

PILA Bulletin, 25 June 2010

The Bulletin on Public Interest Law is issued by the Public Interest Law Alliance, a project of FLAC.

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If you wish to have an item included please contact bulletin@pila.ie.

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1. Government drops appeal in historic transgender case

The Government has withdrawn its appeal to the Supreme Court in the case of transgender woman Lydia Foy. It has accepted a High Court ruling that Irish law on transgender rights is in breach of the European Convention on Human Rights (ECHR).

The Taoiseach must now report the Court's decision to the Dail within 21 sitting days and the Government will have to introduce legislation to recognise transgender persons in their new gender and allow them to get new birth certificates or face condemnation by the European Court of Human Rights.

Former dentist Dr Lydia Foy, who was registered at birth as male, has succeeded in her 13-year battle for legal recognition as a woman and for a birth certificate showing her sex as female.

FLAC, which has represented Dr. Foy throughout the case, paid tribute to her courage and tenacity in taking these proceedings. "This has been a long and painful road for her to travel", said FLAC Senior Solicitor Michael Farrell, "but her action will help many others who have to make this difficult journey too".

He voiced FLAC's welcome for the Government's decision to drop its appeal, saying: "This is a major development for transgender people who have suffered from isolation, exclusion and prejudice for far too long". FLAC called on the Government to act quickly to introduce legislation to recognise the new gender identity of transgender people and allow them to obtain birth certificates in their acquired gender.

The recent appointment of an inter-departmental working group to look at changing the law was a step in the right direction, said FLAC but it was very late in the day as the Government had known the law would have to be changed since a key decision of the European Court of Human Rights in a UK case in 2002, see *Christine Goodwin v. the United Kingdom* 11/07/2002 28957/95. The UK had introduced a Gender Recognition Act in 2004 which protects the position of family members of transgender persons, who were also left in a legal limbo by the current absence of any transgender legislation.

FLAC also welcomed the fact that the Government had decided to act upon the first declaration made by the courts that a provision of Irish law was in breach of the ECHR. This showed that the European Convention on Human Rights Act 2003 (the ECHR Act) could provide a remedy for breaches of human rights that were not adequately protected under Irish law.

FLAC has paid tribute to the ground-breaking work of its legal team in this case over the years since the case began in 1997. They had successfully challenged ingrained stereotypes about gender identity and had pioneered the use of the ECHR Act in the Irish courts, leading to the first confirmed declaration of incompatibility under that Act.

To view the Goodwin case, see

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=28957/95%20%7C%20Goodwin&sessionid=55954880&skin=hudoc-en>.

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2. Mr. Justice McKechnie nominated for appointment to Supreme Court

Mr. Justice McKechnie has been nominated by the Government for appointment to the Supreme Court. His nomination is to replace Mr. Justice Hugh Geoghegan who retired last month. The selection came one day after the announcement was made regarding the withdrawal of an appeal by the Government against his 2007 judgment in the Foy case, which declared the Civil Registration Act 2004 as incompatible with the European Convention on Human Rights (ECHR). As well as involvement in the two High Court decisions of the Foy case, Mr. Justice McKechnie was also involved in the recent data retention decision in which he ruled in favour of Digital Rights Ireland Ltd by granting them standing, refusing the State security for costs and referring the case for a preliminary ruling to the European Court of Justice (ECJ).

Other major High Court cases in which Mr. Justice McKechnie presided include the “Mr G” case, in which he ruled that an unmarried father whose children had been taken by his separated partner without his consent to the UK had considerable rights under Article 8 of the ECHR, and a case (“Miss D” case) where he held that the HSE could not stop a teenage girl from travelling abroad for an abortion.

The following are the concluding remarks from his 2007 judgment in *Foy -v- An t-Ard Chláraitheoir & Ors* [2007] IEHC 470;

“Everyone as a member of society has the right to human dignity, and with individual personalities, has the right to develop his being as he sees fit; subject only to the most minimal of State interference being essential for the convergence of the common good. Together with human freedom, a person, subject to the acquired rights of others, should be free to shape his personality in the way best suited to his person and to his life. All persons by virtue of their being are so entitled.”

