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The Human Rights Law  
Resource Centre Ltd aims to:

1. Contribute to the harmonisation of Australian law and policy with international human rights norms;
2. Build the capacity of the legal profession, judiciary and community sector to develop Australian law and policy consistently with international human rights standards; and
3. Empower people that are disadvantaged or living in poverty by operating within a human rights framework.

The HRLRC achieves these aims by conducting and supporting human rights legal services, litigation, education, training, research, policy analysis and advocacy.

OPINION

**A Fair Go for the Poor, Homeless and Unemployed**

Earlier this year, the Victorian Government passed the *Charter of Human Rights and Responsibilities*, becoming the first state to enact comprehensive legislative protection of civil and political human rights.

The right to freedom and protection from discrimination, an integral component of the international human rights framework, is enshrined in s 8 of the *Charter*. Regrettably, however, the right is limited to protection from those forms of discrimination that are already prohibited by Victoria's *Equal Opportunity Act*. This calls for urgent reform because Victoria's current anti-discrimination laws fail to protect some of our most vulnerable and disadvantaged communities, including people who are homeless, unemployed or who have an irrelevant criminal record.

Discrimination against these groups contributes to poverty, has adverse health consequences and can lead to social isolation.

In Victoria, it is still lawful to discriminate against someone merely because they are unemployed, poor or homeless. This is in spite of the fact that research shows that people who are homeless – and in Victoria over 23,000 people experience homelessness on any given night – are frequently treated unjustly and unfairly by police, employers, and providers of goods, services and accommodation. Discrimination in these areas is a major impediment to homeless people obtaining or maintaining secure accommodation or employment. Victoria's *Equal Opportunity Act* must be amended to give people who are poor, homeless or unemployed a 'fair go'.

Similarly, and in contrast to most Australian jurisdictions, there is no prohibition in Victoria against discrimination on the basis of an irrelevant criminal record. This is a major problem, as admitted by the present government some time ago. In fact, Victorian Department of Justice research in 2004 confirmed that a criminal record has enduring consequences for an offender and creates a range of obstacles to rehabilitation and reintegration, including securing lawful employment and accommodation, acquiring certain licences, obtaining credit or insurance, participating in public life, and admittance to particular professions. The next government must take the initiative, and responsibility, to protect the rights of Victorians that are discriminated against on the basis of an irrelevant criminal record. A government should be judged not only on the health of its budget or the size of its police force. It should also be measured by the laws and policies it has in place

to protect and promote the rights of its most vulnerable and its real endeavors to create, in the words of the current government, 'a fairer Victoria'.

*Kristen Hilton is the Coordinator and Principal Solicitor of the PILCH Homeless Persons' Legal Clinic.*

*Peter Noble is the Principal Solicitor of the Loddon Campaspe Community Legal Centre.*

## NEWS

### **New Resource: A Guide to the UK Human Rights Act 1998**

The Human Rights Division of the UK Department for Constitutional Affairs has recently published the third edition of its *Guide to the Human Rights Act 1998* (October 2006).

Given the significant similarities between the UK *Human Rights Act 1998* and both the Victorian *Charter of Human Rights and Responsibilities* and the ACT *Human Rights Act 2004*, it is likely that the *Guide* will be of significant comparative value to Australian lawyers and human rights practitioners.

The *Guide* provides a brief overview of the objects and purposes of the *Human Rights Act*, together with a useful summary of how the Act works and may be used to seek redress.

Most usefully for Australian practitioners, the *Guide* also provides reasonably detailed summaries of the rights protected by the Act:

- the right to life;
- freedom from torture or inhuman or degrading treatment;
- freedom from slavery or forced labour;
- the right to liberty and security;
- the right to a fair trial;
- the right to no punishment without law;
- the right to respect for private and family life;
- freedom of belief;
- freedom of expression;
- freedom of assembly and association;
- the right to marry;
- the right to freedom and protection from discrimination; and
- the right to education.

