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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

Human Rights are Common Sense

Victoria's *Charter of Human Rights and Responsibilities* has now been in force for three months. Although it is too early to evaluate the *Charter's* impact, some early insights and reflections are timely.

UK *Daily Times* columnist Melanie Phillips (*The Age*, 21 March 2007) would have us believe that Victoria has enacted a 'judicial delivery system for cultural Marxism'. Conservative politicians and commentators made similarly dire predictions prior to the *Charter's* commencement, deriding it as a 'monstrous attack' on democratic traditions that would empower minority groups and left-wing judges. Meanwhile, the *Charter's* proponents describe it as landmark legislation that will strengthen democracy, promote accountability, and ensure respect for fundamental rights and freedoms.

So what do the first three months of the *Charter* – and the first six years of the UK *Human Rights Act* on which it is based – tell us about its likely impact and implications?

First, the *Charter* is likely to improve public services. A recent evaluation of the UK Act undertaken by the Lord Chancellor found that human rights have exerted a 'powerful', 'positive and beneficial' impact on the development and delivery of public policy and services. Services are required to be – and have become – more consumer-focused, integrated and efficient. A human rights focus has also led to 'better public service outcomes'. The review concluded that 'the Act has led to a shift away from inflexible or blanket policies towards those which recognize the circumstances and characteristics of individuals'. In other words, the Act has made services more responsive to human than bureaucratic needs.

A second reflection from the UK is that the *Charter* will not transfer power from the legislature to the judiciary. The Lord Chancellor's review found that the UK *Human Rights Act* has not significantly altered the constitutional balance between the legislature, the executive and the judiciary.

Thirdly, and perhaps most importantly, the UK experience tells us that the *Charter* will enhance decision-making processes across all levels and arms of government. The *Charter* requires that parliament consider and report on the compatibility of proposed legislation with human rights. It requires that public authorities give 'proper consideration' to, and act compatibly with, human

rights. It requires that the courts interpret legislation consistently with human rights unless it is clear that parliament intended otherwise. The value of these mechanisms is that, where applicable, decisions must now be made having regard to explicit and transparent standards and values. Moreover, these standards and values are universal and agreed: the right to life; to be protected from discrimination; not to be tortured; to liberty; to a fair trial; to freedom of thought, expression and assembly; to respect for privacy and family life. No reasonable person would contest the importance and validity of these rights. That is not to say that the *Charter* will spell the end of bad public decisions, whether by the parliament, public authorities or the courts. As before the enactment of the *Charter* there will be good decisions and bad decisions and both will be sought to be justified.

In Victoria, the *Charter* has featured prominently in relation to one proposed Bill and one judicial decision to date. Parliament considered the *Charter* in the context of the Major Events (Aerial Advertising) Bill, which seeks to circumscribe 'aerial ambush marketing at major events in Victoria' by making it an offence to display commercial aerial advertising without authorization. The responsible Minister concluded that while the Bill does restrict the right to freedom of expression, that limitation is reasonable and proportionate and therefore compatible with the *Charter*. Similarly, in the recent decision of *R v Williams*, the Supreme Court held that while the *Charter* may enshrine a right to legal representation in certain circumstances, this does not require that a trial be stayed for over six months until the defendant's lawyer of choice is available.

In the UK, recent court decisions have held that, in certain circumstances the right to life requires that hospitals are under an obligation to provide life sustaining treatment where it is in the best interests of the patient. They have held that the right to freedom from cruel treatment requires authorities to act to prevent children in a family from ongoing abuse and neglect. And they have held that the right to family required that an elderly couple who had been married for over 30 years and who were separated and moved to different care homes be reunited and enabled to live together.

These are common sense decisions. They may or may not have been made with the same outcome without the *Charter* or the UK *Human*

Rights Act. What is fundamentally different, however, is that the decisions are now made in a way that is more transparent and accountable. They are justified by explicit reference to human rights rather than implicit or even unacknowledged reference to vague notions of 'public interest', 'public policy' or even personal interests and prejudices. Perhaps that is why human rights so affront conservative politicians and commentators like Phillips.

Philip Lynch is Director of the Human Rights Law Resource Centre

NEWS

Children's Rights: New General Comment from UN Committee on Rights of Child Supports a Comprehensive Approach under the Charter

Children's rights must be considered in a 'comprehensive', holistic way, not as a collection of discrete provisions, the UN Committee on the Rights of the Child suggests in its recently-released General Comment 10 on Children's Rights in Juvenile Justice.

