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The Human Rights Law Resource Centre Ltd aims to:

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2. Build capacity in the legal and community sectors to use human rights in casework, advocacy and service delivery.
3. Empower people that are disadvantaged or living in poverty by operating within a human rights framework.

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Opinion

A Human Rights Approach to Immigration Law

In recent times, Australia has suffered a crisis of credibility when it comes to human rights compliance. This is most evident in the area of immigration. Protection of borders has regularly predominated over the protection of fundamental rights of those within them. So too, has political expediency. There has been serious slippage in a number of areas, to the extent that it can be considered systemic. Notorious amongst these has been the acute and egregious retreat from fundamental human rights obligations in the area of Immigration law, particularly in relation to the treatment of asylum seekers and refugees in Australia.

Australia’s recent approach to asylum seekers and refugees has been radical and degenerative in nature. The approach has created one of the toughest and most extensive anti-asylum seeker systems in the Western world. From a human rights perspective Australia’s approach represents, in many respects, the Western world’s worst practices and a potentially problematic precedent. Key features have included: mandatory, indefinite, non-reviewable detention; Temporary Protection Visas; the Pacific/Indian Ocean Solutions; naval repulsion of asylum seekers arriving by boat; and ‘excision’ of Australian territory to preclude people seeking asylum in Australia at all.

The evidence is in, and the case for systemic reform is compelling. While the recent post-Palmer report Petro Georgiou-led reform processes have diminished the daily suffering for many, reform has been limited and largely restricted to bureaucratic process and conduct, rather than policy.

With recent political regime change in Australia, the question of immigration reform now invites a quite different inquiry; here is a snapshot of some key priority themes and signposts for reform in the context of Immigration *policies and laws*.

Move to the Mainstream

Over the last decade, we have witnessed the construction of a legal architecture in the Immigration area which ‘excised’ decision-making and other government conduct from the ordinary, mainstream Australian legal system. In many areas, this has involved legislative developments which represent a radical departure from the well-established foundations of our legal system. Such principles include the application of the rule of law, access to legal advice, access to the Courts, *habeas corpus*, and anti-discrimination. There have been strenuous attempts by the Executive to expunge these principles from migration law. Australia’s response has also involved a prolific range of

regulatory amendments driven by an ever-increasing and obsessive trend of 'hole-plugging' – that is, fixing perceived loopholes – with scant regard for fundamental normative legal principles, and a resultant litany of dubious legal contortions. In turn, it has abrogated certain core international human rights principles and undermined Australia's treaty obligations.

Reform should restore decision-making and other operations under Immigration policy to the mainstream of the Australian legal system to ensure that they function in conformity with Australia's fundamental legal principles and international human rights principles and obligations.

Key Priority Areas

Pacific Solution and Indian Ocean Solution

One of the major Immigration policy reforms under the new Government has been dismantling the Pacific Solution. The Pacific Solution represented a radical departure from mainstream domestic and international human rights law principles, principally by: selectively 'excising' Australian territory to preclude those arriving in such territory from equal access to legal rights, such as the making of a protection visa by warehousing them in Nauru or PNG. The policy involved the assessment of refugee status under a fundamentally inferior processing regime outside the rule of law and completely failed to provide timely, durable solutions of resettlement for recognised refugees.

Given the centrality of this policy to Australia's anti-asylum seeker system, and the serious harm it inflicted on many refugees, this reform was significant. However, too much celebration is premature. The new Labor Government has retained the excision laws, and a policy which condemns informal boat arrivals to remote detention on Christmas Island in circumstances which remain unclear and unsatisfactory. It is of profound concern that the Government appears to be replacing the Pacific Solution with an *Indian Ocean Solution*. Under the reformed policy there remains the real risk that the core elements of the Pacific Solution, except foreign warehousing, will continue to apply, albeit on 'excised' Australian soil.

To remedy the policy's flaws, reform needs to ensure that asylum claims are assessed in a way which is compatible with mainstream Australian and international law- i.e., adjudication under the rule of law, the right of independent review, removal of obstacles to access full legal and other assistance and guaranteed, durable protection in Australia for recognised refugees.

Temporary Protection

Another key reform priority is the abolition of temporary protection for Convention refugees. The Labor Party promised reform in this area pre-election last year, though to date, there has been no tangible progress. It is quite clear that the current temporary protection system, introduced in 1999, is flawed and unprecedented internationally. It flagrantly violates a number of human rights principles and treaty obligations, including: non-discrimination and non-penalisation for reason of mode of arrival; the right to family reunion, the right to re-entry and Travel Documents; the right to social security and the right to protection. Further, it has caused substantial re-traumatisation to many recognised refugees, who have been left in limbo and endured forced family separation.

The key reform required is abolition of Temporary Protection Visas for onshore asylum seekers who are determined to be Convention refugees. Such persons should be granted permanent residence. This would require legislative amendment. In the interim, a process should be urgently established to convert the current status of hundreds of temporary protection and humanitarian visa holders to permanent Protection visas. This 'conversion' process could be completed under existing legislation, via the processes proposed by a coalition of NGOs, including the Refugee & Immigration Legal Centre. This would reduce the daily damage TPV holders and their families continue to face.

Mandatory Detention

Australia's continued policy of mandatory, indefinite and non-reviewable detention of asylum seekers violates its obligations under various international treaties, including the *ICCPR* and the *CROC*. The arbitrary, non-reviewable nature of the policy has been condemned by a wide range of independent domestic and international human rights bodies. The acute psychological and physical harm and trauma inflicted on people, including children, subjected to such policies is also well-documented.

These policies are also clearly contrary to ordinary principles of detention under mainstream Australian law, in which deprivation of liberty by the State must be for reasons related to criminal activity, or

administrative necessity for individual or public protection, and generally, for a finite or fixed period, with the possibility of challenging the legality of detention before a Court applying due process safeguards. Under the post-Palmer reform process, although there has been some substantial progress by way of routine release of children and families into the community and reduction of numbers of prolonged detention cases, recent reforms have left the ultimate power of community release entirely to the personal discretion of the Minister, with no other legislative, enforceable limits placed on the government.

In broad terms, detention reform must move the system from a *discretion*-based to a *law*-based approach, with enshrinement of the legally enforceable principle that detention of asylum seekers is inherently undesirable and should only be used as a last resort. Reform should also prioritise the re-establishment of an onshore processing system that focuses on community-based measures, and ensures that 'administrative' immigration detention is strictly time-limited, subject to periodic judicial review, and only used to effect reasonable, necessary and proportionate aims, such as initial entry health and security checks. The alternatives to detention that are currently being successfully developed and employed by the Department of Immigration, and the more efficient processing of claims, provide fertile ground for further progress.

In the meantime, asylum seekers should be released in accordance with the above principles and afforded work rights and access to established welfare programs. For those who pose appreciable character and/or security risks, transfer to appropriate community detention structures with necessary monitoring and reporting requirements should be effected.

