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

The Centre 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.

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Opinion

National Consultation and Legislative Bill of Rights
Essential to Best Serve Human Rights

Five years ago I began my term as the President of the Australian Human Rights Commission, confident in the ability of the common law and a robust democracy to protect human rights. I leave convinced we need a major legal and cultural overhaul in order to deal with the human rights challenges of the 21st century.

I have spent almost a half a century in the legal profession and over a decade on the bench of the Federal Court.

It is no secret that the mandatory detention regime caused deep discomfort in parts of the Federal Court judiciary. In 2003, I held that the detention of Mr Al Kateb – a stateless Palestinian man locked in immigration detention – was lawful despite evidence that there was no foreseeable end to his detention. Ultimately, the High Court confirmed that nothing in the *Migration Act* or the Constitution prevented indefinite detention.

As a judge, I was not asked to understand the emotional trauma of the detainees that appeared before the Court. I did not know the conditions in which asylum seekers were detained – nor did I ask. Although international law prohibits inhumane and arbitrary detention, Australian law does not.

The results are troubling. As a judge, I felt the decision at which I arrived was legally correct yet morally reprehensible.

As President of the Commission, I was repeatedly confronted with the sorts of human rights problems I did not see sitting in a Court building. I stood in the Management Security Unit at Villawood Immigration Detention Centre – a small, bleak space where long idle hours corrode the mental health of detainees. At Baxter I saw children – the same age as my own – and witnessed in their disturbed manner the profound damage wrought by long-term detention.

It is sometimes said that the best human rights protection is the fair-mindedness of the Australian people. Without doubting the capacity of Australians for compassion, the absence of legal remedies means that human rights abuses are not always made public. Many minds had already disintegrated in long-term detention before the story of Cornelia Rau hit the front page.

I suspect the reality is that members of the judiciary, like people on the street, have little occasion to engage face to face with the human rights problems faced by their fellow Australians.

When I was a judge, although I sometimes had doubts about the laws I was required to apply, I did what many people do and placed my faith in Parliament to correct the harshness of the law.

At the Commission I soon realised my faith in current parliamentary processes to protect basic rights was naive. We frequently scrutinised the human rights compatibility of new bills. As the President, I saw major legislation – including counter-terrorism bills and the package of bills to enable the Northern Territory intervention – rushed through Parliament with grossly inadequate consideration of the impact of these laws on basic rights.

In 2005, I warned new counter-terrorism laws were in danger of reflecting a police state where sweeping police powers were immune from effective challenge. While there was a need to introduce new laws to deal with the threat of terrorism, some new offences and powers were so broad in scope, they almost *invited* abuse. The potential of these laws to be misapplied in ways that ruin reputations and trample on basic rights was confirmed last year by the arrest and detention of Dr Haneef.

Now, after five years at the Commission, I can no longer in good conscience support the familiar refrain that rights are best protected by the common law and parliament.

What I would like to see is a new approach to making law and policy that doesn't ignore the human rights picture. I would like to see the legislature focus on *solving* existing human rights problems and *preventing* human rights problems from happening in the future.

The federal Government proposes to hold a public consultation about how best to protect human rights and freedoms in Australia. I believe this consultation should be welcomed for one simple reason. In a country where every night over 100,000 people are homeless, and Indigenous Australians still die 17 years earlier than their non-Indigenous counterparts, we can and should do better.

I am now convinced that the best way to ensure that all three arms of government – the executive, the legislature and the judiciary – take care when they make decisions that impact on basic human rights is to introduce a statutory charter of rights. As a Federal Court judge, I did not see the need.

The old argument that the current system is working well just does not stand up.

Opponents of a charter should spend less time glossing over the inadequacies of our current arrangements and more time formulating positive proposals to better protect people for whom the enjoyment of basic rights are still out of reach.

We should not forget the children taken away and the laws that punish the kids of same-sex families. And we should not forget the damage to Australia's international reputation that occurs when we fail to practice what we preach.

A statutory charter should not allow Courts to strike down laws that are incompatible with human rights. However, if we are serious about implementing our international obligations, we should give Courts the power to provide meaningful remedies to individuals who are victims of human rights violations.

The suggestion that these kinds of arrangements will encourage judicial activism is simply scaremongering. The interpretation of human rights by the judiciary will not be an imaginative exercise. Instead, it will occur in accordance with the predictable traditions of legal reasoning. Human rights are not new in Australian legal jurisprudence, just fragile and fragmented.

I believe – perhaps optimistically – that the main obstacle to improving human rights protection in Australia is not a lack of care, but a lack of understanding.

If the proposed federal Government inquiry into human rights protection can engage ordinary Australians with the kinds of human rights issues that came across my desk in the last five years, the case for change might just succeed.

John von Doussa QC is former President of the Australian Human Rights Commission

Just Do It: Leadership and a National Human Rights Charter

Imagine if we could get all of Australia to start a slow hand clap. And then, over the top of it, comes a plaintive chant 'Why are we waiting?'

It probably wouldn't be long before it collapsed into a national Mexican wave (clockwise?), but before the nation, inevitably, turned to mindless entertainment they would have made a point: stop procrastinating and just do it. Enact a charter of rights.

Consultations, discussion papers, roundtables, workshops, inquiries, reports and summits. What government balks at, at the very least, volunteering that it will comply with international human rights

standards? Only the Australian government it seems. Why the timidity, the apprehension, the hesitancy, in declaring – again at the very least – ‘we undertake that the laws, policies and practices that govern Australia will not breach your human rights’?

In a time of leadership by opinion poll, the fear of backlash is palpable. Business may not like it. Faith-based groups may not like it. At least one media organisation may not like it and, worse, may adopt an editorial policy that is consistently opposed to it.

While national leadership fails, the states and territories are forging ahead, leading us to a situation where various governments of the federated provinces recognise and guarantee the human rights of their citizens, but the government of the federated nation does not.

We live with, and seem to accept, human rights violations by government. Even if we were to say ‘Enough Indigenous disadvantage, enough police and security powers, enough limits on the franchise, enough work ‘choices’, enough detention without trial, enough fortress Australia, enough discrimination, enough homelessness, enough youth suicide’ and so on, there is no standard against which the policies and practices of government can be assessed.

In the years between elections, when representative democracy is in the rigid grip of party obedience and news is filtered through the colour and lights of a trivialising media, government accountability is in limbo. Even at elections the battle is fought on memories of – and spin on – recent events.

But the conservative nature of Australians and their leaders, compounded by the mean inwardness of vision encouraged by national policy over the past decade, together make it hard to get anyone to take seriously the need for strong leadership to address the endemic transgression of human rights in Australia. ‘Best leave well enough alone’, ‘Don’t rock the boat’, ‘It’ll be OK’, and, most insidious, the now respectable ‘I’m OK’, all deflect responsibility for holding government accountable for its conduct.

With this licence to govern as it pleases, is it surprising that no government would hurry to volunteer to subject itself to a regime that exposes its every act to scrutiny for international best practice?

Prominent charter advocates are in fact asking for little more than a system of scrutiny, and perhaps the power that exists in Victoria to mount a court challenge against a public authority’s decision for human rights non-compliance. But charter advocates are at pains to avoid suggesting that a person might be compensated for a government’s breach of their human rights, although Tasmania is considering just that, and the UK’s *Human Rights Act* goes that far. Instead, charter advocates are promoting a damages-free ‘dialogue’ model of human rights which relies principally on education, and the incremental persuasion of reprimand by the courts, to bring about government compliance with human rights.

Designing a human rights charter does not, however, involve an either/or decision: education, and winning hearts and minds, are necessary to achieve human rights compliance, but they are consistent too with sheeting home responsibility for wrongdoing, and making government face the consequences – and costs – of its failure to protect its people’s human rights.

It shows the strength of the anti-charter lobby that charter supporters must not only promise not to expose government to liability, they must promise too that a charter will not threaten parliamentary sovereignty. This is an unnecessary defence against a specious and distracting attack: a charter that is the product of parliament, even a charter with teeth, can be no more a threat to parliamentary sovereignty than, say, anti-discrimination law. Opponents of a charter can take heart from the unhesitating speed with which the previous government, in implementing the NT Intervention, by-passed the race discrimination restriction that a previous government attempted to impose on federal laws.

Earlier this year I mused on what I would do ‘If I were Attorney-General’ (HRLRC Bulletin Vol 21, Jan 2008, p 20); I said that I would commit the government to be bound by human rights standards in legislation and policy, and that I would ensure that government compliance would be justiciable. I asked, rhetorically I thought, ‘how otherwise can our commitment to human rights be credible?’. I didn’t say that I would conduct national consultations to see if even *non*-justiciable human rights are a good idea. Government compliance with human rights standards is not novel, let alone radical, and it is a policy position that a government ought put before and debate in parliament.

The government’s determination to not make a decision itself and take it to parliament is bemusing, especially as it need only implement the established model that has ruffled few feathers in the ACT and Victoria, and that Fred Chaney’s committee has recommended for Western Australia. There is no good

reason to consult again. Four separate recent inquiries and reports in Australia have canvassed expert and public opinion on questions such as 'which rights' and 'what model'.

But on 10 December this year (International Human Rights Day), in a gesture that is as ironic as it is intentionally symbolic, the federal government will propose spending time and money on creating another forum for charter arguments. The debate will take place in a vacuum: there will be no model that is endorsed by the government and can be described and attacked and defended. Rather, the consultation will continue a general free-for-all, for-and-against human rights debate that will not educate people, but will polarise and alienate them.