The key international law instrument protecting children's rights is the *UN Convention on the Rights of the Child* of 1989. With 193 ratifications, it is the most widely-adopted international human rights instrument to date. The Convention has had a significant effect on Australian law through legislation and the actions of the federal and state equal opportunity commissions. However, this implementation has been somewhat piecemeal.

This might be about to change. For two key reasons related to the recently enacted Victorian *Charter of Human Rights and Responsibilities*, the Convention, and the comments on it, might have a much greater legal effect. First, s 32(2) of the Charter provides that the Convention and the General Comment, like other treaties and the statements of other key human rights agencies, may be an important resource for interpreting Victorian law. Statements like the General Comment not only make concrete statements as to how certain rights must be applied, they also inform the philosophy behind the Charter. Second, s 44(2)(a)(ii) of the Charter suggests

more of the Convention on the Rights of the Child may be adopted after a future review.

Specific Rights of Children in the Charter

There are three sections of the Charter that specifically provide for children's rights. Section 17(2) provides that every child has the right to the protection he or she needs by reason of being a child. Overseas, similar provisions have been used extensively in family law situations.

Sections 23 and 25(3) provide for specific rights for children in criminal proceedings, including separate detention before trial, rapid onset of trial, and appropriate treatment after conviction. It is here that we can see the effects of s 32(2) of the Charter, as General Comment No 10 explains not only the rationale behind a right such as appropriate treatment after conviction (putting children in detention facilities with adults 'compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate'), but also provides concrete ways to implement the right (amongst other things, children are supposed to be given time with their peers to encourage social integration, should have access to education, and require particular oversight).

While it does not explicitly refer to children, s 8 of the Charter may also have a great bearing on children's rights. Section 8 provides a suite of rights relating to non-discrimination. The definition of 'discrimination' in the Charter is linked to the definition found in s 6 of the *Equal Opportunity Act 1995 (Vic)*, and must be discrimination on the basis of one of the attributes laid out in that Act. One of these attributes is 'age'. Most of the relevant case law concerns older citizens, but this does not mean that children are not included. This means that s 8 prevents discrimination based on status as a child.

The Hidden Right: Non-discrimination against Children

As s 8(2) explicitly provides, human rights, such as those in the Charter, are to be accorded without discrimination to all people. That means that every Charter right has an in-built application to children. For example, s 15, which guarantees freedom of expression, must be applied to children without discrimination and this might have a bearing on laws touching on juvenile delinquency, among others.

Interestingly, the General Comment touches on questions like these, noting that the discriminatory application of rights when children are concerned continues to be an issue, and warning against 'inadvertent discrimination', which we generally call indirect discrimination.

As s 8 has no explicit limiting language, any law that discriminatorily impacts on the rights of a child can therefore be preserved only by s 7(2).

Conclusion

The aim of the Charter is to integrate human rights more closely into Victorian law. We will see many similar pronouncements from international agencies and many judgments of international courts in future, and they will certainly have an effect on the philosophy behind and the concrete manifestations of the Charter rights.

The General Comment emphasises the importance of a comprehensive, holistic and integrated approach to children's rights in juvenile justice, and this could very well be the view taken of the similar rights in the Charter.

The General Comment is available at <http://www.ohchr.org/english/bodies/crc/comments.htm>.

Paul Lamb is an Articled Clerk with DLA Phillips Fox

Women Prisoners in Victoria: The Role of the Victorian Equal Opportunity and Human Rights Commission

In May 2005, the Victorian Equal Opportunity and Human Rights Commission (then the Equal Opportunity Commission of Victoria) was requested to undertake a systemic investigation into discrimination against women in prison. After a preliminary examination of the issues raised, the Commission determined that it would not seek the approval of the Attorney-General to undertake a formal inquiry, but instead, pursuant to its powers to undertake education and research, would endeavour to work with Corrections Victoria ('CV') and a number of other stakeholders to audit the delivery of services to women prisoners against a human rights framework. The conclusions of the Commission's consideration of the request for an investigation were presented to

representatives of the Federation of Community Legal Centres ('Federation of CLCs'), the Victorian Council of Social Services ('VCOSS'), the Corrections Inspectorate of the Department of Justice and Corrections Victoria ('CV'), in December 2006.

The report concluded as follows:

After assessing the allegations of discrimination in the Submission and conducting preliminary research on the issues, the Commission on 6 February 2006 decided not to seek the Attorney-General's consent to conduct a formal investigation into systemic discrimination against women in Victorian prisons. Instead the Commission has decided to call upon Corrections Victoria to perform an audit of the infrastructure, policies and procedures applying to women in prison to ensure compliance with anti-discrimination obligations under the Act, and to consult with the Commission in the framing and monitoring of the audit.

