



INDEX

OPINION 1

NEWS..... 2

NATIONAL CHARTER OF RIGHTS DEVELOPMENTS.... 4

VICTORIAN CHARTER OF RIGHTS DEVELOPMENTS.... 7

VICTORIAN CHARTER CASE NOTES 9

COMPARATIVE LAW CASE NOTES 15

HRLRC POLICY WORK..... 19

HRLRC CASEWORK..... 23

SEMINARS AND EVENTS... 24

RESOURCES AND REVIEWS 25

HUMAN RIGHTS JOBS 25

IF I WERE ATTORNEY-GENERAL... 26

Human Rights Law
Resource Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000
P: + 61 3 8636 4450
F: + 61 3 8636 4455
W: www.hrlrc.org.au
ABN: 31 117 719 267

The HRLRC 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.

The Centre is a registered charity. Donations are gratefully received and fully tax deductible.

Opinion

A Matter of National Importance

‘After 10 months of listening to the people of Australia, the Committee was left in no doubt that the protection and promotion of human rights is a matter of national importance.’

The National Human Rights Consultation Committee delivered its report to the Attorney-General on 30 September. The report was publicly released on 8 October.

The Committee recommended that Australia adopt a federal Human Rights Act.

It also recommended that human rights education in schools and universities, in the broad community and in the public sector, be significantly enhanced, and suggested a National Human Rights Education Plan could coordinate the delivery of human rights education across sectors in Australia.

The Commission agrees that implementation of these recommendations is an essential ingredient in developing a human rights culture in Australia.

However, human rights education is fundamentally linked to effective human rights protections. While human rights protections in Australia remain an incomplete patchwork, it will be difficult to deliver truly effective human rights education.

For this reason and in accordance with the findings and recommendations of the Committee, Australia needs a national Human Rights Act based on the ‘dialogue model’.

This reform would be a modest and sensible reform of the way that human rights are considered by our decision-makers.

The Committee’s recommendations to enhance the functions of the Australian Human Rights Commission are also important and welcome. In particular, the recommendation to expand the definition of ‘human rights’ under the Australian Human Rights Commission Act which would mean the Commission could perform its key functions with regard to *all* of Australia’s international human rights obligations.

We particularly welcome the recommendation that complaints of human rights violations and those made under International Labor Organization Convention 111 be justiciable in court if they cannot be conciliated. Currently, individuals whose human rights have been breached, such as those who have experienced inhuman and degrading treatment while in immigration detention, have no access to an effective remedy.



The final outcome of their complaint is a report made to Parliament, the recommendations of which may not be acted upon. Providing access to the courts for these complaints is an important step towards providing an effective remedy for breaches of human rights.

There has been some public debate about whether the Commission should have a role in notifying Parliament if a court finds that a law is inconsistent with human rights. The Commission's view is that it does not matter who is charged with notifying Parliament. What does matter, however, is that Parliament is informed, so that there is an opportunity for a careful and principled reconsideration of a law that has been found by a court to breach human rights.

In any event, this element of a Human Rights Act, while important, is not the key reform that will lead to enhanced human rights protections. What will make the greatest difference to human rights protections are the pre-legislative processes and public authority obligations that will assist in preventing human rights problems from occurring in the first place.

Having heard about the basic rights that affect all of us in our everyday lives, the Committee recommended that some economic, social and cultural rights might be included in a federal Human Rights Act, namely the rights to an adequate standard of living, to the enjoyment of the highest attainable standard of physical and mental health, and the right to education. This is a significant development, as economic, social and cultural rights are generally not included in human rights instruments in similar jurisdictions. Following advice from Stephen Gageler QC and Henry Burmester QC, the Committee recommended that economic, social and cultural rights not be judicially enforceable.

The Commission acknowledges the very strong views that economic, social and cultural rights should not be the subject of litigation. Consequently we welcome the recommendation that the Commission should be able to receive complaints about possible breaches of these rights. Our investigation and conciliation processes will ensure that a discussion takes place between individuals who feel these rights have been breached and relevant government decision-makers.