If the government must consult rather than use the parliament for what it is there for, then it needs to show the way, and say: 'Here is a charter, what do you think of it?'. Asking 'Well, where shall we begin?', abdicates responsibility for leadership; it is not good policy, even if the government believes it is clever (defensive) politics.

One legacy of a national human rights charter could be that it sets minimum standards for federal, state and territory anti-discrimination laws. In light of the longstanding status and broad coverage of those laws, any new 'minimum standard' should be unremarkable. But we might need such a standard, and bemoan its absence, if current proposals to harmonise anti-discrimination laws lead to compromising at the lowest common denominator.

As a national code of regulation, Australia's anti-discrimination laws are inconsistent and confusing, especially for employers, but harmonising the laws must not lead to the same concessions to good policy and practice that the previous government perpetrated when it enacted the flimsy *Age Discrimination Act*. Downgrading our anti-discrimination laws is only an example of where law and policy could go unless the federal government shows a strong, public and principled commitment to human rights compliance, of its own accord, without asking for permission.

Simon Rice is Director of Law Reform and Social Justice at the ANU College of Law.

News

Australia Ratifies Optional Protocol to CEDAW

On the eve of the International Day for the Elimination of Violence Against Women, 25 November 2008, Australia ratified the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*.

Attorney-General Robert McClelland and Minister for the Status of Women Tanya Plibersek said that 'by becoming a party to the Optional Protocol, the Government is making a powerful statement that discrimination against women in any form is unacceptable'.

Mr McClelland said that 'the Rudd Government is committed to overcoming the stereotypes and prejudices that can stifle women's rights and weaken equality. Becoming party to the Optional Protocol demonstrates our commitment to the promotion and protection of the rights of women, both at home and abroad.

Under the Optional Protocol, women in Australia will be able to make a complaint to the UN Committee on the Elimination of Discrimination Against Women about alleged violation of Australia's obligations under CEDAW. This can only occur after domestic legal options have been exhausted. The protocol also permits a UN investigation process in relation to systemic violations of women's rights.

'Acceding to the Optional Protocol will send a strong message that Australia is serious about promoting gender equality and that we are prepared to be judged by international human rights standards,' said Minister Plibersek. She further stated that it 'will also add credibility to our offers of support to women across our region.'

Australian Professor Elected to UN Committee on the Rights of Persons with Disabilities

Professor Ron McCallum AO, Professor of Labour Law at Sydney Law School, has been elected as an inaugural member of the UN Committee on the Rights of Persons with Disabilities.

The Committee, which is comprised of 12 independent international human rights and disability experts, is established under the *UN Convention on the Rights of Persons with Disabilities* to monitor, and make recommendations regarding, implementation of that treaty. The Optional Protocol to the Convention further authorizes the Committee to examine and determine individual complaints with regard to alleged violations of the Convention by States parties to the Protocol.

Professor McCallum, who has experienced blindness since birth and is Deputy Chair of Vision Australia, will be the only Australian member of a UN human rights treaty body following Professor Ivan Shearer's resignation from the UN Human Rights Committee in December 2008. According to Australian Human Rights Commissioner, Graeme Innes, 'Professor McCallum's election is a great honour for Australia. It will further enhance the respect Australia has recently attracted on international human rights issues.'

Human Rights Committee Issues General Comment on Legal Nature, Effect and Implementation of Views

General Comment No 33 on the obligations of States Parties to the *Optional Protocol to the International Covenant on Civil and Political Rights* was recently adopted by the Human Rights Committee.

The Optional Protocol establishes the mechanism under which the Committee may receive and consider and provide views on individual communications. The individual communication process aims to ensure effective protection for individuals who have suffered a violation of rights afforded to them under the *ICCPR*.

General Comment 33 states that while the Committee is not a judicial body, its views exhibit some 'important characteristics of a judicial decision', including that:

They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.

The General Comment further provides that States Parties are obliged to 'use whatever means lie within their power in order to give effect to the views issued by the Committee', particularly having regard to the fact that

the views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.

The General Comment also provides guidance on States Parties obligations to respond in a timely and adequate manner to communications and to respect the Committee's requests for interim measures in cases where action by the State Party would cause irreparable harm to the author of a communication.

The General Comment is available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

Rachel Ball is a lawyer with the Human Rights Law Resource Centre

Allens Arthur Robinson Receives Award for Outstanding Contribution to Human Rights

Leading national law firm Allens Arthur Robinson has been recognized for its outstanding pro bono contribution to human rights with a Victoria Law Foundation Distinguished Pro Bono Award 2008. AAR was recognized, in particular, for its partnership with the Human Rights Law Resource Centre through which it has conducted significant and successful strategic litigation and law reform work, including in respect of prisoners' rights and Charters of Rights.

A number of other firms with which the Centre has partnerships were also recognized for their outstanding pro bono work, including Blake Dawson, Clayton Utz, Corrs Chambers Westgart, DLA Phillips Fox and Minter Ellison.

Victorian Charter of Rights Developments

Statements of Compatibility under the Victorian Charter

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

Below is an analysis of recent significant Statements.

Sheriff Bill 2008 (Vic)

The *Sheriff Bill 2008* (Vic) seeks to provide one consolidated legislative framework for the appointment of the sheriff and their functions, powers and duties. In the 2006-2007 year, over 900,000 criminal and civil warrants were referred to the Victorian Office of the Sheriff for execution. The Bill bolsters the powers and duties of the sheriff to enforce those warrants.

The provisions of the Bill provide for the following:

- the sheriff will be empowered to arrest a person named in a warrant, restrain, enter premises, seize and sell property, demand payment and request name and address;
- changes to the sheriff's powers to include:
 - a new power of forced entry when executing civil warrants (subject to safeguards);
 - a power to enter premises to serve seven-day notices;
 - the ability to receive payment from third parties (in certain circumstances);
 - the ability to request payment on enforcement orders;
 - a power to seek residential address information from state and local government bodies including Victoria Police, VicRoads and the Residential Tenancies Board Authority (again, subject to subject to safeguards); and
- new procedures for enforcement, including executing multiple types of warrants at the same time, and allowing the sheriff to enforce warrants based on electronic verification.

The Statement of Compatibility identifies four *Charter* rights engaged by these measures: the right to freedom of movement (s 12); privacy and reputation (s 13); property rights (s 20); and liberty and security of person (s 21).

New powers of entry, arrest, temporary restraint, and to accompany police at road blocks will limit rights to move freely within Victoria and to liberty, by restricting certain people's movement while the sheriff executes a warrant or determines their identity. The Statement contends the new powers are a reasonable limitation, as they are subject to safeguards and limitations including that there is no other less restrictive means reasonably available to achieve the purpose of efficient execution of warrants. The Statement also expresses the view that temporary restraint is a reasonable limitation and will continue only for the minimum time necessary to ensure enforcement of a warrant.

The right of privacy is engaged by new powers permitting the sheriff to request residential address information from state and local government bodies and requiring proof of identity of the driver or occupant of any vehicle pulled over at a police road block. The Statement contends that the right to privacy is not 'unlawfully or arbitrarily interfered with' as it is subject to safeguards and is consistent with the objective of locating people with unexecuted warrants.

Property rights are engaged by the sheriff's power to seize and sell property of a person where authorised by legislation or a warrant and gives the new purchaser good title to the property. The Statement explains that these limitations on protected rights are imposed in accordance with law, are not arbitrary and therefore do not amount to an unreasonable limitation. Furthermore, the limitations do not amount to an unlawful deprivation of property as the proceeds may be applied to the payment of any outstanding warrant amounts and the costs of the execution.

Kerryn Saric, Human Rights Law Group, Mallesons Stephen Jaques

Police Regulation Amendment Bill 2008

The *Police Regulation Amendment Bill 2008* (Vic) amends the *Police Regulation Act 1958* (Vic) to:

- reform existing remedial and dismissal procedures;
- clarify the supervisory powers of the Chief Commissioner; and
- improve procedures for the State to assume liability in civil actions against members of the police force.

The Bill was originally part of the *Police, Major Crime and Whistleblowers Legislation Amendment Bill 2008* and was split on 9 October 2008 in the Legislative Assembly.

The Statement of Compatibility identifies human rights issues relating to misconduct, investigation and dismissal powers. The Statement concludes that the Bill is compatible with the *Charter*.

Misconduct

The Bill restricts members from gaining alternative employment without prior approval by characterising such actions as misconduct. According to the Statement, any limits this places on the right to freedom of association (s 16(2) of the *Charter*) are reasonable and justified. The Statement alludes to comparative jurisprudence that affirms the necessity of restrictions of this right for positions of public service and responsibility. This necessity is said to arise from the importance of neutrality and impartiality of police members. Furthermore, the Chief Commissioner may take human rights into consideration when approval of these activities is sought.

Investigation powers

In furtherance of an investigation relating to misconduct, the Bill provides the Chief Commissioner with powers to require answers, information or relevant documents from a member. The Statement acknowledges that this may raise concerns with respect to the right of a person charged with a criminal offence 'not to be compelled to testify against himself or herself or to confess guilt' (s 25(2)(k) of the *Charter*). However, the Statement concludes that the powers are compatible with this right. Firstly, the Chief Commissioner is not able to use evidence gained from these powers in order to gather evidence for a criminal trial. Secondly, the Bill contains provisions in relation to admissibility that encompass the 'use' immunity which is required by s 25(2)(k) of the *Charter*. This immunity precludes the use of statements made in other proceedings being used against the accused in criminal proceedings.

