



INDEX

OPINION ..... 1  
NEWS..... 2  
VICTORIAN CHARTER OF RIGHTS DEVELOPMENTS .... 4  
CASENOTES ..... 6  
HRLRC POLICY, ADVOCACY AND LAW REFORM ..... 11  
HRLRC CASEWORK..... 12  
SEMINARS AND EVENTS... 14  
EDUCATION, TRAINING AND RESOURCES..... 15  
IF I WERE ATTORNEY-GENERAL.... 16

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The Human Rights Law Resource Centre Ltd aims to:

1. Contribute to the harmonisation of Australian law and policy with international human rights norms.
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 HRLRC achieves these aims by conducting and supporting human rights legal services, litigation, education, training, research, policy analysis and advocacy.

Opinion

Righting Australia’s National Housing Crisis

In a recent Canadian poll, housing affordability came in just behind national security as most the important issue for Canadians. The Canadian government responded promptly to concerns by releasing a new housing affordability and homelessness plan. Earlier this year in the French national elections, housing and homelessness became major campaign issues after a cleverly organized campaign around rising homelessness saw people from all levels of French society braving wintry conditions to camp in protest along the Seine.

It remains unclear just what needs to be done in this country to get our federal government to take housing issues seriously. Unfortunately, the government’s dismissive response to a recent UN report which investigates the state of housing in Australia offers little promise that we will start to see a new commitment to making housing more accessible and affordable for all Australians.

The report presented at the UN Human Rights Council in Geneva on 12 June, is based on observations made by the UN Special Rapporteur on the Right to Adequate Housing, Miloon Kothari, during his three week visit to Australia in August last year. In his report, Kothari describes what he saw as a ‘serious hidden national housing crisis’ that in some parts of the country has resulted in a ‘humanitarian tragedy’.

The report highlights appalling housing conditions for Indigenous people, women (particularly those fleeing family violence), and the large homeless population spread through our cities, towns and in the bush. The report concludes that Australia has failed to implement its obligation to fulfil the right to adequate housing. The report also makes a number of specific, practical recommendations, including the establishment of a national housing ministry and increased spending on public housing and crisis accommodation services. It recommends the amendment of various laws that impact disproportionately on people experiencing homelessness. It also stresses the need for greater consultation with groups that are most significantly affected by inadequate housing.

That we are in the grip of a housing affordability crisis will come as little surprise to most Australians. Latest estimates indicate that 35% of low-income households are under ‘housing stress’, meaning that their housing costs are so great that there is not enough left over to meet other basic needs.

But instead of engaging with the substance of the report and tackling the issues in a constructive way, the federal government admonished the UN for dedicating its resources to a country

where human rights violations are not 'serious', dismissing the report as 'unbalanced' and 'inadequate,' and as pandering to 'special interest' groups.

Such a statement reveals a critical misunderstanding of what the Australian government's obligations are in relation to the right to adequate housing – that is, to devote the maximum of its available resources to ensure conditions that allow all people to live with basic dignity. Furthermore, it suggests that adequate housing is low on the government's priority list.

The government's response is not just bad news for diplomacy, it is also bad news for the 100,000 people across Australia who experience homelessness on any given night. It is bad news for those who are regularly refused crisis accommodation because of a desperate lack of resources. It is bad news for those who, even after 10 years, are still waiting for public housing. And, it is bad news for those low and middle income Australians who are feeling the pinch of high rent and impossibly high mortgage repayments.

Consider for a moment the response of the Spanish government, which was also criticized for the poor state of housing in some areas of Spain. While not conceding to all of the issues raised, Spain welcomed the analysis and the practical recommendations for reform and committed itself to addressing low levels of public housing.

One of the primary criticisms contained in the report on Australia is that there appears to be very little political will at a federal level to tackle the issue of affordable, safe and culturally appropriate housing in a long term, holistic way. Unfortunately the government's reaction seems only to reaffirm this point.

Let's hope that the response on 12 June was just hot headed and reactive. Let's hope that with a more sober reflection of the report there will come recognition of the fundamental importance that having somewhere safe and secure to live plays in every social, employment, educational, justice and health initiative. Let's also hope that the state and territory governments to whom the same human rights obligations apply, step up to the plate and show that these are serious issues, worthy of serious attention.

The Australian Federal Government recently announced a budget surplus – its tenth in eleven years – of \$10.6 billion. With domestic and international pressure mounting, surely it is now time for the government to understand that unless there is long-term, comprehensive investment into addressing the housing crisis and its consequences, those who have been relegated to the footnotes of the government's economic success story will soon hit the front page.

*Kristen Hilton is the Coordinator and Principal Solicitor of the PILCH Homeless Persons' Legal Clinic in Melbourne. She was in Geneva for the release of the UN report.*

## News

### Centre Establishes Project to Support NGO Engagement with UN Human Rights Bodies

The Human Rights Law Resource Centre is developing a 'clearing house' project to support and facilitate the effective, coordinated and strategic use of international human rights mechanisms by Australian NGOs and civil society.

NGO engagement with international human rights bodies can play a vital role in matters such as: standard setting; promoting adoption and ratification of international instruments; monitoring human rights implementation; ensuring scrutiny of human rights reporting obligations; submitting Shadow Reports; disseminating comments and recommendations; following up on implementation; and educating the broader community about human rights. However, despite the critical role played by NGOs in the international human rights arena, the experience of the HRLRC and other NGOs is that, generally speaking, Australian NGO engagement with UN human rights bodies is relatively ad hoc, reactive and inadequately resourced.

The Centre has already held preliminary consultations with key stakeholders to consider the need for, and development of, a range of strategies and mechanisms to resource NGOs to make the best possible use of international human rights bodies. That consultation process identified the following key issues:

- The human rights framework is increasingly recognised as a valuable tool of empowerment, advocacy and accountability in the NGO sector. It is also increasingly recognised that NGOs have

a critical role to play in ensuring that international human rights frameworks are informed by and responsive to local conditions and that, in turn, local conditions are informed and influenced by international human rights.

- Although some NGOs and networks are very adept at using international human rights mechanisms, this engagement tends to be largely reactive and under resourced. In particular, there tends to be insufficient attention and resources dedicated to following up on domestic implementation of the reports and recommendations of human rights bodies.
- There is significant need for the building and strengthening of NGO capacity to engage with UN human rights bodies in a coordinated, strategic and adequately resourced way.
- The establishment of a permanent institutional capacity to provide resources and support in this regard would be very valuable.