Ministerial Discretion

The vast powers of Ministerial discretion are another area which requires fundamental reform. They involve an unprecedented legal architecture comprising over 20 sets of powers in which the Immigration Minister is the only person in the country able to decide the fate of literally thousands of people each year. Often the cases involve questions as grave as the rights to family unity and protection from persecution, but without the right of appeal, or to even compel the Minister to consider the case, let alone be provided with reasons for the decision. This process does not conform to basic public expectations of accountable, transparent and fair decision-making. Recent history under successive Ministers has shown how arbitrary, whimsical and unwieldy this system can be. There is also substantial evidence that the process by which Ministers receive advice is seriously flawed.

It is concerning that under these extensive powers, the Minister is left to be the sole gatekeeper on a whole range of international human rights treaty obligations under the *Convention against Torture*, the *ICCPR* and the *CROC*. While there are good reasons for a safety net for exceptional cases, the general principle must be that decisions on such complex and often grave situations be regulated not by political process but by the rule of law.

Minister Evans' recent expression of concerns about the powers and his decision to review them are welcome. With clear legal and policy guidance, administrative decision-makers and Courts are best-equipped to decide the matters currently subject to Ministerial discretion. Reforms should bring this area into line with ordinary administrative decision-making under our legal system. For example, in relation to international human rights treaty obligations which fall outside the Refugees Convention, the Government should introduce a complementary protection system which operates under ordinary administrative law processes, such as exists in other comparable Western jurisdictions such as Canada.

Conclusion

The reform course should be partly chartered by moving the operation of Immigration law into line with ordinary principles under the mainstream legal system in Australia, and framed by a coherent set of principles and doctrines, which also are informed by international human rights obligations. Highest priority should be given to areas where the most egregious harm has been done. However, history tells that Immigration policy is particularly vulnerable to the cynical and unprincipled dictates of the political environment. Thus, reforms would ultimately be far more resilient if Immigration reform could operate in concert with the introduction of a federal Charter of Human Rights.

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News

Australia to Ratify Optional Protocol to the Convention against Torture

The Attorney-General, the Hon Rob McClelland MP, has indicated that Australia will ratify the *Optional Protocol to the Convention against Torture*.

The OPCAT provides for the establishment of a system of regular visits to places of detention – including prisons, immigration detention centres and psychiatric institutions – to be carried out by independent international and national bodies. It enables experts to examine first-hand the treatment of persons deprived of their liberty, and to make recommendations on the basis of their observations.

According to the Attorney, 'Labor is committed to ratifying the Optional Protocol on Torture, and we will soon be consulting the states and territories as to how that can be achieved.'

Speaking to the *Sydney Morning Herald*, Professor George Williams of the University of NSW, said that Australia's previous refusal (under the Howard Government) to ratify the OPCAT was a 'really good example of how Australia has left the front line in the fight against torture'. The Secretary-General of the international Association for the Prevention of Torture, based in Geneva, Mark Thomson, said: 'There's an opportunity now [for Australia] to get back that reputation and become a leader in human rights.'

Government Moves to Endorse Declaration on the Rights of Indigenous People

The Federal Government has announced that it will endorse the landmark UN Declaration on the Human Rights of Indigenous Peoples.

The Declaration was adopted by the UN General Assembly in September 2007 with an overwhelming majority of 143 states voting in favour and only 4 – including Australia – voting against the text.

Australia's Minister for Foreign Affairs, the Hon Stephen Smith, said the Government was consulting with stakeholders, including states and territories, about reversing Australia's opposition to the declaration.

'We are of course positively disposed to the Declaration, but once we've finalised those consultations and we've come to a conclusion, we will let our view be known in the UN General Assembly,' said Mr Smith.

The Declaration, which was negotiated over more than 20 years, sets out the individual and collective human rights of Indigenous peoples, including the right to self-determination, freedom and protection from discrimination, cultural and customary rights, rights to language and identity, land and resource rights, and development rights. The Declaration enshrines the principle that Indigenous peoples have the right to participate in decision-making processes which affect them and requires that states consult and cooperate in good faith with Indigenous peoples on matters which affect their rights.

Australia Commits to Positive Engagement with UN Human Rights Bodies

In a significant statement to the UN Human Rights Council at its 7th Session on 5 March 2008, Australia has committed itself to a much more constructive engagement and relationship with UN human rights bodies than has prevailed over the last decade.

The statement said, in part, that 'The new Australian Government was elected on a platform highlighting its commitment to human rights, and with an explicit mandate to strengthen Australia's engagement with the United Nations system. In this context, we will work constructively and actively with the Human Rights Council to ensure this body is able to respond effectively to human rights situations that demand its attention.'

The full text of the statement is available at http://www.foreignminister.gov.au/releases/2008/fa-s046_08.html.

Opposition MP Urges Review of Australia's Counter-Terrorism Laws

On 17 March 2008, Liberal MP Petro Georgiou introduced a private member's Bill to parliament to establish the position of independent reviewer of Australian terrorism laws.

Speaking for the Bill, Mr Georgiou said parliament had enacted more than 30 laws dealing with terrorism since 2001, establishing offences and procedures that departed significantly from traditional criminal law principles and practices and restricted fundamental civil liberties.

Writing in *The Age* in advance of introducing the Bill, Mr Georgiou said:

A democracy's response to the threat of terrorism cannot simply comprise the enactment of more stringent laws and the expansion of police and intelligence agencies.

The point was well made last year by the European Commissioner for Justice, Freedom and Security, Franco Frattini, when he said: 'Our citizens entrust us with the task of protecting them against crime and terrorist attacks; however, at the same time, they entrust us with safeguarding their fundamental rights. Any necessary steps we take to enforce security must always be accompanied by adequate safeguards to ensure scrutiny, accountability and transparency.'

The challenge of protecting security without undermining people's fundamental rights requires constant vigilance. But the machinery of vigilance in Australia is deficient.

Given the importance of terrorism laws for the foreseeable future, and their exceptional character, it is vital that legislators, the government and the community receive credible independent advice on a routine basis about the actual operations of the measures.

Appointing an independent reviewer would provide a much-needed additional safeguard for our security and our rights.

At this stage it is not clear when the Bill will be debated or whether it will be supported by the Government. Liberal MP Judi Moylan has strongly supported the Bill, while Brendan Nelson MP considers it 'has merit'.

The full text of Mr Georgiou's article, 'Guarding Us from the Laws that Guard Us' is available at <http://www.theage.com.au/news/opinion/guarding-us-from-the-laws-that-guard-us/2008/03/16/1205602190306.html>.

Victorian Charter of Rights Developments

Supreme Court Judge Calls for 'Urgent' Amendment to *Charter* to Ensure 'Orderly' Proceedings

A Supreme Court judge has called on the legislature to urgently amend s 35 (Notice to Attorney-General and Commission) of the Victorian *Charter of Human Rights and Responsibilities* to ensure that a party's reliance on the *Charter* does not result in disruption or delay to proceedings.

Section 35(1)(a) of the *Charter* requires a party to a proceeding in the County Court or Supreme Court to give notice to the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission if a question of law arises relating to the application of the *Charter*.