The Commission supports the Committee's suggestion that some economic, social and cultural rights should be included in a Human Rights Act, and that those parts of the Act that do not involve access to the courts, apply to these rights. The lives of many people in Australia will be enhanced if a human rights framework is consistently applied to the development of law and policy affecting the rights to an adequate standard of living, the highest attainable standard of health and the right to education.

The issue as to whether Australia should adopt a Human Rights Act remains controversial. Opponents of such a reform have been vocal since the report's release. Their main criticism is that a Human Rights Act shifts power from the Parliament to the courts. However, as suggested by Professor Stephen Gardbaum, an international expert on the dialogue model of human rights protection, in assessing Human Rights Acts 'the relevant question is not whether there has been an increase in judicial power but whether too much or too little'.

In our view, the balance in the model being considered in Australia is the right one. It will not, as some have suggested, compromise our system of democracy. An Australian Human Rights Act would be fundamentally democratic. It would be an act of our democratically-elected Parliament setting out the framework for human rights protections, public accountability and good governance in Australia.

We are at a significant juncture in the debate about whether Australia should have a Human Rights Act. The Commission's call to both those who support and those who oppose a Human Rights Act is to engage in informed and measured debate on the question of how best to protect human rights.

There is much common ground – everyone engaged in this debate expresses a desire for a community where human rights are respected. Let's build on this common ground to build a community where all people are more aware of their human rights and their responsibility to protect the rights of others.

The Hon Catherine Branson QC is President of the Australian Human Rights Commission

News

Australian Professor Elected Chair of UN Disability Rights Committee

Professor Ron McCallum AO has been elected as the 2010 Chair of the United Nations Committee on the Rights of Persons with Disabilities.

Professor McCallum is a leading legal academic and disability rights advocate. He has experienced blindness since birth, was Dean of Sydney Law School from 2002 to 2007, and the inaugural president of the Australian Labour Law Association.

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*. It is responsible for:

- reviewing the implementation of the Convention on the Rights of Persons with Disabilities;
- considering complaints under the Optional Protocol to the Convention; and
- inquiring into grave and systematic violations of the Convention.

Australia has ratified both the Convention and its Optional Protocol and is in the process of preparing its first report on the realisation of disability rights in Australia to the Committee.

Business and Human Rights Consultations: Operationalising the 'Protect, Respect, Remedy' Framework

On 5 – 6 October 2009, the UN Special Representative on Business and Human Rights, Professor John Ruggie, undertook a consultation in Geneva to discuss operationalising the 'Protect, Respect, Remedy' framework. The framework was developed by Professor Ruggie in response to his 2005 mandate to:

- identify standards of corporate responsibility with regard to human rights;
- elaborate on the role of States in regulating corporations with regard to human rights;
- develop materials for human rights impact assessments of corporate activity; and
- compile a compendium of best practices by States and business on this issue.

The framework is based on three core principles:

- the State duty to protect against human rights abuses by third parties, including business;
- the corporate responsibility to respect human rights; and
- the need for greater access to effective remedy, judicial and non-judicial, for victims of corporate related human rights violations.

The UN Human Rights Council unanimously welcomed the framework in June 2008 and renewed the term of the Special Representative for a further three years. The renewed mandate requires Professor Ruggie to report on how to operationalise the core principles of the framework by providing practical recommendations and concrete guidance to enable their implementation by States, businesses and others. Specifically, the mandate requires the Special Representative to:

- provide views and concrete practical recommendations on ways to strengthen the duty of the State to protect all human rights from abuses by business;
- elaborate further on the scope and content of the corporate responsibility to respect all human rights; and
- make recommendations for enhancing access to effective remedies for those whose human rights are impacted by corporate activities.