The value of an institutional information, coordination and capacity building service has also been recognised by the UN Office of the High Commissioner for Human Rights and UNESCO:

NGOs are well advised to concentrate their efforts, to 'speak with one voice'. The more NGOs cooperate and intensify the dialogue among themselves, the stronger NGOs can present their issues orally and in written form vis-à-vis experts and government representatives.

The Centre has received a grant of \$15,000 from the Reichstein Foundation to assist in the development of this exciting and important project. When established, the 'clearing house' will function primarily as a point of coordination, facilitation, enablement, resources, information and support for NGOs in their engagement with UN human rights bodies. It will aim to:

- ensure that the human rights work of NGOs and civil society is performed in an adequately resourced, systematised and coordinated way;
- promote coordination, collaboration and cooperation among NGOs in the area of human rights;
- build human rights capacity of NGOs through the collation and provision of timely, accessible and targeted information and training; and
- contribute to development of Victoria's and Australia's domestic law and practices with respect to human rights and Australia's international obligations.

### **UN Office of the High Commissioner for Human Rights Establishes Pacific Region Office and Website**

The UN Office of the High Commissioner for Human Rights (OHCHR) has recently opened a Pacific Regional Office. The Regional Office covers the 16 member countries of the Pacific Islands Forum (being, Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Republic of the Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu).

The aims and activities of the Pacific Regional Office include the following:

- promoting the ratification of core human rights treaties and providing support for reporting and implementation obligations;
- undertaking human rights awareness raising activities;
- disseminating information and training on human rights;
- increasing use by State and non-State actors of human rights norms and standards;
- increasing use by rights-holders of international human rights norms and mechanisms;
- increasing ratification of and reporting under international human rights treaties;
- strengthening national protection systems; and
- enhancing capacity to promote and protect human rights.

The Pacific Regional Office website is a particularly useful and valuable resource. Downloadable material includes the latest UN human rights reports on Pacific countries (eg, the recent report of the UN Special Rapporteur on the Protection of Human Rights while Countering Terrorism on Australia) and an excellent publication, *Advancing the Implementation of Human Rights in the Pacific*, which contains the

most recent UN Treaty Bodies recommendations for all the 16 countries of the Pacific region. The publication also includes selected country-based examples of follow-up given to UN recommendations and provides explanations of the UN human rights monitoring mechanism. Also available are:

- an online handbook for NGOs on working with the OHCHR;
- further information about the regional office;
- the latest news on human rights in the Pacific region;
- the latest OHCHR publications;
- recent lectures, speeches and papers on human rights issues;
- documents and press releases on a range of human rights issues;
- information on how to make an individual complaint; and
- links to other related organisations.

The Pacific Office website is at <http://pacific.ohchr.org>.

## Victorian Charter of Rights Developments

### 'The Human Rights Act – Changing Lives'

A new report by the British Institute of Human Rights concludes that, seven years after its introduction, the UK *Human Rights Act 1998* is making a significant and positive change to the lives of a wide range of people. The report, entitled *The Human Rights Act: Changing Lives*, analyses 15 cases in which the Act has been used by marginalised or vulnerable individuals and groups 'to challenge poor treatment and, through this, to improve their own and others' quality of life'.

The case studies demonstrate that the Act has been used for and on behalf of a wide range of people – including young people, older people, victims of domestic violence, parents, asylum seekers, people with mental health problems and people with disabilities – to protect human dignity, challenge discrimination, promote participation, challenge brutality and other cruel or inhumane treatment, challenge blanket policies, and to require positive steps to protect human rights.

According to the BIHR, a number of key lessons can be distilled from the case studies, including:

- Human rights can provide a practical tool for people facing discrimination, disadvantage or exclusion.
- Human rights offer a 'more ambitious vision of equality beyond anti-discrimination and can help people in situations where everyone [in the same situation] is being treated equally badly'.
- The core human rights principles of dignity, equality, respect, fairness and autonomy can be used to trigger new thinking and to help decision-makers 'see seemingly intractable problems in a new light'.
- The language and ideas of rights can be used to secure positive changes not only to individual circumstances, but also to policies and procedures.
- Awareness-raising, education and capacity building around human rights can empower people and lead to improved public service delivery and outcomes.

The report also notes the critical role that the community sector and NGOs can and should play in empowering people with knowledge about human rights and acting with and for them to promote and protect human rights.

The report is available at [http://www.bihr.org/downloads/bihr\\_hra\\_changing\\_lives.pdf](http://www.bihr.org/downloads/bihr_hra_changing_lives.pdf).

### Statements of Compatibility under the Victorian Charter

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

Two recent statements of interest relate to the Crimes Amendment (DNA Database) Bill and the Infertility Treatment (Amendment) Bill.

### **Crimes Amendment (DNA Database) Bill**

The Crimes Amendment (DNA Database) Bill will enable Victorian statutory agencies to participate in automatic national DNA data matching through the National Criminal Investigation DNA Database ('NCIDD').

Section 13(a) of the Charter states that a person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with. The Statement of Compatibility issued with the Bill concludes that 'these amendments do not directly interfere with the privacy of individuals' for the following reasons:

- while the NCIDD contains DNA information, it does not contain any other identifying information. As such, it will still be incumbent on the jurisdictions involved to provide identifying information to each other in accordance with each jurisdiction's legislative framework;
- existing safeguards in relation to the taking, storage, use and disposal of DNA samples are unaffected by the Bill; and
- the offence provisions have been broadened so that they apply to any misuse of information obtained from Victorian samples in other jurisdictions, as well as those obtained in Victoria.

The Statement concludes that any 'interference' with privacy under the Bill would not be unlawful.

The Statement also asserts that any interference with privacy under the Bill would not be arbitrary for two reasons:

- because the Bill provides clear parameters around the matches that can be made with other jurisdictions while also implementing suitable safeguards in the form of offences for any breaches of what is permissible; and
- because the Bill will assist in resolving crime, exculpating (as well as inculcating) suspects, and identifying missing persons and disaster victims.

A further way of reconciling the intrusion upon the right of privacy with the requirements imposed by the Charter might have been to refer to s 7 of the Charter which sets out when rights can reasonably be limited.

### **Infertility Treatment (Amendment) Bill**

The Infertility Treatment (Amendment) Bill amends the *Infertility Treatment Act 1995 (Vic)* to allow for somatic cell nuclear transfer ('SCNT') under licence for research purposes, whilst retaining the current prohibition on reproductive cloning.