In considering the potential application of the *Charter* to the trial of 12 Melbourne men accused of terrorist-related offences under the *Commonwealth Criminal Code*, in particular the relevance of the right to a fair hearing under s 24, Bongiorno J stated:

Compliance with this provision would, of necessity, involve delay – perhaps considerable delay – which in the context of an application such as this would be at least inconvenient and perhaps even intolerable.

Section 35 of the Charter contains no severance provision, nor does it contain any urgency exception such as are found in s 78B of the *Judiciary Act 1903* (C'th). These are major impediments to the smooth operation of the Charter which need the urgent attention of the Legislature. The section needs to preserve a residual discretion in the judge to relieve a party from giving notice where to do so would unduly disrupt or delay a proceeding or for other good reason. This is, for obvious reasons, particularly important in criminal proceedings. Without such a power there is a real danger that the notice provisions of the Charter will be used to delay or even disrupt the orderly conduct of criminal trials.

In the event, Bongiorno J was able to determine the application without reference to the *Charter*, thereby avoiding any issues under s 35(1)(a). This approach also obviated any need for His Honour to consider whether the potential application of the *Charter* to a trial in federal jurisdiction raises any questions 'which require the issue of notices to all State Attorneys-General and the Federal Attorney-General pursuant to s 78B of the *Judiciary Act 1903* (C'th)'.

A detailed case note on the decision (*R v Benbrika & Ors* (Ruling No 20) [2008] VSC 80 (20 March 2008) at <http://www.austlii.edu.au/au/cases/vic/VSC/2008/80.html>) will appear in the next edition of the Bulletin.

Other Charter of Rights Developments

ACT Strengthens Human Rights Act

On 4 March 2008, the Legislative Assembly in the ACT passed the *Human Rights Amendment Act 2008*, amending the *Human Rights Act 2004* (ACT). Many of the changes made to the Act are modelled on Victoria's *Charter of Human Rights and Responsibilities Act 2006*. The amendments follow the report of a 12-month review into the ACT Human Rights Act's operation released in June 2006.

The most significant change is the broadening of the ACT Human Rights Act to impose a direct duty on public authorities to act and make decisions consistently with human rights. An exemption exists if public authorities are complying with any Commonwealth or Territory law which cannot be reconciled with the ACT Human Rights Act.

As in the Victorian Charter, public authorities are defined to include government agencies and authorities, as well as all entities performing public functions (eg private businesses providing public transport services).

Additionally, the ACT Human Rights Act as amended will provide a direct right of action for persons who consider they are a victim of a public authority acting inconsistently with human rights. They will be able to initiate Supreme Court proceedings challenging the act or decision of the public authority. This provision is based on the UK Human Rights Act, and does not appear in the Victorian Charter. The ACT Supreme Court will be able to grant any relief it considers appropriate if the action is successful, other than an award of financial compensation (unless the person has an independent right to damages).

Private corporations which do not act as public authorities may also voluntarily choose to be subject to the obligation to comply with human rights by making a request to the Minister.

The provisions relating to the obligations of public authorities do not commence operation until 1 January 2009, so that Government and public authorities have time to prepare for the introduction of these additional obligations.

The *Human Rights Amendment Act 2008* makes it clear that all ACT laws must be interpreted in a manner compatible with human rights, unless this is inconsistent with the purpose of the law (ie if the law intends to operate inconsistently with a particular human right).

The Human Rights Act now also contains a (non-exhaustive) list of factors which the Court can consider when determining whether a proposed restriction on a human right is reasonable. A similar provision is found in the Victorian Charter (s 7), and reflects the 'proportionality test' adopted in overseas jurisprudence regarding reasonable limitations on particular human rights.

Jonathan Kelp, Solicitor, and Rachel Guthrie, Articled Clerk, Human Rights Law Group, Mallesons Stephen Jaques

Proposed Charter of Rights for Tasmania on Hold Pending National Consultation

The newly appointed Attorney-General for Tasmania, David Llewellyn, has indicated that the Tasmanian Government will defer the enactment of the Charter of Rights proposed by the Tasmanian Law Reform Institute pending the outcomes of any national consultation about a Charter of Rights. The Attorney stated that he 'favoured a consistent approach across all states and Territories'. 'I will be discussing it with the Federal Attorney as I understand he is looking at the issue on a national basis,' he said.

Pressure Grows for Charter of Rights in NSW

Despite strong opposition from the NSW Attorney-General, John Hatzistergos, pressure is mounting for a community consultation regarding a NSW Charter of Human Rights. In a significant development, the NSW Bar Association has endorsed the adoption of a NSW Charter of Rights modelled on the Victorian Charter and the ACT *Human Rights Act*.

For further information and to support a NSW Charter of Rights, see www.nswcharterofhumanrights.org.

Victorian Charter Case Notes

Insulting Words and Behaviour in Public and the Right to Freedom of Expression

Ferguson v Walkley & Anor [2008] VSC 7 (31 January 2008)

Under ss 17(1)(c) and 17(1)(d) of the *Summary Offences Act 1966* (Vic), it is an offence to use insulting words and behave in an insulting manner in a public place. In this decision, Harper J held that these sections are subject to the decision in *Coleman v Power* (2004) 220 CLR 1 (that is, 'whether the impugned behaviour is so deeply or seriously insulting, and therefore so far contrary to contemporary standards of public good order, as to warrant the interference of the criminal law'). The Court held that, the effect of such an interpretation renders the provisions of the Summary Offences Act consistent with the right to freedom of expression enshrined in s 15 of the Victorian *Charter*.

Facts

Mr Ferguson was convicted of two charges under the Summary Offences Act. These charges arose out of two incidents in which he swore at the police, using insulting words in a public place contrary to s 17(1)(c), and behaving in an insulting manner in a public place contrary to s 17(1)(d). In the first incident, the police officers were called to attend at the Commercial Hotel, where Ferguson had refused to leave the premises. Upon leaving and walking onto the street, Ferguson yelled insults at the police officers for a period of five minutes, using phrases with the words 'f***', 'c***' and so on. The second incident occurred when the police officers attended Ferguson's residence after complaints were made about loud music, and Ferguson again used similar language.

Ferguson appealed to the Supreme Court of Victoria, arguing that the magistrate had erred on the ground that words are not 'insulting' within the meaning of the Summary Offences Act unless they are intended, or are likely, to provoke unlawful physical retaliation. Ferguson submitted that there could be no reasonable likelihood of unlawful retaliation since the words were directed at police; and that it must be assumed that the police would not retaliate unlawfully.

Decision

Justice Harper rejected Ferguson's submission, commenting that the same argument had been rejected by a majority of the High Court in *Coleman v Power*. His Honour also highlighted the inappropriateness of adopting a test based on the likelihood of retaliation by the victim, and adopted the test laid down by Gleeson CJ in *Coleman v Power*, that is, 'whether the impugned behaviour is so deeply or seriously insulting, and therefore so far contrary to contemporary standards of public good order, as to warrant the interference of the criminal law'. Based on this reason, Harper J then concluded that Ferguson's behaviour in each instance met those criteria and was thus contrary to the relevant provisions of the Summary Offences Act. Accordingly, the appeal was dismissed.