Each summary defines the right, outlines the substantive content of the right, analyses the

obligations imposed by the right, and contains discussions of (and citations for) leading UK and European Court of Human Rights cases in which the right has been considered or applied.

The *Guide* is written in plain English and is available at <http://www.dca.gov.au/peoples-rights/human-rights/publications.htm>

## CASENOTES

### **Relevance of the 'Right to a Fair Trial' to Extension of Time Limits**

*Hanan Al-Rawahi v Mohammad Ali Niazi* [2006] ACTSC 84 (15 September 2006)

The ACT Supreme Court has recently considered the relevance of the right to a fair trial under s 21 of the *Human Rights Act 2004* (ACT) to the extension of time limits in civil proceedings.

#### **Facts**

The applicant, an overseas student, suffered serious injuries when she was struck by a car while walking across a pedestrian crossing in February 2004. Although she instructed solicitors in relation to the matter in March 2004, notice of the claim was not served upon the respondent and his insurer until 16 August 2005.

Under s 51 of the *Civil Law (Wrongs) Act 2002* (ACT), the applicant was required to serve a notice of claim upon the respondent within nine months of the date of the accident, or to provide a reasonable excuse for the delay. In this case the delay had been caused in part by difficulties in serving the respondent, who was overseas for some time. It also took many months to obtain a copy of the police report of the incident. There was then some confusion as to whether the respondent's insurer had been notified of the claim, as the insurer was handling the claim of another person injured in the same incident. However, the insurer did not accept that these factors amounted to a reasonable excuse, and rejected the claim.

The applicant then applied to the Court for an order under s 59 of the *Civil Law (Wrongs) Act* authorising her to proceed further with a claim for damages for personal injury despite her non compliance with the time limit in s 51 of the Act.

#### **Decision**

Master Harper considered that the applicant did not have an objectively reasonable excuse for

the failure to serve notice of claim upon the respondent as, despite the various difficulties, there had been a window of opportunity in which the applicant could have served notice on the respondent within time. However, he decided to grant the application to allow the applicant to proceed with her claim under s 59 of the *Civil Law (Wrongs) Act*, notwithstanding her non-compliance with the statutory time limit for serving the claim.

### Reasoning

Master Harper noted that he had a broad discretion under s 59 of the *Civil Law (Wrongs Act)*, which allowed him to consider the interests of justice generally, and was not limited to cases in which the applicant had a reasonable excuse for non-compliance.

He noted that:

as the discretion [in s 59] is conferred by statute it is also appropriate when exercising it to have regard to the *Human Rights Act 2004*. Section 21 of that Act provides for the right to a fair trial. The section relevantly provides that 'Everyone has the right to have ... rights and obligations recognised by law ... decided by a competent, independent and impartial court or tribunal after a fair and public hearing'. In an application such as this, where the claimant's right to bring an action for damages for personal injury is at stake, this provision suggests that if there is any doubt, the Court should err in favour of ordering that the claimant be allowed to pursue her claim. (at [39])

Master Harper noted that no prejudice had been caused to the respondent as a result of the delay, and that if the application was refused this would be unjust to the applicant, given the seriousness of her injuries and the circumstances of the accident:

This is a case where a pedestrian has been struck on a marked crossing by a car. Without seeking to prejudge the issue of liability, I note from the police report that the respondent was to be prosecuted for 'furious/reckless/dangerous driving'. If I were to refuse the order sought, the applicant would go without a remedy for her apparently serious injuries, including a fractured pelvis, and the respondent would escape civil liability. So would the insurer, which has accepted a premium for the very risk which has eventuated. (at [41])

For these reasons, he granted the application, but ordered costs in favour of the respondent.

The decision is available at <http://www.courts.act.gov.au/supreme/judgments/al-rawahi.htm>.