During his time as Special Representative, Professor Ruggie has taken a strong research and evidence-based approach to fulfilling both mandates. Professor Ruggie has held many regional, sectoral and issue based consultations across the world as well as a number of expert workshops. Although part of this process, the Geneva consultation in October 2009 was unique because it was the first time a multi-stakeholder consultation on business and human rights had been convened at the request of the Human Rights Council. The consultation was convened by the Office of the UN High Commissioner for Human Rights and was attended by over 300 representatives from UN member states, business, academia, human rights organisations and civil society.

In his opening remarks to the Geneva consultation, Professor Ruggie identified the following five key challenges for business and human rights.

- The push to construct a delimited list of business-specific human rights is unhelpful because companies can affect the entire spectrum of internationally recognised rights.

- Governments tend to lack adequately comprehensive policies and regulatory arrangements to fully manage the complex business and human rights agendas.
- Most companies tend to lack fully-fledged internal governance systems to conduct adequate human rights due diligence and most businesses take an overly legalistic approach to human rights.
- Most companies lack grievance mechanisms to which affected individuals and communities can bring concerns.
- The incidence of corporate-related human rights abuse is higher in countries with weak governance institutions where local laws are non-existent or not enforced. This often occurs in armed conflict zones.

He then discussed two often cited approaches to dealing with these challenges. The first is the imposition of binding international law standards directly on companies, as traditionally favoured by human rights advocates. The second is the use of voluntary initiatives and best practice guidelines, as traditionally favoured by business. Professor Ruggie said that he does not believe that these approaches are capable of effectively causing corporate change. Accordingly, he is seeking to identify alternative approaches as part of fulfilling his second mandate to operationalise the framework.

Following Professor Ruggie's opening remarks, the consultation held seven sessions which were addressed by panellists followed by discussions with attendees. Panellists representing various stakeholders were present including Jody Kollapen, former Chair of the South Africa Human Rights Commission, Ebele Okobi-Harris, from Yahoo! Inc., and Salvador Quishpe, representing the indigenous Saraguro community of Ecuador. Further information about the consultation and submissions made to the Special Representative can be viewed at <http://www.business-humanrights.org/SpecialRepPortal/Home/OHCHRConsultation-Geneva5-6Oct2009>.

Michael Gomm is a Law Graduate with Allens Arthur Robinson

Human Rights and Corporate Law Reports Released

The UN Special Representative on Business and Human Rights has recently released the first reports in the 'UN Corporate Law Tools Project'. This project examines the extent to which corporate law principles and practices currently require or encourage consideration of human rights by corporations.

These reports are an excellent guide for corporations with operations or business activities in these jurisdictions that want to better understand how existing laws regulate corporate human rights impacts, with a view to minimising legal and related risks and ensuring legal compliance.

The UN Corporate Law Tools Project was commenced by the UN Special Representative of the Secretary-General on Business and Human Rights, Professor John Ruggie, in March 2009. It examines laws in operation in 40 jurisdictions across the world and focuses on various issues, including requirements for incorporation, directors' duties, reporting and listing requirements, and shareholder engagement.

The reports examine the status of existing law, the role and attitudes of regulators and courts in applying these laws to require or facilitate companies to consider their human rights impacts, and what preventative or remedial action may have been taken in this regard.

The first of these reports were published by the UN in September 2009. They include reports prepared by Allens Arthur Robinson for each of Australia, New Zealand, Indonesia and Papua New Guinea.

The reports are at www.business-humanrights.org/SpecialRepPortal/Home/CorporateLawTools.

Craig Phillips is a Partner with Allens Arthur Robinson

National Charter of Rights Developments

It's Time to Act on Human Rights:

Federal Government Releases Landmark Human Rights Report

On 8 October 2009, the Attorney-General, the Hon Robert McClelland MP, released a landmark report recommending that Australia enact a comprehensive national Human Rights Act. The report of the

National Human Rights Consultation Committee also recommends a range of other measures to protect human rights in Australia, including enhancing human rights education, improving parliamentary scrutiny of human rights, strengthening the Australian Human Rights Commission, improving access to justice and addressing Indigenous disadvantage and exclusion.

