



INDEX

OPINION 1
NEWS..... 3
VICTORIAN CHARTER OF RIGHTS DEVELOPMENTS.... 4
CASE NOTES 5
HRLRC POLICY, ADVOCACY AND LAW REFORM 13
HRLRC CASEWORK..... 14
SEMINARS AND EVENTS... 14
EDUCATION, TRAINING AND RESOURCES..... 15
IF I WERE ATTORNEY-GENERAL... 16

Human Rights Law
Resource Centre Ltd
Level 1, 550 Lonsdale Street
Melbourne VIC 3001
P: + 61 3 9225 6695
F: + 61 3 9225 6686
E: hrlrc@vicbar.com.au
W: www.hrlrc.org.au
ABN: 31 117 719 267

The Human Rights Law Resource Centre Ltd aims to:

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

Opinion

Australia Avoids an Uncomfortable Conversation with the UN Committee against Torture

In early November, the Australian Government was scheduled to appear before the UN Committee against Torture to discuss Australia’s compliance with the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* over the last 5 years. Less than a week before the review, the Australian Government withdrew, citing that an election had been called and the Government entered ‘caretaker mode’. At best, this is a very weak rationale. At worst, it is a blatant attempt to avoid human rights scrutiny in the context of an election. The review would have involved the Government engaging in a constructive dialogue regarding Australia’s performance with independent international human rights experts. The review is retrospective and would not have involved the Government making any legislative, fiscal or other commitments. At the conclusion of the review, the Committee would have issued ‘Concluding Observations’, setting out positive aspects of Australia’s performance and recommendations as to further compliance with the Convention. It is perhaps no coincidence to Australia’s withdrawal that these Concluding Observations were due for release on 23 November, the day before the federal election.

The Australian Government had good reason to be nervous as to what these Observations may have included. The right to be free and effectively protected from torture and other forms of cruel, inhuman or degrading treatment or punishment is a fundamental human right. The *Convention against Torture* absolutely prohibits any form of cruel treatment and commits Australia to take all necessary action to prevent, investigate and remedy torture or other cruel treatment. The day before Australia was to be reviewed, a coalition of non-government organizations – including the Human Rights Law Resource Centre, Amnesty International, the National Association of Community Legal Centres and the NSW Council of Civil Liberties – made submissions and gave evidence to the Committee that various aspects of Australian law, policy and practice are incompatible with this non-derogable norm.

At the most fundamental level, in the absence of a national Charter of Rights, the prohibition on torture and other cruel, inhuman or degrading treatment or punishment is not adequately enshrined in Australian law. Unlike in comparative jurisdictions such as the United Kingdom, New Zealand or Canada, there is no national legislative or constitutional human rights instrument against which laws, policy and practice which may impair freedom or human dignity are measured or counterbalanced.

Consequently, under the suite of more than 40 anti-terror laws enacted since 11 September 2001, a person who is suspected of having any knowledge or information about terrorism may be detained without charge with no (or only very limited) judicial authorization or oversight. They may be prohibited contact with a lawyer and, where contact is permitted, it can be monitored by authorities. Both the detainee and the lawyer may be denied information as to the basis or purpose of the detention, and the lawyer may be denied information regarding the treatment of his or her client. It is an offence, punishable by up to 5 years imprisonment, for the detainee and his or her lawyer, family or guardian, to disclose details as to the investigation or treatment. It is well recognised that there is a strong interrelationship between incommunicado detention and torture and, moreover, that incommunicado detention may, in and of itself, amount to cruel, inhuman or degrading treatment. Accordingly, the Human Rights Committee has stated that States have an obligation not only to prohibit torture, but also to enact and promote safeguards against detention incommunicado, including by granting access to detainees to doctors, lawyers and family.

The absolute prohibition against torture subsumes an obligation to investigate and remedy allegations of torture. International scrutiny regarding Australia's acquiescence in the detention and treatment of Australian citizens David Hicks, Mamdouh Habib and Jack Thomas, together with the Australian Government's failure to properly investigate their corroborated allegations of torture, would probably not have been a welcome election issue.

In November 2000, following the previous periodic review of Australia, the Committee against Torture recommended that Australia 'continue its efforts to address the socio-economic disadvantage that, among other things, leads to a disproportionate number of Indigenous Australians coming into contact with the justice system'. Seven years on, the Australian Government would have good reason to be concerned as to the Committee's views on implementation of this recommendation. Indigenous peoples in Australia are among the most highly incarcerated peoples in the world. While Indigenous Australians account for approximately 2.4% of the population, at least 24% of the prison population is Indigenous. Over the last six years, the rate of Indigenous imprisonment in Australia has risen by 23%, the highest rate in ten years. In 2003, Indigenous children between the age of 10 and 14 were 30 times more likely to be incarcerated than non-Indigenous children of the same age.

The treatment of non-Indigenous prisoners and Australian prison conditions would also have been of concern to both the Committee and the Government. Human rights courts and tribunals from around the world have consistently held that a failure to provide adequate facilities so as to ensure that prisoners are not subject to degrading conditions, including particularly the failure to provide adequate health care to mentally ill prisoners, may amount to a violation of the prohibition against torture. According to the European Court of Human Rights, and other bodies such as the UK Court of Appeal and the UN Human Rights Committee, it is incumbent on a state to 'organise its penitentiary system in such a way that ensures respect for the dignity of detainees, regardless of financial or logistical difficulties'. Despite this, there is significant evidence that mental health care in Australian prisons is manifestly inadequate and may amount to a level of neglect that constitutes degrading treatment or punishment. The number of forensic patients and mentally ill inmates in Australian prisons is increasing, without a proportionate increase in health resources. Recent research indicates that of a total Australian prison population of around 25,000, approximately 5000 inmates suffer serious mental illness. There is substantial evidence from across Australia that access to adequate mental health care in prisons is grossly inadequate, that the mentally ill in prison are often 'managed' by segregation, and that such confinement – often for very long periods – can seriously exacerbate mental illness and cause significant psychological harm. According to evidence given by the Victorian Institute of Forensic Mental Health to a recent Senate Select Committee, 'currently in Australia the provision of care to mentally ill prisoners is rudimentary at best. Rarely are proper provisions made'.

A related concern for both the Committee and the Government would have been that unconvicted remand prisoners, particularly persons accused of 'terrorist'-related offences, are routinely held in highly oppressive conditions that are demonstrably injurious to mental health. In a recent Victorian case in which a terrorist accused sought bail on the grounds that the conditions were so oppressive as to constitute 'exceptional circumstances', a Supreme Court judge stated that the 'conditions in Acacia Unit in Barwon Prison are such as to pose a risk to the psychiatric health of even the most psychologically robust individual'. His Honour went on to say that, 'Close confinement, shackling, strip searching and other privations to which the inmates at Acacia Unit are subject all add to the psychological stress of

being on remand, particularly as some of them seem to lack any rational justification. This is especially so in the case of remand prisoners who are, of course, innocent of any wrongdoing.’ This concern is shared at an international level, with the UN Working Group on Arbitrary Detention recently commenting on the ‘particularly severe’ conditions of detention of remand prisoners, the ‘extraordinarily restrictive conditions’ of detention prescribed for any person charged with a terrorist offence, and the lack of sufficient discretion for judges to decide on bail applications in such matters.