Gabrielle McKinnon is the director of the ACT Human Rights Act Research Project at the ANU. Project website: <http://acthra.anu.edu.au>

## HRLRC POLICY, ADVOCACY and LAW REFORM

### Submission to Review of Australia's Mutual Assistance Law and Practice

The Centre has recently made a submission regarding the relevance of international human rights to the Commonwealth Attorney-General's review of Australia's mutual assistance policy and practice. 'Mutual assistance' is the formal process that countries use to request or render assistance in the investigation and prosecution of criminal offences.

The HRLRC submission argued that the guiding principle of the Review should be that mutual assistance policy and processes must be consistent and comply with Australia's human rights obligations. The HRLRC submitted that Australia will be in breach of its human rights commitments if:

- it provides mutual assistance to a foreign country where there are reasonable grounds to believe that to do so may place a person at risk of his or human rights being violated; or
- it receives mutual assistance from a foreign country where there are reasonable grounds to believe that to do so may 'give effect' to a human rights violation by or in that country (eg, by admitting to evidence material obtained in a foreign country in violation of the right to protection from cruel treatment or punishment).

### Grounds of Refusal

Before rendering mutual assistance to a foreign country, the Minister must consider the grounds for refusing requests under s 8 of the *Mutual Assistance Act*. Some of these considerations are mandatory grounds for refusal (such as the request relating to the prosecution or punishment of a person for a 'political offence'), while others are discretionary (such as that the

request could prejudice an Australian criminal investigation or proceeding).

The HRLRC submission argued that, consistent with its obligations under international human rights law, Australia should retain and ensure a broad and effective range of safeguards in the mutual assistance process. In particular, the HRLRC argued that the following mandatory grounds for refusal should be added to s 8 of the Act:

- the request relates to the investigation, prosecution or punishment of an offence in respect of which the death penalty may be imposed;
- the provision of assistance may result in a person being subject to cruel, inhuman or degrading treatment or punishment;
- the provision of assistance may result in the person being detained in conditions which violate the inherent dignity of the human person; or
- the provision of assistance may result in the person being charged or convicted in relation to an offence which is incompatible with international human rights norms (eg, prosecution for the offence of engaging in consensual homosexual activity).

In respect of all of the existing and proposed grounds of refusal, the HRLRC contended that the Act should clearly state that they apply to the investigation, as well as the prosecution and punishment, of an offence.

### **Death Penalty Matters**

The *Mutual Assistance Act* currently provides, at s 8(1A), that a request for assistance must be refused if it relates to the prosecution or punishment of a person for an offence which may carry the death penalty, unless the Attorney-General is of the opinion that special circumstances exist justifying the provision of assistance. Section 8(1B) of the Act provides that the provision of assistance may be refused if the Attorney-General believes that it may result in the imposition of the death penalty and the circumstances of the case warrant refusal, having regard to the interests of international criminal co-operation.

The HRLRC submission highlighted that art 6 of the *International Covenant on Civil and Political Rights* ('*ICCPR*') provides that every person has the inherent right to life, which has been held by the UN Human Rights Committee to impose a non-derogable obligation not to

extradite a person to a foreign country in circumstances where it is foreseeable that the person may be subject to the death penalty. In the HRLRC's view, this prohibition extends to the provision of mutual assistance, with the Committee stating that:

States parties that have abolished the death penalty have an obligation [under art 6(1)] to so protect in all circumstances... For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application.

In addition to being a State party to the *ICCPR*, Australia has ratified the *Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty*, which contains a preambular recognition that 'all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life'. The *Second Optional Protocol* requires Australia to take 'all necessary measures to abolish the death penalty within its jurisdiction', which, in the HRLRC's view, extends to taking all necessary measures within its control (including the refusal of mutual assistance in death penalty matters) to prevent the imposition of the death penalty by a foreign country.

Having regard to the non-derogable nature of the right to life, the desirability of abolishing the death penalty in all jurisdictions, and Australia's obligation to take all measures necessary to achieve such abolition, the HRLRC argued that s 8 of the *Mutual Assistance Act* should be amended to provide that a request by a foreign country for assistance in respect of the investigation of, or prosecution or punishment for, an offence in relation to which the death penalty may be imposed must be refused unless the provision of assistance would assist the defence. That is, it should be mandatory to refuse assistance in any circumstances where such assistance may contribute to or result in the death penalty being imposed against a person.