The report was released following one of the most extensive exercises in participatory democracy in Australian political history. The independent Consultation Committee, chaired by Jesuit priest and law professor Father Frank Brennan, received over 35,000 submissions and hosted 66 roundtables in 52 locations throughout metropolitan, regional and rural Australia. Over 87 per cent of the submissions called for the enactment of an Australian Human Rights Act.

The Committee found that, 'after 10 months of listening to the people of Australia, [there is] no doubt that the protection and promotion of human rights is a matter of national importance.'

The Committee made the following further key findings which must be carefully considered in responding to the recommendations contained in the report:

- Human rights matter deeply to Australians. They resonate with Australian democratic values, the rule of law and our sense of a fair go. There is strong support for the promotion and protection of all human rights, including economic, social and cultural rights (p 96). 'For most Australians, the main concern is the realisation of economic and social rights such as the rights to education, housing and the highest attainable standard of health' (p 365).
- While Australia has strong democratic and legal institutions, they do not provide comprehensive or even adequate protection of human rights. The patchwork quilt of human rights protection is missing pieces and this is felt most keenly by the marginalised and vulnerable (p 127-128).
- Human rights are not enjoyed fully or equally by all Australians. Both in fact and in law, many groups within Australia experience profound disadvantage, including the homeless, people with mental illness, Aboriginal Australians, asylum seekers and children with disability. There is a strong view that 'we could do better in guaranteeing fairness for all within Australia and in protecting the dignity of people who miss out' (p 343-344). Positive legislative and institutional action to promote human rights has widespread public support.
- There is a need for better education about human rights within the community (p 149-151).
- There is a need for a better understanding of and commitment to human rights within government and greater consideration of human rights in the development of legislation and policy (p 149-151, 175, 355-356). Instilling a human rights culture in the federal public sector is integral to better protect and promote human rights in Australia (p 186).
- There is strong support for strengthening and expanding the powers, functions and resources of the Australian Human Rights Commission (p 195).
- There is very strong support for a Human Rights Act. 87.4 per cent of submissions to the Committee which considered the issue supported the enactment of a Human Rights Act.

Consistently with these findings, the Committee recommends that Australia adopt a comprehensive Human Rights Act with the following key features:

- The Act should promote a dialogue about human rights between parliament, the executive, the courts and the community.
- The Act should only recognise and protect the human rights of human beings. Its protection should extend to all people within Australia, as well as all people who are overseas but subject to Australian jurisdiction.
- The Act should enshrine civil and political rights and possibly social and economic rights, particularly the right to adequate housing, the right to health and the right to education.
- The Act should recognise and provide that certain rights are absolute and non-derogable, including the right to life, the right to a fair hearing and the right to protection from cruel, inhuman or degrading treatment. All other human rights would be subject to a general limitations clause, which permits such reasonable limits as can be demonstrably justified in a free and democratic society, taking into account relevant factors.

- The Act should establish robust pre-legislative human rights scrutiny mechanisms. New bills introduced into parliament should include a statement as to their 'human rights compliance' and a Joint Committee on Human Rights should review the human rights compatibility of all bills.
- The Act should bind 'federal public authorities', including federal Ministers, bodies created by federal laws and undertaking public functions, and private entities that perform public functions on behalf of federal public authorities.
- The Act should require that federal authorities act compatibly with rights (other than economic and social rights) and give proper consideration to human rights (including economic and social rights) in decision making.
- The Act should require courts to interpret all federal law compatibly with human rights so far as is possible consistent with statutory purpose, but not empower courts to invalidate legislation.
- Where it is not possible for legislation to be given a human rights-consistent interpretation, the High Court be given the exclusive power to make a declaration of incompatibility. Such a declaration would not affect the validity of the legislation but would require that parliament reconsider that legislation within a specified period. The decision as to whether to amend, repeal or leave the legislation untouched would be entirely a matter for parliament.
- The Act should provide people with effective remedies where their human rights are breached. In the case of civil and political rights, an individual would be able to institute an independent cause of action against a federal public authority, with the usual suite of remedies available, including damages. The Committee recommends that breaches of economic, social and cultural rights not be justiciable, but that the Australian Human Rights Commission be given a mandate to hear complaints in relation to those rights.