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3. Marriage Equality “We Are Family” campaign

Marriage Equality recently launched „We Are Family“, a national poster campaign which gives visibility to lesbian and gay families living in Ireland. The groundbreaking campaign shatters the silence and myths surrounding these families and calls on the Government to recognise and protect same-sex couples and their children.

We Are Family posters, depicting real Irish lesbian and gay couples, some with their children, are being carried by Dublin Bus and have been sent to Libraries, Family Resource Centres and Community Information Centres nationally. Further information is available on www.marriagequality.ie/wearefamily.

The new Marriage Equality poster campaign, *We Are Family*, gives visibility to same-sex families and calls for an end to the discrimination which these families experience on a day-to-day basis.

Marriage Equality hope this poster campaign will help to give a voice to these families and help people see that they are like any other family in Ireland. Lesbian and gay families deserve the same rights and protections as any other family. Put simply, same sex families deserve equality.

Marriage Equality has produced *We Are Family* postcards, as part of this project, which they are asking everyone who believes that same-sex families should not be discriminated against, to sign and send to local TDs asking them to end this discrimination.

Marriage Equality are asking people to take 50 postcards (to coordinate amongst family and friends who are registered to vote), to sign them and send them back to local TDs. To get your postcards, please contact Marriage Equality on 01-873 4183 or e-mail: info@marriagequality.ie.

Marriage Equality is a campaign working for equal marriage rights for same-sex couples in Ireland. We Are Family is its latest campaign and was made possible thanks to the support of The Community Foundation of Ireland and the wonderful families who participated.

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4. MRCI hosts roundtable on forced labour, and in UK: Victim of forced domestic labour receives justice

On 9 June 2010 the Migrant Rights Centre Ireland and the Irish Congress of Trade Unions held a roundtable on forced labour. Speakers from Anti-Slavery International, the Anti-Human Trafficking Unit at the Department of Justice, Equality and Law Reform, Trades Union Congress UK were in attendance. Eilis Barry BL presented a paper which concluded that owing to the broad definition of trafficking in the Criminal Law (Human Trafficking) Act 2008, forced labour can be prosecuted as an offence in its own right. As readers of the PILA bulletin may know, the European Court of Human Rights has held that Article 4 of the ECHR requires states to have criminal legislation in force which offers sufficient practical protection to those required to perform compulsory labour and which makes it possible for the culprits to be punished, see *Siliadin -v- France* App. No. 73316/01, 26th July 2005 at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Siliadin%20%7C%2073316/01%20%7C%20%u2013v%20%7C%20France&sessionid=55937469&skin=hudoc-en>.

MRCI will continue to campaign on this important issue and further information can be found on their website www.mrci.ie.

Meanwhile, a victim of forced domestic labour in the UK has been granted justice where her previous employer, who subjected her to forced domestic labour for almost three years was convicted of common assault. The victim, a client of civil liberties group Liberty, came to the UK from Nigeria in 2004 to work as a domestic servant for a solicitor practicing in London. Little had been done to investigate the victim's verbal and physical abuse suffered at the hands of her employer until Liberty brought legal proceedings under the Human Rights Act 1998. Article 4 of the European Convention on Human Rights is incorporated into UK law by the Human Rights Act 1998, outlining that "no one shall be held in slavery or servitude", or "be required to perform forced or compulsory labour".

For more information on the case, see <http://www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2010/28-05-10-justice-for-victim-of-modern-day-slavery.shtml>.

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5. UK: Transgender woman wins legal battle to receive pension at 60

Christine Timbrell, a woman who underwent a sex-change operation in 2000, has won her legal right to receive her pension from the age of 60 – the retirement age for women born on or before 5 April 1950 - as opposed to 65 – the age for males born before 6 April 1959. Following her operation, Christine continued to live with her wife as a married couple. Upon applying for her state pension in 2002, which she asked to be backdated to her 60th birthday, she was refused. The refusal was based on the Gender Recognition Act 2004, which entitles transsexuals to enjoy the full status of their gender, with the new sex of married transsexuals only being recognised when their marriages are annulled or dissolved.