Australia’s immigration law and policy would have been another area of major concern for the Committee against Torture and therefore the Australian Government. Australia’s continued policy of mandatory indefinite detention of asylum-seekers – particularly in light of the documented deleterious impact of such detention on the physical and mental health of asylum-seekers, especially children – breaches numerous articles under both the Convention and instruments such as the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child*. Australia’s repudiation of any responsibility for monitoring or following up on cases of asylum-seekers who do not receive protection in Australia and are consequently deported would have also made for some uncomfortable discussion. There is substantial evidence that asylum-seekers who have been returned by Australia to their country of origin have been tortured and even killed. Australia regularly deports asylum-seekers to countries which are not signatories to the *Refugees Convention* (such as Malaysia and Thailand) and to so called ‘safe third countries’ (such as China) in which the use of torture and other cruel or degrading treatment remains widespread.

International scrutiny and accountability – particularly by experts such as the Committee against Torture – is critical to the effective promotion and protection of human rights. A constructive dialogue about how Australia could more fully implement its obligations under international human rights law should be welcomed and not eschewed for short-term electoral gain. There was once a time when Australia was a world leader and very active participant in the development and operation of international human rights standards and monitoring mechanisms. Let us hope that such a time dawns again soon.

Phillip Lynch is Director of the Human Rights Law Resource Centre

News

Centre Receives Major Support from DLA Phillips Fox and R E Ross Trust

The Human Rights Law Resource Centre has recently received major commitments of financial and pro bono support from DLA Phillips Fox and the R E Ross Trust.

DLA Phillips Fox, one of Australasia’s largest legal firms, has agreed to extend the secondment of their Human Rights Lawyer, Ben Schokman, on a full-time basis for a further 12 months. Over the last year, Ben has made a very substantial contribution to the Centre and the promotion of human rights, including coordinating submissions to the UN Committee against Torture and the UN Human Rights Committee and undertaking major policy work in relation to access to justice, same-sex entitlements, family violence and Indigenous land management. For further information about the DLA Phillips Fox Community Care program, see www.dlaphillipsfox.com/about_pf/CommunityCare.asp.

The R E Ross Trust, a Victorian charity, has committed more than \$140,000 over three years to assist the Centre to employ an additional human rights lawyer. It is estimated that this lawyer will facilitate the provision of at least \$1 million of additional pro bono legal work to promote the human rights of marginalised and disadvantaged individuals, communities and groups each year. For further information on the R E Ross Trust, which makes grants to improve social and economic outcomes for disadvantaged and vulnerable people in Victoria, see www.rosstrust.org.au.

Awards Recognise Lawyers’ and Activists’ Commitment to Human Rights

The work of a number of lawyers and activists to promote and protect human rights in Australia was recently recognized through the Tim McCoy Award and the Law Institute of Victoria President’s Awards.

The Tim McCoy Award is conferred annually to an individual or organization for a significant contribution to human rights and access to justice. On 9 November 2007, the Award was conferred jointly to Vickie Roach (an Aboriginal woman who successfully challenged the constitutional validity of the Federal

Government's disenfranchisement of prisoners in the High Court) and Charandev Singh (a community legal centre worker and activist with an outstanding and longstanding commitment to prisoners' rights).

The LIV President's Awards are conferred annually in a number of categories. The Human Rights Law Resource Centre offers its particular congratulations to the following winners and runners-up:

- Kristen Hilton (Executive Director, Public Interest Law Clearing House) – Winner of the Community Lawyer Award
- Cecilia Riebl (Lawyer, Blake Dawson) – Winner of the Access to Justice Award for her work through the Blake Dawson Pro Bono Program and the Human Rights Law Resource Centre, including in relation to prisoners and the right to human treatment in detention
- Emily Howie (Senior Associate, Allens Arthur Robinson) – Shortlisted for the Pro Bono Award for her work through the AAR Pro Bono Program and the Human Rights Law Resource Centre, including in relation to prisoners' voting rights, and the development of Charters of Rights in Tasmania and Western Australia.

Victorian Charter of Rights Developments

Assisting Community Organisations to Comply with the *Charter*

With the pro bono support of firms, including DLA Phillips Fox and Clayton Utz, the Centre is giving legal advice to a range of community and non-profit organizations about their obligations under the Victorian *Charter*. In particular, the Centre is providing advice as to whether such organizations discharge any 'functions of a public nature' and thereby have obligations as 'public authorities' to properly consider and act compatibly with human rights.

The Centre is also assisting organisations to assess current policies and practices for human rights-compliance and to develop practical resources and materials to enable monitoring and compliance on an ongoing basis.

A Human Rights Act for Western Australia?

As reported in Editions 14 and 17, the West Australian Government is currently consulting about a proposed WA Human Rights Act. A consultative committee, appointed by the Government and chaired by the Hon Fred Chaney (former Minister in the Fraser Government and Director of Reconciliation Australia), received over 300 submissions in less than three months. The Committee submitted a report and recommendations to the WA Attorney-General on 16 November 2007. It is expected that the Committee's report will be publicly released in around 3-4 weeks after the Government has considered its recommendations. For further information see www.humanrights.wa.gov.au.

The Centre's submission to the inquiry is available at www.hrlrc.org.au under Policy Work>HRLRC Submissions>Fostering a Human Rights Culture: Submission to WA Human Rights Act Inquiry.

The State of Human Rights

What Difference will a *Charter* Make in Victoria?

This panel discussion, hosted by the Hon Rob Hulls MP, Attorney General and Deputy Premier, and Julie McCrossin, will feature speakers including Dr Helen Szoke (CEO of the Victorian Equal Opportunity and Human Rights Commission), Fred Chaney AO (Chair of the Consultation Committee for a WA Human Rights Act) and Christine Nixon (Chief Commissioner of Victoria Police).

Date: 12.15 – 2.00pm on Tuesday, 11 December 2007

Venue: Capitol Theatre, 113 Swanston Street, Melbourne

RSVP: doj.rsvp@justice.vic.gov.au or to Andrea Smith on (03) 8684 0863

Charter of Rights Workshops for Community and Non-Government Organisations

The Victorian Equal Opportunity and Human Rights Commission is running a series of free Charter of Human Rights and Responsibilities Workshops for community and non-government organisations from

February – June 2008. The workshops are designed to help community organisations understand and apply the rights and obligations contained in the Charter, including:

- ensuring human rights standards are maintained and upheld;
- promoting access and equity, especially for disadvantaged and marginalised people; and
- meeting legal obligations.