Relevance for the Victorian Charter

Justice Harper noted that criminalising offensive language or conduct has the potential to interfere with the rights protected by s 15 of the *Charter*. Section 15 enshrines the right to freedom of expression, which includes the 'freedom to seek, receive and impart information and ideas of all kinds'. His Honour made no further explicit reference to s 15, but commented on the potential effect of s 17(1)(c) of the Summary Offences Act on 'freedom of speech'. Harper J's conclusion was that Ferguson's swearing was devoid of intellectual content or value, and so the freedom of speech issue was not relevant in this case.

Regardless, s 15(3)(b) of the *Charter* recognises that 'the right may be subject to lawful restrictions reasonably necessary ... for the protection of national security, *public order*...[emphasis added]'. Under the test adopted, an offence occurs only where 'the impugned behaviour is so deeply or seriously insulting, and therefore so far contrary to contemporary standards of *public good order*, as to warrant the interference of the criminal law [emphasis added]'. Therefore, these provisions of the Summary Offences Act operate as examples of the lawful restrictions envisaged by the *Charter* itself.

The greatest challenge, and the greatest risk of injustice, in respect of the right to freedom of expression, lies with determining what level of behaviour is sufficiently 'contrary to contemporary standards of public good order'. On this point, Harper J observed that consideration of the particular

context is critical. For example, the use of personally offensive language in the course of a public statement of opinions on political and government issues would not of itself contravene the provisions. On the other hand, a contravention would occur where a 'mindless barrage of insults' is directed at police who are in the course of executing their duties, while other members of the public are present, such as in the present case.

No doubt the greatest difficulty will arise in cases that lie between these extremes. In each scenario, the right to freedom of expression needs to be balanced against any competing public interests. However, assuming appropriate consideration is given to the relevant factual context, this decision suggests that these provisions of the Summary Offences Act are not, *prima facie*, inconsistent with s 15 of the *Charter*. The decision is available at <http://www.austlii.edu.au/au/cases/vic/VSC/2008/7.html>.

Joseph Ip, Human Rights Law Group, Mallesons Stephen Jaques.

Applicability of the Charter to Acts and Decisions of Public Authorities Connected with a Judicial Proceeding

Guneser v Magistrates' Court of Victoria & Anor [2008] VSC 57 (5 March 2008)

In a recent decision of the Supreme Court of Victoria, Habersberger J considered the extent to which the rights protected under the Victorian *Charter* apply to the acts and decisions of public authorities that are connected with a judicial proceeding.

Facts

On 19 May 2003, a Melbourne taxi driver named Genco Guneser was involved in a violent altercation with two passengers over an unpaid fare. Four charges were laid against him in relation to this incident, each alleging indictable offences.

On 1 March 2006, the day of a contest hearing before the Magistrates' Court of Victoria, Mr Guneser dismissed his lawyers, leaving himself unrepresented. At the hearing, Mr Guneser was asked whether he consented to having the charges against him heard and determined summarily, pursuant to s 53(1) of the *Magistrates' Court Act 1989* (Vic). Mr Guneser repeatedly applied for adjournments in order to obtain legal advice on this issue. These applications were refused, but the matter was stood down on several occasions, enabling Mr Guneser to consult a Victoria Legal Aid duty lawyer. Ultimately, Mr Guneser did not consent to summary jurisdiction.

In May 2006, and after the receipt of new forensic evidence, two further charges were laid against Mr Guneser, including a charge of intentionally causing serious injury. This charge cannot be heard and determined summarily. A committal hearing took place in January 2007, as a result of which Mr Guneser was committed for trial in the County Court of Victoria on all six charges.

Mr Guneser initiated judicial review proceedings in the Supreme Court of Victoria, naming the Magistrates' Court and the police informant as defendants. Habersberger J interpreted Mr Guneser's application as seeking to either have:

1. the criminal proceedings permanently stayed, or
2. the charge of intentionally causing serious injury withdrawn or the order committing him for trial in the County Court quashed, and the remaining charges returned to the Magistrates' Court to be heard and determined summarily.

Decision

Mr Guneser's application did not make any explicit reference to the *Charter*. However, during oral argument, Mr Guneser repeatedly claimed that his rights had been infringed. In response, counsel for the police informant argued that the transitional provisions in s 49 of the *Charter* meant that it did not apply in respect of Mr Guneser's complaints.

Habersberger J held that he did not need to consider whether the rights contained in the *Charter* would apply to Mr Guneser's impending criminal trial in the County Court. Rather, the question before his Honour was whether the acts and decisions of:

1. the Magistrate before whom Mr Guneser appeared on 1 March 2006 (in refusing his applications for adjournments and determining that he had refused to consent to summary jurisdiction);

2. the police informant and the Office of Public Prosecutions on 24 May 2006 (in laying the additional charge of intentionally causing serious injury); and
3. the Magistrate before whom Mr Guneser appeared in January 2007 (in committing him for trial in the County Court);

-- were acts or decisions of public authorities that, pursuant to s 38 of the *Charter*, were required to be performed or taken compatibly with *Charter* rights.

Habersberger J held that the police informant and the Office of Public Prosecutions are public authorities for the purposes of the *Charter*. His Honour also held that a magistrate conducting a committal is acting in an administrative capacity, and hence is a public authority for the purposes of the *Charter* pursuant to s 4(1)(j).

Habersberger J doubted that a magistrate's decision to refuse an adjournment, or to determine that a defendant had refused to consent to summary jurisdiction, were decisions that were part of committal proceedings. It would follow from this that such decisions are not decisions of a public authority for the purposes of the *Charter*. However, his Honour held that he did not need to decide this question. (In fact, his Honour may have asked himself the wrong question on this point: the correct question under s 4(1)(j) may be whether a magistrate is acting 'in an administrative capacity' when considering an adjournment application, or when determining that a defendant has refused to consent to summary jurisdiction, regardless of whether these decisions form part of a committal proceeding.)

However, Habersberger J held that section 49(3) of the *Charter*, which provides that the obligations on public authorities do not apply to acts performed or decisions made before 1 January 2008, meant that the *Charter* could not be used to challenge the acts or decisions that were the subject of Mr Guneser's complaints.

Ultimately, Habersberger J rejected each of the grounds upon which relief was sought, and dismissed Mr Guneser's application.

Implications for the Victorian *Charter*

This decision clarifies that there are a number of acts and decisions connected with a judicial proceeding that are in fact acts and decisions of public authorities. These include acts and decisions of police informants and prosecutors to lay and prosecute charges, and of magistrates to commit defendants to stand trial for indictable offences. As a consequence, it is unlawful for police informants, prosecutors and magistrates to perform these acts incompatibly with, or make these decisions without giving proper consideration to, *Charter* rights.

Practitioners should note that s 38 the *Charter*, which imposes the relevant obligations on public authorities, commenced operation on 1 January 2008. Therefore acts and decisions connected with a judicial proceeding that were performed or taken on or after 1 January 2008 are subject to the *Charter* rights. It would appear to be immaterial that the relevant judicial proceeding to which the acts or decisions relate was commenced before 1 January 2008 (cf section 49(2) of the *Charter*).