Christine took legal action following the Department for Work and Pensions' decision that she was only entitled to a state pension from the age of 65. At the appeal, Lord Justice Aiken gave the ruling of the three judges outlining that the lack of a legal framework which would allow the law to recognise the change in gender and to obtain a pension was discrimination, in breach of EC Directive 79/7 on equal treatment and social security (and see the ECJ case *Richards v. Secretary of State for Work and Pensions* C-

423/04). It was ruled that the Department for Work and Pensions was "obliged to recognise that Ms Timbrell had a right, by virtue of her acquired gender, to a retirement pension from her 60th birthday". The consequence of this was that the Department was required to backdate pay of Ms Timbrell's pensions. The Court rejected the Department's submission that damages should suffice, finding that the Department was obliged to give proper effect to the EU right vindicated.

To view the judgment in full, please follow the link:
<http://www.bailii.org/ew/cases/EWCA/Civ/2010/701.html>.

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6. UK: Lord defends Human Rights Act in special lecture on *Challenges of the new Supreme Court*

The Head of the UK Supreme Court, Lord Philips, has delivered a special lecture on "The Challenges of the Supreme Court". In his speech he takes the opportunity to respond to the attacks on the Human Rights Act 1998 which have accused the legislation of hampering the fight against terrorism. He defended the judiciary in light of their regular use of the Human Rights Act 1998 to limit the effects of the anti-terrorism laws enacted by the government over the past ten years, outlining how "respect for human rights is a key weapon in the ideological battle".

The full speech of Lord Philips is available in both text and audio format, to access please follow the link <http://www.gresham.ac.uk/event.asp?PageId=45&EventId=1010>.

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7. UK: Camera surveillance project of predominantly Muslim area of Birmingham halted after threat of legal action from civil liberties group Liberty

A camera surveillance project of a predominantly Muslim area of Birmingham has been halted after the civil liberties group Liberty threatened legal action. The "Project Champion" entailed two predominantly Muslim suburbs being monitored by a network of over 150 number plate recognition cameras, which was three times more than in the entire city centre. Public criticism ensued after the Guardian newspaper reported that the project was in fact funded by the Terrorism and Allied Matters fund, which specifically gives grants for projects that "deter or prevent terrorism or help to prosecute those responsible".

The Safer Birmingham Partnership (SBP), which connects the police and council assigned to oversee the project, accepted that they "should have been more explicit about the role of the counterterrorism unit in the initial project management". Following on from the public outcry, Liberty threatened to bring a judicial review to challenge the surveillance project, arguing inter alia that the project was discriminatory and counter-productive to race relations in the area, and that the alleged discrimination could form a further basis of a legal challenge under race and equality legislation and Article 14 ECHR under the Human Rights Act 1998. The project has been halted for the moment, with the SBP announcing that the cameras would not be turned on.

Labour MP Roger Godsiff tabled an early day motion in parliament last week, condemning the Project as a "grave infringement of civil liberties" and calling on the government to "launch an immediate consultation with representatives of the local community into the scope and scale of this initiative and to give assurance that the

cameras will not be activated until these consultations have taken place and the feelings of the local communities have been made known”.

To view the early day motion in full, please follow the link <http://www.general-election-2010.co.uk/uk-party-political-news/project-champion-and-surveillance-of-the-muslim-community-in-birmingham>.

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8. UK: Public Legal Education Network releases new guide on principles and guidance for PLE providers

Public Legal Education Network (Plenet) has released a new guide on principles and guidance written specifically for people who provide or who are thinking about providing public legal education. It suggests that there are five basic principles to follow to deliver good public legal education. The principles, known as 'Apple' cover Audience, Purpose, Provider, Learning and Evaluation. The guide provides practical examples and suggestions under each heading to help people put the principles into practice.

The guide was commissioned by Plenet and was written in collaboration with a range of organisations: Advice Plus, AdviceUK, Bar Pro Bono Unit, Citizens Advice, Citizenship Foundation, College of Law, Law Centres Federation, LawWorks, Legal Services Commission and NIACE who all contributed their knowledge, skills and expertise.