SCNT (often termed 'therapeutic cloning') involves the cloning of an embryo. The inner cell mass of the cloned embryo is extracted, producing embryonic stem cells that can be used for research into understanding and treating diseases. The extraction process destroys the embryo, giving rise to debate over the meaning of 'life', and whether the destruction of embryos for scientific research infringes the right to life in s 9 of the Charter. The research envisaged by the Bill also depends on egg donation, leading to a possible interaction with s 10(c) of the Charter in relation to the rights of the donor. Section 10(c) provides that a person must not be subjected to medical or scientific experimentation or treatment without full, free and informed consent.

In the Statement of Compatibility tabled with the Bill, the Minister for Health concluded that the Bill has 'no human rights impact'. The Scrutiny of Acts and Regulation Committee ('Committee') expressed concern over the lack of detail provided in the Statement. The Committee noted that:

where there is reasonable prospect that a provision in a Bill may test or infringe Charter compatibility that issue should be drawn to the attention of the Parliament and a reasoned, even if brief, analysis of why the provision is nevertheless considered compatible with the Charter should be outlined.

After receiving a number of submissions, the Committee concluded that the 'Bill fairly raises a Charter implication under section 10(c)'. The Committee noted the competing policy considerations involved. On the one hand, an altruistic woman should be free to expose herself to the risk and discomfort of egg donation in order to advance medical research. On the other hand, taking into account the Helsinki Declaration (a statement of ethical conduct in research involving human subjects), the donation of eggs for scientific purposes may not be compatible with human rights. The Committee referred at length to

the Helsinki Declaration (in accordance with ss 5 and 32(2) of the Charter), emphasising that egg donation would only be compatible with human rights if donors were sufficiently informed, and if the risks involved have been adequately assessed, can be satisfactorily managed, and are outweighed by the importance of the objective. The Committee 'resolved to write to the Minister' to highlight its concerns in relation to s 10(c) of the Charter, and to seek further information.

The Committee also considered the impact of the Bill on s 9 of the Charter, which provides that 'every person has the right to life and has the right not to be arbitrarily deprived of life' (emphasis added). Section 3 defines persons as 'human beings'; however, there is little guidance on the meaning of 'human being' in the Charter. The Committee did not determine whether an embryo constituted a human being for the purposes of the Charter and therefore whether s 9 had been infringed. Instead, the Committee referred this 'difficult question' of 'ethics and personal conscience' to Parliament for consideration.

*Tal Karp and Thea Schwartz, Human Rights Law Group, Mallesons Stephen Jaques*

### Charter of Human Rights Workshops

The Victorian Equal Opportunity and Human Rights Commission is providing a series of free workshops from June to November 2007 to help community organisations to understand and apply the rights and obligations contained in the Charter.

An 'introductory workshop' will explore the fundamentals of human rights, the function and operation of the Charter, and how organisations can meet their human rights obligations and achieve best practice in this area.

An 'exploratory workshop' will examine the substantive content and application of the human rights in the Charter in greater detail.

An 'advanced workshop' will build on the understanding gained from the previous sessions by further exploring how community organisations can actively engage in the political process to advocate for policy and legislative change.

The workshops are all provided free. See [www.humanrightscommission.vic.gov.au](http://www.humanrightscommission.vic.gov.au) for further information.

### Casenotes

#### UK House of Lords Considers Meaning of 'Public Authority' under the *Human Rights Act 1998*

*YL (by her litigation friend the Official Solicitor) v Birmingham City Council & Ors* [2007] UKHL 27 (20 June 2007)

The UK House of Lords has delivered a much anticipated judgment regarding the meaning of 'functions of a public nature' and 'public authority' under the *Human Rights Act 1998* (UK).

#### Facts

Section 6(3)(b) of the *Human Rights Act* provides that 'any person certain of whose functions are functions of a public nature' is a 'public authority' and, pursuant to s 6(1), must act compatibly with human rights. Section 6(5) provides that 'a person is not a public authority by virtue only of s 6(3)(b) if the nature of the act is private'.

The issue in this case was whether an aged care home run by Southern Cross Healthcare Ltd ('Southern Cross') was performing functions of a public nature when providing accommodation and care to a resident, YL, pursuant to arrangements with a local council, Birmingham City Council.

YL was an 84 year old woman with Alzheimer's Disease. Her accommodation in the Southern Cross care home was largely funded by Birmingham City Council pursuant to a determination under the *National Assistance Act 1948* that she was eligible for such assistance. The issue as to whether Southern Cross was performing functions of a public nature arose after YL was served with a notice to move, allegedly in violation of her right to privacy and freedom from interference with family and the home pursuant to art 8 of the *European Convention on Human Rights*.

YL contended that Southern Cross was 'performing functions of a public nature' within the meaning of s 6(3)(b) and that it had acted incompatibly with her human rights contrary to s 6(1) of the *Human Rights Act*. The UK Secretary of State and a range of NGOs (including Justice, Liberty, the British Institute of Human Rights and the Disability Rights Commission) intervened broadly in support of this position. Both Birmingham City Council and Southern Cross argued against the characterisation of Southern Cross's operation of the care home as a 'function of a public nature'.

### **Majority Decision**

The majority, comprising Lord Scott, Lord Mance and Lord Neuberger, held that the provision of care and accommodation by Southern Cross to YL did not amount to a 'function of a public nature' within the meaning of s 6(3)(b) of the *Human Rights Act*.

In reaching this conclusion, the majority considered the following factors, among others:

- Southern Cross is a for-profit, private enterprise which provides a service for a commercial fee. Notwithstanding that this service may be 'socially useful, it is by motivated by 'private and commercial' considerations and operates in a competitive market.
- While the fees for care and accommodation provided to YL were funded, in part, by Birmingham City Council pursuant to the *National Assistance Act 1948*, neither the care home nor any aspect of its operation was publicly funded. YL was charged and paid a standard commercial fee notwithstanding that this fee was paid, in part, by a public authority. The majority considered that it is appropriate to distinguish between (a) a core public authority supporting or subsidising a business generally (eg, by funding or making grants to private care homes) and (b) such an authority funding services provided by the business to a specific individual.
- Southern Cross did not exercise any statutory powers in relation to YL, despite the fact that she was placed in care pursuant to a statutory determination by Birmingham City Council that she was eligible for care and financial aid.
- The relationship between YL and Southern Cross was regulated by private law contract (although notably this agreement expressly incorporated an obligation on the part of Southern Cross to act compatibly with YL's human rights, failure of which to do so would give YL a cause of action for breach of contract).
- The mere fact that there is a 'public interest' in the provision and regulation of aged care services is not a significant factor; there is a public interest in the regulation of many functions (such as providing financial services, running restaurants and manufacturing and handling hazardous materials) but this does not thereby render them 'functions of a public nature'.
- YL continues to maintain rights under the *Human Rights Act* in respect of the care and accommodation provided to her as against Birmingham City Council.
- While it may be desirable that residents in privately owned care homes be afforded human rights as against the proprietors, this is a matter for the legislature to spell out in clear terms.

