on Economic, Social and Cultural Rights*.

Issues raised by the delegation included:

- the lack of legal recognition and protection of economic, social and cultural rights;
- the nature and extent of poverty in Australia and the need for a comprehensive national poverty reduction strategy;
- Indigenous self-determination and disadvantage;
- the current housing crisis and the significant problem of homelessness;
- groups within society that remain vulnerable to discrimination, such as Indigenous peoples, women and children, people with disability, asylum seekers and gay and lesbian couples;
- violence against women;
- the inadequacy of income and social security supports;
- the regression of workers' rights;
- the crisis in mental health in Australia and the inadequacy of mental health care;
- the chronic under funding of both public health care and education; and
- the deleterious impacts of Australia's immigration law and policy on families and children.

In thanking the NGO delegation for its reports and briefing, the UN Committee stated that 'the NGOs from Australia had provided an example of best practice, providing fact sheets and keeping the work of the Committee focused'.

The Committee will release its Concluding Observations on Australia on or around 25 May 2009.

For a copy of the NGO delegation report and fact sheets, see:

<http://www.hrlrc.org.au/content/topics/esc-rights/icescr-ngo-report-australia-un-committee-on-economic-social-and-cultural-rights/>

Phil Lynch is Director of the Human Rights Law Resource Centre

Centre Calls for Reform of Taxation and Charity Laws to Enable Human Rights Advocacy

The Human Rights Law Resource Centre, together with Blake Dawson, has made a Submission to the Henry Review of Australia's Tax System. The submission requests that the Review Panel recommend amending the *Income Tax Assessment Act 1997* (Cth) to introduce a deductible gift recipient category for human rights organisations.

Currently, the common law definition of 'charity' excludes organisations involved in political activities (such as advocacy or lobbying government), which means that organisations involved in advocating social or structural change in favour of recognising human rights are denied access to a number of tax concessions. This restrictive approach means that human rights organisations, which are not-for-profit entities working towards the betterment of society, are denied access to a number of tax concessions and are limited in their ability to attract donations from philanthropic organisations and individuals donors.

Recognition of the problems with taxation legislation is evident in government and in the courts. Indeed, the United Kingdom government has recognised similar problems in that jurisdiction, prompting it to recently amend its *Charities Act 2006* to include 'the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity' as a charitable

purpose. This amendment has significantly enhanced the ability of organisations such as Human Rights Watch and Amnesty International to raise funds and undertake activities in the UK.

The joint HRLRC/Blake Dawson submission strongly encourages the Review Panel to give positive consideration to amending the ITAA to include 'the promotion and protection of human rights' as a charitable purpose. This would significantly increase the ability and capacity of NGOs in Australia to raise funds and undertake a range of activities to promote human rights. It would also be consistent with the Government's commitment to support the promotion and implementation of human rights in Australia and internationally.

The Centre would particularly like to acknowledge the work of Teresa Dyson and Sarah Hickey of Blake Dawson on this submission.

The 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

Centre Urges Accession to the Optional Protocol to the Convention against Torture

On 19 May 2009, Australia signed the *Optional Protocol to the UN Convention against Torture*.

The *Optional Protocol* establishes a system of regular visits to places of detention by both international and domestic independent expert bodies in order to prevent torture and other forms of ill-treatment.

Australia's signature is consistent with a July 2008, submission by the Centre which examined the benefits of Australia's accession to the *Optional Protocol* and outlined what the domestic implementation of the obligations contained therein would entail.

The Centre now urges the Australian Government to accede and become a party to the *Optional Protocol*.

The Centre considers that Australia's accession to the *Optional Protocol* would:

- protect the human rights of persons deprived of liberty and reduce the incidence and likelihood of ill-treatment of such persons;
- complement and strengthen existing domestic inspectorate and monitoring mechanisms for places of detention and promote human rights compatible detention management;
- foster and promote systematic analysis (and systemic change where necessary) of laws and policies affecting the rights of persons deprived of their liberty;
- strengthen Australia's leadership role within the international community; and
- be consistent with the Australian Government's commitment to constructive engagement with the UN human rights system and to the harmonisation of domestic laws, policies and practices with international human rights standards.

The HRLRC also considers that the *Optional Protocol* can be implemented with relative ease within Australia's existing political and legal structures.

The Centre's submission on *OP-CAT* is available at <http://www.hrlrc.org.au/content/topics/international-human-rights-mechanisms/ratify-optional-protocol-convention-against-torture/>.

Phil Lynch is Director of the Human Rights Law Resource Centre

HRLRC Casework

Centre Seeks Leave to Appear as Amicus in *Charter* Test Case

The Centre has sought leave to appear as amicus curiae in the Victorian Court of Appeal in the matter of *Momcilovic v R*.