The decision to decline to seek the Attorney-General's consent to conduct a formal investigation into systemic discrimination does not in any way detract from the seriousness of the allegations in the submission...[T]he Commission has a preliminary view that a substantial number of the allegations, if accepted at face value, disclose discrimination against women prisoners primarily on the grounds of sex, disability, and/or race in the provision of services by CV. Some of these allegations suggest that discrimination may be of a systemic and serious nature.

The Commission's decline was based on the belief that:

- *CV has embarked on a range of initiatives that aim to improve the delivery of correctional services to women, and*
- *a collaborative approach between CV and the Commission toward the development and implementation of an audit tool would be potentially more effective in tackling any policies, practices or facilities that may systemically discriminate against women prisoners.*

The Commission further believes that in order to maximise the opportunity for effective and solution-based results, the audit should also take into account International Human Rights standards applying to prisoners.

It is recommended that this audit be conducted in association with the Better Pathways strategy which amongst other initiatives,

commits to the development of a policy framework for the delivery of correctional services for women. Such an audit should incorporate anti-discrimination standards into this framework to guide the development and delivery of correctional services for women. The Better Pathways strategy promises to develop measures that will address the areas of prisoner classification, prison disciplinary processes, the use of force, health services, strip-searches, education and occupational programs, and the needs of women with children, Indigenous women, CALD women and women with disabilities. In developing these measures the Commission believes that CV should review all areas for compliance with anti-discrimination law and introduce measures that will ensure the elimination of discrimination.

The Commission seeks to be involved in the development of an audit tool for CV by providing advice on the anti-discrimination and human rights principles that will form the framework of the audit. It also seeks to monitor the implementation of the audit, and have the capacity to publicly report on progress and developments arising from the audit.

The Commission has decided not to seek the Attorney-General's consent for a formal investigation at this stage on the basis that an audit will be undertaken that includes the following characteristics:

- *The capacity to identify the measures necessary to eliminate and avoid discrimination in the infrastructure, policies and procedures applying to women in prison;*
- *Independence;*
- *Informed by expert advice in relation to the application of anti-discrimination and human rights principles;*
- *Transparency in terms of its formulation, implementation and findings; and*
- *Publicly available findings.*

The final extent of the Commission's role will of course depend on available resources and whether CV adopts our recommendations.

CV has displayed a strong commitment to recognizing the human rights of women in prison through its implementation of the Better Pathways strategy and other initiatives. It is in acknowledgment of this commitment that the Commission seeks a collaborative approach

rather than a formal inquiry. The Commission's aim is to assist in building upon and developing Correction's initiatives so that discrimination against women in prison may be avoided.

The Response to the Report

At the meeting in December 2006, the Commission was formally advised by CV that it refuted the allegations of discrimination made in the report, and further that the Department of Justice was unable to accept the Commission's proposed terms for a human rights audit. The Commission insisted in subsequent correspondence with CV that the audit should be transparent and supervised by an advisory committee which should incorporate external stakeholders. The Commission also requested that it be briefed on the progress of the audit and that the outcome of the audit should be publicly available.

The Corrections Inspectorate confirmed that it will continue with the Healthy Prison survey and will taken into account the Commission report in identifying further surveys particularly as they relate to women prisoners.

CV reported that it will undertake an audit of all of its activities against the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter'), in line with the responsibility of all public authorities.

Where to from Here?

The Commission has forwarded the report to all of the stakeholders, including the Minister for Corrections, the Attorney-General, Ombudsman Victoria, and the Victorian Institute of Forensic Mental Health. A meeting was also held with representatives from the Federation of CLCs and VCOSS in February 2007 to discuss the report.

The Commission report is now a matter of public record, and consistent with its educative powers, will be used by both the Commission and stakeholders to ensure that the situation of women prisoners is not ignored. CV, along with all other public authorities, is preparing for the full operation of the Charter, which not only reinforces the existing prohibitions on discrimination, but also requires compliance with a far broader range of human rights norms that are directly applicable to the issues raised by the Federation of CLCs and VCOSS.

The Commission has a specific reporting power under the Charter (s 43). It is anticipated that the first report will be presented to the Attorney-

General early in 2008, and will report on the strategies being implemented by public authorities (including CV), to comply with the Charter's positive obligations from 1 January 2008.

A full copy of the report can be found at <http://www.humanrightscommission.vic.gov.au/publications/reports>.