### **Use of Foreign Evidence**

Where Australia receives evidence from a foreign country for use in domestic proceedings, the *Foreign Evidence Act 1994* (Cth) applies.

Broadly, the *Foreign Evidence Act* permits the adduction of foreign evidence in domestic proceedings if the evidence would have been

admissible if it had been adduced from the person at the proceeding (s 24(2)(b)) and justice would be served by the admission of the evidence (s 25(1)). Section 25(2) of the Act then sets out a range of considerations to which a court should have regard in determining whether justice would be better served by the admission or exclusion of the foreign evidence.

Section 26 of the Act limits the court's discretion to exclude evidence in proceedings relating to a range of terrorism and security-related offences. Foreign evidence may only be excluded in such proceedings where 'the court is satisfied that adducing the foreign material would have a substantial adverse effect on the right of a defendant in the proceeding to receive a fair hearing'.

In the HRLRC's submission, it was recommended that the *Foreign Evidence Act* be amended such that the exclusion of any evidence obtained pursuant to or in the context of a serious human rights violation is mandatory and not subject to limitation or exception.

The exclusion from judicial proceedings of evidence obtained as a result of torture is required by art 15 of the *Convention against Torture*. The rule of exclusion applies equally whether the forum State or another State was responsible for the torture. Customary international law also requires the exclusion from judicial proceedings of evidence obtained as a result of torture.

International law and jurisprudence also requires the exclusion of evidence that, although not obtained as a result of torture, was obtained in the context of cruel, inhuman or degrading treatment or punishment. The *United Nations Declaration against Torture* declares in art 12 that any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment may not be invoked as evidence against the person concerned. The UN Human Rights Committee holds the view that evidence obtained as a result of cruel, inhuman or degrading treatment should be excluded from judicial proceedings in order to discourage violations of art 7 of the *ICCPR* (prohibition on torture and other cruel, inhuman or degrading treatment) and article 14(3)(g) of the *ICCPR* (no compulsion to confess guilt). The International Commission of Jurists has declared that evidence which is obtained by means which

constitute a serious violation of human rights is never admissible.

## Conclusion

The HRLRC submission concluded that it is imperative that Australia's mutual assistance law and practice contain mechanisms and safeguards to ensure that each of the human rights obligations referred to above is respected, protected and fulfilled.

The HRLRC submission is available at [www.hrlrc.org.au](http://www.hrlrc.org.au)

## HRLRC CASEWORK

### Prisoners and the Right to Health

#### *R v MDJ*

MDJ has been diagnosed with chronic paranoid schizophrenia. In 2005, he was convicted on four counts of armed robbery, assault and kidnapping. In his decision, the sentencing judge, Chettle J, acknowledged the extent of the appellant's mental illness, finding a nexus between his mental condition and the commission of the offences. Nevertheless, MDJ was sentenced to an extended prison term of 6 years and 9 months, with a non-parole period of 4 years.

In sentencing, Chettle J acknowledged that MDJ would be best suited to detention in a mental health facility such as Thomas Embling Hospital, but that he could 'say that til the cows come home'. According to his Honour, the lack of 'money, facility and appropriate places to detain people who are sick' meant that MDJ would still 'do his time in mainstream prison'. In light of these limitations, his Honour expressed the view that MDJ would be best accommodated at the Melbourne Assessment Prison, which contains a secondary psychiatric facility, the Acute Assessment Unit ('AAU').

MDJ's legal representatives, Victoria Legal Aid, appealed his sentence on the ground that the sentencing judge had, in the exercise of the sentencing discretion, placed insufficient weight on his mental illness and the burden of imprisonment on someone suffering from a mental illness, the effect being the imposition of a manifestly excessive term of imprisonment.