The matter concerns the application of the *Charter* and the interpretation of s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic). This provision is sometimes referred to as a 'reverse onus' provision. The Attorney-General and to the Victorian Equal Opportunity and Human Rights Commission have both exercised their statutory right to intervene in the proceeding. The question whether 'reverse onus' provisions are compatible with human rights (specifically, the presumption of innocence) has been the subject of consideration by the House of Lords in *R v Lambert* [2002] 2 AC 545, the Supreme Court

of Canada in *R v Oakes* [1986] 1 SCR 103, and the Supreme Court of New Zealand in *R v Hansen* [2007] 3 NZLR 1.

If the Centre is granted leave to appear as *amicus curiae*, which will be determined by the Court on the first day of the appeal on 22 July 2009, its submissions will focus on the proper approach to the interpretative task that the Court is required to perform under s 32 of the *Charter*. Because of the breadth of the obligation imposed by s 32, this is a matter of fundamental importance to the operation of the *Charter*. The central submissions which the Centre will seek to make are:

- The proper approach to statutory construction under the Charter is to *start with* s 32; that is, to see s 32 as a cardinal principle of statutory construction (rather than seeing s 32 as a 'last resort' or 'extraordinary' provision which only comes into play in the event that a statutory provision is incompatible with human rights as a matter of 'ordinary' construction).
- Where a provision is said to limit a human right, it is wrong to consider, first, whether such limits can be justified under s 7(2), before considering whether it is possible to interpret the provision compatibly with human rights under s 32. Rather, where it is alleged that a statutory provision limits human rights, it is necessary to consider whether it is possible to interpret the provision in a way that is compatible with human rights in accordance with s 32 of the *Charter*. Consideration of s 7 only arises in the event that it is not possible to interpret the provision compatibly with human rights under s 32.

The Centre is being represented on a pro bono basis in this matter by Allens Arthur Robinson, together with Mark Moshinsky SC and Chris Young of Counsel.

Phil Lynch is Director of the Human Rights Law Resource Centre

Seminars and Events

2009 Human Rights Dinner – 31 July 2009, Melbourne

The Centre's Annual Human Rights Dinner will be held in conjunction with the Australian Lawyers Alliance on Friday, 31 July 2009 in Melbourne.

Confirmed keynote speakers include the Hon Catherine Branson QC, President of the Australian Human Rights Commission and Justice Yvonne Mokgoro, Judge of the Constitutional Court of South Africa. Renowned author, journalist and commentator David Marr will be the Master of Ceremonies. Further details will be announced shortly at www.hrlrc.org.au.

2009 Protecting Human Rights Conference

2 October 2009, Art Gallery of NSW, Sydney

The conference will consider the National Human Rights Consultation, and provide an update of developments in the Victorian Charter of Human Rights and Responsibilities, the ACT Human Rights Act and in NSW human rights law. Leading Australian and international speakers will consider the National Consultation process, and what reforms it might lead to in Australia. The conference will also address the constitutional dialogue model that is a feature of the human rights statutes in many countries of the British Commonwealth. Finally, the conference will consider some crucial further challenges in relation to human rights protection, including: the rights of Indigenous people; the protection of economic, social and cultural rights; and the intersection between human rights and religion.

Confirmed speakers include:

- Professor Larissa Behrendt, Jumbunna Indigenous House of Learning (UTS)
- The Hon Catherine Branson QC, President, Australian Human Rights Commission
- Professor Andrew Byrnes, University of New South Wales
- Professor Hilary Charlesworth AM and Renuka Thilagaratnam, Australian National University
- Associate Professor Andrea Durbach, University of New South Wales
- Associate Professor Simon Evans, Melbourne Law School
- Professor Stephen A Gardbaum, University of California, Los Angeles

- Rosemary Kayess, Disability Studies and Research Centre
- Mary Kostakidis, National Human Rights Consultation committee member
- The Hon Keith Mason AC, Visiting Professorial Fellow, University of New South Wales
- Phil Lynch, Director, Human Rights Law Resource Centre
- Dr John Tobin, Melbourne Law School
- Associate Professor Kristen Walker, University of Melbourne

Registration is online at www.gtcentre.unsw.edu.au.

Human Rights Resources

Applying Human Rights

Courses at RMIT Centre for Human Rights Education

The Australian Centre for Human Rights Education at RMIT University has developed two exciting postgraduate programs which explore what it means and what it takes to build a culture and practice of human rights. Subjects available include:

- Introduction to Applied Human Rights
- Ethics, Practice and Applied Human Rights
- Education for Human Rights
- Applied Communications
- Transforming Organisations through Human Rights
- Human Rights Campaign Studio

For further information, see <http://www.rmit.edu.au/achre>.