For further information and to register, see

<http://www.humanrightscommission.vic.gov.au/pdf/VEOHRCHRCHARTERWORKSHOPS08.pdf>.

Case Notes

Control Orders Held to Constitute a Deprivation of Liberty

Secretary of State for the Home Department v JJ and Ors [2007] UKHL 45 (31 October 2007)

In a judgment handed down on 31 October 2007, the House of Lords held that obligations imposed on six men under control orders made by the Secretary of State under the *Prevention of Terrorism Act 2005* (UK) ('PTA'), deprived those men of their liberty in violation of art 5 of the *European Convention on Human Rights*.

Facts

The six respondents were suspected of being involved in terrorism related activities, and were assessed as posing a threat to the public. The Home Office imposed control orders on each of the men pursuant to s 2 of the PTA. None of the men had been charged with any offence relating to terrorism.

Under the control orders, each of the men were required to remain within their residence at all times, save for the six hours between 10:00am and 4:00pm. The specified residence of each respondent was a small one-bedroom flat and the terms of the control orders did not allow access to the common areas of the buildings in which those flats were situated. Any visitor to a respondent's specified residence had to receive prior authorisation from the Home Office, which required names, addresses, date of birth and photographic identification to be supplied. Outside of the curfew, the respondent's were confined to restricted urban areas, the largest of which was 72 square kilometres. They were prohibited from meeting anyone by pre-arrangement who had not been given Home Office clearance.

In a decision handed down on 28 June 2006, Sullivan J held that the obligations imposed on the respondents under the control orders deprived the respondents of their liberty in violation of art 5 of the *European Convention*: [2006] EWHC 1623 (Admin). The Secretary of State's appeal against Sullivan J's decision was dismissed by the Court of Appeal on 1 August 2006: [2006] EWCA Civ 1141.

Decision

Article 5 provides that '[e]veryone has the right to liberty and security of person'. There are a number of exceptions to this right including sentence following conviction, breach of a court order, arrest on suspicion of crime, infectious disease, mental illness, unlawful entry and pending action to deport or extradite. None of these exemptions were relevant to the circumstances of the respondents.

The question for the House of Lords was whether the effect of the control orders was to deprive the respondents of their liberty.

What constitutes deprivation of liberty?

In order to deprive the respondents' of their right to liberty, the control orders must do more than merely restrict liberty. It is on this distinction that the judgments of the majority and minority of the House differed.

In the leading majority judgment, Lord Bingham of Cornhill, citing *Guzzardi v Italy* (1980) 3 EHRR 333, stated that deprivation of liberty may take numerous forms other than classic detention in prison or strict arrest. In determining whether or not that individual has been deprived of liberty, the task of the court is to look at the 'concrete situation' of the individual concerned and assess the impact of the measures in question on a person in the situation of a person subject to them. Consistent with this approach, account was taken to a number of aspects of the respondents' obligations under the control orders. Significant weight was accorded to the fact that very few people would obtain the onerous authorisation

from the Home Office to allow them to visit the respondents at their residences. In practice, this meant that each respondent was effectively in solitary confinement for 18-hours every day. The effect of the control orders on the respondents was held to be analogous to detention in an open prison. In a separate but concurring judgment, Lord Brown of Eaton-under-Heywood said:

The borderline between deprivation of liberty and restriction of liberty of movement cannot vary according to the particular interests sought to be served by the restraints imposed. The siren voices urging that it be shifted to accommodate today's need to combat terrorism (or even that it be drawn with such a need in mind) must be firmly resisted. Article 5 represents a fundamental value and is absolute in its terms. Liberty is too precious a right to be discarded except in times of genuine national emergency. None is suggested here.

In dissent, Lord Hoffman and Lord Carswell, held that the control orders did not *deprive* the respondents' of their liberty. Rather, the effect of the obligations was merely to *restrict* the men's liberty. As the respondents were free to walk the street for 6-hours per day, shop, mingle with people, cook their own food, etc; they were deemed not to be in prison or anything akin to it. The concept of 'deprivation of liberty' was interpreted narrowly by Lord Hoffman, on the basis that the right to liberty is an unqualified right. Lord Hoffman considered that otherwise 'the law would place too great a restriction on the powers of the state to deal with serious terrorist threats to the lives of its citizens'.

Implications for the Victorian Charter

Section 21 of the Victorian *Charter* protects an individual's right to liberty and security.

The decision in *Secretary of State for the Home Department v JJ & Ors*, by reason of s 32(2) of the *Charter*, will be highly relevant to a Victorian court's consideration of the meaning of 'liberty' for the purposes of s 21 of the *Charter* and the issue as to what constitutes a 'deprivation of liberty'.

The decision is available at <http://www.bailii.org/uk/cases/UKHL/2007/45.html>.

Sarah Guy, Human Rights Law Group, Mallesons Stephen Jaques

Human Rights Committee Considers Scope of the Right to Equality before the Courts

Dudko v Australia, HRC, UN Doc CCPR/C/90/D/1347/2005 (29 August 2007)

In an important decision regarding the nature and scope of the right to equality before the courts, the UN Human Rights Committee has found Australia in violation of art 14(1) of the *International Covenant on Civil and Political Rights*.

Facts

The author of the communication, Lucy Dudko, was convicted by the NSW District Court in 2001 of a range of offences associated with assisting an inmate to escape prison. Her appeal to the NSW Court of Criminal Appeal was rejected in August 2002. An application for special leave to appeal to the High Court was refused on 16 March 2004.

The author was unable to obtain legal aid or representation for the Special Leave application and, despite her wish to be present at the hearing, was not able to appear either in person or by telecommunications link from the prison. The Director of Public Prosecutions was present and made oral submissions but maintained that he was unable to comment on the reasons for denial of the author's right to appear. It was subsequently submitted that the practice in NSW is that people in custody do not appear in the High Court, although this practice varies in other jurisdictions which do permit and facilitate appearances.

Decision

Article 14(1) of the *ICCPR* provides, inter alia, that 'All persons should be equal before courts and tribunals'.

The Human Rights Committee held that while the disposition of an appeal does not necessarily require an oral hearing, where an oral hearing *is* held and 'the defendant is not given an opportunity equal to that of the State party in the adjudication of a hearing bearing on the determination of a criminal charge, the principles of fairness and equality are engaged'. Where this is the case, the State party bears the

onus of demonstrating that any procedural inequality was 'based on reasonable and objective grounds, not entailing actual disadvantage or other unfairness to the author'.