Further key recommendations in the Committee's almost 500 page report include that:

- the Federal Government develop a national plan of comprehensive human rights education and that 'education be the highest priority for improving and promoting human rights in Australia';
- the Federal Government audit all legislation, policies and practices to ensure human rights compliance;
- Federal Parliament establish a Joint Committee on Human Rights to review all legislation for compliance with human rights (whether or not a Human Rights Act is adopted);
- the *Administrative Decisions Judicial Review Act 1975* (Cth) be amended to provide that human rights are a relevant consideration in administrative decision-making;
- the *Acts Interpretation Act 1901* (Cth) be amended to require courts to interpret federal laws consistently with human rights, as much as it is possible to do so consistently with the legislation's purpose;
- the Federal Government develop a whole-of government approach to human rights and appoint a Minister responsible for human rights;
- federal departments and agencies develop human rights action plans and report on human rights compliance in their annual reports; and
- the Australian Human Rights Commission receive a strengthened mandate and powers.

The Human Rights Law Resource Centre made three major submissions to the consultation: *Engage, Educate, Empower* in April 2009; *A Human Rights Act for All Australians* in May 2009; and a *Supplementary Submission on Religion and Human Rights* in June 2009. These submissions, together with our collection of case studies, online materials and comprehensive discussion paper entitled *Engaging in the Debate*, were extensively referred to and endorsed in many other submissions and cited over 170 times in the report itself. These submissions are at: www.hrlrc.org.au/our-work/focus/national-consultation/.

The report of the National Human Rights Consultation is at www.humanrightsconsultation.gov.au/.

The Government is expected to announce its detailed response to the report in December 2009.

Phil Lynch is Director of the Human Rights Law Resource Centre

Human Rights and Corporate Responsibilities: The Relevance of the National Human Rights Consultation to Private Companies

The human rights responsibilities of corporations are a subject of significant international and domestic debate. The report of the National Human Rights Consultation will inform this debate, as it specifically addresses the role of the private sector in promoting and protecting human rights.

Notably, the report refers in some detail to a submission to the Consultation Committee by Professor John Ruggie, the UN Special Representative on Business and Human Rights. In that submission, Professor Ruggie recommended that the Australian Government adopt the 'Protect, Respect and Remedy' framework for the regulation of business and human rights. That framework, developed by Professor Ruggie in consultation with business, governments and civil society, was unanimously adopted by the UN Human Rights Council in 2008. The Consultation Committee report also notes specific suggestions from other submissions, such as a proposal to include human rights provisions in government contracts and a proposed requirement that human rights impact statements be prepared for significant projects involving public-private partnerships.

The Committee's report recommends the introduction of a federal human rights act that would apply to 'federal public authorities', including bodies that perform public functions on behalf of such authorities. It further recommends that individuals should be able to bring cases against such bodies for breach of human rights and that the available remedies should include damages. If the Government follows those recommendations, private companies that perform public functions on behalf of Federal Government agencies could be sued for breaching human rights and could be liable to pay monetary compensation for such breaches.

Further, private companies that are not bound to comply with a federal human rights act could be contractually obliged to respect protected rights under agreements with public authorities.

The report recommends that any federal human rights act should require courts to interpret legislation in a manner that is compatible with the rights protected under that act and consistent with the legislation's purpose. This would include laws that affect private companies.

The report also suggests that any federal human rights act should require public authorities to give proper consideration to relevant, protected rights (including economic and social rights) in making decisions. This includes decisions that affect corporations, such as a decision about whether to grant a statutory lease or licence. In such circumstances, public authorities could be deterred from dealing with private companies that do not comply with protected rights.

The report also makes multiple recommendations separate to the enactment of a federal human rights act, including in relation to statutory interpretation and administrative decision-making.