The full text decision is available at <http://www.austlii.edu.au/au/cases/vic/VSC/2008/57.html>.

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Comparative Law Case Notes

Duties of Police Include Positive Action to Promote Right to Life

Smith v Chief Constable of Sussex Police [2008] EWCA Civ 39 (5 February 2008)

In this decision, the UK Court of Appeal held that a claim in negligence against the police for failing to protect life should have regard to the duties imposed and standards required by art 2 of the *European Convention on Human Rights*.

Facts

On 10 March 2003, Mr Smith was attacked with a claw-hammer by his former partner Mr Jeffrey and was seriously injured. Mr Smith alleged that he had repeatedly told the local police that Mr Jeffrey was threatening to kill him, and that the police took no appropriate protective action. Mr Jeffrey was convicted of causing grievous bodily harm.

Mr Smith was out of time for suing for breach of his convention rights pursuant to s 7 of the *Human Rights Act 1998* and instead brought a claim in negligence in the Brighton County Court against the Sussex Police. The key issues were whether the facts of the case disclosed a reasonable cause of action and whether the police arguably owed a duty of care to Mr Smith that required them to arrest Mr Jeffrey in order to protect Mr Smith. The Judge at first instance ruled that they did not. The Judge struck out the claim on the ground that there was no sufficient relationship of proximity between Mr Smith and the police, and his claim should not be entertained on public policy grounds.

Mr Smith appealed.

Decision

The Court of Appeal held that the case should not have been struck out as the claim was not doomed to failure and it was arguable that the police owed Mr Smith a duty of care. Furthermore, the Court should have had regard to the duties imposed and the standards required by art 2 of the *Convention* (the derivative obligation upon states to take reasonable steps to protect human life).

Mr Smith demonstrated to the Court of Appeal that the police had failed in its positive obligation to protect his life under art 2. The police should have been alerted by the evidence provided by Mr Smith, and arrested Mr Jeffrey promptly. Instead, Mr Jeffrey was left at large and permitted to carry out the attack which he had been threatening to make. This attack demonstrated that the police had done little or nothing to protect Mr Smith and accordingly his appeal was upheld and the action reinstated.

Lord Justice Pill, delivering the third judgment of the Court, added his view that there was a strong case for developing this common law action for negligence in the light of convention duties. In his view, it was appropriate to absorb the rights which art 2 protected into an action of negligence and a claim in negligence should, on appropriate facts, have regard to the duties imposed and standards required by the right to life under art 2. His Lordship was of the opinion that, in the circumstances, it was not appropriate to put a claim under art 2 and a claim in negligence in different compartments, each with its own limitation period.

Implications for the Victorian Charter

In the Victorian context this decision is significant for the interpretation and application of s 9 of the Victorian *Charter*, which enshrines the right to life. By imposing a positive obligation upon the police to protect life, the case reinforces common law and arguably establishes that the police owe a duty of care to protect individuals from attack. This case also demonstrates that the application of s 9 of the *Charter* can potentially strengthen a negligence claim.

The decision is available at <http://www.bailii.org/ew/cases/EWCA/Civ/2008/39.html>.

Ashleigh Ellis and Jason Pobjoy, Human Rights Law Group, Mallesons Stephen Jaques

Detention of Prisoners for Public Protection

Secretary of State for Justice v Walker [2008] EWCA Civ 30 (1 February 2008)

In this decision, the UK Court of Appeal found that there may be a breach of arts 5(4) and 5(1)(a) of the *European Convention on Human Rights* where a prisoner is detained for longer than is necessary for the protection of the public. These provisions may also be infringed where a prisoner is detained for a lengthy period without a meaningful review of the risk that they pose to the public.

Facts

The Secretary of State for Justice in the United Kingdom has a policy for the treatment of prisoners serving life imprisonment and indeterminate sentences for public protection ('IPPs'). One objective of this policy is to release such prisoners at the expiry of their minimum term (or 'tariff period'), if they can demonstrate that their continued detention is no longer necessary for the protection of the public. To have any prospect of being released, these prisoners need to attend offending behaviour programs, which are mostly available at First Stage lifer prisons. First Stage lifer prisons are typically for male adults whose escape would be dangerous to the public. Under the policy, detention at such a prison is the first of three stages of a life sentence.

The respondents, Mr Walker and Mr James, were both sentenced to IPPs, with tariff periods of less than five years. They were detained at a local prison and unable to move to a First Stage lifer prison, due to a lack of vacancies. As such, the respondents had no access to the courses needed to demonstrate that their release after the tariff expiry was justified.

The respondents argued that the conduct of the Secretary of State, in failing to provide for access to the programs, infringed, or was capable of infringing, their rights under arts 5(1) and 5(4) of the *Convention*.

Article 5(1) of the *Convention* prohibits the deprivation of a person's liberty. One exception to this prohibition is 'the lawful detention of a person after conviction by a competent court': art 5(1)(a). Under art 5(4), anyone who is deprived of their liberty is entitled to challenge the lawfulness of their detention, and to be released if their detention is not lawful.

Decision

European Court Jurisprudence

The Court first considered jurisprudence of the European Court of Human Rights, which has recognised that an indeterminate prison sentence can only be justified by art 5(1)(a) where it is necessary to protect the public. In such circumstances, art 5(4) requires a court to undertake periodic review to decide 'whether or not the detention remains justified'.

Domestic Jurisprudence

The Court then considered two domestic decisions involving alleged infringements of arts 5(1) and 5(4).

In *R (Noorkoiv) v Secretary of State* [2002] EWCA Civ 770, it was held that a delay of two months between the claimant's tariff expiry and parole hearing infringed his art 5(4) right, but not his art 5(1) right. The Court endorsed these findings, and observed that the detention of a *dangerous* prisoner will be justified under art 5(1)(a), even where it is not subject to periodic review that satisfies art 5(4). However, if a lengthy period passes without such a review, the detention may cease to be justified.

In *R v Secretary of State ex p Cawser* [2003] EWCA 1522, the Court held that the appellant's detention was justified under art 5(1)(a), despite a delay in arranging for him to attend a sex offender treatment program.

Application of Jurisprudence

First, the Court found that if the respondents remained in the local prison, the conduct of the Secretary of State would be likely to infringe art 5(4). This conduct prevented an assessment of whether their detention was necessary for public protection, and thereby gave them 'no realistic prospect of being released'. As such, a stage may be reached where the respondents have been prevented from 'making a meaningful challenge to the lawfulness of [their] detention'.

Second, the Court found that the respondents' art 5(1)(a) rights had not yet been infringed. Namely, their detention remained necessary for public protection, and had not yet become 'disproportionate or arbitrary'. The Court highlighted that non-compliance with art 5(4) 'will not, of itself, result in infringement of art 5(1)(a)'. However, it also suggested that 'the prevailing situation ... may ultimately ... result in infringement of art 5(1)'.