The Committee unanimously held that, in the present case, Australia had not provided 'any plausible reason why it would be permissible to have counsel for the State take part in the hearing in the absence of the unrepresented defendant, or why an unrepresented defendant in detention should be treated more unfavourably than an unrepresented defendant *not* in detention who can participate in the proceedings.' Having regard to this, the Committee concluded that the conduct of the Special Leave application had violated the guarantee of equality before the courts in art 14(1).

The author also submitted that the rejection of her legal aid application amounted to a violation of art 14(1). The Committee rejected this submission on the basis that she had not appealed the rejection and had therefore not exhausted domestic remedies as required by art 5(2)(b) of the Optional Protocol. The Committee did say in obiter, however, that while a state has a discretion to direct finite legal aid resources to meritorious matters, this discretion should be exercised having regard to factors including 'the nature of the proceedings, the powers of the appellate court, the capacity of an unrepresented party to present a legal argument, and the importance of the issue at stake in view of the severity of the sentence'.

Implications for the Victorian Charter

This decision may be relevant to the interpretation and application of s 24 of the *Charter*, which provides that 'a person charged with a criminal offence or a party to a civil proceeding has the right...to a fair hearing'. The case affirms that the right to a fair hearing is inherently linked with notions of equality before the courts, which may raise issues of court fees, complexity of procedure, a right to legal aid, awarding of costs and discrimination. It also affirms that the right to a fair hearing is a fundamental human right which must not be limited in the mere interests of 'practicality and convenience': see also, *R v McBride* [2007] ACTSC 8 (13 February 2007). The decision is consistent with well established jurisprudence both from the Committee itself and the European Court of Human Rights that the same procedural rights – including the opportunity to make oral and written submissions, access material, challenge evidence and cross-examine witnesses – must be given to each party involved unless distinctions can be justified on objective and reasonable grounds: see, eg, *Gertruda Hubertina Jansen-Gielen v The Netherlands*, UN Doc CCPR/C/71/D/846/1999; *Van Orshoven v Belgium* [1997] ECHR 20122/92 (25 June 1997).

Finally, the Committee's comments on the considerations relevant to the allocation of legal aid may be relevant to the interpretation and application of the *Legal Aid Act 1978* (Cth) and Victoria Legal Aid's Guidelines and Conditions.

The decision is available at http://www.ohchr.org/tbrucpr/Dudko_v_Australia.pdf.

Philip Lynch is Director of the Human Rights Law Resource Centre

To What Extent is it Acceptable to Limit Freedom of Expression to Protect Reputation?

Lindon, Otchakovsky-Laurens and July v France [2007] ECHR 21279/02, 36448/02 (22 October 2007)

To what extent is it acceptable to limit the right to freedom of expression to protect a person's reputation? A recent decision of the Grand Chamber of the European Court of Human Rights, *Lindon v France*, considers the question.

Facts

Lindon authored a novel, *Le Procès de Jean-Marie Le Pen* ('Jean-Marie Le Pen on Trial'), a fictional work informed by the facts of two real-life murders committed by militants from the far-right French Front National. Through the narrative of a fictional murder trial – a 'vector for direct criticism' of Le Pen – the book focuses attention on Le Pen's role, as the Front National's leader, in the murders.

Under the relevant domestic law, a statement that 'impugns the honour or reputation' of a person is defamatory, and publication of defamatory statements is proscribed. The Paris Criminal Court convicted Lindon and his publisher (the first and second applicants) under the domestic law, finding a number of statements in the book to be defamatory, and rejecting the defence that the statements were published in good faith. Subsequently, a newspaper published an opinion article that reproduced the defamatory

statements, asserting they were not defamatory. The newspaper publisher (the third applicant) was separately convicted under the domestic law. Each of the applicants was ordered to pay fines of about €2,300 and damages of about €3,800 to each of Le Pen and the Front National.

Decision

The *European Convention* guarantees the right to free expression. Under art 10(2), the right may be 'subject to such ... restrictions and penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others ...'. The applicants pleaded the relevant domestic law violated art 10.

The domestic law interfered but only to the extent 'necessary in a democratic society'

The Court rejected the applicants' contention that the domestic law was not 'necessary in a democratic society'. In the Court's supervisory jurisdiction, the relevant question is whether, in the context of the case as a whole, the reasons advanced to justify interference with the right to freedom of expression are 'relevant and sufficient' and 'proportionate to the legitimate aim pursued'.

The Convention guarantees the right to reputation (art 8), so it is appropriate to restrict freedom of expression to protect a person's reputation or honour. The Court reasoned that a restriction or penalty on freedom of expression was 'necessary' if there was a 'pressing social need'. In this matter, the Court emphasised the narrow scope for acceptable restriction of freedom of expression, because the statements:

- amounted to political speech or debate, in which freedom of expression is vital; and
- criticised a politician, being amongst a class of persons who, unlike private individuals, 'inevitably and knowingly' lay themselves open to close public scrutiny.

Considering 'the virulence of [Le Pen's] speech and his extremist views' and Le Pen's numerous convictions for incitement to racial hatred and apologia for war crimes, in this case the European Court required a particularly high degree of tolerance.

However, the Court considered that balancing the rights to reputation and free expression, 'regardless of the forcefulness of political struggles', it was appropriate to ensure a 'minimum degree of moderation and propriety'. Given the 'virulent content of the impugned passages' and that the statements explicitly named Le Pen and the Front National party, the Court agreed the statements were defamatory. The content of the impugned statements was 'such ... to stir up violence and hatred ... going beyond ... tolerable ... political debate' even against an extremist figure such as Le Pen.

The Court also affirmed the domestic courts' rejection of the first and second applicants good faith defence. The impugned statements were neither backed by a sufficient factual basis nor framed in sufficiently dispassionate language.

Four members of the Court dissented, giving considerable weight to the content of the work. The minority distinguished works of fiction, which they argued should be afforded a higher level of protection, from reporting of fact. The majority's approach 'imprisoned literature in a set of rigid rules at odds with the freedom of artistic creation and expression'. The minority also disagreed that the impugned statements constituted an appeal to hatred or violence.

The Court also upheld the third applicant's conviction. Like political speech, freedom of the press attracted a high level of protection under art 10. However, absent special grounds, journalists are protected under art 10 only insofar as they act 'in good faith and on an accurate factual basis' providing 'reliable and precise information in accordance with the ethics of journalism'. In the circumstances, the Court felt it had been unnecessary to reproduce defamatory statements to give a complete account of the first and second applicants' convictions. The article denied that the statements were defamatory 'in spite of a finding to that effect' and 'overstepped the limits of permissible provocation'.

The domestic law imposed a 'penalty prescribed by law'

The first and second applicants alleged that the application of the domestic law was not foreseeable 'to a reasonable degree', so their convictions were not 'prescribed by law'. Rejecting the argument, the Court reiterated that:

- it was acceptable to couch laws 'in terms which ... are vague and whose interpretation and application are questions of practice' to allow the law 'to keep pace with changing circumstances'; and
- a law could satisfy the requirement of foreseeability even if legal advice was necessary to assess the consequences of an action.