Foreign Correspondent

Developments at the United Nations and in International Human Rights Law

Human Rights Council – Membership Elections

In mid-May elections were held for membership of the Human Rights Council, and one of the most notable aspects was that the United States decided to seek membership and was appointed unopposed. New Zealand signaled to the Western and Other Group of countries that it would step aside from what had been scheduled as its 'turn' for membership, in order to allow the US to progress. Becoming a member of the UN Human Rights Council is a great change in the way in which the US engages with the Human Rights Council, and could mean the interaction during Council sessions changes somewhat during the next year. Other countries elected to Council membership for the first time were Belgium, Hungary, Kyrgyzstan and Norway. 13 existing members were re-elected: Bangladesh, Cameroon, China, Cuba, Djibouti, Jordan, Mauritius, Mexico, Nigeria, Russia, Saudi Arabia, Senegal and Uruguay.

On 14 May 2009, High Commissioner for Human Rights, Ms Navi Pillay, used the occasion of the election of members to the Council to comment on criticism that members of the Human Rights Council include governments with 'less-than-pristine human rights records'. 'To those critics I say two things: Is there any country that has a blemish-free record? Human rights violations are not the bane of any particular country or region. And even if such a thing were possible, what impact would a club of the virtuous have on those outside?'

Special Session of the Human Rights Council on the situation in Sri Lanka

A Special Session of the Human Rights Council has been called for 26 May 2009, to address the human rights situation in Sri Lanka. A draft resolution has been circulated by Sri Lanka and the members of the Non-Aligned Movement, and this resolution will be negotiated during the coming days as we see how the Council will respond to this situation. This is the 11th Special Session of the Human Rights Council, and another example of how the member states can and do get together when urgent human rights

situations require attention.

The Special Session of the Human Rights Council follows a mission in April 2009 by the UN Representative on Internally Displaced Persons, Mr Walter Kälin. After his mission, Mr Kälin expressed his extreme concern about the 'civilians forced to stay in the conflict zone as well as continued confinement of internally displaced persons to camps.' He explained that 'At least 50,000 internally displaced civilians remain trapped in the conflict zone, with their lives exposed to great danger and without access to sufficient humanitarian assistance. The LTTE prevents them from leaving the area and has placed military installations close to civilians. The Government has also been using heavy weapons, including mortars, in the conflict zone over the last few days. This combination of factors must have resulted in unacceptably high numbers of civilian casualties.'

Durban Review Conference

One of the most controversial items on the human rights calendar of late was the Durban Review Conference held in Geneva in April. The outcome document for the conference was in fact finally agreed upon in advance (after many Preparatory Meetings). Despite participating in the decision making on the outcome document, considered by most to be a reasonably balanced and useful document, Australia and several other states (Canada, Germany, Italy, Netherlands, New Zealand, Israel and the US) nonetheless decided to boycott the meeting itself. This led to a difficult meeting, to be expected after the outcome document had been built on consensus on the basis that there would be unanimous participation at the meeting itself. The only Head of State to participate in the meeting was Iranian President Mahmoud Ahmadinejad, who gave a memorable speech, causing several diplomats to walk out in protest. Another controversy that occurred during the meeting was the suspension of several NGOs deemed to have acted inappropriately.

One of the most positive aspects of the meeting was the parallel event 'Voices – Everyone affected by racism has a story that should be heard'. This series of events, which took place throughout the Durban Review conference, gave a space for victims of racism from different countries and cultures to share their personal experiences, with the aim of giving a human face to the issues. The 'Voices' sessions were moderated by Gay McDougall, UN Independent Expert on Minority Issues.

Climate Change Report

A few weeks ago the Office of the High Commissioner for Human Rights issued a landmark report on Climate Change, to be presented at the UN Climate Change Conference in Copenhagen in December. The report advocates that climate change should be informed and strengthened by international human rights standards and principles, and must address the lives of individuals and communities which are affected. The report explains how climate change has affected human rights – including the rights to life, food, water, health, housing, and self-determination – and how it impacts upon specific groups, including women, children and Indigenous peoples who are particularly vulnerable to climate changes' detrimental consequences. It is expected that the study, which was requested by the Human Rights Council, will lead to more discussion at the next Human Rights Council session in June.

Expatriate human rights advocates meet to discuss National Human Rights Consultation

As detailed in other sections of this Bulletin, the last couple of months have been busy periods for staff of the Human Rights Law Resource Centre who have been participating in the UN Treaty Body sessions in New York and Geneva (in particular the Human Rights Committee and Committee on Economic, Social and Cultural Rights and their reviews of Australia). It has been much appreciated that in each city they have taken the occasion to meet with some of us expatriate human rights advocates to update us on the human rights situation in Australia and discuss possible submissions to the National Human Rights Consultations. Other groups have also been meeting on this topic – for example the newly created international section of Australian Lawyers for Human Rights, which partnered with the British Institute of International and Comparative Law to hold a workshop to draft a submission to the national human rights consultation.