### **Minority Decision**

The minority, comprising Lord Bingham and Baroness Hale, held that Southern Cross, 'in providing accommodation, health and social care for YL, was performing a function of a public nature', further stating that 'this was a function performed for YL pursuant to statutory arrangements, at public expense and in the public interest'.

In reaching this conclusion, the minority considered the following factors, among others:

- The phrase 'function of a public nature' should be interpreted widely to give effective domestic protection to human rights.
- It is relevant to consider the role and responsibility of the state to the subject matter in question, including the extent to which the state regulates or supervises the function and whether, as a matter of last resort, the state would be willing to pay for or discharge the function. That is, is the function one in relation to which the state has assumed some level of responsibility, at public expense if necessary, and in the public interest? In the present case, the provision of aged care services is subject to detailed statutory and regulatory control. Further, the state is willing to (and does) apply

public funds to support those who cannot pay for themselves rather than to leave them without care or accommodation. More than 80% of residents in Southern Cross care homes were placed and subsidised under the *National Assistance Act*.

- It is relevant to consider the extent of the risk, if any, that improper performance of the function might violate an individual's human rights. Persons in care are – by reason of age, illness, disability and other circumstances – a particularly vulnerable section of the community. There is a significant public interest in the promotion and protection of the human rights of such people.
- Another important factor is whether the function involves or may involve the use of statutory or coercive powers. Thus, for example, it was common ground that both privately run prisons and private psychiatric hospitals exercising powers of detention under the *Mental Health Act 1983* are performing functions of a public nature.
- The primary purpose of the *Human Rights Act* is to 'bring rights home'. As asserted by the Secretary of State (intervening) and two bipartisan reports of the Joint Parliamentary Committee on Human Rights on *The Meaning of Public Authority under the Human Rights Act*, a narrow approach to 'functions of a public nature' is likely to mean that many people, particularly vulnerable people, are deprived of their right to an effective remedy for any violation of their human rights and that the *Human Rights Act* will continue to fall short of its aims of 'bringing rights home' to the UK. It is also notable that, in the course of parliamentary debates on the Act, the Home Secretary and the Lord Chancellor 'made it clear that persons or bodies delivering privatised or contracted-out public services were intended to be brought within the scope of the Act by the "public function" provision'.

#### **Implications for the Victorian Charter**

Section 4(1)(c) of the Charter provides that a 'public authority' includes 'an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise)'. Section 4(2) of the Charter enumerates a range of non-exhaustive factors that may be taken into account in determining if a function is of a public nature, including whether the function is conferred by or under statute, whether it is connected to or identified with government, whether the function is regulatory in nature, and whether the entity is publicly funded to perform the function. Many of these factors are derived from UK case law which is, in turn, likely to inform their interpretation and application.

In the Centre's view, it is to be hoped that Victorian Courts follow the approach taken by the minority in the present case. Commenting on the decision, the British Institute of Human Rights stated, 'We are stunned by this decision. By exempting private care homes from the *Human Rights Act* when they house people under contract to a local authority, the House of Lords has undermined the fabric of human rights protection in the UK.' As the Joint Committee stated in its 2007 report on the *Meaning of Public Authority under the Human Rights Act* (summarised in Edition 13 of this Bulletin):

In a series of cases our domestic courts have adopted a more restrictive interpretation of the meaning of public authority, potentially depriving numerous, often vulnerable people...from the human rights protection afforded by the Act. We consider that this is a problem of great importance, which is seriously at odds with the express intention that the Act would help to establish a widespread and deeply rooted culture of human rights in the UK.

...

In an environment where many services previously delivered by public authorities are being privatised or contracted out to private suppliers, the law is out of step with reality. The implications of the narrow interpretation...are particularly acute for a range of particularly vulnerable people in society, including elderly people in private care homes, people in housing association accommodation, and children outside the maintained education sector, or in receipt of children's services provided by private or voluntary sector bodies.

It is critical the Victorian Courts heed this warning and ensure that the Victorian Charter is interpreted and applied so as to give real and effective protection to human rights.

The decision is available at <http://www.bailii.org/uk/cases/UKHL/2007/27.html>.

*Philip Lynch is Director of the Human Rights Law Resource Centre*

## Delay in Parole Hearing may Constitute Arbitrary Detention

*Johnson v Secretary of State for the Home Department* [2007] EWCA Civ 427 (9 May 2007)

The UK Court of Appeal has held that a delay in determining eligibility for parole may amount to arbitrary and unlawful detention.

### Facts

This was an appeal from a decision of a deputy High Court judge. The applicant, Mr Johnson, was sentenced in May 2000 to seven years in prison. This meant he was a 'long term prisoner' under the *Criminal Justice Act 1991* (UK) c 53. As such he was entitled to be released on license after he had served half his sentence if the Parole Board ('Board') so recommended. Six months before he was eligible for parole, Mr Johnson indicated that he wished to be considered for parole. While decisions were usually taken by the Board prior to the prisoner's parole eligibility date, Mr Johnson's application for parole had not been heard almost eight and a half months after the eligibility date. In this time Mr Johnson sought permission to apply for judicial review. On 13 February 2004, the Board recommended Mr Johnson's release and he was released ten days later.

Mr Johnson alleged that the Board's delay in hearing his case was a breach of art 5(4) of the *European Convention on Human Rights*, as protected by the *Human Rights Act 1998* (UK), which provides that:

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if his detention is not lawful.

Mr Johnson claimed he had an enforceable right to compensation under art 5(5) of the Convention.

At first instance Sullivan J refused permission to apply for judicial review because the parole application had, by then, been considered and damages was not an available remedy under the law at that time. Mr Johnson appealed, and after a change in the law, was granted permission to apply for judicial review. The deputy high court judge considered there was no breach of art 5(4) of the Convention and consequently did not address the question of compensation under art 5(5). Mr Johnson appealed.