The conclusion was 'particularly true' for persons carrying on professional activities, who the Court felt would ordinarily 'be expected to take special care in assessing the risks' of their activities. Although the relevant domestic case law was 'dated and rather scant', it was incumbent on the applicants 'to apprise themselves of the relevant [law]' even if specialised advice was necessary.

The penalties were proportionate

Given the margin of appreciation left to domestic authorities under the Convention, the Court agreed that criminal sanctions responding to defamation are not disproportionate. Considering the moderate fines imposed and damages awarded against the applicants, the measures taken against them were not disproportionate to the legitimate aim for which they were designed.

Implications for the *Charter*

The *Charter's* guarantee of the right to free expression, which under s 15(3)(a) may be 'subject to lawful restrictions necessary ... to respect the rights and reputation of other persons', is materially equivalent to the Convention provision. Victorian courts are entitled under s 32 of the *Charter* to consider international courts' judgments, and may immediately look to this decision in applying s 15, especially in interpreting:

- the *Defamation Act 2005* (Vic) insofar as it modifies the defences available to, and principles for assessment of damages in, common law defamation actions; and
- the criminal defamation provisions of Part I of the *Wrongs Act 1958* (Vic).

The decision is available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database>.

Sam Porter, Human Rights Law Group, Mallesons Stephen Jaques

Interference with the Publication of Opinions a Violation of the Right to Freedom of Expression

Flux and Samson v Moldova [2007] ECHR 28700/03 (23 October 2007)

The European Court of Human Rights has held that judicial decisions in defamation proceedings brought against a Moldovan newspaper interfered with its right to freedom of expression, and more specifically its right to disseminate public opinion on a matter of public interest. The decision addressed the permissible limitations on the right to freedom of expression in the context of a potentially defamatory publication.

Facts

Flux, the applicant newspaper, published an article based on a story by the mother of Aurelia Samson, the second applicant. The article described problems that Ms Samson had experienced with her neighbour, described by the Court as 'GC', the former State Minister of Construction. The article included statements such as 'a former State official builds himself castles', 'the neighbours say that he rents them to earn a fortune' and 'through various methods he forced the elderly who lived in the same neighbourhood to leave their houses in exchange for paltry sums of money'. The article included GC's comments in relation to the allegations and a summary of several supporting documents that GC had provided to Flux.

GC brought court proceedings against Flux claiming damages in defamation. Before the first instance Court gave judgment, Flux published an apology to GC at the request of GC and the second applicant.

The Buiucani District Court found in favour of GC and ordered Flux to publish a retraction and pay damages and costs. This decision was made on the basis of Flux's apology, the fact that information in the article was held not to 'coincide with the truth' and that the article repeatedly mentioned GC's former

ministerial post, causing harm to GC when it could not be shown that he had used his former position in any illegal way. The judgment was upheld on subsequent appeals.

Flux submitted a complaint to the European Court alleging a violation of art 10 of the *European Convention*, which provides the right of freedom of expression subject to restrictions that are prescribed by law and 'necessary in a democratic society'.

The parties accepted that there had been an interference with Flux's freedom of expression and that this interference was 'prescribed by law'. The matter before the Court was therefore whether the interference was 'necessary in a democratic society'.

Decision

The European Court held that the decisions of the Moldovan courts violated art 10 of the Convention on the basis that they did not correspond to a pressing social need and were therefore not necessary in a democratic society. In reaching this conclusion, the Court addressed the following factors:

- the article contained value-judgments and opinions in relation to which Flux could not be expected to prove the truth;
- the published opinions were not without factual foundation;
- the article was balanced and presented both parties' views, meaning that Flux had acted in good faith and consistently with principles of responsible journalism;
- the article raised issues of genuine public interest in addressing alleged abuses by a former State official; and
- any residual harm to GC's reputation was removed by Flux's publication of the apology.

The Court also reiterated the generally accepted statement that 'punishment of a journalist for assisting in the dissemination of statements made by another person... would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so'. The Court held that such 'strong reasons' did not exist in the current case and awarded pecuniary and non-pecuniary damages and costs in favour of Flux.

Implications for the Victorian Charter

This decision has potential significance in relation to the interpretation and application of s 15 (right to freedom of expression) and s 7 (permissible limitations) of the *Charter*. By operation of s 32(2) of the *Charter*, the decision may also inform the interpretation and application of the *Defamation Act 2005* (Vic) and the defamation provisions of the *Wrongs Act 1958* (Vic).

In relation to section 7 of the *Charter*, the decision affirms the principle that human rights should only be restricted to the extent that such restriction can be justified in a democratic society and in pursuit of a 'pressing social need' (see also s 7(2)(b) of the *Charter*). The decision promotes freedom of expression in the publication of opinions founded in fact, presented in a balanced manner and disseminated in circumstances where the relevant issues are of public importance.

The decision is available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database>.

Kellie Simmonds, Human Rights Law Group, Mallesons Stephen Jaques

Mandatory and Prolonged Detention Violates Prohibition against Arbitrary Detention

Shams & Ors v Australia, HRC, UN Doc CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004 (11 September 2007)

In a decision regarding mandatory immigration detention, the UN Human Rights Committee has elucidated its jurisprudence on the content and application of art 9 of the *ICCPR*, the right to liberty and security of person and to be free from arbitrary detention.

Facts

The eight authors, all of whom were Iranian nationals, arrived in Australia by boat between October 2000 and April 2001. They were classified as 'unlawful non-citizens' and detained in immigration

detention for between 3 and 4 years. All of the authors eventually received either a permanent humanitarian visa or a temporary protection visa.

The authors alleged that their detention, treatment and proposed refoulement constituted violations of various provisions of the *ICCPR*. After considering various legal and factual issues, the Committee found a violation of arts 9(1) and 9(4).

Decision

Article 9(1) of the *ICCPR* relevantly provides that 'No one shall be subject to arbitrary arrest or detention'. Article 9(4) provides that any person who is arrested or detained must be entitled to challenge the lawfulness of their detention in court and be released without delay if the detention is unlawful.

In relation to art 9(1), the Committee held that, in order to avoid being characterized as 'arbitrary', detention must not continue beyond the period for which it can be appropriately justified. In the present case, the Committee noted that Australia had not advanced grounds particular to the authors which could justify such prolonged detention. In particular, Australia did not demonstrate that there were no less restrictive or invasive means of achieving the ends of preventing 'escape' or appearance at hearings. This is consistent with jurisprudence from the European Court of Human Rights, which establishes that detention can only be justified by 'relevant and sufficient reasons' particular to the individual, and that the state must 'scrupulously examine' and address 'evolving circumstances' in order to legitimise the continued deprivation of liberty of a person: see, eg, *Benjamin and Wilson v United Kingdom* (2003) 36 EHRR 1.