Dismissal powers

The Statement also deals with the ability of the Chief Commissioner to take action under dismissal provisions whilst a criminal investigation or charge for an offence is pending. Under s 25(1) of the *Charter*, 'a person charged with a criminal offence has the right to be presumed innocent until proven guilty'. The Statement concedes that this right can apply to disciplinary hearings. However, it highlights that a finding of misconduct founded directly upon having committed a criminal offence is limited by the Bill to circumstances where the offence has been proven. In addition, the Statement makes reference to *Jakumas v Lithuania* [2006] ECHR 6924/02 (from the European Court of Human Rights) which found that a dismissal of itself does not affect the presumption of innocence in subsequent criminal proceedings. The Statement does include the caveat that the Chief Commissioner should avoid making public statements in relation to a misconduct proceeding where this would 'affirm guilt' in relation to a criminal charge.

Civil proceedings against police members

The Bill makes it a requirement for civil actions against individual police members to be brought against the State. This vicarious liability will not apply in cases of serious and wilful misconduct. In its submission to the Scrutiny of Acts and Regulations Committee, the HRLRC was concerned that these amendments may significantly limit the deterrence against police misconduct, and pointed out that police misconduct may result in the breach of fundamental human rights such as the right to life (s 9 of the *Charter*) and the right to liberty and security of person (s 21 of the *Charter*). Consequently, greater measures than those envisaged by the Bill are needed to prosecute those who undermine these rights. This analysis was not considered in the Statement, which focuses primarily on the human rights implications for police members themselves.

Sheranga Fernando, Human Rights Law Group, Mallesons Stephen Jaques

Other Charter of Rights Developments

Campaign for a National Charter of Rights Continues

The Centre is continuing its work on the campaign for a federal Charter of Human Rights. The Centre is working with the Australian Human Rights Group – a network of now over 60 organisations from across the country and different sectors who are committed to human rights protections.

Recent developments in relation to a federal Charter of Human Rights over the last month include:

- In a recent speech, the Attorney-General noted:
 - the Rudd Government believes human rights are of such national significance, that we are committed to an Australia-wide consultation. We want to hear the Australian people's views on the protection of human rights. We are currently working through arrangements for the consultation. And I will have more to say on this at a later date. Ultimately, the consultation will seek community views on how best to protect and promote human rights and responsibilities. We want to encourage broad community debate on a range of human rights issues – not only on whether a Charter or Bill of Rights is necessary.
- In other developments, the Hon Justice Kevin Bell (Victorian Supreme Court Judge and VCAT President) presented a paper, 'Enhancing Australian Democracy with a Federal Charter of Rights and Responsibilities' which notes the value and benefit of a federal Charter (available at www.vcat.vic.gov.au).
- Many individuals and organisations have emailed the Attorney on the need for human rights protection in Australia via www.getup.org.au/campaign/readytobeheard.
- Telstra provided the Prime Minister and Attorney-General with a public submission in favour of a federal Charter.

These articles and speeches are available from www.hrlrc.org.au. If you are interested in becoming involved in the campaign for a federal Charter of Human Rights, please contact Phoebe Knowles on seconddee1@pilch.org.au.

New Report Shows UK *Human Rights Act* Protects Vulnerable People and Improves Lives

A new report, published by the British Institute of Human Rights to mark ten years of the UK *Human Rights Act* and 60 years of the *Universal Declaration of Human Rights*, demonstrates that the *HRA* is protecting vulnerable people from abuse and poor treatment in public services.

The report highlights examples where the *HRA* helps protect people from brutality, and unnecessary intrusion of their privacy, and promotes people's inherent human dignity and participation in life.

The report shows that the *HRA* is an invaluable tool for public service staff, service users and their advocates, enabling people to challenge poor treatment without having to go to court, because it requires public services to consider people's basic human rights in their everyday work, and respond to individual needs.

The report highlights sixteen new case studies where the *HRA* has made concrete positive changes in people's lives; protecting the fundamental rights of women, children, older people, people with disability, people with mental health needs, people with learning disabilities and asylum seekers.

Ceri Goddard, acting Director of the British Institute of Human Rights said:

The *Human Rights Act* is ten years old and should be celebrated for the positive changes it is making to people's everyday lives – in our hospitals, care homes and schools. Sadly, myths and misperceptions abound about this law, fuelling calls to scrap it, but the British Institute of Human Rights's experience is that when people know the facts and understand how to use the law and its principles, the *Human Rights Act* is a vital tool protecting vulnerable people and promoting good practice in public services.

The report makes a number of recommendations to further promote and protect human rights, including:

- The need for a major public awareness campaign to illustrate the benefits of the *HRA* to everyone.
- People need to be empowered to learn about their rights and use the *HRA*, and that this will result in good practice and a culture of respect for human rights.
- Public authorities should proactively and strategically integrate human rights throughout public services, policy and practice.

The report is available at

<http://www.bih.org.uk/sites/default/files/BIHR%20Changing%20Lives%20FINAL.pdf>.

Ceri Goddard is acting Director of the British Institute of Human Rights

Tasmania Moves Towards Enactment of State-based Bill of Rights

In a major speech on 30 October 2008, Tasmanian Premier David Bartlett indicated that the state is seriously considering the enactment of a Bill of Rights. Speaking on the topic of social disadvantage and poverty, the Premier stated:

I think an important part of connecting communities through social inclusion is making sure that people have a clear understanding of their rights and responsibilities as members of the Tasmanian community.

That is why I can flag today that I am interested in looking further at a Bill of Rights for Tasmania. I have asked Deputy Premier and Attorney General, Lara Giddings, to bring forward recommendations to Cabinet about the need for a Bill of Rights, and its potential content.

Setting down rights on paper is about empowering people. It gives us the chance as a community to set out some of the political freedoms and social rights that all Tasmanians should have. And social empowerment in turn builds a sense of community. It also gives us the opportunity to once again lead the nation with a socially progressive agenda, as we have done over the past decade with our significant relationships legislation, our family violence prevention policy, and our provision of compensation to the Stolen Generations.

The speech is at http://www.premier.tas.gov.au/media_room/speeches/social_headland_speech.

Victorian Charter Case Notes

VCAT Considers Interpretative Provision in Taxi Licensing Case

XFJ v Director of Public Transport (Occupational and Business Regulation) [2008] VCAT 2303 (31 October 2008)

In overturning a decision by the Director of Public Transport to refuse to grant XFJ, the applicant, accreditation to drive commercial taxi vehicles under the *Transport Act 1983 (Act)*, VCAT considered the application of the obligation under s 32(1) of the *Charter* to interpret laws consistently with human rights.

Facts

XFJ came to Australia as a refugee from Ethiopia in 1989. Prior to arriving in Australia he endured many hardships during his escape from Ethiopia, including imprisonment and torture in Egypt. In 1990, during a period of acute depression, he stabbed his estranged wife to death and shortly afterwards failed a suicide attempt.

XFJ was acquitted of his wife's murder on the ground of insanity and was detained in a psychiatric institution. In 1998, after years of rehabilitation and treatment, he was released into the community on a special supervisory regime and in 2003 he was completely discharged.

When XFJ first applied for a taxi licence, the Director of Public Transport refused his application. The *Transport Act 1983* has deeming provisions which provide that a person found not guilty of an offence on the basis of mental impairment is considered guilty for the purposes of the *Act*. On closer inspection, it emerged that the deeming provision was not applicable to XFJ as he had been dealt with under the pre-1997 insanity regime. When the Director reconsidered his decision, he accepted that he had a discretion to exercise, but denied the application on the basis of the 'public care objective' contained in s 169 of the *Act*.

Mr XFJ applied to VCAT for a review of the Director's decision to refuse accreditation.

Decision

The Deputy President overturned the Director's decision and found that XFJ should be awarded a licence to operate taxicabs.

The decision hinged predominantly on the interpretation of the factual circumstances of the case. While the Director of Public Transport found the 'public care objective' would not be served by accrediting XFJ, the Deputy President disagreed, finding that XFJ had been rehabilitated and there was 'no serious safety issue'. This was based largely on the evidence of the consultant psychiatrists who gave evidence that XFJ has been free of any mental health symptoms for the past 14 years and is 'probably no more likely to have another episode of depression than does anybody else in the community'.

Application of the Victorian *Charter*

During the course of the hearing, counsel for XFJ raised a number of arguments based on the *Charter*. While the Deputy President acknowledged that s 32(1) of the *Charter* requires that statutory provisions be interpreted 'in a way that is compatible with human rights', he declined the opportunity to engage the issues raised by the *Charter*, commenting that his interpretation of the *Transport Act*:

is in accordance with [s 32(1)], and no issue arises of any inconsistency between the *Transport Act* and the *Charter of Human Rights and Responsibilities Act 2006*. Hence, even although issues relative to the *Charter* have been raised and argued before me, it is, as far as I can see, unnecessary for me to consider giving notice to, or inviting argument from, either the Attorney General or the Human Rights Commission.

With respect, this approach is concerning for two reasons.

First, the better view of s 32(1) is that interpretation of a statutory provision compatibly with human rights should be considered in the first instance, rather than only after some ambiguity or prima facie incompatibility has been identified. The *Charter* seeks to 'establish a framework for the protection and promotion of human rights in Victoria'. The purpose of s 32 is to establish a requirement that statutory provisions be interpreted in a way that is compatible with human rights. Consistently with these purposes, the *Charter*-compatible interpretation should now be regarded as 'ordinary' and 'normal'.