### Decision of the Court

The Court of Appeal found there had been a breach of art 5(4) of the Convention as Mr Johnson's detention had been arbitrary, and therefore unlawful, for the period between his becoming eligible for parole and his release. The matter was remitted for consideration of appropriate compensation under art 5(5).

The Court relied on the decision in *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54, where the House of Lords held that the right to liberty protected by art 5 of the Convention applied to any provision in domestic law allowing a prisoner to seek early release. Although art 5 does not require an early release scheme to be put into place, once such a scheme is in operation art 5 applies to it. The Court considered that a determinate sentence is a 'composite package': art 5(4) applies once the non-parole period is over but does not apply while parole is not available.

The Court considered that, for the purpose of art 5(4), the situation of Mr Johnson was analogous to that of a prisoner serving an indeterminate (life) sentence. The application of art 5(4) to indeterminate sentence prisoners was considered in *R (Noorkoiv) v Secretary of State for the Home Department* [2002] EWCA Civ 770. In that case, the Board was under a statutory duty to hear the parole application of an indeterminate sentence prisoner once he became eligible for parole. It was held that art 5(4) was violated by the Board's failure to hear the application speedily. The Court considered that this case applied equally to determinate sentence prisoners, and that the absence of a statutory obligation to hear Mr Johnson's parole application was immaterial. In both situations the prisoners' applications were treated arbitrarily because different determinate or indeterminate sentence prisoners were having their parole applications heard 'at different periods of time after their eligibility date'. Thus although Mr Johnson's detention was not itself arbitrary, it was unlawful because he could show that, had his parole hearing occurred earlier, he would have been released earlier. Thus there was 'an unjustified and ... arbitrary period of delay' contrary to art 5(4), which gives a prisoner a right to have his parole application heard speedily so that his detention does not become arbitrary.

### **Implications for the Victorian Charter**

Section 32(2) of the Charter permits Victorian courts to use the judgments of foreign courts to assist in the interpretation of Charter rights. The judgment of the Court in this case will be relevant to future consideration of s 21(7) of the Charter, which provides that '[a]ny person deprived of liberty ... is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must: (a) make a decision without delay; and (b) order the release of the person if it finds that the detention is unlawful.' Of particular interest is the finding that the equivalent to s 21(7) will be breached where a prisoner is eligible to make a parole application but that parole application is not considered promptly.

The decision is available at <http://www.bailii.org/ew/cases/EWCA/Civ/2007/427.html>.

*Jane Tipping, Human Rights Law Group, Mallesons Stephen Jaques*

### **UK Court of Appeal Considers Positive Obligations Arising from Right to Life**

*Van Colle & Anor v Hertfordshire Police* [2007] EWCA Civ 325 (24 April 2007)

The UK Court of Appeal has held that the right to life imposes a positive obligation on responsible authorities to take reasonable steps to safeguard the lives of those in their jurisdiction as against known and immediate risks.

#### **Facts**

This was an appeal from a decision of the UK High Court to the UK Court of Appeal. The High Court held that the appellant, the Chief Constable of the Hertfordshire Police, acted unlawfully in violation of arts 2 and 8 of the *European Convention on Human Rights*. It was held that the appellant had failed to discharge the positive obligation of the police to protect the life of a witness, Giles Van Colle. Giles was murdered in November 2000 by Daniel Brougham after a number of threats and incidents of witness intimidation by Brougham. Giles was supposed to give evidence for the prosecution at Brougham's trial on charges of theft. It was alleged that Brougham had stolen from Giles' optometrist store when he was employed by Giles.

The respondents were the victim's parents who were the administrators of his estate. The respondents' case was that the appellant infringed Giles' rights under arts 2 and 8 of the Convention. Their claim was brought in reliance upon s 6(1) of the *Human Rights Act 1998* (UK) and proceedings were brought under s 7. The judge at first instance awarded damages of £50,000, made up of £15,000 in respect of the distress suffered by Giles in the weeks leading up to his death and £35,000 in respect of his parents' grief and suffering. In this appeal the appellant challenged the decisions of the judge on both liability and quantum.

#### **Legal Principles**

There was no dispute that if the appellant did infringe Giles' rights under arts 2 and 8 of the Convention, then the appellant would be liable to the respondents under sections 6 and 7 of the HRA and the Court of Appeal had power to award damages under s 8 of the HRA. Article 2(1) of the Convention states:

Everyone's right to life shall be protected by law. No-one shall be deprived of his life intentionally save in the execution of a sentence of a Court following his conviction of a crime for which this penalty is provided by law.

The Court referred to *Osman v United Kingdom* (2000) 29 EHRR 245 as a source of the principles to be applied in this case. In *Osman*, the European Court of Human Rights held that the authorities of a Member State, including the police, can be under a positive obligation imposed by art 2 in some circumstances to take preventive, operational measures to protect a person whose life is at risk from the criminal acts of another.

#### **Issue**

The central issue in this case was the scope, nature and extent of the positive obligation on a State to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.

## Findings

The Court of Appeal upheld the decision of the judge at first instance in relation to liability. It was held that art 2(1) of the Convention enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It was accepted that art 2 of the Convention may imply, in certain well-defined circumstances, a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.

The Court of Appeal held that it was sufficient for an applicant to show that:

- there was a real and immediate risk to life;
- the risk was to an identified individual or individuals;
- the authorities knew or ought to have known about the risk; and
- the authorities failed to take measures within the scope of their powers which, judged reasonably, they might have been expected to take to avoid the risk.

On the facts in this case, the Court of Appeal agreed with the trial judge, holding that the numerous threats and incidences of intimidation by Brougham created a risk to the life of Giles. That risk was found to be immediate and likely to persist up until Giles was to give evidence at trial. Giles was clearly identified as an individual and not simply a member of the community. He was to be a witness for the prosecution at a criminal trial. It was upheld that the authorities ought to have been aware that there was a risk to Giles' life and that they ought to have given consideration to the possible need to protect Giles. The Court therefore concluded that the police infringed Giles' right to life under art 2 of the Convention and dismissed the appeal in regards to liability.

## Quantum

The Court of Appeal held that the amount of damages awarded by the trial judge was too great by comparison with amount of other awards granted by UK courts and the European Court of Human Rights. The Court accordingly reduced the amount of damages awarded to £25,000 overall, made up of £10,000 to the first respondent as personal representative of Giles' estate and £7,500 to each of the respondents personally.