Implications for the Victorian Charter

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

The decision suggests that there may be a breach of ss 21(1), 21(3) and 21(7) of the *Charter* where a prisoner is detained for longer than is necessary for public protection. These provisions may also be infringed where a prisoner is detained for a lengthy period without a meaningful review of the risk that they pose to the public, such that their detention becomes 'disproportionate or arbitrary'.

The decision is available at <http://www.bailii.org/ew/cases/EWCA/Civ/2008/30.html>.

Brinsley Saw, Human Rights Law Group, Malleons Stephen Jaques

UK Court of Appeal Considers Balance between Media Freedom of Expression and Protection of Children's Privacy

Trinity Mirror & Ors, R (on the application of) v Croydon Crown Court [2008] EWCA Crim 50 (1 February 2008)

The UK Court of Appeal has held that the right to freedom of expression and the media's right to disclose the identities of convicted persons and report in the public interest may outweigh the interests of children of convicted persons and their right to privacy.

Facts

The case involved a man in the UK being charged with possession of child pornography. A question arose as to whether the defendant's identity could be suppressed in order to prevent harm to his children.

At the hearing of the defendant's pleading, no attempt was made to withhold the defendant's name from the published court list or in the court itself. Following the defendant pleading guilty to possessing child pornography, the judge adjourned the proceeding for a pre-sentence report. At the same time, the defendant's counsel successfully applied to the court to make an order that restrained the media from identifying him or his convictions, as to do so would identify his two daughters and they would be likely to suffer significant harm. Four months after the adjournment, the trial continued and the defendant's name was again published in the court list and referred to in open court. At the conclusion of the trial, a reporter unsuccessfully sought to have the suppression order discharged (the Court of Appeal described the basis of the trial judge's decision to decline to discharge the order as being to 'protect the children from the sins of their father').

The decision to not discharge the order was subsequently appealed to the Court of Appeal.

Decision

The Court of Appeal upheld the appeal, thereby permitting publication of the defendant's identity, on the basis that trial court lacked the jurisdiction to make an order to restrain the publication. However, of particular relevance to human rights, the Court of Appeal also held that it would have permitted such publication after balancing the defendant's children's art 8 rights (right to respect for private and family life) against the media's art 10 rights (freedom of expression) under the *European Convention on Human Rights*.

The Court of Appeal acknowledged that the decision engaged two conflicting principles: the protection and well-being of children on the one hand, and open justice in courts exercising criminal jurisdiction on the other. However, it argued that 'it is impossible to over-emphasise the importance to be attached to the ability of the media to report criminal trials', and that, unless there were exceptional circumstances, curtailing the principle of open justice by concealing the identity of those convicted of criminal offences would significantly erode public confidence in the criminal justice system.

Implications for the Victorian Charter

This decision is important for Victorian human rights law in relation to the balancing exercise of these competing rights; to date there has been no judicial consideration on balancing the right to freedom of expression under s 15 and the right to privacy under s 13 of the *Charter*.

Should the media wish to publish the identity of those convicted and sentenced for criminal offences (particularly serious offences such as those relating to child pornography), subject to any legislative restrictions, it is likely that Victorian courts will not prohibit them from doing so.

However, it is important to be mindful of s 24(3) of the *Charter*, which provides that all *judgments* and *decisions* made by a court or tribunal in either criminal or civil proceedings must be made public unless the best interests of a child otherwise requires, or a law other than the *Charter* otherwise permits (emphasis added).

There is no equivalent restriction on publication of judgments or decisions in either the *European Convention on Human Rights* or the UK *Human Rights Act 1988*.

Further, in relation to the Victorian media, there are legislative restrictions on publication by the media on 'accounts of proceedings' in the Family Court (*Family Law Act 1975* (Cth) s 121)) and 'proceedings'

in the Children's Court (or of a proceeding arising out of a Children's Court proceeding) (*Children, Youth and Families Act 2005* (Vic) s 534). However, as a general rule, the reporting of criminal proceedings in State courts is not restricted.

Following the Court of Appeal decision, there is a possibility that s 24(3) of the *Charter* could restrict the media from reporting the identity of a convicted person in a judgment or decision, as such a report could be contrary to the best interests of the convicted person's children.

However, should s 24(3) of the *Charter* be relied upon, exceptionally compelling reasons to restrain the media from identifying convicted persons that have children are required. Indeed, even after the Court of Appeal had accepted evidence – adduced on behalf of the children from their mother, their social worker, their headmistress and a consultant child psychiatrist – about the detrimental effect on the children should their father's identity be disclosed, the Court argued that there was nothing in the case to distinguish the plight of the defendant's daughters from that of a massive group of children of persons convicted of offences relating to child pornography.

The decision is available at <http://www.bailii.org/ew/cases/EWCA/Crim/2008/50.html>.

Steven Loh is a secondee lawyer in the Litigation Department at Corrs Chambers Westgarth

European Court Considers Meaning of 'Retrospective Punishment'

Kafkaris v Cyprus [2008] ECHR 21906/04 (12 February 2008)

The Grand Chamber of the European Court of Human Rights has recently considered the scope and application of art 7 of the *European Convention on Human Rights*, which provides that no person shall be subject to a 'heavier penalty than the one that was applicable at the time the criminal offence was committed'.

Facts

Mr Kafkaris was found guilty of three counts of murder by the Limassol Assize Court. Kafkaris was sentenced to mandatory 'life imprisonment' in respect of each count.

The prosecution sought clarification of the term 'life imprisonment' because of an inconsistency between the *Criminal Code*, which stated it was for the lifetime of the convicted person, and the *Regulations*, which stated it was for 20 years. The court held that the former was the case. However, upon his admission to prison, Kafkaris was given a written notice by authorities detailing the terms of his incarceration, including a conditional release date. The remission of his sentence had been assessed on the basis that it amounted to imprisonment for 20 years.

On 16 March 1998, Kafkaris applied for pardon or suspension of the remainder of his sentence so that he could care for his wife, who was suffering from leukaemia. This request was refused. The date of his intended release was further postponed to 2 November 2002, because of an offence committed while in prison. However, he was still not released on this date. Consequently, on 8 January 2004 he submitted a writ of *habeas corpus* to the Supreme Court challenging the lawfulness of his detention. His application was dismissed on 17 February 2004.

Kafkaris lodged a complaint with the European Court in June 2004 which was declared admissible in April 2006. In August 2006, the Chamber relinquished jurisdiction in favour of the Grand Chamber.

Decision

Article 7 provides, in part, that a heavier penalty cannot be imposed on a person than the one applicable at the time the offence is committed. The European Court considered, however, that it cannot be read in a way that outlaws the gradual clarification of the rules of criminal liability through judicial interpretation, so long as the development is consistent with the essence of the offence, and is reasonably foreseeable.

The Court further considered that an assessment of whether a penalty breaches art 7 requires consideration of its nature and purpose; its severity; its characterization under national law; procedures involved in its making and implementation; and whether it is imposed in response to a criminal offence. The Court drew a distinction drawn between a penalty and enforcement of the penalty.