Second, it is not clear why the Deputy President considered s 35 of the *Charter*, which requires notice to the Attorney General and the Victorian Equal Opportunity and Human Rights Commission in certain County Court and Supreme Court proceedings. Section 35 does not apply to the Tribunal or to parties before VCAT and should certainly not be treated as a pre-condition to the consideration or application of the *Charter*.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VCAT/2008/2303.html>.

Timothy Kern is an intern from the Australian National University.

Comparative Law Case Notes

Protection of Children and Vulnerability to Ill-Treatment

E (a child), Re (Northern Ireland) [2008] UKHL 66 (12 November 2008)

In this case, the House of Lords decided that a police response to sectarian unrest in Northern Ireland did not constitute a breach by the State of its positive obligation to prevent the infliction of inhuman and degrading treatment upon its citizens under art 3 of the *European Convention on Human Rights*.

Baroness Hale discussed how the special vulnerability of children impacted upon the State's obligations under article 3.

Facts

The appellant's daughter attended a Catholic girls' primary school in Belfast, Northern Ireland. Along with other parents, the appellant regularly walked her daughter to the school along Ardoyne Road. Houses along this road were primarily inhabited by Catholic families but one part of the road was bordered on either side by an estate occupied by Protestant families.

For unknown reasons, there was an outbreak of disorder between the two religious groups in June 2001. This developed into abuse towards children walking to and from school with their parents along Ardoyne Road, such abuse including the throwing of explosive devices and other missiles, death threats, verbal abuse, shouting of sexual obscenities and the use of piercing whistles and sirens. It was the police response to this behaviour which formed the subject matter of the appellant's complaint.

Police responded by erecting barriers along Ardoyne Road and deploying significant numbers of police in riot gear in order to ensure the safe passage of the children and their parents. A number of officers were injured in the operation, some severely. The operation was successful in that no children were injured, however the intimidating and violent environment created by the police response had a marked impact on the emotional health of many children.

The appellant initially applied for judicial review, arguing that the chief of police had failed to secure the effective implementation of the criminal law, but this application was dismissed. The appellant was then

granted leave to appeal that decision to the Court of Appeal in Northern Ireland for reasons of 'public interest', however that appeal was also dismissed.

The appellant was granted leave to appeal to the UK House of Lords 'on account of the importance of the issues concerned'. The key argument presented by the appellant was that the State (through its law enforcement arm, the police) was in breach of its positive obligation under art 3 of the *European Convention* to take the steps required of it to prevent the infliction of inhuman and degrading treatment upon the appellant and her daughter.

Decision

The House of Lords unanimously agreed to dismiss the appellant's appeal. Lord Carswell, delivering the lead judgment, identified four issues required to be resolved in relation to article 3:

- whether the appellant was entitled to seek relief on behalf of her child, who was not formally a party to the proceedings;
- whether the appellant and her daughter suffered inhuman or degrading treatment;
- whether art 3 was engaged so as to give rise to the positive obligation under that article; and
- if so, whether the police took sufficient steps to discharge that obligation.

In relation to the first question, Lord Carswell found that the proceedings were properly instituted but that it would have been preferable for the child to have been joined as a party.

On the second question, Lord Carswell noted that the respondents had conceded that some of the more extreme behaviour experienced by the appellant and her daughter did constitute inhuman and degrading treatment, and his Lordship regarded this as a correct concession.

On the third and fourth questions, Lord Carswell noted with approval that all parties had accepted that art 3 imposes both a negative obligation (an obligation not to inflict inhuman and degrading treatment) and a positive obligation (an obligation to take steps to prevent the infliction by third parties of inhuman and degrading treatment) on the State. Lord Carswell confirmed that the positive obligation under art 3 requires States to do all that could reasonably be expected of them to avoid the risk of inhuman or degrading treatment, once they are aware or ought reasonably to be aware, of that risk. An assessment of the 'reasonableness' of a State's response requires the court to make an objective assessment of proportionality, taking into account the circumstances of the case, the ease or difficulty of the State taking the precautions and the resources available. After applying this approach to the facts, Lord Carswell found that 'the evidence supports the overall wisdom of the course which (the police) adopted'.

In response to an argument by the appellant that the police failed to have regard to the best interests of the children pursuant to art 3(1) of the *UN Convention on the Rights of the Child*, Lord Carswell found that the police action was taken in the children's best interests.

Baroness Hale saw fit to provide additional comments regarding the impact of the special vulnerability of children on the requirements set out in art 3 of the *European Convention*. According to Baroness Hale, the special vulnerability of children is relevant in two ways:

- First, ill-treatment will only attract the protection of art 3 if it satisfies a minimum level of severity. The special vulnerability of children will be a relevant factor in assessing whether this level of severity is met.
- Second, the special vulnerability of children will impact upon the scope of a State's obligation to protect them from inhuman or degrading treatment.

Baroness Hale considered that although the State's actions made the experience even more frightening for the children, the evidence did not show that the children's experiences would have been any better had the police responded in another way.

Relevance to the Victorian Charter

Section 32(2) of the *Charter* states that "[i]nternational law and the judgments of domestic, foreign and international courts and tribunals relevant to human rights may be considered" when interpreting a Charter provision.

The principles enunciated in Lord Carswell's decision may be relevant to a court's consideration of the scope of the rights set out in s 10 of the *Charter* (protection from torture and cruel, inhuman or degrading treatment).

Baroness Hale's comments provide useful insight into the special rights afforded to children and may be relevant to a court's assessment of s 17 of the *Charter* (children's rights and the requirement to act in the best interests of children).

The decision is available at <http://www.bailii.org/uk/cases/UKHL/2008/66.html>.

Jessica Zikman is on secondment to the Human Rights Law Resource Centre from Lander & Rogers

Right to a Fair Hearing and Prosecutorial Independence

Haase v Independent Adjudicator & Anor [2008] EWCA Civ 1089 (14 October 2008)

Article 6(1) of the *European Convention of Human Rights* provides, '[i]n the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law.' This case was an appeal from a decision of the High Court holding that art 6(1) does not require prosecutorial independence. The England and Wales Court of Appeal dismissed the appeal and held that art 6(1) does not impose a general requirement of prosecutorial independence. Their Lordships held that a lack of prosecutorial independence should only be taken into account when it has some other effect on the impartiality of the tribunal.

Facts

The claimant was a prisoner who refused to provide a urine sample for the purposes of a drug test and so was charged with disobeying a lawful order. The matter was referred to an Independent Adjudicator for determination. At the adjudication, the prosecution's case was essentially conducted by the reporting Prison Officer. The Independent Adjudicator determined that the prisoner had disobeyed a lawful order and ordered that a further 21 days be added to the prisoner's sentence.

It was accepted on behalf of the prisoner that the 'tribunal', namely the Independent Adjudicator, met the requirement of impartiality and independence. However, it was argued that there was a separate implied requirement that in order to meet the requirement of a fair hearing the prosecutor, too, must be independent and impartial. It was submitted that this requirement was not met because the prison officer who brought the charge and gave evidence also conducted the prosecution's case.

Decision

Richards LJ (with whom the other judges agreed) rejected the contention that art 6(1) imposes any general requirement as to the independence and impartiality of the prosecutor. Richards LJ stated at [19], 'if the tribunal is independent and impartial, then it seems to me that fairness can in principle be achieved without imposing an additional general requirement as to the independence and impartiality of the prosecutor.'

At the centre of the prisoner's case was the judgment in *R v Stow* [2005] EWCA Crim 1157, which was said on behalf of the prisoner to establish the principle that the prosecutor must be independent and impartial for the purposes of art 6(1).

Richards LJ conceded that *Stow* provided some support for the prisoner's case since the decision rested on the conclusion that the prosecuting authority was not sufficiently independent and impartial for the purposes of art 6(1). However, his Lordship contended that the decision in *Stow* should be treated with caution for the following reasons:

- the need for a degree of independence and impartiality on the part of the prosecution was conceded by the Crown in *Stow* and the court did not have the benefit of a broad range of arguments;
- *Stow* relied heavily on Strasbourg case-law, but failed to appreciate how limited the Strasbourg case-law is on the issue of prosecutorial independence and impartiality; and
- the court's focus in *Stow* was on the specific context of a court-martial and what was said about prosecutorial independence and impartiality should not be treated as governing cases arising in other contexts.

In conclusion, their Lordships took the view that there is no general requirement under art 6(1) of prosecutorial independence and impartiality and that there was no basis for finding such a requirement to exist in the prison disciplinary context.

Relevance to the Victorian *Charter*

The Courts in the United Kingdom are bound by s 2(1) of the *Human Rights Act 1998* to take into account decisions of the European Court of Human Rights. In contrast, s 32(2) of the *Charter* simply states that international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision. In light of this, the decision in this case may, but will not necessarily, inform the interpretation of s 24 of the *Charter*, which enshrines the right to an independent and impartial hearing in Victoria.

The decision of their Lordships suggests that the right to a fair hearing should not be interpreted to mean that every aspect of a hearing (for example, the prosecution) must be totally independent — so long as the impartiality of the hearing itself is not compromised, art 6(1) and similar provisions will not have been violated.

This decision is available at <http://www.bailii.org/ew/cases/EWCA/Civ/2008/1089.html>.