In relation to art 9(4), the Committee held that the lawfulness of detention must be capable of *substantive* and not merely formal or procedural review. It is not enough that detention is merely compliant with domestic law; it must be compatible with the *ICCPR* and proportionate in all the circumstances. The Committee held that art 9(4) requires that a court have the power to order release if the detention is, or in any way becomes, arbitrary or unlawful. The Committee noted that, pursuant to the provisions of the *Migration Act 1958* (Cth) and the decision of the High Court in *Al-Kateb v Godwin* [2004] HCA 37, Australian courts do not have this power of substantive review and release. Again, this is consistent with jurisprudence from the European Court, which has repeatedly held that detained persons must have the ability to 'obtain a review by a court of the lawfulness of their detention both at the time of the initial deprivation of liberty and, where new issues of lawfulness are capable of arising, periodically thereafter': see, eg, *Benjamin and Wilson v United Kingdom* (2003) 36 EHRR 1; *Melnikova v Russia* [2007] ECHR 24552/02 (21 June 2007).

Having regard to the above, the Committee found a violation of arts 9(1) and 9(4) and held that the authors should be paid adequate compensation for their prolonged detention.

Implications for the Victorian Charter

This decision may be relevant to the interpretation and application of s 21 of the *Charter*, which is said in the Explanatory Memorandum to be modelled on art 9 of the *ICCPR*. While the present decision relates to immigration detention, an area of federal law and responsibility, it is clear that s 21 of the *Charter* (as with art 9 of the *ICCPR*) applies to all deprivations of liberty, including in relation to criminal law, remand, preventative detention, juvenile detention, mental illness and compulsory treatments: see, eg, HRC, *General Comment No 8: Right to Liberty and Security of Persons* (1982) [1]. These are all areas of state law and responsibility that will be subject to the *Charter* and should therefore be regulated and administered having regard to the principles articulated in this and related decisions.

The decision is available at http://www.ohchr.org/tbru/ccpr/Shams_et_al_v_Australia.pdf.

Phillip Lynch is Director of the Human Rights Law Resource Centre

European Court Considers Lawfulness of Continued Detention on Remand

Nowak v Poland [2007] ECHR 18390/02; *Owczar v Poland* [2007] ECHR 34117/02; *Michalak v Poland* [2007] ECHR 16864/02

Three recent cases from the European Court of Human Rights consider the principles to be applied in determining whether continued detention is lawful. This case note considers the potential impact of

these decisions on the interpretation of ss 21(5) and (6) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Facts

The cases concerned the complaints of three applicants about the excessive length of their detention on remand. The men were arrested in 1999 on suspicion of, among other things, repeated group rape with aggravated cruelty as members of an organised criminal gang. They were convicted of the charges in July 2002 after being held on remand for two years and seven months (Mr Nowak) and three years and 11 days (Mr Owczar and Mr Michalak).

Decision

The applicants relied in particular on art 5(3) of the *European Convention on Human Rights*:

Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

In the current cases, the European Court noted that there were three main grounds that the domestic court had used to justify the period of detention: the serious nature of the offences; the severity of the potential penalties; and the need to secure the proper conduct of the proceedings, including the risk that the accused might go into hiding.

In interpreting the obligations under art 5(3), the European Court made the following observations:

- Article 5(3) requires an accused to be provisionally released once his or her continuing detention ceases to be reasonable.
- Continued detention will only be reasonable if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.
- Although it is necessary that a reasonable suspicion persists that an accused committed an offence in order for his or her continued detention to remain lawful, with the lapse of time this will no longer be sufficient on its own.
- Even if there are other grounds that are held to be 'relevant' and 'sufficient' to justify the deprivation of liberty, the relevant authorities must display 'special diligence' in the conduct of the proceedings.
- Whether or not a period of detention is 'reasonable' must be assessed in each case according to its special features; there is no fixed time-frame that applies.

In the cases of *Owczar* and *Michalak*, the European Court found the reasons given by the domestic court had become less relevant over time and were not sufficient to justify detaining the men for three years and 11 days. In particular, the Court commented that it had not been explained why the applicants' release, which was granted pending their appeal, had not been considered at an earlier stage. On this basis, the Court found that there had been a violation of art 5(3) in relation to both men.

In the case of *Nowak*, the Court noted that the seriousness of the accusations, which included charges of being the leader of the organised criminal gang, justified the defendant being held in custody for two years and seven months. The Court found that the domestic authorities had shown 'special diligence' in handling Nowak's case, based on the complexity of the case and the fact that the prosecuting authorities had completed the investigation relatively quickly. On this basis, the Court concluded that the grounds given for Nowak's pre-trial detention were 'relevant' and 'sufficient' to justify holding him in custody and found that there had been no violation of art 5(3).

Application to the Victorian *Charter*

The relevant *Convention* provisions are very similar to s 21 of the Victorian *Charter*, which enshrines the right to liberty and security. Of particular relevance are ss 21(5) and (6), which provide:

- (5) A person who is arrested or detained on a criminal charge;
 - (a) must be promptly brought before a court; and
 - (b) has the right to be brought to trial without unreasonable delay; and

(c) must be released if paragraph (a) or (b) is not complied with.

(6) A person awaiting trial must not be automatically detained in custody, but his or her release may be subject to guarantees to appear:

(a) for trial; and

(b) at any other stage of the judicial proceeding; and

(c) if appropriate, for the execution of judgment.

Under s 32(2) of the Victorian *Charter*, the jurisprudence of the European Court may be used to interpret these provisions of the *Charter*. The considerations outlined by the European Court in this case may be particularly relevant in Victoria in the future given increasing attention upon terrorism and the creation of legislation that allows for extended periods of preventative detention and detention without trial. In particular, the cases are authority for the proposition that any pre-trial detention must be justified by 'relevant and sufficient' reasons and, further, that the reasons must take adequate account of the defendant's individual circumstances. A blanket policy, such as a policy that all persons charged with terror-related offences be remanded in custody, will not satisfy this test. The case is further authority for the principle that prolonged pre-trial detention must be regularly and freshly reviewed with particular scrutiny. In light of the decisions above, Victorian courts would do well to consider the real and positive force that the European Court and other courts have given to these rights associated with liberty and security, and read s 21 broadly.

The decisions are available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database>.

Alison Dodd is a lawyer with DLA Phillips Fox

HRLRC Policy, Advocacy and Law Reform

Indigenous Land Management and Cultural Practices

In conjunction with Native Title Services Victoria and DLA Phillips Fox, the Centre made a recent submission to the Victorian Environmental Assessment Council regarding Indigenous land management and cultural practices in the River Red Gums Forests.