Claire Mahon is an Australian international human rights lawyer based in Geneva, Switzerland, where she works as a consultant for NGOs and the UN. She is the Coordinator of the Project on Economic, Social and Cultural Rights at the Geneva Academy of International Humanitarian Law and Human Rights.

If I Were Attorney-General...

Promoting and Protecting the Rights of Children and Families

If I were Attorney-General, I would legislate to incorporate international human rights treaties such as the *International Covenant on Civil and Political Rights*, the *Convention on the Elimination of All Forms of Discrimination against Women*, the *Convention on the Rights of the Child* and the like into domestic law. This would be preferable to legislating for a Bill of Rights and would provide an appropriate lead to the eventual incorporation of an Australian Charter of Rights into the Constitution.

Another major area that I would reform is the law relating to children and families. I would seek the consent of the States and Territories to refer their child protection powers and criminal jurisdiction over offences committed by or against children. If the States and Territories refused to co-operate in the reference of powers, I would rely upon the external affairs power incorporating the *Convention on the Rights of the Child* to implement national legislation covering the whole of these areas.

The legislation would provide for a unified national Family and Children's Court. The Court would consist of three tiers, an appellate division, a general trial division and a summary division. The new Court would incorporate the existing Family and Federal Magistrates' Court, which would be strengthened by appropriate appointments from State and Territory jurisdictions.

All judicial officers would be required to satisfy criteria similar to those set out in the *Family Law Act*: that by reason of training, experience and personality, the person is a suitable person to deal with matters of family and children's law.

The selection of judges and magistrates would be more transparent, with positions being advertised and appointments being recommended by a neutral committee.

The method of exercising family and child protection jurisdiction would closely resemble the less adversarial jurisdiction of the present Family Court and I would also develop a less adversarial jurisdiction in juvenile criminal cases while protecting existing rights to due process and a fair trial.

The Court's ability to deal with issues of sexual and other abuse of children and family violence would be strengthened by the provision enabling it to exercise criminal jurisdiction in relation to offences against children.

Geographically, the Court would be divided for administrative purposes into regions that may, but need not necessarily, reflect existing State and Territory boundaries.

The Court would be fully staffed with appropriate professionals including legally trained registrars, psychiatrists, psychologists and social workers, including Indigenous people. I would also legislate to bring existing family mediation centres into the Court. I can see little point in preserving these institutions which are directed only at mediation of disputes relating to children in private family law proceedings and would be better integrated into a court that takes an overall view of family problems.

I would see the new Court as providing a model for an eventual Australian judicial system and the reformation of the adversary system as it operates in general law.

The focus of the Court would be very much upon children and their rights and needs, rather than upon the 'rights' of parents. Therefore Howard Government changes made under pressure from men's groups including presumptions of equal parenting responsibility, and the need for the court to consider equal division of time between parents, would be repealed.

I would legislate for the appointment of an independent Children's Commissioner reporting to Parliament, with responsibility to monitor the system, including the performance of the new Court. All legislation affecting children would be referred to the Commissioner for report before being passed.

I would urge the PM to appoint a Minister for Children in charge of a Department of Children.

I would repeal the 2004 amendments to the *Marriage Act* defining marriage as a union between a man and a woman and reform the law to enable marriages between gay and lesbian and transsexual and intersex people.

In accordance with the recommendations of the Australian Law Reform Commission, I would legislate to ensure that underage Indigenous girls forced into traditional marriage and their children would not suffer disadvantage as a result. I would similarly look at improving the lot of Islamic women and their children

in second and subsequent marriages, whether married under the *Marriage Act* or pursuant to Islamic law.

I would repeal the Intervention legislation in the Northern Territory and the provisions abrogating the *Racial Discrimination Act*. In its place, I would provide proper police services to remote communities, including accelerated recruitment of Indigenous police and the involvement of many more Indigenous people in the Court system as judicial and administrative officers and as counsellors, mediators and social workers.

Finally, I would legislate to preserve Indigenous customary law in so far as it is not inconsistent with human rights principles and for example, recognise practices such as Torres Strait islander traditional adoptions. I would give legislative effect to the UN Declaration on the Rights of Indigenous Peoples.

The Hon Alastair Nicholson AO RFD QC is the Former Chief Justice of the Family Court of Australia. He is an Honorary Professorial Fellow at the Department of Criminology, University of Melbourne.