Thea Snow, Human Rights Law Group, Mallesons Stephen Jaques

Right to Life, Right to a Fair Hearing and the Protection and Anonymity of Defendants

Times Newspapers Ltd & Ors v R & Ors [2008] EWCA Crim 2396 (24 October 2008)

The England and Wales Court of Appeal has held that a defendant should not be identified if it would lead to a 'real and immediate' risk to their right to life.

Facts

Six British soldiers were charged with conspiracy to defraud and brought before a court-martial. The Judge Advocate General ordered that the proceedings should be held in camera in their entirety, and that no reports of the proceedings should be published (other than the fact the six soldiers were charged). The media and one of the soldiers appealed this order to the Courts Martial Appeal Court.

The appellants submitted that the order was wrong in principle, could not be justified on the materials before the JAG and, in any event, was far more restrictive than necessary on proper evaluation of the authorities and the evidence. The other parties accepted that the order made was wider than was necessary in the interests of justice.

Decision

Lord Justice Latham considered the basic principle that justice requires proceedings in court to be held in public, with all the consequences that entails (see *Scott v Scott* [1913] AC 417). It is only where the proper administration of justice would be affected that any derogation from this principle can be permitted (see *Attorney-General v Leveller* [1979] AC 440, 450 (Diplock LJ), 471 (Scarman LJ)). As the Army did not oppose the appeal (other than to exclude the public where matters engaging national security were truly in issue), the appeal was allowed. The media then sought orders that the materials placed before the Court in camera be made available; however, the Court refused this submission.

Anonymity

The Court considered that it is an important aspect of open justice that defendants' names should be made public, except where such publication would frustrate or render impracticable the administration of justice or there is a statutory exception.

His Honour considered the decision in *Re Officer L* [2007] 1 WLR 2135, where the House of Lords considered art 2 of the *European Convention on Human Rights*, which states in part, 'Everyone's right to life shall be protected by law'. In that case, the House of Lords held that art 2 would be engaged if there was a 'real and immediate' risk to the life of the witnesses, so that the State's obligations to take reasonable steps towards preventing loss of life could justify the grant of anonymity.

Lord Justice Latham then considered that, to make an order for anonymity for all or any of the soldiers, the Court must be satisfied either that the administration of justice would be seriously affected if the

order was not granted, or that there was a 'real and immediate' risk to the life of any of the soldiers if anonymity was not granted.

The in camera evidence (including their service history) led the Court to conclude that the identification of two of the soldiers' names would place them in real and immediate risk. The Court granted the two soldiers anonymity on the basis that this was 'a reasonable and proportionate precaution to take in order to provide the protection' to which they were entitled. The Court also found that publication of the other three soldiers' names could allow the first two soldiers to be identified; on this basis, they were also granted anonymity.

The sixth soldier, Staff Sergeant McKay, asserted his rights to an open hearing under art 6 of the Convention. The Court recognised that disclosure of his name risked undermining the integrity of the order in respect of the others, but held that his rights must be accommodated.

Relevance to the Victorian Charter

Unlike other recent UK cases considering human rights in a media context, the right to privacy was not discussed in this judgment. However, the judgment strongly supports the common law presumption that justice requires proceedings in court to be held in public, and media reportage of those proceedings to be allowed. However, where an individual's human rights are in real and immediate risk, the courts will upset that presumption and make orders to protect those rights.

In broadening the principle in *Re Officer L* to apply to defendants (as well as witnesses), the UK courts have held that courts are obliged to consider the right to life of those parties. Where there is a 'real and immediate' risk to the lives of defendants and witnesses, the courts are obliged to grant them anonymity. The reality and immediacy of risk is a matter of fact, taking account of the relevant circumstances.

The decision is available at <http://www.bailii.org/ew/cases/EWCA/Crim/2008/2396.html>.

James Farrell is a lawyer with Corrs Chambers Westgarth and a Team Leader with the PILCH Homeless Persons' Legal Clinic

Costs in Public Interest and Pro Bono Litigation

PHS Community Services Society v Canada (Attorney General), 2008 BCSC 1453 (31 October 2008)

This case concerned an application for special costs. The Supreme Court of British Columbia held that the proceeding was public interest litigation, and that special costs could therefore be awarded to the plaintiffs.

Facts

The central issue for determination in this case concerned whether or not the Supreme Court should exercise its discretion to award the plaintiffs costs on the ground that *PHS Community Services Society v. Canada (Attorney General)*, 2008 BCSC 661 (27 May 2008) was public interest litigation. In that case, the Supreme Court declared that laws that made safe self-injecting rooms illegal were unconstitutional and incompatible with the rights to life, liberty and security of person guaranteed in the *Canadian Charter of Human Rights and Freedoms*.

In support of their claim for special costs, the plaintiffs (being, PHS Community Services Society, the operator of a self-injecting room site known as 'Insite', and the second and third plaintiffs, users of Insite) argued that the proceeding was public interest litigation that had significant implications for injecting drug users' ability to access justice. The plaintiffs further argued that they did not have a personal interest in the litigation's outcome. The defendant contested the claim that the proceeding was public interest litigation, arguing that the plaintiffs did have a personal interest in the outcome of the litigation. The defendant also argued that PHS is not impecunious.

Decision

Justice Pitfield held that the proceeding was public interest litigation. In so doing, he explained: '[m]y reasons for judgment described the evolution of the policy decisions that led the City of Vancouver and the provincial government to pursue a harm reduction strategy and to use Insite as one means of reducing the harm associated with intravenous drug use. The plaintiffs undertook this litigation with a view to preserving the operations of a publicly-funded facility'.

Justice Pitfield dismissed the suggestion that the plaintiffs' had a personal interest in the litigation. PHS, he explained, is a non-profit organisation, which operates Insite for the benefit of the community and not for personal gain. The interests of the second and third plaintiffs were the same as those that any citizen has with respect to the operation of healthcare facilities – personal health and welfare. His Honour stated that, 'this action benefits all who suffer from the illness of addiction. The interests that PHS and the individual plaintiffs have in the outcome of the litigation are not such as to remove them from the ambit of public interest litigants'.

In his judgment, Justice Pitfield was satisfied that PHS was unable to afford the conduct of the litigation. Moreover, he observed, 'I am not persuaded that financial worth or the ability to pay is a factor that should predominate where what is under consideration is an award of special costs following the successful completion of litigation'

Dismissing the defendant's argument that special costs should not be awarded because the plaintiffs engaged legal assistance on a pro bono basis, Justice Pitfield said:

Costs have been incurred by someone, whether by the plaintiffs or by third parties in order to assist the plaintiffs. The defendant should not derive a windfall because of the fact that a third party has underwritten the costs of the litigation. With respect, the defendant contradicts itself when it says on the one hand that one must be impecunious if an award of special costs is to be considered, but says on the other that if a party is impecunious and cannot afford counsel but is represented on a *pro bono* basis, the benefit of an award of special costs should be denied or reduced.

Justice Pitfield awarded the plaintiffs special costs on a full indemnity basis. In so doing, he noted that indemnity 'will extend to and include the reasonable value of all pro bono services provided to PHS and the individual plaintiffs, and the amount of all reasonably necessary disbursements, by whomever incurred'.

Relevance to the Victorian Charter

Access to justice is a fundamental principle that underpins the Victorian *Charter* and the Australian legal system more generally. If citizens are unable to afford legal representation or do not institute public interest proceedings for fear of an unfavourable costs order, their ability to vindicate their rights and/or seek outcomes in the public interest under the Victorian *Charter* will be significantly impeded. For these reasons, this decision is important authority for the interpretation of and protection of the right to a fair hearing (s 24) and the right to recognition and equality before the law (s 8).

The decision is available at

<http://www.canlii.org/en/bc/bcsc/doc/2008/2008bcsc1453/2008bcsc1453.html>.

Tony Mohorovic is a Lawyer with Corrs Chambers Westgarth. He is currently on secondment with the Public Interest Law Clearing House (PILCH). Simone Cusack is a Public Interest Lawyer with PILCH.

Right to Private and Family Life and to Family Unity

AS (Pakistan) v Secretary of State for the Home Department [2008] EWCA Civ 1118 (15 October 2008)

The England and Wales Court of Appeal recently allowed an appeal against a decision of the Asylum and Immigration Tribunal regarding the deportation of AS, a Pakistani national. The Court held that the Tribunal erred in two respects: first, in finding that deportation would not interfere with AS' right to respect for his private and family life (under art 8 of the *European Convention on Human Rights*), and second, in its assessment of proportionality.

Facts

AS came to the United Kingdom on a student visa in 1998, and married L in September 2003. Although his student visa had expired, AS was granted leave to remain in the UK as a spouse until November 2005. AS committed two motoring offences in the following year. In October 2003, he was convicted and fined for driving without 'L' plates. In June 2004, he was arrested and charged for causing death by dangerous driving. For the latter, AS was sentenced to three years' imprisonment.

AS was served with a deportation notice in May 2006, and released from prison in January 2007.

He appealed the decision of the Secretary of State to deport him, mainly on the grounds of interference with his private and family life. The appeal was dismissed, as was AS' appeal to the Tribunal in

December 2007. In the meantime, L had become pregnant and gave birth to the couple's first child in May 2008.