It was submitted that MDJ did not remain at the AAU and was frequently moved between prisons. This negatively affected the continuity of his psychiatric treatment. Further, there was evidence that he experienced ongoing difficulty

obtaining adequate medication, and that the symptoms of his schizophrenia were regularly 'managed' by placing him in 23-hour solitary confinement for up to 8 days at a time.

In a recent decision of the Victorian Court of Appeal (*Royal Women's Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85 at [70]), a call was made by Maxwell P for practitioners to bring before the Court arguments of international law, to the extent that this would assist in the determination of cases. The HRLRC identified the *MDJ* appeal as one in which the Court might benefit from submissions on international law relating to the rights of prisoners with a mental illness to adequate health care. The HRLRC considered various options as to how such arguments might best come before the court, including making an *amicus curiae* application or co-counselling. In the particular circumstances of this case, it was decided that the most effective approach would be to encourage and assist Counsel for the appellant to present the international law arguments to the Court.

In written submissions, Counsel for the appellant argued that international law supports the common law position that a person imprisoned for a criminal offence should not suffer punishment over and above the deprivation of liberty which imprisonment entails.

Further, Counsel submitted that international law adds to the common law in two respects. First, unlike the common law, which does not expressly set standards of mental health care, international law sets minimum standards of care and defines a failure to meet these as a form of punishment over and above the sentence imposed. Secondly, international law provides that where punishment occurs which is over and above the deprivation of liberty, the prisoner is entitled to an effective remedy pursuant to art 2(3) of the *ICCPR*, which could take the form of a reduced sentence.

In putting these arguments reference was made to a number of international instruments which set out the right of prisoners to adequate mental health care:

- Art 10 of the *ICCPR*, which states that all persons deprived of their liberty must be treated with humanity and respect for their inherent dignity;
- Art 12 of the *International Covenant on Economic Social and Cultural Rights*,

which provides for the right of everyone to the enjoyment of the highest attainable standard of physical and mental health;

- The UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, which state that incarcerated persons should have access to the best health care available in their country (Principle 20);
- The UN Basic Principles for the Treatment of Prisoners, which provide that prisoners must have access to health services available in their country without discrimination on the grounds of their legal situation (Principle 9); and
- The UN Standard Minimum Rules for the Treatment of Prisoners, which require that the prison system 'shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation' (Rule 57).

The Centre considers that mentally ill persons are typically not adequately supported, or provided for, in correctional facilities. In particular, limited resources mean that prisons are often unable to provide adequate professional services, including mental health professionals. This results in inadequate screening, assessment, treatment, crisis intervention, institutional and post-release community management. The Centre further considers – and expert commentary supports the position – that inadequate provision of appropriate psychiatric treatment to mentally ill persons detained in prisons can *exacerbate* pre-existing medical conditions, such as schizophrenia.

The *MDJ* case could be said to illustrate the deficiencies in our prison systems in relation to the provision of adequate mental health care for prisoners. International law is one tool to which the Courts are able to have recourse in trying to address such deficiencies.

Judgment has been reserved.

*Steven Amendola is a Partner with Blake Dawson Waldron.*

*Beth Midgley is a Lawyer with Blake Dawson Waldron.*

*Cecilia Riebl is an Articled Clerk with Blake Dawson Waldron.*

*Blake Dawson Waldron, together with Brian Walters SC and Michael Kingston of Counsel,*

*provided substantial pro bono assistance to the HRLRC to enable international human rights law submissions to be prepared in the MDJ case.*

## **SEMINARS and EVENTS**

### **Economic, Social and Cultural Rights Workshop:**

#### **Advocacy, Litigation and Implementation Strategies**

with

#### **Malcolm Langford**

Senior Legal Officer

ESC Rights Litigation Programme, Centre on Housing Rights and Evictions

#### **Details**

Date: Thursday, 30 November 2006

Time: 9.00am – 12.30pm

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

Cost: Free

Registration is essential and numbers are strictly limited.