## Implications for the Victorian Charter

Section 32(2) of the Charter allows the judgments of foreign courts to be used in interpreting Charter rights. This judgment will be relevant to future consideration of the right to life contained in s 9 of the Charter. Particularly relevant is the finding that the right to life imposes a positive obligation on governments to take reasonable steps to safeguard the lives of those in their jurisdiction as against known and immediate risks.

The decision is available at <http://www.bailii.org/ew/cases/EWCA/Civ/2007/325.html>.

*Robert Kovacs, Human Rights Law Group, Mallesons Stephen Jaques*

## HRLRC Policy, Advocacy and Law Reform

### Australia to be Examined by UN Committee Against Torture in November 2007

In May 2005, the Australian Government submitted its Fourth Periodic Report to the UN Committee Against Torture as part of its reporting obligations under the UN *Convention Against Torture* ('CAT'). The Committee will consider Australia's Report at its next session in November 2007.

Prior to the Committee's review of Australia's report, the Human Rights Law Resource Centre, together with a range of NGOs such as the National Association of Community Legal Centres, will submit information to the Committee for the purpose of assisting it to develop a list of questions that will be asked of the Australian Government.

The issues of particular concern to the Centre in relation to Australia's obligations under the CAT include that:

- the CAT has not been incorporated into Australia's domestic law, despite its ratification by the Australian Government in 1989. Further, Australia has not ratified the Optional Protocol to the CAT, thereby depriving individuals of access to an effective remedy where any available domestic remedies have been exhausted;
- the Report fails to address Australia's mandatory detention of asylum seekers, the conditions of immigration detention and the lack of access for detainees to appropriate health care;
- recent findings of the Palmer Report into the circumstances of the immigration detention of Cornelia Rau, as well as reports of the Commonwealth Ombudsman, have revealed 'deep seated cultural and attitudinal problems' within the Department of Immigration and a 'poor understanding' by many immigration officials of the migration legislation and the powers they are authorised to exercise;
- Indigenous Australians are among the most highly incarcerated peoples in the world. Despite representing approximately 2% of the population, Indigenous Australians represent around 24% of the prison population;
- the Australian Government has still not adequately implemented the recommendations of the Royal Commission into Aboriginal Deaths in Custody. Despite its findings more than 15 years ago, over 75% of deaths in custody in 2003 were of Indigenous Australians detained for no more than public order offences;
- mandatory sentencing provisions for many offences remain in the Northern Territory and Western Australia, and Indigenous Australians continue to be disproportionately affected by those provisions; and
- the lack of adequate mental health care in prisons, which has been the subject of significant adverse judicial comment recently in Victoria.

*Ben Schokman is the DLA Phillips Fox Human Rights Lawyer on secondment to the Human Rights Law Resource Centre*

## HRLRC Casework

### High Court Hears Constitutional Challenge to Prisoner Disenfranchisement

Vickie Lee Roach is an Indigenous woman from the Stolen Generations. She holds a Masters degree and is now undertaking a PhD. She is a peer educator and active in Aboriginal affairs. She is also an inmate at the Dame Phyllis Frost Women's Prison in Victoria, having been sentenced to imprisonment for negligently causing serious injury in a car accident. As a prisoner she is denied the fundamental human right to vote following a 2006 amendment of the *Commonwealth Electoral Act* which stripped all prisoners of the right.

On 12-13 June 2007, the High Court heard a challenge to the constitutional validity of the blanket disenfranchisement of prisoners brought by the Human Rights Law Resource Centre on Ms Roach's behalf.

The hearing raised major issues as to prisoners' rights, Indigenous rights, the right to vote, representative democracy and responsible government.

The prisoner disenfranchisement provisions of the *Commonwealth Electoral Act* are being challenged on the grounds that they are:

- contrary to ss 7 and 24 of the Constitution, which require that the Senate and the House of Representatives be 'directly chosen by the people';
- inconsistent with the implied freedoms of political participation and communication;
- beyond the legislative powers of the Commonwealth; and
- incompatible with Chapter III of the Constitution, in that they amount to an additional punishment.

It is further contended that the provisions are not reasonably appropriate or adapted to any legitimate end.

Similar legislation taking away the right of prisoners to vote has been struck down in other jurisdictions, including in Canada, the United Kingdom and South Africa. Each of these jurisdictions contains

constitutional or legislative protection of human rights, throwing into sharp focus the need for a federal bill of rights in Australia. As Ms Roach has written:

If we exclude prisoners from society by taking away their basic right to political communication, and condemn them as undesirables, how many other sections of society could become similarly marginalised? And how many other rights could then be eroded on the same precept?

The Centre was provided with very substantial pro bono assistance in the matter from a team comprising Ron Merkel QC, Kristen Walker and Fiona Forsyth of Counsel, and Peter O'Donahoo, Neil McAteer, Emily Howie, Peter Haig and Ben Rechter of Allens Arthur Robinson. This team made an outstanding commitment and contribution to the matter. They brought exceptional professionalism, intellect, rigour and experience to the matter. They worked with enthusiasm and humour, often under very heavy workloads and time constraints.

The decision of the Court has been reserved.

Further information on the case, including copies of the plaintiff's written submissions and links to the transcripts of hearing, is available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under 'Legal Briefs' in the 'Human Rights Library'.

### **UN Working Group on Arbitrary Detention Expresses Serious Concern about Conditions of Detention of 'Melbourne 13'**

As reported in Edition 11 of the Bulletin, the detention of 13 men accused of terrorist-related offences (the 'Melbourne 13') was considered by the UN Working Group on Arbitrary Detention at its 48<sup>th</sup> Session in May 2007.

The matter came before the Working Group pursuant to an urgent communication transmitted by the Human Rights Law Resource Centre in August 2006. That communication raised concerns as to the type, length, conditions and effects of the detention. In the Centre's submission, aspects of the detention were inconsistent with provisions of the *ICCPR*, the *ICESCR* and the *UN Standard Minimum Rules on the Treatment of Prisoners*.

At its May session, the Working Group adopted an 'Opinion' on the matter. The Opinion is available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under 'Legal Briefs' in the 'Human Rights Library' and is summarised below.

The Working Group's mandate constrained its consideration to whether the conditions of detention are of such severity and duration as to impede the right to the preparation of an adequate defence and a fair trial (paragraphs [2] and [22-3]). The Working Group concluded, at [29], that 'the material before it does not disclose such a lack of observance of international norms relating to a fair trial which would confer on the detention an arbitrary character'.