The Tribunal assessed whether the deportation would infringe AS' private and family life by reference to Lord Bingham's 'five questions' from *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27. Although the Tribunal accepted that AS had established a private and family life in the UK, it did not accept that the deportation engaged art 8. After considering evidence of conditions in Pakistan, particularly the conditions affecting AS' wife if she were to accompany him, the Tribunal concluded that L would not suffer unreasonable hardship if required to relocate. The Tribunal also concluded that AS could expect to find employment in Pakistan, and receive any required psychological treatment there.

Although the Tribunal thought that this was sufficient to dispose of the appeal, it went on to consider the issue of proportionality. The Tribunal examined AS' two motoring offences, and concluded that AS had 'displayed a disregard for the laws of the United Kingdom over a prolonged period of time'. This led to the finding that the interference with AS' rights was proportionate to the legitimate aim achieved by deportation.

Decision

In the Court's view, the Tribunal was correct in using Lord Bingham's five questions as a framework for its analysis. However, the Court also held that the Tribunal had assessed the conditions that L would face in Pakistan (as a Western woman) in the wrong context. The conditions were mainly relevant to the question of proportionality, rather than the interference with AS' private and family rights in the first place. Once the Tribunal had (correctly) established that AS and his wife had established a family life in the UK, it was evident that deportation would interfere with these rights.

The Court observed that 'the degree of interference ... is likely to depend more on the disruptive effect of relocation itself, rather than on the social and political conditions likely to be encountered in the country of destination'. It also confirmed that the threshold for engaging art 8 is not high, and that the Tribunal was wrong to find that art 8 had not been engaged (especially in light of the Tribunal's findings about AS' family circumstances, employment and social ties).

On the issue of proportionality, the Court criticised the Tribunal's approach and assessment. It found that the Tribunal was too critical of AS' character and criminal behaviour, and failed to consider factors such as his good behaviour in prison, low risk of re-offending, and psychological trauma he was found to have suffered after the 2004 accident. This led the Tribunal to a flawed assessment of the 'public interest' in deporting AS, and it was found to have struck an unfair balance between AS' interest and the community's interest. The Tribunal's reasons for decision should have more clearly explained why the public interest outweighed the interference with AS' private and family life.

The Court also found that the Tribunal had failed to consider the effect of AS' deportation on L's private and family rights. In light of the House of Lords decision in *Beoku-Betts v Secretary for the Home Department* [2008] UKHL 39, the Tribunal should have considered the impact on the 'family unit as a whole'. In this case, L had lived in the UK her whole life, had strong ties to the UK and an established private life, and the couple had a young child. These factors ought to have been fully considered by the Tribunal.

Relevance to the Victorian Charter

This decision may assist a Victorian court's consideration of s 13 (the right not to have privacy, family or home unlawfully or arbitrarily interfered with) and s 17 (protection of the family by society and the State, and recognition of family as 'the fundamental group unit of society') of the *Charter*.

Together with the House of Lords' decision in *Beoku-Betts*, the decision indicates that the effect of a measure on an individual's *Charter* rights may require assessment against the rights of spouses and the 'family unit as a whole'. Further, the Court of Appeal's reasoning on the proportionality of the interference with AS' private life may also assist Victorian Courts in their assessment of a range of *Charter* rights that cannot be interfered with 'arbitrarily'.

The decision is available at <http://www.bailii.org/ew/cases/EWCA/Civ/2008/1118.html>.

Rebecca Pereira, Human Rights Law Group, Mallesons Stephen Jaques

HRLRC Policy Work

A Human Rights Agenda for the 75th Anniversary of the UDHR

10 December 2008 marks the 60th anniversary of the *Universal Declaration of Human Rights*. The UDHR recognises that respect for human rights and the rule of law is the foundation of peace, justice, security and human development.

Australia played an important and constructive role in the development of this historic instrument and subsequent international human rights laws and mechanisms.

Australia's domestic, regional and international interests over the next 15 years and beyond require that we commit to collaborative and constructive leadership in developing and implementing modern and effective human rights standards, institutions and initiatives.

In this context, and in advance of the 60th anniversary of the UDHR, the Human Rights Law Resource Centre brought together a diverse range of Australian experts to develop an agenda to improve the promotion and protection of human rights at the domestic, regional and international levels.

The panel sought to do this by identifying significant or emerging human rights issues, challenges or opportunities for civil society and governmental action over the next 15 years, and developing an action plan for progress in the following areas:

- The rights of Indigenous Australians.
- Human rights, governance and policy development.
- International and regional institution building, engagement and normative development.
- Poverty, aid, trade, business, human rights and development.
- Equality and non-discrimination.
- The recognition, promotion and protection of economic, social and cultural rights.
- Building a culture of human rights through education and engagement.

The outcomes of the panel's discussions are available at www.hrlrc.org.au under Policy Work>Domestic Submissions>A Human Rights Agenda for the 75th Anniversary of the UDHR (Nov 2008).

Australia Urged to Ratify Optional Protocol to UN Convention on the Rights of Persons with Disabilities

Just a few months after ratifying the *Convention on the Rights of Persons with Disabilities*, the Australian Government has initiated a consultation on ratification of the Optional Protocol to the CRPD. In October, the HRLRC made a submission to the National Interest Analysis in support of Australia's ratification of the Optional Protocol.

The Optional Protocol establishes two procedures designed to supplement the CRPD and strengthen and promote its implementation. The communication procedure allows individuals or groups to submit a communication to the Committee on the Rights of Persons with Disabilities alleging violations of the substantive rights protected under the CRPD. The inquiry procedure allows the Committee to initiate inquiries into reliable information indicating grave or systematic violations of the CRPD by a State Party.

The HRLRC considers that ratification of the Optional Protocol would:

- complement and strengthen existing domestic mechanisms designed to promote disability rights;
- foster and promote analysis and change;
- strengthen Australia's role within the international community;
- be consistent with the Australian Government's commitment to constructive engagement with the UN human rights system and to the harmonisation of domestic laws, policies and practices with international human rights standards; and
- enhance public awareness and understanding of the rights of people living with disabilities.

The HRLRC's submission also highlighted the symbolic significance of Australia's ratification of the Optional Protocol and the important role ratification would play in mainstreaming the human rights of people living with disability.

The Centre's submission is available at www.hrlrc.org.au under Policy Work>Domestic Submissions>Disability Rights: Australia should Ratify OP to Disability Convention (Oct 2008).

Rachel Ball is a lawyer with the Human Rights Law Resource Centre

HRLRC Casework

Centre Intervenes in *Charter* Test Case Regarding Rights of Person with Mental Illness

The Centre has intervened as amicus curiae in a significant *Charter* case before Justice Bell, President of the Victorian Civil and Administrative Tribunal, heard between 18 and 24 November 2008.

The case concerns the compulsory medical treatment of a man without his consent, and without this treatment having been reviewed by the Mental Health Review Board as required by the *Mental Health Act 1986* (Vic) for a period of approximately 15 months, from April 2007 until June 2008.

The *Mental Health Act* establishes a regime for 'involuntary treatment orders' and 'community treatment orders', and prescribes time limits within which such orders (which are made by an authorised psychiatrist) 'must' be reviewed by the Board. However the Act is silent as to the consequences of a failure to review the order within the time limits specified (namely, 8 weeks).

The issue of construction raised by the case is: what is the true construction of the provisions of the *Mental Health Act* requiring the Board to review ITOs and CTOs within specified time limits? Is the requirement obligatory, such that a failure by the Board to review an ITO or a CTO within the specified time results in the order expiring or being discharged?

In the Centre's submission, a human rights compatible interpretation of the *Mental Health Act* should be adopted, either under s 32 of the *Charter* or pursuant to common law principles of construction. Adopting this approach, the better construction is that the times specified in the *Mental Health Act* are obligatory, such that a failure to review an ITO or CTO within the time limits specified in the Act results in the orders expiring or being discharged.

In the Centre's submission, the involuntary treatment of the applicant without adequate review resulted in a breach of his rights under ss 10(c), 13(a), 10(b), 12, 21 and 24(1) of the *Charter*. The Centre further submitted that those breaches of the applicant's human rights are serious and that real and effective protection of his rights supports the making of a declaration to this effect.

The Centre was provided with outstanding and significant pro bono assistance in this case by Mark Moshinsky SC and Chris Young of Counsel, together with Allens Arthur Robinson.

Centre Intervenes in Housing Test Case regarding meaning of 'Public Authority'

The Tenants' Union and the PILCH Homeless Persons' Legal Clinic recently assisted two sets of tenants in challenging the validity of no reason eviction notices issued by a transitional housing authority. The Centre sought and was granted leave to intervene as amicus curiae on the question, what is a 'public authority' under the *Charter*?

Section 4(1)(c) provides that, for the purposes of the *Charter*, a public authority includes:

an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise).

The Centre submitted that while 'there cannot be a single litmus test of what is a function of a public nature' (see *YL v Birmingham City Council* [2008] 1 AC 95 at [65] per Baroness Hale), a number of principles should guide the Tribunal's consideration of s 4(1)(c).

- First, consistent with the underlying purpose of the *Charter*, the section should be given a broad and generous interpretation.
- Second, the Tribunal should focus on the function being performed, rather than the nature of the organisation exercising the function. The Centre noted that a function will be either public in nature or it will not; the nature of the function does not change depending on the nature of who is performing it.
- Third, the relationship between the organisation and the state may be relevant, but only to the extent that it indicates whether the function is being exercised *on behalf of* the State.

- Fourth, what constitutes a function of a public nature is a question of substance, not form or technical legal distinction. This principle responds to the decision in *YL* and Baroness Hale's dissent that it was 'artificial and legalistic to draw a distinction between meeting those [health care] needs and the task of assessing and arranging them, when the state has assumed responsibility for seeing that both are done.'