As with the potential introduction of a federal human rights act, many of these proposed steps could have tangible impacts on private companies.

Jess D'Souza is a lawyer with Allens Arthur Robinson

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.

Major Transport Projects Facilitation Bill 2009

The Major Transport Projects Facilitation Bill 2009 aims to provide a 'one-stop shop' with respect to regulation of major transport infrastructure projects. It will facilitate the consolidation of existing environmental, planning and heritage approvals into a single process. This streamlined procedure will apply to projects 'declared' to be of State or regional economic, social or environmental significance.

A comprehensive impacts statement ('CIS') must be prepared and publicly exhibited. Submissions are to be invited in relation to it. An assessment committee will review these submissions, conduct a

preliminary hearing and formal public hearing and prepare a recommendation on the project. The Minister must consider this recommendation in determining whether to approve the project.

The Bill potentially engages a number of rights under the Victorian *Charter*.

Cultural rights

Section 19(1) of the *Charter* protects an individual's right to enjoy their culture. Section 19(2) specifically extends this right to Aboriginal persons. Currently, Crown land may be reserved for its cultural significance. The Bill enables reservations to be revoked following the CIS process. According to the Statement of Compatibility, cultural rights will not be infringed, as revocation will only occur following a 'transparent and public process'. However, the Bill does in fact remove many of the opportunities for review of this process.

Right to privacy and freedom from unlawful or arbitrary interference with one's home

By providing for project authorities to enter into possession of project land, the Bill engages s 13 of the *Charter*, which protects an individual's right to privacy and freedom from unlawful or arbitrary interference with one's home. According to the Statement of Compatibility, the Bill's procedural safeguards, which include notice requirements and a three month grace period after approval during which a project authority must not enter land that is used as a principal place of residence, ensure the right is not infringed.

Right to freedom of movement

Section 12 of the *Charter* protects an individual's right to freedom of movement. Under the Bill, a project authority may restrict access to a project area, which could include land to which a member of the public would otherwise have access. According to the Statement of Compatibility this restriction is 'reasonably necessary' pursuant to s 7(2) of the *Charter* to achieve the purpose of facilitation of major transport projects (which facilitate movement). Access is only restricted for so long as the project continues.

Right to freedom of expression

The right to freedom of expression, expressed in s 15 of the *Charter*, has been interpreted in some jurisdictions to include a right to offend, shock or disturb. It can be subject to lawful restrictions reasonably necessary to respect the rights and reputation of other persons, or for the protection of public order. The Bill criminalises conduct that insults, disturbs or obstructs a person attending a hearing or a member of an assessment committee performing their functions. The Statement of Compatibility asserts that this is reasonably necessary to ensure accurate assessments and protect public order. However, the Statement of Compatibility does not identify why existing public order laws are insufficient to protect the expeditious conduct of the committee.

Right to a fair hearing

Section 24 of the *Charter* protects a person's right to a fair hearing. The Bill ousts all forms of judicial review in respect of all decisions except the final approval decision of the Planning Minister. The Explanatory Memorandum makes clear that s 24 does not apply to committee hearings. Section 24 of the *Charter* has been interpreted to apply to 'persons and bodies who conduct proceedings with parties' (Bell J in *Kracke v. Mental Health Review Board* [2009] VCAT 646 at 417). The Statement of Compatibility asserts that 'the administrative decisions at issue here do not involve the conduct of proceedings with parties'. In any case, the key decision of the minister to approve the relevant project is subject to review.

Time limits and limitation periods can breach the right to a fair hearing. The Bill provides that a proceeding must be filed within 21 days of publication of a decision. The Statement of Compatibility asserts that this is reasonable as strict time limits are needed to ensure finality and quick implementation of decisions.