To read the guide in full, please follow the link <http://www.plenet.org.uk/data/files/ple-principles-and-guidance-june-2010-254.pdf>.

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9. Hungary: Human rights victory in pro bono case for victims of anti-Roma school segregation

In a landmark case, five Roma children who were victims of anti-Roma school segregation have received compensation from a Hungarian Court. Public school segregation is an ongoing problem in Hungary, with the Court in this case finding the municipality to be in breach of the law on public education with regard to the equal treatment of Roma and non-Roma children at the school in Miskolc in northeastern Hungary.

The case was taken by the Chance for Children Foundation, a non-profit organisation, with pro bono representation by the Budapest office of Allen & Overy. This partnership stemmed through a “matchmaking” service of the Public Interest Law Institute’s Hungarian Pro Bono Clearinghouse, which links up law firms seeking to offer free legal assistance to NGOs requiring legal help on a variety of issues such as litigating public interest cases like this one.

The Public Interest Law Institute has highlighted how this case shows the “vast potential for law firms to make a real impact on everyday lives through their pro bono work and to advance human rights”.

To read more about the case, see http://www.pili.org/index.php?option=com_content&task=view&id=40306&Itemid=93.

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10. ECHR: Convention does not oblige states to ensure the right to marry to homosexual couples

The European Court of Human Rights has reached a landmark decision in *Schalk and Kopf v. Austria* 24 June 2010, declaring that the European Convention on Human Rights does not oblige States to ensure the right to marry to homosexual couples. The application to the European Court was made in 2004 by a same-sex couple from Austria who was refused the right to contract marriage by the Vienna Municipal Office on the grounds that it could only be contracted between two persons of opposite sex. After appealing this unsuccessfully, the case reached the Constitutional Court, where the couple's case was dismissed on the basis that neither the Austrian Constitution nor the Convention required that the concept of marriage be extended to relationships of a different nature and that the protection afforded to same-sex couples under the Convention did not oblige States to change the law of marriage. In 2010, the Registered Partnership Act came into force in Austria, providing for many of the same rights and obligations for registered partners as for spouses, but with certain differences remaining, including registered partners not being allowed to adopt a child.

In the European Court case, the couple argued there had been a violation of their right to marry under Article 12, and a violation of the prohibition of discrimination under Article 14 in conjunction with the right to respect for private and family life under Article 8.

In reasoning that there was no violation of Article 12, the Court outlined that while the case of *Christine Goodwin v. the United Kingdom* [GC] (no. 28957/95, ECHR 2002 VI) held that the inability to conceive a child could not be regarded *in itself* as removing the rights to marry, the couple could not conclude from that that Article 12 should be read as *obliging* member States to provide for access to marriage for same-sex couples. It was observed that due to a lack of consensus regarding same-sex marriage among member States and the fact the relevant article of the Charter of Fundamental Rights of the European Union (to which the Austrian government referred in their pleadings) which grants the right to marry does not include a reference to men and women allows the conclusion that the right to marry must not in all circumstances be limited to marriage between two persons of the opposite sex. However the Charter leaves open to States the decision whether or not to allow same-sex marriage through their national law. In finding no violation of Article 12, the Court concluded that Article 12 did not impose an obligation on the Austrian Government to grant a same-sex couple access to marriage.

With four votes to three, the Court further found that there was no violation of Article 14 in conjunction with Article 8, reasoning that the Convention was to be read as a whole and in light of the conclusion that Article 12 did not impose an obligation on States to grant same-sex couples access to marriage. Looking to the fact that the Registered Partnership Act 2010 came into force in Austria, meaning it was open to the applicants to have their relationship formally recognised, the Court ruled it was not their job to establish whether the lack of any means of legal recognition for same-sex couples constituted a breach of Article 14 in conjunction with Article 8 if this situation still continued.