Accordingly, the Centre submitted that the underlying rationale of s 4(1)(c) is that an entity should be a public authority, and therefore bound to act compatibly with human rights under s 38 of the *Charter*, where:

1. it is performing a function for which the public, in the form of the State or a public authority has, in a broad sense, a responsibility in the public interest to see performed; and
2. it is doing so pursuant to a loosely connected arrangement whereby it is acting as the agent, delegate or representative of, or merely carrying out the purposes of, the State or a public authority.

The Centre worked with Freehills (Jennifer Riley and Malcolm Cooke) and Alistair Pound and Ron Merkel QC of Counsel to quickly prepare the application for leave to intervene as amicus and the submissions on the question, and is grateful for their contribution. The decision has been reserved.

Phoebe Knowles is on secondment to the Human Rights Law Resource Centre from Minter Ellison

Seminars and Events

Dignity, Fairness and Good Government: The Role of a Human Rights Act with Lord Thomas Bingham, former Senior Law Lord of the United Kingdom

Date: 6.00 to 7.45pm, Tuesday, 9 December 2008

Venue: Mallesons Stephen Jaques, Level 50, 600 Bourke Street, Melbourne

Cost: \$25 / \$15 for full-time students and pensioners

Registration is essential. Use Booking Form available at www.hrlrc.org.au.

Lord Bingham retired after 8 years as Senior Law Lord of the House of Lords, the highest judicial office in the United Kingdom, in September 2008. Described recently by *The Times* as 'the pre-eminent lawyer of his generation with a brilliant, incisive mind', Lord Bingham is a leading human rights jurist. His landmark rulings under the *Human Rights Act 1998* (UK) and the *European Convention on Human Rights* have contributed significantly to promoting and protecting fundamental rights and freedoms and the rule of law in the UK and beyond.

Human Rights and Australia: Writing the Next Chapter

Date: 11:00 for 11:30am until 1:00pm, Thursday, 11 December 2008

Venue: RMIT Storey Hall, 336-342 Swanston Street, Melbourne (near corner of Latrobe St)

RSVP: By Monday 1 December by email to doj.rsvp@justice.vic.gov.au. For information contact Peggy Aresti on (03) 8684 0859 or peggy.aresti@justice.vic.gov.au.

The panel discussion will be opened by The Hon Rob Hulls MP, Deputy Premier and Attorney-General and hosted by journalist and broadcaster Julie McCrossin.

Panellists include:

- The Hon Rob Hulls MP Deputy Premier and Attorney-General
- The Hon Robert McClelland MP Commonwealth Attorney-General
- The Hon Catherine Branson President, Australian Human Rights Commission
- Dr Helen Szoke CEO, Victorian Equal Opportunity and Human Rights Commission
- Cassandra Devine Youth Ambassador, Victorian Equal Opportunity and Human Rights Commission
- Prof Larissa Behrendt Professor of Law and Director of Research, UTS Jumbunna Indigenous House of Learning

Focus for panel discussion:

- Highlight the Charter's key achievements, one year on;

- Discuss what the Charter has achieved so far for vulnerable groups in our community and what more needs to be done to ensure the human rights of these groups are protected; and
- Identify the key lessons we can learn from the Victorian experience of implementing the Charter, which may be useful in other jurisdictions and nationally.

What's Wrong with Human Rights?

with Professor Steven Greer, Professor of Human Rights at Bristol University Law School

Date: 12.30 to 2.00pm, Friday, 12 December 2008

Venue: Lander & Rogers, Level 12, 600 Bourke Street, Melbourne

Cost: Free

Registration is essential by email to admin@pilch.org.au.

This lecture, jointly presented by the Human Rights Law Resource Centre and the Institute of Legal Studies at the Australian Catholic University, will review contemporary national and international debates about the role of human rights in law, politics, and society. It will be particularly relevant and timely given the 60th anniversary of the *Universal Declaration of Human Rights* on 10 December 2008 and the Rudd Government's commitment to a national public consultation regarding the recognition and protection of human rights in Australia.

Human Rights Resources

What's New on the HRLRC Website?

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

- Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006' (2008) 32 *Melbourne University Law Review* 422
- The Hon Justice Kevin Bell (Victorian Supreme Court Judge and VCAT President), 'Enhancing Australian Democracy with a Federal Charter of Rights and Responsibilities', Speech to the Australian Institute of Administrative Law, 20 November 2008

Human Rights Overboard: Seeking Asylum in Australia by Linda Briskman, Susie Latham and Chris Goddard (Scribe Press, 2008)

If I let my inner dictator loose, every person in Australia would be forced to read this book, while listening to the Paul Kelly song 'I get a little emotional sometimes'. *Human Rights Overboard* is essentially a collection of the oral testimony and written submissions from the People's Inquiry into Detention, established by the Australian Council of Heads of Schools of Social Work in 2005. The Inquiry was partly in response to the Cornelia Rau affair, whose harrowing story begins the book.

By 2005, a lot of work had been done on the problems inherent in Australia's system of immigration detention by Federal Parliamentary Committees, the UN Human Rights Committee, the Commonwealth Ombudsman, psychological and medical literature, NGOs and, in particular, the Human Rights and Equal Opportunity Commission. We'd already come a long way from when I first started out in refugee advocacy for the churches in 2000 and not even SBS would run a story on children in detention.

We knew, even by then in 2000 when the numbers were swelling, that mandatory detention was inherently and irredeemably problematic, and ultimately irreconcilable with basic human rights and respect for human dignity. We knew mandatory detention had the propensity to result in arbitrary detention, which then took an unacceptable psychological toll on a vulnerable community. We knew the use of private contractors to administer detention centres led to problems with accountability and transparency. Those of us who regularly visited detention facilities in Australia and Nauru saw and reported systemic cruelty and damaged humans on all sides of the fence. By 2005, Australia was facing international embarrassment and condemnation on the world stage. By 2005, research had shown the availability of more effective and cheaper alternative models, which would still ensure the integrity of the migration system.

I knew then, before I read this book, that our system of detention from 1994 until now, was 'something systematically rotten'. This was how Waleed Aly phrased his reaction to *Human Rights Overboard* in the Australian Literary Review and it is spot on. I knew it. I believe we all should have known it. But I cried anyway. I needed to hear the tale of the whole; we always need to hear the actual words of those who suffered, and we will need to reflect on where it all went wrong for years to come. It is also very important to record the many Australians who participated in this Inquiry, who stood up for these people, advocated on their behalf, criticised the system, visited people, wrote letters, engaged with individual cases and policy reform. I am proud of the many lawyers who tried their best to put the case for complying with Australia's obligations under international law and the most basic principles of justice that relate to detention.

But in my view, looking back, it was expressions of shared humanity, not legal argument or policy papers that eventually swung opinion polls and politics. It was the social workers, in my view. Their emphasis on the lived experiences of individuals and families is a language that can get buried in the words spoken in Parliament and courts. I congratulate the Australian Council of Heads of Schools of Social Work and the authors of this book, and on their continuing work on so many issues of preserving human dignity in our communities.

There is still a long way to go in the reform process before we can genuinely say 'never again' in relation to immigration detention. Many people are still detained who are not asylum-seekers and their rights must be upheld. I was proud to be present in the ANU Law Library audience to hear Minister Chris Evans announce the changes to policy in broad terms. There are still elements of the old policy, like excision, to be grappled with, and uncertainty about how some issues will play out on the ground. There is an excellent chronological description of policy changes in this book, and an equally excellent description of how all the various elements of law and government policy affected these individuals so adversely. Those laws are largely still on the books. The Department is seen as largely resisting the cultural change prescribed in the Palmer Report. The people described in *Human Rights Overboard* are now what advocates call the 'legacy caseload' and there are still many more scenes to play out in the resolution of their situations. This book serves as a reminder to us to put dignity and humanity at the centre of our work now on immigration reform, and to stay strong.

Susan Harris Rimmer is President of Australian Lawyers for Human Rights

Human Rights Law Jobs

Legal Policy Officer @ the Federation of Community Legal Centres

The Federation of Community Legal Centres is the peak body for Victoria's 52 community legal centres. In this role, you will promote the Federation's social justice policy initiatives. Full-time, fixed term employment to 30 June 2010, based in Carlton. Package up to \$69,370 (includes super and leave loading). Generous additional tax benefits available. 5 weeks annual leave.

For a position description and application details, and information on other jobs in Victorian community legal centres, go to www.communitylaw.org.au or call 9652 1500. Applications close Wednesday 3 December 2008.

Foreign Correspondent

Developments at the UN and in International Human Rights Law

General Assembly

Optional Protocol on ESC Rights

Action on human rights in Geneva slows down somewhat during November, as attention shifts to New York where the General Assembly is wrapping up its 63rd session. Amongst the large number of resolutions and issues being discussed and decided, a few stand out for special mention. First, one of my favourite topics, the Optional Protocol to the *International Covenant on Economic, Social and Cultural Rights*: this instrument was adopted by consensus at the Third Committee* on Tuesday 18 November. To my knowledge, this is the first such instrument to be adopted by consensus, indicating extraordinary progress in states' willingness to recognize the justiciability of ESC rights, and to provide a forum for victims to seek redress for violations. Now we await the verdict of the GA plenary, which is

expected to approve the text on Human Rights Day, 10 December 2008. It is not anticipated that this plenary approval will be problematic, and it is hoped that many countries (such as Australia?) will co-sponsor the resolution, demonstrating their support for this long overdue communications mechanism.