As the Report on the Bill by the Scrutiny of Acts and Regulations Committee points out, a key objective of the Bill is to provide an approval process which is more certain, predictable and timely. If decisions other than the final project decision can be reviewed or appealed, it introduces uncertainty and generates a risk of delay, as well as reducing attractiveness of the project to investors. In addition,

decisions under the Bill are 'based on transparent and accountable' processes that incorporate best practice, which is claimed to outweigh the risks associated with removing appeal rights.

Sachini Mandawala, Human Rights Law Group, Mallesons Stephen Jaques

Victorian Charter Case Notes

The Meaning of 'Public Authority' and the Application of the Charter to Non-Government Bodies

Metro West v Sudi [2009] VCAT 2025 (9 October 2009)

The Victorian Civil and Administrative Tribunal has held that a non-profit housing agency is a 'public authority' under section 4(c) of the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Justice Bell's decision provides a detailed discussion of the considerations relevant to determining whether a non-governmental agency is required to comply with the *Charter*. Importantly for those who advocate on behalf of people at risk of homelessness, the decision also recognises that '[d]isadvantaged people in need of social housing and at risk of homelessness are among the most vulnerable in the community. Their human rights are imperilled by their circumstances.'

Facts

Metro West Housing Services Limited is a provider of transitional housing to those at risk of homelessness in the western suburbs of Melbourne. Although a private company, its primary function regarding the allocation and management of housing stocks is governed by a service agreement with the Victorian Government. Metro West receives government funding to provide these services and exercises delegated statutory powers under s 35 of the *Housing Act 1983* on behalf of the government, allowing it to lease, sub-lease, acquire and dispose of property.

Metro West had introduced a policy of automatically issuing notices to vacate to its tenants at the beginning of their tenancy, and regularly throughout the tenancy, in order to ensure that the tenants did not overstay. They sought to rely upon one of these automatic notices in applying for orders for possession against both Sudi and Hailu families.

Both the Sudi and Hailu families argued that Metro West was a public authority under the *Charter*, and was therefore not entitled to give the notice to vacate or make an application for possession because in doing so its actions were incompatible with their human rights protected under the *Charter*.

Whilst Metro West initially argued that it was not a 'public authority' as defined in the *Charter*, it later conceded this point and withdrew the notices to vacate. The tenants therefore requested that Bell J make a formal declaration on the question of whether Metro West was a 'public authority'.

Decision

In his decision, Bell J compared and distinguished at some length the comparative legislation and jurisprudence regarding functional public authorities in the UK, New Zealand and Canada.

Significantly, Bell J endorsed the reasoning of Lord Bingham and Baroness Hale in their dissenting judgements in the UK decision of *YL v Birmingham City Council* [2008] 1 AC 95. Consistently with those judgments, Bell J emphasised frequently throughout his decision that '[t]he definition of 'public authority' in s 4 must be given a wide and generous interpretation which is consistent with [the central purpose of the *Charter* to protect and promote human rights]'

Bell J also made some useful observations regarding the policy rationale for the application of the *Charter* to public authorities, in the following terms:

The state cannot shirk its human rights responsibilities by implementing its programs and policies through private entities acting on its behalf. Where private entities exercise public functions of a public nature on behalf of the State or a public authority, the functions come with unavoidable human rights responsibilities for the entity itself.

Bell J cautioned that the matter of determining whether an entity is exercising a 'public function' should be 'approached as a matter of substance and not form or legal technicality' and that 'each case must be considered on its own facts and merits'.

In light of this, Bell J determined that the provision of social housing is a public function which the government exercises on behalf of the community in the public interest. Together with the provision of public funding to various groups who exercise this function, Bell J held that this would be sufficient to characterise the functions exercised by Metro West as being of a public nature.

In addition, Bell J found that the statutory foundation of housing policies and programs contributed to the finding that Metro West carried out 'public functions'. Importantly, Bell J confirmed that relationships between entities and the government characterised by s 4(1)(c) do not need to be characterised or capable of being characterised in formal legal terms – it 'covers relationships which may be looser than contract, agency and other legal categories...It covers arrangements under which the entity is acting as [the state's] representative or for [the states's] purposes in the practical sense'.