At the time Kafkaris committed the offence, premeditated murder carried a sentence of life imprisonment. According to the existing Cypriot case law, this meant the biological life of the prisoner. However, at the time of his incarceration, executive and administrative authorities were operating under the premise that the penalty was tantamount to 20 years' imprisonment. The European Court concluded that at the time he was found guilty of the murders Cypriot law was insufficiently precise to enable Kafkaris to discern, even with appropriate advice, the scope of the penalty and the manner of its execution. Therefore there was a violation of art 7 in this respect.

The Court stated that the fact that Kafkaris no longer has a right to have his life sentence remitted relates to the manner of execution of the sentence, rather than the penalty imposed on him. Where the nature and purpose of a measure relates to the remission of a sentence or a change in a regime for early release, this does not form part of the penalty within the meaning of art 7. The Court considered, therefore, that there had not been a violation of art 7 of the Convention in this regard. While it is true that changes in prison legislation and the conditions of release rendered his imprisonment harsher, they cannot be construed as imposing a heavier penalty than that imposed by the trial court.

Justice Borrego Borrego offered a sharply critical dissent of the European Court's 'Ivory Tower' reasoning as regards art 7. He stated that Kafkaris is the victim of discriminatory treatment relative to all other Cypriot criminals, many of whom were also incarcerated under life sentences and who were released after 20 years. He claims that the reason for Kafkaris's continued incarceration is his inability or unwillingness to identify the powerful citizen who masterminded the murder, who remains at large.

Justices Loucaides and Jočienė also dissented on the issue of retrospective imposition of a heavier penalty. They note that the philosophy of art 7 is geared toward preventing abuses by the State, and its basic scope and objective is to prohibit the retrospective effect of criminal legislation such as that witnessed in the case of Kafkaris.

Relevance to the Victorian Charter

The terms of s 27(1) and (1) of the *Charter* are very similar to those of art 7(1) of the *European Convention*. As such, this case proves illustrative of the type of complex factual matrix that would bring the *Charter* into effect. Section 27(3) of the *Charter* goes beyond the provisions of art 7 and provides greater clarity than the Convention in situations where a penalty is reduced *after* a person has committed an offence, but *before* sentencing has taken place.

It should be noted that recent press reports indicate that Kafkaris is seeking to take the case to the UN Human Rights Committee, so further clarification of the principles in this case may emerge in the future.

The case is available at:

<http://cmiskp.echr.coe.int/tkp197/viewbkm.asp?sessionId=5451013&skin=hudoc-en&action=html&table=F69A27FD8FB86142BF01C1166DEA398649&key=68298&highlight=>

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HRLRC Policy Work

UN Human Rights Council Considers Report on Right to Health of Prisoners and Asylum-Seekers in Australia

The UN Special Rapporteur on the Right to Health, Professor Paul Hunt, has recently tabled his report before the 7th Session of the UN Human Rights Council. Among other matters, the report provides a summary of communications sent by the Special Rapporteur to governments regarding alleged or possible violations of the right to health. Prior to publication of the report, these communications are confidential as between the Special Rapporteur and the government concerned. The report discloses that, during 2006/07, the Special Rapporteur sent two communications to the Australian Government, both of which resulted from advocacy and information provided by the Centre.

In one communication, the Special Rapporteur expressed concern about allegations that a number of persons detained in connection with alleged terrorist-related offences 'were subjected to periods of extended solitary confinement, had extremely limited and restrictive visitation rights, and were allowed outside of their cells for a very limited time each day'. He also raised allegations that 'there was an overall lack of access to adequate health care and particularly mental health care in Victorian prisons'

and that 'the conditions of confinement had a deleterious effect on the mental health of some of the detainees'.

In the second communication, the Special Rapporteur expressed concern regarding the access to health care of individuals holding a Bridging Visa E, as well as the enjoyment of the right to health of asylum seekers in detention centers in Australia.

In both cases, the Special Rapporteur urged the government to respond promptly to his communications and to take all steps necessary to redress situations involving the violation of the right to health.

The Special Rapporteur's Report is available at

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/7session/A.HRC.7.11.Add.1.doc>

Centre Urges Australian Government to Support Negotiation of *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*

The Centre has written to the Attorney General, the Hon Rob McClelland MP, calling on the Australian Government to strongly support the negotiation and adoption of an effective, comprehensive complaints and inquiries mechanism for the *ICESCR*. The UN Working Group on the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* is meeting in Geneva from 31 March to 4 April 2008 to further negotiate the text of this draft instrument. The Working Group is aiming to finalise negotiation of the text by December 2008 to coincide with the 60th anniversary of the *Universal Declaration of Human Rights*.

The *OP to ICESCR*, in its present draft form, would provide individuals and groups with a means to seek and obtain a remedy for violations of their economic, social and cultural rights at the international level, where they are denied one domestically.

The Centre is concerned about proposals, however, for an 'à la carte' approach to rights protection under the *OP to ICESCR* pursuant to which governments could pick and choose which rights would be justiciable. The Centre urged the Australian government to reject such a proposal. An 'à la carte' approach would significantly diminish the universality of human rights and undermine the principle of equal recognition and effective protection of economic, social and cultural rights.

HRLRC Casework

Education and Dignity for Children with Disabilities

The Centre is working with the Disability Discrimination Legal Service and Blake Dawson to ensure that children with intellectual disabilities are provided with adequate access to educational opportunities and are treated with fairness, dignity and respect. The Centre considers that a range of practices, including the use of restraints, may raise issues under the *Charter*, including in relation to s 13 (right to privacy) and s 17 (protection of families and children).

Centre Continues Advocacy on behalf of Australian Man Deported to Sweden

The Centre continues to work on the case of a man deported to Sweden on the basis of his criminal record, much of which related to when he was a minor and a ward of the State. The Centre took an individual communication to the UN Human Rights Committee and has now received the Australian Government's response.

In its response the Government asserted that despite the fact that Mr Nystrom arrived in Australia when he was 27 days old and had lived his whole life here, including some time in State care, Australia is *not* his 'own country'. They went further saying that removing him to a country where he does not speak the language or understand the culture is proportionate and in accordance with community expectations. Finally, it argued that his removal is not an infringement on his right to family despite the effect being ongoing separation from his mother, sister and two nephews. The Centre is now preparing a response.

Seminars and Events

Defending Human Rights

with Hina Jilani, UN Special Representative on Human Rights Defenders

The University of Melbourne Human Rights Forum's International Visitor for 2008, Hina Jilani, will be delivering a public lecture on the role of human rights defenders in promoting the international human rights framework. Ms Jilani is the Special Representative of the UN Secretary-General on Human Rights Defenders. She is an advocate of the Supreme Court of Pakistan and founder of the Women's Action Forum, the first legal aid clinic in Pakistan, and the Human Rights Commission of Pakistan. Ms Jilani was a member of the International Commission of Inquiry on Darfur established by the UN Security Council and the United Nations Expert Group on Darfur.

Date: 6.00pm (refreshments), 6.30pm-7.30pm (lecture) on Tuesday 1 April 2008

Venue: Melbourne Law School, 185 Pelham St, Carlton

RSVP: human-rights@unimelb.edu.au by Thursday, 27 March 2008 with 'Jilani' in the subject line.