Notwithstanding this conclusion, the Working Group expressed four significant concerns about the case.

First, the Working Group considered, at [23], that the 'conditions of detention, as described by the source and not contested by the Government, are particularly severe, especially taking into account that they have been imposed upon persons who have not yet been declared guilty and who must, accordingly, be presumed innocent'.

Second, the Working Group expressed concern, at [24], that correspondence between the defendants and their lawyers are scanned by prison officers and that legal professional visits are videotaped.

Third, the Working Group stated at [27] that they 'remain concerned that the law appears to make the detention under extraordinarily restrictive conditions the rule for any person charged with a terrorist offence, without sufficient room for consideration of the specific charges against the detainees and their individual circumstances or dangerousness'.

Fourth, the Working Group went on to say, at [27], that the submissions from both the Centre and the Government 'suggest that the judges deciding on bail applications might not have sufficient discretion to consider these matters either, at least in the absence of "exceptional circumstances"'.

The impact of the conditions of detention of the Melbourne 13 on their ability to prepare an adequate defence was also considered by the UN Special Rapporteur on the Independence of Lawyers and Judges in a report tabled before the UN Human Rights Council on 11 June 2007 and available at <http://daccessdds.un.org/doc/UNDOC/GEN/G07/128/12/PDF/G0712812.pdf?OpenElement>.

## Seminars and Events

### 'Freedom from Torture and other Cruel, Inhuman or Degrading Treatment or Punishment' with Prof Claudio Grossman, Vice-Chair of the UN Committee Against Torture – 8 August 2007

The prohibition on torture and other cruel, inhuman or degrading treatment or punishment is a fundamental principle of human rights law and is now enshrined in s 10 of the Victorian *Charter of Human Rights*. In other jurisdictions it has been invoked in areas ranging from prison conditions, to strip-searches, to protection and support for people who are vulnerable or destitute, to access to adequate health care for prisoners and other detainees.

In this lecture, **Prof Claudio Grossman of the UN Committee Against Torture** will consider the content, scope and application of the prohibition on torture. He will also discuss the obligations of the state arising from the right to freedom from torture.

This seminar is co-presented with the Amnesty International Australia Legal Group.

The seminar will be held from 6 – 7.45pm on 8 August 2007 at DLA Phillips Fox, Level 21, 140 William St, Melbourne.

For further information, including a booking form, see [www.hrlrc.org.au](http://www.hrlrc.org.au)

### 'The Responsibility to Protect: The Evolution of a New International Norm' with the Hon Gareth Evans AO QC – 13 August 2007

The **Hon Gareth Evans AO QC is President of the International Crisis Group**, a global NGO working to prevent and resolve deadly conflict.

Gareth Evans was a member of Australian Parliament for 21 years, including 13 years as a Minister, holding the portfolios of Attorney General and Minister for Foreign Affairs, among others.

As Foreign Minister, Gareth Evans became known internationally for his work in developing the UN peace plan for Cambodia, brokering the international Chemical Weapons Convention and founding APEC.

In this seminar, Evans will discuss the emerging responsibility of states and the global community to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

The lecture will be followed by a public discussion with **Justice Chris Maxwell**. Justice Maxwell is President of the Victorian Court of Appeal and a former adviser to Gareth Evans.

The seminar will be held from 6 – 7.45pm on 13 August 2007 at Allens Arthur Robinson, Level 34, 530 Collins St, Melbourne.

For further information, including a booking form, see [www.hrlrc.org.au](http://www.hrlrc.org.au)

### 'Freedom, Respect, Equality, Dignity: What Difference can a Human Rights Charter Make?' with Lord Robert Walker of the House of Lords – 15 August 2007

In this lecture, **Lord Robert Walker of the UK House of Lords** will reflect on his experience 'judging' human rights under the *Human Rights Act 1998* to consider the difference that a Charter of Human Rights can make to the enjoyment and protection of human dignity, respect, equality and freedom.

This seminar is co-presented by the Victorian Equal Opportunity and Human Rights Commissions. It will be held from 12.30 – 2pm on 15 August 2007 at Mallesons Stephen Jaques, Level 50, 600 Bourke St, Melbourne.

For further information, including a booking form, see [www.hrlrc.org.au](http://www.hrlrc.org.au)

### 'Counter-Terrorism and Human Rights' – 19 July 2007

This public forum will be held at 7pm on Thursday, 19 July 2007 at Melbourne Town Hall.

Join leading human rights and civil liberties advocates to hear how the Australian Government has responded to the threat of terrorism by introducing laws that undermine your human rights, and find out

more about the campaign to restore the fundamental rights of all Australians violated in the name of security.

Sponsored by Amnesty International Australia, Liberty Victoria, National Association of Community Legal Centres, the Federation of Community Legal Centres (Vic), Public Interest Advocacy Centre, and Australian Lawyers for Human Rights.

Admission is free and RSVP is not required. For further information contact [Derec.Davies@amnesty.org.au](mailto:Derec.Davies@amnesty.org.au).

### Protecting Human Rights Conference – 25 September 2007

This conference is jointly presented by the Centre for Comparative Constitutional Studies (Melbourne Law School), the Gilbert + Tobin Centre of Public Law (UNSW) and RegNet (ANU). It will discuss developments in the protection of human rights by Australian charters and human rights acts.

The conference provides an important opportunity to examine the Victorian *Charter of Human Rights*, the ACT *Human Rights Act* and other bills of rights. Leading Australian and international speakers will also address the future of the protection of human rights, such as economic, social and cultural rights, in Australia and other countries. The day is aimed at both a legal and non-legal audience.

More information, including the full conference programme and registration form is available at <http://cccs.law.unimelb.edu.au> (under News and Events) or from [law-cccs@unimelb.edu.au](mailto:law-cccs@unimelb.edu.au).

## Education, Training and Resources

### Doughty Street Chambers Human Rights Information Service

Doughty Street Chambers in London provides an excellent human rights information service regarding the operation and use of the *Human Rights Act 1998* (UK) and the *European Convention on Human Rights*. Online services provided free-of-charge include:

- Casenotes and summaries of select human rights cases;
- Articles, papers, lectures and speeches on human rights issues prepared by members of Doughty Street Chambers;
- A comprehensive searchable database of all cases considered under the *Human Rights Act 1998* (UK) to 2002; and
- A monthly human rights newsletter available by contacting [s.parmar@doughtystreet.co.uk](mailto:s.parmar@doughtystreet.co.uk).