Death Penalty

One of the traditionally most controversial resolutions at the General Assembly is the death penalty. This year was only the second year in a row that the resolution, which calls for a moratorium on capital punishment, passed! On 21 November, the Third Committee adopted this soft law proclamation in favour of the total abolition of capital punishment. 105 countries voted in favour of the resolution, 48 against, and 31 abstained. The big difference since last year was that 5 Arab League states changed their vote.

Country-specific resolutions and No-Action Motions

Another development related to the use of the 'No Action Motion' in relation to country situations. Some readers who follow these things closely may remember the way in which the former Human Rights Commission and GA members seek to avoid resolutions criticizing their human rights situation through the use of procedural measures. On 21 November this unfortunate practice was dealt a blow when the attempt to set aside a resolution about Iran was voted down. The resolution in question had been proposed by Canada, and was critical of the Islamic Republic of Iran over its use of torture, executions, violent repression of women, and discrimination against a range of religious groups and other minorities. Iran, in an attempt to pre-empt the resolution, called for a 'no-action motion', requesting member States to vote on whether or not they would even discuss the resolution Canada had proposed. Iran lost this attempt to stifle discussion, and hopefully this is the beginning of the end when it comes to use of these methods for suppressing scrutiny. The original resolution, which also calls on Iran to implement the recommendations that Secretary-General Ban issued in a recent report on Iran, was subsequently passed by majority vote.

International Day of Violence Against Women & DRC

On 25 November, the international community stops to consider violence against women. In this context, particular attention is being given to the problems in the eastern region of the Democratic Republic of the Congo, and the latest violations of human rights which add to the horrific figures of hundreds of thousands of women who have been killed, raped and beaten over the last decades. High Commissioner for Human Rights, Navi Pillay, drew attention in her statement to the way in which violence against women is still a huge problem all across the world, not just in conflict zones and trouble spots like the DRC. The High Commissioner confirmed that: 'Efforts to combat violence against women will never be fully successful while national legal frameworks to protect them, and grant them the possibility of economic and social independence, remain inadequate.'

US Presidential Election and Human Rights

The recent election of Barack Obama as President-Elect of the USA has warranted celebrations in the human rights world for a number of reasons. His election, of course, is an affirmation of the success of the civil rights movement – a man of colour has been elected President in a country where many living people remember the reality of disenfranchisement on the basis of race. His election also holds great promise for the national, and indeed global, recognition of socio-economic rights. In the final Presidential Debate, a memorable question was asked of the two candidates: 'Is health care in America a privilege, a right, or a responsibility?'. Senator Obama (as he was then) responded clearly that health care 'should be a right for every American. In a country as wealthy as ours, for us to have people who are going bankrupt because they can't pay their medical bills ... there's something fundamentally wrong about that.' Together with reports that Obama is open to the US considering ratification of the *ICESCR*, this indicates that the trend towards equality in treatment between civil and political rights and socio-economic rights is finally hitting the shores of one of the greatest detractors. We can only hope that this will be reflected in both the way in which the US engages in international negotiations on these issues (for example its dismal voting record on ESC rights resolutions), and its domestic implementation and protection of access to justice for victims.

A further way in which this change in government heralds the potential for international change in the

human rights world, is the hopeful reversal of the US's recent policy of disengagement from the UN in forums such as the Human Rights Council. The outcome of the election was bitter-sweet for human rights advocates however, with the overturning of the legal right to same-sex marriage. Since election, Obama's assurances that he will end the Guantanamo Bay detention centre, and uphold the prohibition against torture, demonstrate to the world the US' re-engagement with human rights law.

UDHR 60th Anniversary Celebrations

It seems all the world is preparing to celebrate the 60th anniversary of the *Universal Declaration of Human Rights* on 10 December. There are many UN organized activities, including the awarding of an important Human Rights Prize. Human Rights Day 2008 will mark the end of a full year of special events and promotional activities under the theme 'Dignity and Justice for all of us'. The main UN website contains details of many of the activities: <http://www.un.org/events/humanrights/udhr60/>. The OHCHR website also contains kits and publicity materials for people organizing human rights events in December – see <http://www.ohchr.org/EN/UDHR/Pages/60UDHRIntroduction.aspx>.

As would be expected, such an occasion also provides the opportunity for reflection about the future of human rights. To this end, a Panel of Eminent Persons has been convened to produce an Agenda for Human Rights, to be launched on 5 December (see further www.udhr60.ch/).

Claire Mahon is an Australian international human rights lawyer based in Geneva, Switzerland, where she works as a consultant for NGOs and the UN. She is the Coordinator of the Project on Economic, Social and Cultural Rights at the Geneva Academy of International Humanitarian Law and Human Rights, and an Adjunct Clinical Professor of Law at the University of Michigan Law School in the USA.

If I Were Attorney-General...

Ensuring Substantive Equality through the Elimination of Gender Stereotypes

If I were Attorney-General, I would prioritize, as an issue of national importance, the elimination of discrimination and the realization of substantive equality for men *and* women. In so doing, I would seek, *inter alia*, to combat the root causes of discrimination and inequality, including, in particular, wrongful gender stereotyping.

Gender stereotypes are generalised views of attributes possessed by, or the roles that are or should be performed by, men and women respectively. Gender stereotypes are not necessarily harmful or discriminatory. As journalist and social commentator Walter Lippmann rightly pointed out in 1922, gender stereotypes can, for example, be useful tools to help process the social complexity of the world. However, when stereotypes are applied in ways that ignore individuals' needs, wishes, abilities and circumstances, or that create gender hierarchies, human rights are violated.

Gender stereotyping affects men and women. Take the example of the sex-role stereotype that women should be primarily caregivers. The operation of this prescriptive stereotype has deprived many women of the opportunity to participate in public life, gain economic self-sufficiency, and forge identities independent of their role as caregivers. It has also deprived society of their valuable contributions. At the same time, this stereotype has deprived many men of the opportunity to participate in caregiving, and denied them recognition of their role as carers. As the Constitutional Court of South Africa explained in *President of the Republic of South Africa v Hugo*, this harms men by failing to recognise their equal worth and dignity as fathers, carers and individuals. It also burdens them with the responsibility of being primary breadwinners.

Despite significant strides, wrongful gender stereotypes remain socially pervasive and persistent in all sectors of Australian society. This was recently evident during the national debate concerning paid maternity leave. Largely invisible from this debate was the role that men play in caregiving. While the provision of paid maternity leave is essential to enable women to recover from the physical act of childbearing, gender stereotypes prevented a more robust debate about the role of both parents and the broader community in the provision of childcare. Stereotypes also limited debate about the provision of childcare in same-sex relationships. What this debate teaches us is that, while it is necessary to eliminate direct and indirect discrimination, it is not sufficient to achieve substantive equality. The Australian Government must go further; it must reformulate its laws, policies and practices to ensure that stereotypes do not devalue men or women, or script them into rigid and pre-determined sex-roles.

The rights to equality and non-discrimination require respect for the equal and intrinsic worth of all human beings, both men *and* women; it is imperative to honour the basic choices they make (or would like to make) about their own lives, and enable them to shape their own identities free from stereotypes.

If I were Attorney-General, I would adopt a number of measures to eliminate the wrongful forms of gender stereotyping that continue to impede efforts to eliminate discrimination and achieve substantive equality. Such measures would include the following.

First, as Attorney-General, I would seek to ensure Australia's compliance with international instruments, such as the *Convention on the Elimination of All Forms of Discrimination against Women*, which require States Parties to eliminate wrongful and discriminatory stereotyping. In this connection, I would seek to ensure that all branches of government refrain from gender stereotyping and, where appropriate, take positive measures to eliminate and remedy this wrong. As Justice L'Heureux-Dubé of the Supreme Court of Canada explained in *R v Ewanchuk*, 'individuals should be able to rely on a [legal] system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions'. Gender stereotypes should not be permitted to surface in a state's legal system, and courts should denounce laws, policies and practices 'which not only perpetuate archaic myths and stereotypes ... but also ignore the law'.

Second, if I were Attorney-General, I would follow through on the recommendation of the Joint Standing Committee on Treaties to ratify the Optional Protocol to CEDAW. In so doing, I would underscore the importance of ensuring access to an international means of redress for violations of women's rights, including in cases of stereotyping. This would send a clear message that Australia takes seriously its commitment to achieving substantive equality.

Third, as Attorney-General, I would seek to take advantage of the opportunities presented by the reviews of the *Sex Discrimination Act 1984* (Cth) and the *Equal Opportunity Act 1995* (Vic) to highlight the linkages between stereotyping and systemic discrimination and inequality in Australia. In particular, I would work together with stakeholders to develop a national action plan to address the stereotyping phenomenon.

Finally, if I were Attorney-General, I would advocate for a national Charter of Human Rights, and undertake an inquiry into the merits of enacting a federal Equality Act.

In conclusion, in order to combat discrimination and ensure substantive equality, greater priority must be given to the elimination of wrongful gender stereotyping. If I were Attorney-General, I would seek to give wrongful gender stereotyping the attention and resources that it requires.

Simone Cusack is a Public Interest Lawyer at the Public Interest Law Clearing House (Vic). She is co-author (with Prof Rebecca J Cook) of Stereotyping Women: Transnational Legal Perspectives (forthcoming)