Morning tea will be served.

RSVP by 23 November to Phil Lynch at [hrlrc@vicbar.com.au](mailto:hrlrc@vicbar.com.au) or (03) 9225 6695.

## **EDUCATION, RESOURCES and TRAINING**

### **Online International Human Rights Resources relevant to Victorian *Charter of Human Rights and Responsibilities***

The human rights contained in the Victorian *Charter of Human Rights and Responsibilities 2006* are largely modelled on the civil and political human rights enshrined in the *ICCPR*. Many of these civil and political rights have also been enshrined in regional human rights instruments (such as the *European Convention on Human Rights*) and domestic human rights instruments (such as the United Kingdom *Human Rights Act 1998* and the ACT *Human Rights Act 2004*).

Pursuant to s 32(2) of the *Charter* (which provides 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'), the considerable jurisprudence developed under these instruments can and should be considered in determining the content and application of *Charter* provisions.

Set out below is a selection of key international jurisprudential sources that are available online. The next edition of the Bulletin will feature key comparative regional jurisprudential material while the edition following that will feature key comparative domestic sources.

#### **UN Human Rights Committee**

The Human Rights Committee ('HRC') is responsible for monitoring implementation of, and compliance with, the *ICCPR*. Pursuant to the *First Optional Protocol* to the *ICCPR*, the HRC also has jurisdiction to hear complaints from individuals who claim that their human rights have been violated by a State party to that Protocol.

Through these functions, the HRC has generated significant jurisprudence regarding the substantive content and application of civil and political rights, including:

- General Comments – A General Comment is an authoritative interpretation of the content of a human rights provision of the *ICCPR*. As at 28 August 2006, the HRC had issued 31 General Comments. General Comments are available at <http://www.ohchr.org/english/bodies/hrc/comments.htm>
- Views on Individual Communications – Views on Individual Communications are decisions made under the *First Optional Protocol* and an important source of jurisprudence. The HRC's Views on Individual Communications are available at <http://www.bayefsky.com/docs.php/area/jurisprudence/node/3/treaty/ccpr/opt/0> or <http://www1.umn.edu/humanrts/undocs/allundocs.html>.
- Concluding Observations – Concluding Observations are findings and recommendations by the HRC in relation to State party implementation of the *ICCPR*. Again, they are an important source of jurisprudence. Concluding

Observations are available at <http://www.bayefsky.com/docs.php/area/connoclobs/node/2/treaty/ccpr/opt/0> or at <http://www1.umn.edu/humanrts/hrcommittee/hrc-country.html>

### UN Special Rapporteurs

The UN Human Rights Council has appointed a number of Special Rapporteurs (or independent experts) with thematic mandates in areas of civil and political rights under the *ICCPR*. Among other things, these Special Rapporteurs are responsible for developing the normative content of human rights within their mandate, including by preparing and publishing annual and thematic reports. Special Rapporteurs have been appointed, and developed jurisprudence and standards, in the following areas, among others, relevant to the *Charter*:

- Arbitrary detention (<http://www.ohchr.org/english/issues/detention/index.htm>);
- Freedom of opinion and expression (<http://www.ohchr.org/english/issues/opinion/index.htm>);
- Freedom of religion or belief (<http://www.ohchr.org/english/issues/religion/index.htm>);
- Minority issues (<http://www.ohchr.org/english/issues/minorities/expert/index.htm>); and
- Torture and other cruel, inhuman or degrading treatment or punishment (<http://www.ohchr.org/english/issues/torture/rapporteur/index.htm>).

### Other International Human Rights Bodies

In addition to being enshrined in the *ICCPR*, there are a range of specific civil and political rights contained in the *Charter* that are also contained in other international human rights instruments, including:

- *International Covenant on Economic Social and Cultural Rights*;
- *International Convention on the Elimination of all Forms of Racial Discrimination*;
- *Convention on the Elimination of all Forms of Discrimination against Women*;
- *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*;
- *Convention on the Rights of the Child*;

- *Convention relating to the Status of Refugees*; and
- *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*.