To view the judgment in the case of *Schalk and Kopf v. Austria* 24 June 2010 in full, please follow the link <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Schalk&sessionId=55927598&skin=hudoc-en>

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11. ECHR: Greece found in breach of right to freedom of religion

A decision of the European Court of Human Rights has found Greece to be in breach of the right to freedom of religion under Article 9 of the Convention. The case of *Dimitras and Others v. Greece* involved applicants complaining that in court proceedings of which they had been a part, the use of religious procedures such as swearing on bibles, religious symbols in the courtroom, and the religious bias of Orthodox Christian judges together constituted a violation of their Convention rights.

It was argued that their right to a fair trial under Article 6(1) was violated by the presence of religious symbols in the courtrooms and the potential lack of impartiality by the Greek Orthodox Christian judges, with the Court dismissing this complaint as unsubstantiated.

However a violation was found of Article 9 with the Court ruling that the requirement to reveal religious convictions in order to avoid taking a courtroom oath encroached upon the applicants' freedom of religion. In giving this ruling, the Court re-iterated the negative aspect of the freedom of religion under Article 9, namely the right of the individual "not to reveal his faith or his religious beliefs and not to be obliged to act or refrain from acting in such a way that it was possible to conclude that he did or did not have such beliefs – and all the more so when aptitude to exercise certain functions was at stake".

The Court looked at the fact that under the Greek Penal Legislation, it is a presumption that a witness is from Orthodox Christian faith. As a result, if a witness is to deviate from this rule, they must reveal their religion to the judge or reveal they are of no religion. The Court also looked to the differences between this system and the Greek Civil Procedures, where witnesses can choose between taking a religious oath or making a solemn declaration. Under the current Penal Legislation, witnesses must declare their religion so as to be able to make the alternative solemn declaration. The Court ruled this was a violation of Article 9, concluding that the interference with the applicants' freedom of religion was neither justified nor proportionate to the legitimate aim.

To view the press release of the case of *Dimitras and Others v. Greece* 3 June 2010 (judgment available only in French) in full, please follow the link <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=869133&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

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12. New modules on Galway LL.M. in Public Law

The School of Law in NUI Galway is pleased to announce the addition of two new modules to its successful LL.M. in Public Law programme. The programme commenced in 2005 and graduates have succeeded in securing positions in the Law Reform Commission, Attorney General's office, DPP's office, leading law firms and Ph.D. programmes in Ireland, the UK and the US.

The first module, *Advocacy, Activism and the Public Interest*, will be coordinated by Donncha O'Connell, the first full-time director of the ICCL and board member of London-based NGO, INTERIGHTS. It will examine the role of advocacy and the dynamics of activism in advocating diverse forms and aspects of "the public interest". Its focus will be on the regulatory issues concerning non-governmental bodies, their relationship with the state, specific instances of activism overtly animated by public interest goals, and selected themes, such as media reporting of public interest issues.

The second module, *Contemporary Issues in Law and Society*, will be coordinated by programme director, Marie McGonagle, and will examine contemporary issues of law and society at national and international level. The focus will be on the role of public law and public interest law in addressing problems and effecting change in society. As the emphasis is on contemporary issues, precise themes addressed may vary from year to year.

For more information on the LL.M. in Public Law, please see www.nuigalway.ie/law. Application is via www.pac.ie.

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13. The Thomson Reuters Foundation launches "TrustLaw"

The Thomson Reuters Foundation has launched "Trustlaw", a free online service promoting the practice of pro bono legal work around the world, as well as an international information hub on anti-corruption and governance issues. It establishes a free international marketplace for pro bono projects, connecting lawyers with those who are unable to pay but need legal assistance. The uniquely ambitious service already has over 190 partners signed up across the globe, including over 60 leading law firms, 80 NGOs and almost as many social entrepreneurs. The service is today live, at <http://www.trust.org/trustlaw>.

To view a TrustLaw article "The power of pro bono to change lives", please follow the link <http://www.trust.org/trustlaw/pro-bono/news-and-analysis/detail.dot?id=331c44ba-6221-41c3-85d7-f982823154f3>.