The submission considers the application of the rights and obligations contained in the *Charter of Human Rights and Responsibilities Act 2006* to the Council's draft proposals regarding the River Red Gums Forests. As stated in the Preamble, one of the founding principles of the Victorian *Charter* is that human rights have a special importance for the Aboriginal people of Victoria with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters. The protection of cultural rights (s 19) and the right to take part in public life (s 18) are of particular relevance to the recommendations contained in the Draft Proposals Paper relating to Indigenous land management and cultural practices.

The Centre's submission urges the implementation of measures to facilitate the involvement of Indigenous people in decision-making about issues relating to their identity and culture and their connection with traditional lands in accordance with the human rights contained in the Victorian *Charter*.

The submission is available at www.hrlrc.org.au under Policy Work>HRLRC Submissions>Indigenous Land Management and Cultural Practices.

Family Violence Reforms

In conjunction with the Mallesons Human Rights Law Group, the Centre has recently assisted the Federation of Community Legal Centres (Vic) to make a submission to the Victorian Government regarding the draft Family Violence Bill 2007, which provides for the making of interim and final family violence orders. The submission recommends that the draft Bill be amended to ensure that its protections are equally afforded to all persons who, through disability, illness or cognitive impairment, require, and are dependent upon, a carer. In support of this recommendation, the submission discusses domestic and comparative human rights jurisprudence regarding equal protection of the law; protection from cruel, inhuman or degrading treatment or punishment; and protection of children.

In a letter to the Federation, the Attorney General referred to the submission as an 'unprecedented collaboration' which will make a significant and useful contribution to ensuring that the final Bill better protects women and children from family violence.

The submission is available at www.hrlrc.org.au under Policy Work>HRLRC Submissions>Family Violence Reforms.

HRLRC Casework

Provision of Appropriate Medical Services to Elderly Persons

In partnership with DLA Phillips Fox, the Centre is providing assistance to a middle aged woman with an acquired brain injury who requires urgent therapy to treat severe contractures of her left hand. The contractures cause considerable pain and suffering and are resulting in deterioration of her hand. Although the woman has been waiting for therapy for over 3 years, she is not considered a priority because she is aged over 50. If appropriate medical services are not provided, it is likely that radical surgery will be required, which may consist of severing the tendons in her fingers or even amputation of the hand.

The Centre considers that a lack of adequate medical services potentially raises concerns in relation to sections 8 (right to non-discrimination) 10 (protection from cruel, inhuman or degrading treatment), 13 (right to privacy) and 21 (right to security of person) of the Victorian *Charter*. Together with DLA Phillips Fox, the Centre is exploring a range of options to ensure that an adequate support package is provided to the woman. As an interim measure, the advocates have been able to obtain one-off funding for urgently needed medical treatment.

Reducing Blood-Borne Virus Transmission in Prisons

There is substantial evidence that condoms and needle and syringe programs are highly effective in reducing blood borne virus transmission, including of Hepatitis C and HIV/AIDS. Despite this evidence, such programs are generally not available in Australian prisons, notwithstanding the significant success of such programs in comparative jurisdictions. The Centre is currently examining whether the relevant public authorities have a positive obligation under the Victorian *Charter of Human Rights and Responsibilities Act 2006* and the ACT *Human Rights Act 2004* to provide NSPs and condoms in prisons in order to minimise the spread of blood borne viruses.

The issue is also currently the subject of litigation before the European Court of Human Rights in the matter of *Shelley v United Kingdom* under provisions of the UK *Human Rights Act 1998* and the *European Convention*.

Seminars and Events

Australia's First Ever Human Rights Arts and Film Festival

29 November – 2 December

From the underbelly of St Kilda to the crisis zone in Darfur, from East Timorese Art Collectives to Bert and Ernie on Sesame Street, Australia's first ever Human Rights Arts and Film Festival will challenge, touch and inspire audiences from all walks of life.

The Festival will feature award-winning films from all over the world, international and local artists, high-profile speakers, live music, and stalls featuring a range of social, humanitarian and environmental organisations. For full program details, visit www.hraff.org.au.

7th Annual Human Rights Oration

'Putting Equality Back on the Agenda'

The 2007 Human Rights Oration, organised by the Victorian Equal Opportunity and Human Rights Commission, will be delivered by author and journalist, Dr Anne Summers.

The oration will address the issue that 'Equality for women has been off the political agenda for too long now. No human rights agenda can be complete without the inclusion of a clear commitment to the equality of women.'

Date: 12.30 – 1.30pm on Monday, 10 December 2007

Venue: ZINC at Federation Square, corner of Flinders and Swanson Sts, Melbourne

RSVP: Event is free, but registrations required: alex.manning@veohrc.vic.gov.au or (03) 9281 7144

ChARTing Rights: Freedom, Respect, Equality and Dignity

An exhibition of works from the Commission's Human Rights Community Arts Project

Through a series of artistic workshops facilitated by community artist, Marion Singer, participants from a diverse range of community groups explored the key themes of the Victorian *Charter of Human Rights and Responsibilities*: freedom, respect, equality and dignity. Their photographic works are now on display in this thought-provoking exhibition.

Date: 9.30am – 5.00pm from 7 December – 14 December

Venue: Old Melbourne Gaol, Female Exercise Yard of the Watch House, Russell Street, Melbourne

Education, Training and 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:

- Professor Conor Gearty, 'The Human Rights Act: Are Judges Now Out of their Depth?', JUSTICE Tom Sargent Memorial Annual Lecture 2007, London, 17 October 2007
- Priyanga Hettiarachi, 'The Sacred and the Profound: Judicial Review and Rights, Proportionality and Deference to Executive Conduct' (2007) 29 *Australian Bar Review* 223

Graduate Program in Human Rights Law 2008

The Melbourne Law School Graduate Program in Human Rights offers one of the widest ranges of human rights subjects in Australia. Subjects are taught by leading practitioners and academics from around Australia and the world. For 2008, the program includes subjects taught by Justice Zak Yacoob (South African Constitutional Court), Prof Martin Scheinin (UN Special Rapporteur on Human Rights and Counter-Terrorism) and Prof Susan Marks (London School of Economics).

For further information, see www.masters.law.unimelb.edu.au.

Our Freedoms: A Decade's Reflection on the Advancement of Human Rights

(Human Rights Institute of the International Bar Association, 2007)

Our Freedoms: A Decade's Reflection on the Advancement of Human Rights was published this year by the International Bar Association to mark the first ten years' work of its Human Rights Institute (HRI).

The book comprises eleven chapters on a number of human rights issues that have varied in profile over the last decade. A couple of themes are identifiable. One is the role of international organisations in progressing human rights, with chapters on the role of war crimes tribunals, of the UN in conflict resolution and peace management; and of the UN Special Rapporteur for the Independence of Judges and Lawyers. Another is the evolving issue of business and human rights, with chapters on the relationship between human rights, international law and the business enterprise, and a commentary on the draft *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*. Other chapters address diverse topics including the rights of victims of crime, freedom of expression, and sexuality and discrimination.