Where relevant, it may therefore be necessary to consider the General Comments, Views and Concluding Observations of those bodies. The following websites are useful in this regard:

- <http://www.ohchr.org/english/bodies/index.htm>
- <http://www.bayefsky.com/>
- <http://www1.umn.edu/humanrts/un-orgs.htm>

### Global Human Rights Education Network @ [www.hrea.org](http://www.hrea.org)

Human Rights Education Associates (HREA) is an international NGO that supports human rights learning, the training of activists and professionals, the development of educational materials and programming, and community-building through on-line technologies.

HREA works with individuals, NGOs, inter-governmental organisations and governments interested in implementing human rights education programs. The services provided by HREA include:

- assistance in curriculum and materials development;
- training of professional groups;
- research and evaluation;
- clearinghouse of education and training materials;
- networking human rights advocates and educators; and
- a comprehensive human rights education website at [www.hrea.org](http://www.hrea.org).

[www.hrea.org](http://www.hrea.org) is a comprehensive news and resource centre for human rights on an international level. Upcoming human rights events can be browsed from the home page. It also provides up-to-date headline news on human rights issues, in addition to articles on human rights issues. The site is primarily divided into two sections: a Learning Centre and a Resource Centre.

The Learning Centre provides excellent training materials for human rights advocates, including 'Study Guides' in relation to a range of rights. Each Study Guide includes an introduction to

the right, a discussion of the substantive content of the right, details of the international and regional instruments enshrining the right, advocacy and training materials about the right, and information about mechanisms to enforce the right. The Guides also offer links to the full text of international treaties relevant for the topic, and other useful resources on the HREA and University of Minnesota Human Rights Library web sites. The Learning Centre also includes information about specialized distance education courses for human rights advocates and educators. The Tutorial section and Discussion Boards of the Learning Centre are currently under construction.

The Resource Centre is an on-line repository of human rights education and training materials, forums, databases and links to other organisations and resources. The materials are provided free of charge. The Resource Centre includes:

- a library containing over 2,000 full-text guides, curricula, textbooks and other documents that can be used for both formal and non-formal education about human rights;
- various moderated on-line discussion forums (or 'listservs') to support human rights education and learning;
- a database which includes a directory of human rights education organisations, a comprehensive listing of human rights courses and programs offered worldwide, and an extensive annotated bibliography of human rights education materials; and
- links to numerous other human rights education initiatives and organisations worldwide.

*Joseph Ip is a law student at the University of Melbourne and a volunteer with the Public Interest Law Clearing House (Vic).*

## **IF I WERE ATTORNEY-GENERAL...**

### **Facilitating Public Interest Litigation**

In 1972, when the Attorney-General of Tasmania, Mervyn Everett, gave his fiat to conservationists to challenge the lawfulness of the flooding of Lake Pedder, he refused to accept a cabinet directive to stop the litigation. The Premier, Eric Reece, sacked him, assumed the office of Attorney-General himself, and withdrew the fiat. The courts were not permitted to decide.

This highlights one of the problems with the role of the Attorney-General. The position is held by a politician, and yet the Attorney is expected to oversee the way the courts hold politicians to account.

Last August, the Blue Wedges coalition approached the Supreme Court of Victoria to challenge the legality of the State Government's 'trial' dredging of Port Phillip Bay. Blue Wedges alleged that the dredging would be in breach of the government's own laws, particularly because it was being conducted without any environment effects statement ('EES'). The Minister had called for an EES and was awaiting its provision. Section 6(2) of the *Environment Effects Act* requires that 'no works' be carried until the EES has been considered by the Minister. These trial works involved 4 to 5 per cent of the overall works, and moving 1.7 million cubic metres (a 'large' dredging project is regarded as 500,000 cubic metres), enough earth to make a pile stretching from Melbourne to Sydney. The claim by Blue Wedges had, at the very least, real prospects of success.