Dr Helen Szoke is Chief Conciliator/Chief Executive Officer of the Victorian Equal Opportunity and Human Rights Commission

VICTORIAN CHARTER OF RIGHTS DEVELOPMENTS

Victorian Parliament Considers First Statements of Compatibility

Although the *Charter of Human Rights and Responsibilities 2006* (Vic) only came into force, in part, on 1 January 2007, already its impact can be observed at the initial phases of Parliamentary law-making.

Pursuant to s 28 of the Charter, all new Bills that are introduced into Parliament must be accompanied by a Statement of Compatibility. This Statement must outline whether, and how, the Bill is compatible with the Charter and, if it is not compatible, the nature and extent of the incompatibility and whether the incompatibility can be justified by s 7(2) of the Charter. Since 1 January 2007, approximately nineteen Statements of Compatibility have been tabled before Parliament.

Of the Statements that have been tabled before Parliament, four identified rights protected by the Charter that were relevant to the respective Bills, and one Statement identified a right protected by the Charter that was justifiably limited in accordance with s 7(2).

The Nuclear Activities (Prohibitions) Amendment (Plebiscite) Bill 2007 was considered to be compatible with s 18 of the Charter in that it 'enhances' the right to participate in conduct of public affairs). The Statements of Compatibility made in respect of the Legal Profession Amendment Bill 2007 and the Gambling and Racing Legislation Amendment (Sports Betting) Bill 2007 identified the right to privacy and reputation (s 13) as potentially being impacted upon by the respective Bills. The Statement for the Livestock Disease Control Amendment Bill 2007 identified the human rights of freedom from forced work (s 11) and protection of

property rights (s 20) as potentially affected by the Bill. However, the Statements concluded that the human rights identified were not in any way unlawfully or arbitrarily interfered with, or were not limited, and therefore s 7(2) was not engaged, or discussed. Each of these Statements concluded that the respective Bills were compatible with the Charter.

The Major Events (Aerial Advertising) Bill 2007 'requires commercial aerial advertising at specified events to be authorised, and makes it an offence to undertake unauthorised commercial aerial advertising in airspace within sight of the venues for those events'. In respect of this Bill, the Statement of Compatibility highlighted two human rights under the Charter that are potentially impacted upon: namely, freedom of expression (s 15) and property rights (s 20). In relation to the right of an individual not to be deprived of his or her property, the Statement considered that the deprivation of property in the circumstances outlined in the Bill 'is not arbitrary and is undertaken in accordance with the law'. Therefore, whilst 'relevant' and 'requiring consideration' the human right relating to property in s 20 of the Charter 'is not limited, restricted or interfered with' by the Bill and a s 7(2) analysis was not required. However, the essential right to freedom of expression, including commercial advertising, was considered as being limited by the Bill and an examination of the limitation was undertaken in accordance with s 7(2). The Statement of Compatibility considered that there was 'a rational and proportionate relationship between the limitations imposed by the Bill and the purpose of its limitation' and concluded that the Bill was compatible with the Charter.

To access current statements of compatibility go to <http://www.dms.dpc.vic.gov.au/> (search under 'Bills' icon).

Other useful websites are:

- <http://www.parliament.vic.gov.au/sarc/default.htm> (search under 'Alert Digests' icon)
- <http://tex.parliament.vic.gov.au/bin/texthtmlt?form=VicHansard.adv> (search Hansard)
- <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Your+Rights/Human+Rights/>
- <http://www.humanrightscommission.vic.gov.au/human%20rights/>

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ACT Supreme Court Considers Interpretative Provision of *Human Rights Act 2004 (ACT)*

Capital Property Projects (ACT) Pty Ltd v Planning and Land Authority [2006] ACTSC 122 (15 December 2006)

The ACT Supreme Court has recently considered the application of s 30(1) of the *Human Rights Act 2004 (ACT)*, which provides that, 'In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.' The Victorian *Charter of Human Rights and Responsibilities 2006* similarly provides, at s 32(1), that 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.'

In *Capital Property Projects (ACT) Pty Ltd v Planning and Land Authority*, the ACT Supreme Court endorsed the approach adopted by the UK House of Lords in *Ghaidan v Godin-Mendoza* [2004] AC 557 to the so-called 'interpretative principle' enshrined in the equivalent s 3 of the UK *Human Rights Act 1998*. In that case, the House of Lords held that, subject to not unduly 'straining' the meaning and purpose of legislation, the interpretative principle may involve the 'reading down' of express provisions and also the implication (or 'reading in') of provisions to ensure human rights compatibility. It requires that, as a matter of law, a human rights consistent interpretation be adopted whenever it is possible to do so, regardless of whether there is any ambiguity and regardless of how the provision in question may have been previously interpreted and applied. The ACT Supreme Court quoted approvingly from the decision of Lord Nicholls of Birkenhead in *Ghaidan* where he stated (at 571):

the interpretive obligation decreed by section 3 is of an unusual and far reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear.