Contributors are all eminent legal professionals from different parts of the world from a broad range of backgrounds, representing practitioners, academia, international organisations and the judiciary.

The introductory chapter outlines the development and achievements of the HRI over the last ten years, through the HRI's focus on general human rights protection, promotion and enforcement, as well as on the independence of the judiciary and the legal profession, and promotion of the rule of law. The HRI undertakes human rights missions and trial observations and provides training and capacity building for law societies and bar associations across the world. Recently, it has established a public interest litigation centre in South Africa and recently commenced monitoring and reporting on the work and proceedings of the International Criminal Court. It has also commenced analysis of legislation developed in response to terrorism.

At the start of each substantive chapter, a personal case study of the detrimental effect of the relevant human rights issue is provided. This serves as a powerful way to engage the reader with the chapter content, as well as a reminder of the direct relationship between the negative experiences of individuals and communities and the human rights law and activism that seeks to prevent these occurrences. A number of the chapters then follow with a candid discussion of progress, setbacks and criticism levelled in connection with their respective human rights issues.

For instance, Howard Varney, member of the Johannesburg Bar who worked on the truth and reconciliation commissions of Sierra Leone, East Timor and South Africa, explores the arguably inherent contradictions in recent post conflict justice initiatives, which generally either seek retribution through criminal prosecution or reconciliation through truth and 'healing'. Varney discusses the extent to which these different justice initiatives can be integrated and the degree to which one's existence may undermine the progress of the other.

Mary Robinson, former UN High Commissioner for Human Rights, outlines the substantial steps that the business and human rights debate has taken in recent years, the evolving role that the UN has played in this debate through establishment of the UN Global Compact and appointment of a Special Representative on Business and Human Rights, and the increasing engagement with human rights of the business community through initiatives such as the Business Leaders' Initiative on Human Rights, which is currently exploring integration of human rights standards into business practice.

Australian High Court Justice Michael Kirby's chapter on sexuality and discrimination identifies the lack of express protection from sexuality discrimination provided by international human rights law and the lack of consistency of enforcement of relevant human rights norms across and within UN regional systems. Justice Kirby then goes on to outline, however, how the *ICCPR* was relied on by Australian citizen Toonen to challenge discriminatory State criminal laws. An overview of Australian legal reform in respect of sexuality discrimination is also provided.

In the book's closing remarks, IBA Executive Director Mark Ellis comments that the diversity of topics addressed by the book's contributors demonstrates the 'undeniable expansiveness of human rights, affecting nearly every aspect of our lives'. The book is also an effective reminder of the varied perspectives, approaches and roles fulfilled within the international and domestic human rights law frameworks.

Rachel Nicolson is a Senior Associate in Allen Arthur Robinson's Corporate Responsibility Group

If I Were Attorney-General...

Natasha Stott Despoja

Australian Democrats' Spokesperson on Attorney-General's Affairs

If I were Attorney-General, I would be proud to stand as the first ever woman be our nation's first law officer. It would remind me that Australia has come a long way on issues of equality and justice, but that there is still much work to be done.

My first job in office would be to implement an urgent inquiry into the state of Australia's anti-terrorism laws. Public confidence in the laws has been shattered by the bungled application of draconian powers by law enforcement and security agencies.

The inquiry would consider whether the 40 odd anti-terror laws passed by the Howard Government since 9/11 are, in combination, balanced, fair, adequate and necessary. It would have regard to the need for national security, balanced against the maintenance of fundamental human rights.

It would consult with the public, law enforcement and security agencies that use the powers at a federal and state level, and would thoroughly examine the laws from a policy, practical and legislative perspective. It would analyse whether the laws achieve their aim of reducing the threat to Australians from acts of terrorism, or whether they alienate sections of the community and perpetuate extremism.

Importantly, I would commit to the immediate implementation of any recommendations to emerge from the inquiry.

I would lead the Commonwealth in a process towards enacting a legislative Bill of Rights and Responsibilities. The process would focus on public consultation and education with a view to engendering a sense of public ownership of any human rights model put forward. It would be impartial, well resourced and independent from Government. It would be governed by clear terms of reference but would also recognise the indivisibility and interdependence of all human rights and would not be bound by arbitrary thresholds.

In lieu of a Bill of Rights, I would use my position in Cabinet to fearlessly promote and advocate for a rights based approach to government.

I would advise my Cabinet colleagues that many Australian practices breach international law, and lean on them to adopt a human rights approach across other portfolios. The abolition of mandatory detention and offshore processing of asylum seekers would be a good place to start, as would my Government's approach to addressing Indigenous disadvantage.

I would work at restoring Australia's reputation as a compassionate and just nation by immediately legislating to implement our international legal obligations in domestic law. I would encourage the executive to ratify important treaties and protocols, such as the United Nations Declaration on the Rights of Indigenous Peoples and the Convention on the Rights of Persons with Disabilities.

I would legislate to close any loopholes that allow Australian intelligence to be used to convict any person of an offence that is punishable by sentence of death. I would be fearless and unwavering in my opposition to the death penalty and other human rights abuses, and encourage the executive to do likewise.

I would immediately re-introduce the Democrats' *Same-sex: Same Entitlements Bill 2007* which would implement the recommendations of the Human Rights & Equal Opportunity Commission and remove 58 federal laws which discriminate against same-sex couples.

In recognition that the fulfilment of rights is predicated on adequate access to justice, I would overhaul the Commonwealth's attitude to legal aid. I would oversee the urgent injection of additional Commonwealth funds to ensure that marginalised and disadvantaged Australians are eligible for legal aid funding in family, criminal and civil law matters.

At the same time, I would make the awarding of Government Legal Services contracts relative to *pro-bono* contributions a priority consideration for the Standing Committee of Attorneys-General, with a view to national conformity.

I would commit my Government to reform of the *Privacy Act* based on the recommendations of the Australian Law Reform Commission. First and foremost, I would remove the double standard that exempts political parties and small businesses. I would also beef up the enforcement and remedial provisions of the Act to ensure that it properly protects the individual's right to privacy.

Finally, if I were Attorney-General, I would take steps towards Constitutional reform aimed at enhancing and restoring government accountability, the recognition of Indigenous Australians and an Australian head of State. I would also remove the politics from the appointment of the judiciary by creating an independent appointments commission to help entrench the separation of powers.

Having introduced legislation for a fixed four year term in the House of Representatives, if I was Attorney-General, I would know exactly when the next election would be. That way, rather than aim my policies at the polls, I could concentrate on genuine and principled legal policy until it was appropriate to turn my mind to the need to renew my mandate from the Australian people.

Natasha Stott Despoja is Senator for South Australia and the Australian Democrats' Attorney-General's spokesperson