A challenge like this takes months to be given a full hearing by the Supreme Court. By then the trial dredging would be finished, and there would be no point in the Court ruling on the controversy.

For this reason, the Blue Wedges coalition asked the court for an interlocutory injunction to prevent works until the issue could be fully argued.

In such cases it is usual for the party who seeks an injunction to give the court an undertaking to pay any damages caused by the delay in works if the court ultimately rules against the legal challenge. If you want a court to stop something so you can bring a case, you must be prepared to cover the loss caused if you fail.

In this case, the prospective damages from a delay in the dredging was said to be some \$32 million, accumulating at over \$300,000 a day. There was no prospect of a community group honestly giving an undertaking to pay such a vast sum, and they sought to be excused from the requirement.

Justice Mandie, relying on the conventional legal approach to these matters, would not excuse them from this requirement, and accordingly would not grant the injunction.

Whatever you think of the merits of dredging Port Phillip Bay, the Blue Wedges case highlights an important gap in our rule of law. If the government was acting unlawfully in this trial dredging, surely the rule of law requires that it be held to account. But how?

In that case, the Planning Minister, who openly supported the trial dredging, was also the Attorney-General. There was no way he was going to give his fiat for the conduct of the case.

The common law assumes that private individuals only take court action to protect their private interests. The common law also assumes that the only party who approaches the courts to uphold the public interest is the Attorney-General. Both these assumptions are now outdated and wrong.

Access to justice is critical for the rule of law. There is no point having the law if members of the community are not able to approach the courts to obtain remedies to enforce it. It is an affront to the rule of law to leave anyone – especially the government – free to break the law because no one can afford to challenge them.

If I were Attorney-General, I would introduce legislation to facilitate public interest litigation.

That legislation would enable litigants who were seeking a remedy for motives other than profit to approach the courts for a preliminary determination as to whether the litigation was in the public interest. If the courts held that it was in the public interest for the case to be determined, then certain consequences would flow:

- in the ordinary course, the party bringing the proceeding in the public interest would not be liable for costs, no matter what the outcome; and
- in the ordinary course, the party bringing the proceeding would be excused from the obligation to give an undertaking as to damages when seeking an injunction.

### **Outlawing SLAPP Suits**

Following agreement between the Attorneys-General of every Australian jurisdiction, uniform defamation laws have now been introduced throughout the country. However, these laws have not dealt with the growing phenomenon in Australia of the SLAPP suit – ‘Strategic Litigation Against Public Participation’.

When court proceedings are brought by corporations against citizens in order to silence their critics – whether over a development or some other issue – the law is being abused to stifle democratic debate about matters of public interest. Australia should follow the lead of United States jurisdictions in outlawing such law suits.

Key aspects of anti-SLAPP legislation would be:

- according qualified privilege to statements made in the course of ‘public participation’ (ie. the democratic process);
- provision to the courts of a ready mechanism to strike out SLAPP suits; and
- power to courts to award punitive damage against corporations who abuse the legal system by bringing proceedings for the improper purpose of silencing their critics.

### **Regulating Public Relations Firms**

Increasingly, public debate is influenced by public relations consultants. There are many PR firms, and they act for government and for large corporations. Sometimes their work is positive, and sometimes it is more questionable. Often, their influence in ‘backgrounding’ journalists or even in supplying stories for media outlets goes quite unseen by the public. Their impact on the democratic process is considerable, but generally there is little prospect of finding out any details of their advocacy, or even for whom they act.

As a lawyer, I act for clients in court and advocate my client’s cause. But my work is regulated, and I must be registered. I must disclose the identity of my client. No such regulation applies in the PR industry, and their advocacy affects not just the outcome of particular court cases, but the entire democratic process.

If I were Attorney-General, I would introduce legislation requiring PR consultants to be registered and requiring the identity of their clients to be disclosed. The transparency introduced would allow citizens to have a better sense of the way the public debate was being influenced. It would enhance our democracy.

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