Lawyers as Defenders of Human Rights

A Dialogue with Hina Jilani, UN Special Representative on Human Rights Defenders

The LIV Administrative Law & Human Rights Section, in partnership with the University of Melbourne Human Rights Forum, is proud to present a dialogue between Hina Jilani, UN Special Representative on Human Rights Defenders, and Brian Walters SC, former President of Liberty Victoria.

With a wealth of personal experience, Ms Jilani will provide a valuable insight into the sometimes dangerous role that lawyers play in other countries, where democracy may be fragile at best. The dialogue will explore the situation of lawyers in Pakistan and the role of lawyers as human rights defenders, offering a unique opportunity to hear from a highly respected expert in this field.

Date: 1:00-2:00pm on Thursday, 3 April 2008

Venue: LIV, 470 Bourke Street, Melbourne

Cost: \$10 LIV Members; \$20 Non-members (sandwich lunch included)

RSVP: By Tuesday, 1 April 2008 at http://www.liv.asn.au/events/calendar/20080403_Defenders.html

Human Rights Resources

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:

- Sir Gerard Brennan, 'The Constitution, Good Government and Human Rights', Paper delivered at Human Rights Law Resource Centre Seminar, Melbourne, 12 March 2008
- Pamela Tate SC, 'Protecting Human Rights in a Federation' (2008) 33 *Monash University Law Review* 217
- Chief Justice Spigelman, 'Statutory Interpretation and Human Rights', Second Lecture in the 2008 McPherson Lectures, Brisbane, 11 March 2008.

Human Rights Jobs

Human Rights Lawyers with Victorian Government Solicitor's Office

The VGSO is seeking applications for the positions of:

- Human Rights Researcher (to provide research and analysis on human rights issues, and draft written advices and research memoranda); and
- Human Rights Solicitor (to assist with the conduct of litigation relating to the exercise of governmental powers, with a particular focus on constitutional and human rights law).

Applications close 31 March 2008. For further information, see <http://www.vgso.vic.gov.au/working/vacancies.aspx>.

Grants and Programs Officer with R E Ross Trust

The R E Ross Trust seeks a full-time Grants and Programs Officer to:

- develop and implement a Small Grants Program to assist organisations to prepare a prospectus using the Ross Trust publication *Inviting Investment in Social Enterprises: A Prospectus Framework for the Social Sector*;
- prepare a Communications Strategy for the Ross Trust, drawing on media team australia's *Six Steps to Effective Communication* and draft the Trust's Annual Report;
- discuss potential grant applications with enquirers and provide guidance in accordance with the Ross Trust's Grant Guidelines;
- undertake research into grant applications;
- contribute to the management of Ross Trust Programs and Collaborations; and
- provide secretariat services at significant meetings.

The role requires tertiary qualifications, work experience and a person with strong interpersonal skills, sound problem-solving ability, very good oral and writing skills and who enjoys a hands-on working environment as part of a small, dedicated team.

Working days and hours are flexible as agreed with the Executive Officer. Some travel within Victoria may be required.

A competitive remuneration package will be offered dependent upon the qualifications, experience and skills of the successful candidate.

For further information, see www.rosstrust.org.au or contact Sylvia Geddes, Executive Director, on sgeddes@rosstrust.org.au or (03) 9690 6255.

If I Were Attorney-General...

Human Rights in the Northern Territory

If I were appointed Attorney General of the Northern Territory, my first day on the job would go something like this ...

In the morning, I would set about establishing a Northern Territory law reform commission. The law reform commission would enquire into issues and matters that were referred by the Attorney General, and would make recommendations for legislative reform.

I would refer two initial matters to the law reform commission for enquiry.

The first would be a review of the legislative requirements relating to the conduct of police investigations in the NT. In particular, the review would examine whether the existing legislative requirements relating to police investigations afford persons being questioned the right to legal representation and adequately protect the right to silence.

In the NT, there is currently no legislative requirement for police to ask a person who is in custody, and the subject of a police investigation, whether they would like to speak to a lawyer before they are questioned. In most other states in Australia, such a requirement does exist.

The right of a person charged with an offence to legal representation is contained in art 14 of the *International Covenant on Civil and Political Rights*. The Human Rights Committee has held that art 10 of the *ICCPR*, which relates to the rights of persons in detention, encompasses a more general right to legal representation for persons in detention.

This right to legal representation is largely diluted if there is no requirement for police to clearly inform an accused person about the existence of the right and, where the accused person chooses to exercise that right, facilitate access to legal representation by assisting the person to contact legal aid.

The same enquiry would also look at the adequacy of the existing safeguards on the right to silence. In particular, the law reform commission would report on the effectiveness and cultural appropriateness of

the current police caution. Judicial officers and practitioners in the NT have acknowledged the problems associated with the police caution. Aboriginal interpreters have noted that it can be difficult to translate the caution in its current form. This is because the caution is inherently counterintuitive - a police officer commences an interview by telling the interviewee that they do not have to answer any questions; the same police officer then proceeds to ask the interviewee a series of questions. There are concerns about whether this is a clear and culturally appropriate way of informing a person of their right to silence. The law reform commission would be tasked with exploring more effective ways of informing people, particularly Indigenous people, of their right to silence.

The second enquiry that I would refer to the law reform commission would involve a review of current sentencing practices in the NT, an examination of the adequacy of existing sentencing options and consideration of alternative sentencing programs. In particular, the enquiry would include a review of the frequency with which court fines are imposed on offenders in the NT, and the effectiveness of court fines as a non-custodial sentence for disadvantaged persons.

With the wheels in motion on the establishment of the new law reform commission, I would meet with the Minister for Health and Community Services over a late lunch to discuss the urgent need for funding to be directed to drug and alcohol rehabilitation services. In particular, we would discuss the need to match live-in rehabilitation programs with services to assist people transitioning out of those live-in programs. I would raise the need for places to be available in rehabilitation services for offenders referred through the court process.

I would hurry to a meeting with the Minister for Housing, and a discussion about the interaction between our respective portfolios. I would seek clarification on the steps that are being taken to address housing standards in Aboriginal communities, as well as the chronic shortage of transitional and emergency accommodation in the NT. We would also discuss the low numbers of applications to the Commissioner of Tenancies by Aboriginal people in remote communities seeking to enforce their rights under the *Residential Tenancies Act*. I would propose to provide increased funding to the Commissioner of Tenancies to outreach to communities to undertake community education about the rights and obligations of tenants and landlords.

I would return to my office tired, but quietly pleased with the progress made in my first day as Attorney General. There I would find, printed out and waiting on my chair, a funding application from the Human Rights Law Resource Centre. The application would request funding to provide human rights training to lawyers, government employees and service providers in the Northern Territory. I would read the application with approval and place it on the top of my list of action items for day 2.

As I cycled home, I would think to myself: 'A human rights law resource centre. What an excellent idea. Wouldn't it be great if we had one of those in the NT ...'

Beth Midgley is a lawyer with Blake Dawson on secondment to the North Australian Aboriginal Justice Agency in Katherine, Northern Territory