The decision of the House of Lords in *Ghaidan* was also endorsed by the ACT Court of Appeal in *Kingsley's Chicken Pty Ltd v Queensland Investment Corporation and Ors* [2006] ACTCA 9, [52].

If this approach is followed in Victoria, it is likely that s 32(1) of the Charter will be, in effect, the

primary 'remedy' under the Act, with a Declaration of Inconsistent Interpretation being a 'remedy' of last resort.

For the full text of the decision in *Capital Property Projects (ACT) Pty Ltd v Planning and Land Authority*, see <http://www.courts.act.gov.au/supreme/judgments/capital1.htm>.

CASENOTES

Supreme Court of Canada Considers Human Rights Implications of 'Counter-Terror' Measures and Detention of Non- Citizens

Charkaoui v Canada (Citizenship and Immigration), 2007 SCC 9

On 23 February 2007, the Supreme Court of Canada overturned provisions of the *Immigration and Refugee Protection Act 2001* (Can) (*IRPA*) relating to the detention of permanent residents and foreign nationals on the basis that the provisions contravened the *Canadian Charter of Rights and Freedoms* (*Charter*). The Canadian Parliament was given one year to rewrite the *IRPA* in accordance with the *Charter*.

Background

The *IRPA* constitutes part of Canada's immigration law and allows the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness to issue certificates of inadmissibility (commonly referred to as 'security certificates') in respect of permanent residents and foreign nationals who are deemed to be a threat to national security (*IRPA Scheme*). A permanent resident named in a security certificate *may* be detained by the Canadian government, whereas a foreign national named in such a certificate *must* be detained. The detention of a permanent resident must be reviewed within 48 hours, however a foreign national must *apply* for review but may not make such an application until *120 days after* a judge of the Canadian Federal Court determines that the security certificate issued against them is reasonable. Once a security certificate is deemed to be reasonable by a judge, the security certificate becomes a removal order.

In addition, during the issuance of the certificate, review of detention and

determination of the certificate's reasonableness, the person named in the security certificate 'has no right to see the material on the basis of which the certificate was issued. Non-sensitive material may be disclosed; sensitive or confidential material must not be disclosed if the government objects to it.' While neither the person the subject of the security order, nor his or her lawyer, can access the undisclosed material, the Government Ministers and the reviewing Judge may rely on that material.

Facts

Mr Charkaoui, Mr Harkat and Mr Almrei (appellants) were living in Canada when they were arrested and detained under security certificates issued by the Minister of Public Safety. Mr Charkaoui is a permanent resident of Canada, while Mr Harkat and Mr Almrei are both foreign nationals. The evidence upon which the decisions to issue security certificates were made by the Minister was partially secret, but the evidence suggested that they were a threat to national security by reason of their involvement in terrorist activities.

The appellants applied to the Supreme Court of Canada on the basis that the *IRPA Scheme* under which their detentions were ordered violates the following provisions of the *Charter*:

- section 7 – guarantee of life, liberty and security of the person;
- section 9 – guarantee against arbitrary detention;
- section 10(c) – guarantee of a prompt review of detention;
- section 12 – guarantee against cruel and unusual treatment; and
- section 15 – guarantee of equal protection and equal benefit of the law.

Findings

Section 7 – Guarantee of life, liberty and security of the person

The Court considered s 7 of the *Charter* in respect of the procedure for determining the reasonableness of security certificates and the processes for detention review under the *IRPA Scheme*.

The Court posited that an application of s 7 of the *Charter* 'requires that laws that interfere with life, liberty and security of the person' must conform to the principles of fundamental

justice. The overarching principle of fundamental justice that applied in this case was that 'before the state can detain people for significant periods of time, it must accord them a fair judicial process.'

The Court had regard to the procedures of the *IRPA Scheme* under which the person named in the security certificate may access little or none of the material relied on by the Ministers and the judge 'and may thus not be in a position to know or challenge the case against him or her.' Accordingly, it held that 'the principle that a person whose liberty is in jeopardy must know the case to meet... has not been merely limited; it has been effectively gutted.' The Court concluded that the procedures for determining whether a security certificate is reasonable, and the procedures for detention review, unjustifiably contravened s 7 of the *Charter*.