For further information, see [http://www.doughtystreet.co.uk/human\\_rights/index.cfm](http://www.doughtystreet.co.uk/human_rights/index.cfm).

### What's New on the HRLRC Website?

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

- Human Rights Law Resource Centre, *Guide to Victorian Charter of Human Rights and Responsibilities* (revised as at June 2007)
- Julie Debeljak, 'Mission Impossible: "Possible" Interpretations under the Victorian Charter and Their Impact on Parliamentary Sovereignty and Dialogue' in Marius Smith (ed), *Human Rights 2006: The Year in Review* (Castan Centre for Human Rights Law, Melbourne, 2007)
- Simon Evans and Carolyn Evans, 'Legal Redress under the Victorian Charter of Human Rights and Responsibilities' (2006) 17(4) *Public Law Review* 264
- Beth Midgley and Cecilia Riebl, 'The Right to Humane Treatment in Detention: How do Victorian Prisons Rate?', Paper to PILCH Law Week Seminar, 17 May 2007
- Rachel Nicolson (Allens Arthur Robinson), 'The Impact of the Charter of Rights on Corporations', Paper to the 2007 LIV Victorian Charter of Human Rights Conference, 18 May 2007
- Alistair Pound, 'The Meaning of the Charter of Human Rights and Responsibilities for Judicial Review and Administrative Review', Paper to the 2007 LIV Victorian Charter of Human Rights Conference, 18 May 2007

- Kristina Stern, 'The Victorian Charter of Human Rights: What is Left Unsaid?', Paper to Australian Institute of Administrative Law, 3 May 2007

## If I Were Attorney-General...

### Barriers to Justice: Access to Legal Services

There is an appalling lack of funding by Australian governments for the provision of legal assistance in relation to civil law matters.

In 1997/1998, the Commonwealth Government removed \$20 million from its funding of legal aid services. The pre-1997 funding levels have never been restored and the current funding levels are, in real dollar terms, less than they were in 1996/1997. The cuts to Commonwealth legal aid funding were coupled with the abandonment of the 'cooperative' model of funding which had allowed legal aid commissions to use funds from Commonwealth and State governments as they considered appropriate. This meant that federal funds could no longer be used to fund criminal law matters and civil law matters arising under state law. At the same time as the funding cuts, the Commonwealth introduced the 'purchaser/ provider' model which saw the government set guidelines which restricted the spending of Commonwealth legal aid funds on specific legal matters arising in the federal jurisdiction only.

This funding model has resulted in there being few or no government-funded legal assistance services in many areas of civil law. Clients with civil law matters, other than family law or Children's Court matters, will, in rare circumstances, receive assistance from legal aid commissions. More often than not, they are ineligible for legal aid funding and seek assistance from community legal centres or pro bono lawyers. Community legal centres, some of whom receive federal government funding, are not resourced to a level adequate to be able to advise on the range of civil law matters which arise and to issue and conduct proceedings.

Pro bono referral schemes, like the Public Interest Law Scheme, the Law Institute of Victoria Legal Assistance Scheme and the Victorian Bar Legal Assistance, have seen an increase in requests for assistance in meritorious civil law matters, particularly in relation to migration, bankruptcy, and employment law. Pro bono barristers and solicitors make a major contribution to securing access to justice for many individuals who cannot afford legal assistance, but who require advice or representation in relation to a legal issue which they are facing. However, there are limits to the capacity of pro bono lawyers to assist. Some matters are too large and 'open-ended' to refer to pro bono lawyers. In some circumstances, solicitors may have legal or commercial conflicts which prevent them from acting. Some matters do not fit the 'pro bono profile'; they may be about a case where a party took a commercial risk which back-fired and such cases are not considered appropriate for or deserving of pro bono assistance. Pro bono has also only made limited in-roads in addressing the lack of access to legal services by Indigenous people and individuals living in rural and regional areas.

The lack of affordability of legal services and the lack of government-funded legal services leads to individuals self-representing at all levels in the court system. In 2002/2003, 38% of parties in the Federal Court were self-represented litigants; in 2004, the Family Court reported that 47% of parties were self-represented at one stage; in the High Court in 2005/2005, in immigration, 88% of matters involved self-represented litigants. Self-represented litigants place a large burden on the court systems. However, most significantly, individuals' substantive rights are undermined when they do not have legal assistance and they try to represent themselves in the court system but are without the skills and knowledge to effectively do so.

The protection and promotion of fundamental rights requires that there be an effective remedy available in circumstances where those rights have been violated. Obtaining an effective remedy will, in many cases, require access to legal advice or representation to fully vindicate the breach of rights which has occurred. It is important that, in the first instance, people have access to legal advice and information to understand whether or not they have a claim or a defence, and if they do have a meritorious case, that they have the legal representation required to vindicate their position through further litigation processes.

If I were Attorney-General, I would seek to implement the proposal for the 'Restoration of a National Civil Legal Aid Scheme' developed by the Australia Legal Assistance Forum and discussed at the Access to

Justice and Pro Bono Conference in Melbourne in September 2006. This proposal envisages that civil legal assistance would be available to an individual who meets a means test and who:

1. *has right of action against a person, a corporation or government which is justifiable in a court or a tribunal of competent jurisdiction;*
2. *has been or is likely to be the subject of action in such a court or tribunal; and*
3. *has a legal position which is assessed as having such merit, viz it passes the 'reasonable prospects of success' test, the 'prudent self-funding litigant' test and the 'appropriateness of spending public funds' test.*

Importantly, under this model, funding would be staged and would start with funding for taking instructions and negotiations, and move through to funding for representation at a hearing.

Another key aspect of this new proposal is that the scale of fees to lawyers accepting briefs to act from legal aid commissions should not be less than the scale fee provided for in the rules of the jurisdiction in which the matter would ordinarily be litigated, or such fees as would ordinarily be paid by the prudent self-funded litigant in case where no scale is available. This is essential if private lawyers are going to continue to be willing to accept legal aid work.

Legal redress should not be closed off to members of the community who have suffered a legal wrong, yet are without the means to pay for legal services. The restoration of a proper civil legal aid scheme by the Commonwealth is essential if the legal system is to offer individuals the chance of finding justice.

*Paula O'Brien is Executive Director of the Public Interest Law Clearing House (Vic)*