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14. Events: The Bar Council hosts seminar "The Role of Lawyers in Environmental Protection", 30 June 2010

The Bar Council of Ireland is hosting a seminar on "The Role of Lawyers in Environmental Protection" on 30 June 2010. International Public law firm Client Earth will discuss cases that can be taken, how policies can be changed and how the Irish Bar can assist. Client Earth is an organisation of activist lawyers committed to securing a healthy planet. They work in Europe and beyond bringing together law, science and policy to create pragmatic solutions to key environmental challenges. Visit www.clientearth.org for more information. Guest speakers James Thornton, CEO of Client Earth and Sandy Luk, Environmental Lawyer will both speak at the event which will be chaired by Turlough O'Donnell SC.

The seminar takes place in the Arbitration centre of the Distillery building 145-151 Church Street, Dublin 7 at 4.15pm next Wednesday 30 June 2010. No booking required.

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15. Irish Women Lawyers Association hosts conference on White Collar Crime, 3 July 2010

The Irish Women Lawyers Association is hosting a conference on White Collar Crime at the Law Society of Ireland on 3 July 2010. The conference will include lectures on Regulatory Crime, the Challenges in the Prosecuting of White Collar Crime, and Money

Laundering with speakers from the Law Department of UCC and the Criminal Fraud Investigation Unit of Garda Bureau of Fraud Investigation.

To book, email admin@iwla.ie or post to IWLA, the Distillery Building, 145-151 Church Street, Dublin 7.

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16. Judicial Review in Asylum Cases, seminar, 5 July 2010

The Irish Society of International Law, together with UCD and Fordham University, New York, will host a seminar entitled *Judicial Review in Asylum Cases: American and Irish Perspectives*, in association with the Irish Branch of the International Law Association. It will involve presentations from Prof. Michael W. Martin of Fordham University and Colm O'Dwyer BL. The event will be chaired by Mr. Justice John D. Cooke of the High Court.

This event will take place on 5 July 2010 at 5.30pm at the Legal Education Centre, Roebuck Castle, UCD. CPD points are available on request and admission is free but places are limited. To reserve your seat, email info@isil.ie.

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17. Irish Penal Reform Trust hosts Open Forum 2010 – “Exploding Prisoner Numbers – Causes, Effects and Solutions” and seminar – “Litigating prison conditions”, 13 July 2010

The Irish Penal Reform Trust (IPRT) is hosting an Open Forum on “Exploding Prisoner Numbers – Causes, Effects and Solutions” on 28 June 2010 at the Morrison Hotel, Ormond Quay, Dublin 1.

The IPRT believes that there is an urgent need to evaluate the sentencing practice and policy, alongside a deeper examination of crime patterns. For that reason, the Open Forum event this year will focus on exploring the causes of prison population growth and on practical measures to arrest that trend. A panel of experts representing the key elements of the criminal justice system will offer different views on current imprisonment trends. The IPRT hopes that, with contributions from IPRT members and an audience of policy-makers and stakeholders within the penal system, the Forum will identify practical measures to address this issue within our penal system.

Contributors to the forum include Judge Michael Reilly, Inspector of Prisons, Dr. Mary Rogan, Irish Penal Reform Trust, and Tom O'Malley, NUI Galway.

To register, RSVP by 25 June 2010 at <http://www.iprt.ie/events-signup>, or alternatively contact Mary at info@iprt.ie or phone 018741400.

The sixth of the Prison Law seminar series will take place on 13 July 2010 on the topic 'Litigating Prison Conditions'.

The focus of the seminar will be on current substantive and procedural issues around litigating prison conditions. Speakers Paul O'Higgins SC and Michael Lynn BL have recently been involved in significant actions around prison conditions (stopping out and prison overcrowding), drawing on both constitutional and ECHR arguments, while Des Hogan of the IHRC will present a paper on the potential role of the Irish Human Rights Commission in prison related actions.

The seminar builds on the recent prison law seminar which addressed the procedural issues surrounding the application of the ECHR Act in a prison law context. The seminar will take place at 5pm, on Tuesday 13 July, 2010 in Distillery Building, Church St, Dublin 7.

For more information about the seminar or to reserve a place, contact Mary at info@iprt.ie or phone (01) 8741400.

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**Public Interest Law Alliance -
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