Section 9 - Guarantee against arbitrary detention and section 10(c) - Guarantee of a prompt review of detention

The Court rejected the argument that automatic detention of foreign nationals is arbitrary. However, it held that 'the lack of review for foreign nationals until 120 days after the reasonableness of the certificate has been judicially determined violates the guarantee against arbitrary detention in s 9 of the *Charter*, a guarantee which encompasses the right to prompt review of detention under s 10(c) of the *Charter*.' The Court determined that the delay of review for foreign nationals could not be justified as the 48 hour review period for permanent residents was evidence of alternative options that would minimally impair an individual's right to protection from arbitrary detention.

Section 12 - Guarantee against cruel and unusual treatment

The Court acknowledged that any contemplation of the s 12 question was 'intertwined with s 7 considerations.' It considered that extended periods of detention under the *IRPA Scheme* would not violate ss 7 and 12 of the *Charter* if that detention is 'accompanied by a process that provides regular opportunities for review of detention' and that review takes into account the following factors: reasons for detention; length of detention; reasons for delay in deportation; anticipated length of detention; and availability of alternatives to detention. The Court applied

those factors to the *IRPA Scheme* and noted that the *IRPA* permitted robust ongoing judicial review. Accordingly, the extended period of detention pending deportation did not violate ss 7 or 12 of the *Charter*, provided that the reviewing court adheres to, and facilitates, robust ongoing judicial review. The Court reiterated that the fairness of that review process was a separate matter that had already been found to be in breach the *Charter*.

Section 15 - Guarantee of equal protection and equal benefit of the law

The appellants argued that the *IRPA Scheme* discriminated against non-citizens and therefore violated s 15 of the *Charter*. The Court found that a breach of s 15 could not be established as there is a specific exemption in s 6 of the *Charter* that allows for 'differential treatment of citizens and non-citizens in deportation matters'.

Conclusion

By way of remedy, the Court declared the judicial approval procedure of detention to be of no force and effect, however suspended the ruling for one year for the Canadian Parliament to amend the *IRPA* so that its provisions are consistent with the *Charter*. At the conclusion of the year, any security certificates deemed to be reasonable will lose their 'reasonable' status, and individuals can 'apply to have the certificates quashed'. The full text decision is available at

<http://scc.lexum.umontreal.ca/en/2007/2007scc9/2007scc9.pdf> or at <http://www.canlii.org/en/ca/scc/doc/2007/2007scc9/2007scc9.html>.

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HRLRC POLICY, ADVOCACY and LAW REFORM

Asylum Seekers and the Right to Health

In August 2006, the UN Special Rapporteur on the Right to Health, Prof Paul Hunt, requested and received advice from the Centre regarding a draft letter to the Australian Government regarding asylum seekers and the right to health.

The Special Rapporteur's report to the current session of the UN Human Rights Council discloses that he sent an urgent appeal to

Australia in October 2006 concerning access to health care for individuals holding a Bridging Visa E, as well as the right to health by asylum seekers in detention centres.

The appeal raises concerns that asylum seekers provided with a bridging visa E were ineligible for financial support and Medicare, and were not granted a right to work. It was alleged that many asylum seekers released from detention centres on medical grounds were unable to access the health care they needed because of their visa status. It was also alleged that some detention centres were unable to provide culturally appropriate mental health care required by many asylum seekers. This was compounded by the detrimental impact of detention upon the mental health of detainees, particularly children. Further, it was also alleged that there was a failure to ensure the underlying determinants of health, such as adequate sanitation and safe and potable water, in some detention centres.

Regrettably, as of February 2007, the Special Rapporteur had not received any reply to this communication.

The Special Rapporteur's report, together with other documentation for the 4th Session of the UN Human Rights Council, is available at <http://www.ohchr.org/english/bodies/hrcouncil/4session/reports.htm>.

HRLRC CASEWORK

Centre files High Court Challenge to Removal of Prisoners' Right to Vote

On 5 March 2007, the Centre commenced legal action in the High Court to challenge the constitutionality of legislation which removes the right of all sentenced prisoners to vote in federal elections.

The plaintiff in the matter is Vickie Roach, an Aboriginal woman who is currently held at the Dame Phyllis Frost Centre in Deer Park. The defendants are the Commonwealth of Australia and the Australian Electoral Commission.

The matter was listed for directions before a single judge of the High Court on 28 March 2007 and is likely to be heard by a Full Court of the High Court in June 2007.

The Centre is being provided with very substantial pro bono assistance in this case by Allens Arthur Robinson, Ron Merkel QC, Michael Pearce SC and Fiona Forsyth of Counsel.

The prisoner disenfranchisement provisions of the *Commonwealth Electoral Act 1918* 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';
- beyond the legislative powers of the Commonwealth; and
- inconsistent with the implied rights to freedom of political participation and communication and not reasonably appropriate or adapted to a legitimate end.

The case raises issues of significant constitutional importance, including parliament's power to limit the franchise and the extent to which voting can be considered an incident of the implied freedoms. The case is also concerned with the fundamental human right to vote and participate in public affairs, enshrined in art 25 of the ICCPR.

SEMINARS and EVENTS

'International Human Rights and Domestic Law: Reflections from the United States'

This seminar, to be addressed by Prof Davison Douglas (former Director of the US Bill of Rights Law Institute) and John Tobin (Senior Lecturer, Melbourne Law School), will discuss strategies and mechanisms for the enforcement of human rights in domestic law.

Time: 5.45 for 6.00pm, Tuesday 24 April

Venue: Minter Ellison

Level 23, 525 Collins St, Melbourne

Cost: \$20 / \$10 concession

RSVP: Use Booking Form available at www.hrlrc.org.au under 'Seminars and Events'

'Killings and the UN: The Strengths and Weaknesses of UN Human Rights Monitoring' with Prof Philip Alston

In this lecture, Prof Philip Alston will reflect on his experience and expertise as a member of a UN human rights treaty body and, more recently, as the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions,

to discuss the efficacy of international human rights monitoring.

Prof Alston is a globally renowned international human rights lawyer and the Director of the Center for Human Rights and Global Justice at New York University.

During his distinguished human rights career, Prof Alston has been Chair of the UN Committee on Economic, Social and Cultural Rights and was instrumentally involved in drafting the Convention on the Rights of the Child. Prof Alston has also worked with the International Labour Organisation, UNICEF, UNESCO, the Office of the UN High Commissioner for Human Rights and the UN Development Program.

Time: 5.45 for 6.00pm, Monday 14 May

Venue: Clayton Utz
Level 18, 333 Collins St, Melbourne

Cost: \$20 / \$10 concession

RSVP: Use Booking Form available at www.hrlrc.org.au under 'Seminars and Events'

Other Forthcoming HRLRC Seminars

The HRLRC is pleased to announce the following further seminars as part of its 2007 Human Rights Seminar Series:

- July (TBC) – Professor Arlene Kanter, Director of Disability Law and Policy Program, Syracuse University
- 8 August – Professor Claudio Grossman, UN Committee Against Torture
- 13 August – Gareth Evans AO QC, President, International Crisis Group
- 15 August – Lord Robert Walker, UK House of Lords

Further details will be available closer to each date.

Reprieve Seminar: 'Reflections on the Death Penalty'

Reprieve presents 'Reflections on the Death Penalty: A Panel Discussion on the Legal, Spiritual and Personal Ramifications of Capital Punishment' with Andrea Durbach (Australian Human Rights Centre), Peter Norden SJ AO (Victorian Criminal Justice Coalition) and Brian Morley (journalist).

Time: 5.15 for 5.30pm, Tuesday 17 April

Venue: DLA Phillips Fox
Level 21, 140 William St, Melbourne

RSVP: Natasha.Stojanovich@dlaphillipsfox.com

Women's Rights Forum: Turning UN Rhetoric into Local Action

The Women's Rights Action Network is running a workshop to:

- Increase understanding of the Convention on the Elimination of All Forms of Discrimination against Women and other international and domestic human rights mechanisms; and
- Enable participants to integrate the recommendations of the UN Committee on the Elimination of Discrimination against Women into their work.

Time: 9.30am – 2.00pm, Thursday 3 May

Venue: Queen Victoria Women's Centre
210 Lonsdale Street, Melbourne

RSVP: carolinelambert@optusnet.com.au

For further information, see www.wrana.org.au.

EDUCATION, RESOURCES and TRAINING

Human Rights Council Special Procedures Bulletin

The Office of the UN High Commissioner for Human Rights has recently published its third quarterly 'Special Procedures Bulletin'.

The 'Special Procedures' of the UN Human Rights Council include Special Rapporteurs and Working Groups.

A Special Rapporteur is an independent expert appointed by resolution of the UN Human Rights Council to examine, monitor, research, report and advise on human rights issues. Special Rapporteurs are entrusted with a mandate that is country specific or thematic (eg, Special Rapporteur on the Right to Adequate Housing, Special Rapporteur on Freedom of Religion or Belief, Special Rapporteur on the Right to Health and Special Rapporteur on the Right to Education).

The key responsibilities of Special Rapporteurs generally include:

- communications to states;

- country visits;
- follow-up work;
- normative work (that is, the development of the content and the application of human rights within the mandate); and
- annual reports.

The Special Rapporteurs aim to help bring intergovernmental debate on human rights closer to the reality on the ground. During recent years, Special Rapporteurs have brought many issues of concern to the attention of the international community, including police brutality, summary executions, the killing of women in the name of honour, and the suffering of street children. Reports of UN Special Rapporteurs often serve as an important early warning, or provide a continuous examination of a particular situation and signal to victims that their plight is not forgotten by the international community.

The 'Special Procedures Bulletin' provides an overview of the main activities of the 41 Special Rapporteurs, including information on communications, country visits, forthcoming and requested missions, press statements and highlights.

The Special Procedures Bulletin is available at http://www.ohchr.org/english/bodies/chr/special/docs/spb_bulletin3.pdf.

IF I WERE ATTORNEY-GENERAL...

If I were Attorney-General I would be daunted by the task ahead of me. A decade or more of lawlessness abroad and abuse of the law at home has created such a backlog of immediately needed action that I would scarcely know where to begin. Here is the most pressing action I would take.

First, I would advise the Prime Minister and Foreign Minister that the detention of David Hicks in Guantanamo Bay is contrary to international law, that he will not get a fair trial in the US Military Commission as currently proposed, and that the refusal by the Australian Government to seek his release amounts to a dereliction of its duty to an Australian citizen. I would advise them to seek his immediate release and repatriation to Australia.

Next I would advise the Minister for Immigration that the exiling of long-term Australian residents like Stefan Nystrom and Robert Jovicic on character grounds was contrary to international law and damaging to Australia's

international reputation. I would recommend the repeal of those parts of the *Migration Act* which permit this practice and the immediate repatriation, at the Government's cost, of those who have been deported under these provisions.

Separately I would advise the Minister for Immigration that the mandatory detention of asylum seekers both within and outside Australia was a breach of Australia's international obligations and should be immediately abandoned and replaced by a system of processing in accordance with those obligations.

I would give reversal of these policies priority because of what they symbolise: a Government which is dismissive of its legal obligations and which treats human beings as expendable in accordance with political expediency. These policies have been so damaging to Australia's reputation and corrosive of its national conscience that their firm and swift repudiation would be imperative.

Next I would announce a review of the raft of anti-terrorist legislation which has been passed over the last few years. I would seek a critical review of the excesses of that legislation, such as the over-wide definition of 'terrorist act', the offence of inadvertently financing a terrorist organisation, the lack of proper protections and accountability in the new investigative powers, control and preventive detention orders, and the sedition laws. I would propose to wind back the law so that it provided the necessary protections and powers for the fight against terrorism but did not sacrifice long-standing freedoms and civil rights.

With a view to avoiding such excesses in the future, I would appoint an independent inquiry into a Commonwealth charter of rights, following the lead of the ACT and Victoria. The inquiry would investigate the various models and be charged with making recommendations to the Government on the introduction of a charter.

I would next appoint an inquiry into legal aid. The focus of the inquiry would be to advise on the level of funding necessary to restore legal aid to its original role of providing access to justice – both criminal and civil – for all, and how such funding could be obtained.

I would institute a review into the staffing of the Attorney-General's Department to result in its 'de-politicisation' and its reinstatement as a

source of fearless and independent advice and policy formulation.

I would, however, reaffirm the current process of appointment of judges. As long as there is a strict separation of powers, I think the Executive Government is entitled to exercise its prerogative of appointing judges. It should be able to influence the judiciary to that extent but that extent only. The corollary of that prerogative is the strict independence of the judiciary and this entails not only freedom from removal but proper pay and working conditions for judges and freedom from political attack. It also imposes a responsibility on Government not to abuse the prerogative by making obviously unsuitable appointments.

I would also reaffirm the Government's Model Litigant policy but insist that it be more than an empty formulation. The Australian Government Solicitor and other Government lawyers would be instructed to adhere strictly to this policy and to avoid the kind of litigation strategies and tactics which, though defensible for private litigants, are inconsistent with the Government's peculiar and unique position as a litigant.

That should just about fill the first week. After that I might take a break and contemplate the second.

Michael Pearce SC is Vice-President of Liberty Victoria