Notwithstanding s 4(5) of the Charter, Bell J noted that the provision of public funding can indicate both that the functions are of a public nature, and that the entity in question acts on behalf of the State or a public authority when exercising those functions.

The application of s 4(1)(c) requires the answer to two questions, which Bell J addressed in the following manner.

Are the functions being exercised of a public nature?

His Honour held that this question turns upon the nature of the *functions* and whether they are being exercised in the public interest, rather than the nature of the entity exercising those functions. In finding that the functions exercised by Metro West in providing transitional housing services (including managing tenancies) were of a public nature, Bell J found that it was relevant to consider the responsibility which government has for the care and protection of vulnerable and disadvantaged people, especially those who are at risk of homelessness.

Are the functions being exercised on behalf of the State or a public authority?

His Honour held that this question requires an analysis of the relationship between the State (or public authority) and the entity in question. Of particular relevance will be whether there is some arrangement under which the entity, in exercising the functions, is acting as their representative or for their purposes in the practical sense. In considering the operations of Metro West, Bell J held that Metro West exercised the relevant functions on behalf of the State as a result of the following factors:

- there was a service agreement between Metro West and the government where the government contracted out the performance of its obligations;
- that service agreement included performance standards and obligations upon Metro West to comply with the government's standards and policies in providing the services;
- Metro West received 'block' funding from the government to perform these services; and
- Metro West exercised delegated statutory functions.

For these reasons, Bell J made a declaration that when exercising the function of providing transitional housing (including the management of tenancies) under the service agreement with the government, Metro West is a public authority under s 4(1)(c) of the *Charter*.

Conclusion

Whilst the outcome of Bell J's decision was not unexpected given the facts of the case, the decision is significant in the depth of analysis and reasoning regarding the application of s 4(1)(c) of the *Charter*. Importantly, Bell J has clearly set out the manner in which the question of whether a particular entity is a public authority under the *Charter* will be approached.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VCAT/2009/2025.html>.

Hayley Parkes, Human Rights Law Group, Mallesons Stephen Jaques

Age Discrimination and Equal Opportunity Exemptions under the Victorian Charter

Lifestyle Communities Ltd (No 3) (Anti-discrimination) [2009] VCAT 1869 (22 September 2009)

In September 2009, VCAT President Justice Kevin Bell dismissed an application by Lifestyle Communities Ltd for an exemption under the *Equal Opportunity Act 1995* (Vic) ('EOA'). In making the

orders, Bell P extensively considered the role of VCAT as a public authority and the operation of s 7(2) (limitations on human rights) and s 8 (right to equality and non-discrimination) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Facts

In 2003, Lifestyle Communities applied to VCAT seeking an exemption allowing it to provide accommodation to people only over the age of 50 years (*Lifestyle Communities Pty Ltd (No 1)*). This application was dismissed with a right of reapplication. In 2004, Lifestyle Communities reapplied to VCAT seeking the exemption in respect of people aged over 55 years for one of their villages. This application was successful (*Lifestyle Communities Pty Ltd (No 2)*). The third application, and subject of this order, sought a change in the conditions of the exemptions previously granted with regards to both the age of the residents and the number of villages covered by the exemption.

In October 2008, Lifestyle Communities submitted an application to VCAT seeking an exemption under s 83 of the EOA to enable them to continue to limit the age of residents of their villages. However, unlike earlier applications, this application sought to provide accommodation exclusively to residents over the age of 50 years, lowering the age restriction by five years from their earlier, successful, application. Further, Lifestyle Communities sought to extend the restrictions to all villages (both current and future) run by the parent and subsidiary companies.

Decision

In denying the application for exemption, Bell P undertook an interpretive exercise examining the concept of discrimination and the discretion to grant exemptions under the EOA and the *Charter*.

Exemptions under the EOA

The EOA prohibits direct and indirect discrimination on the basis of protected attributes, including age, religious belief or activity, sex, race, sexual orientation, impairment and marital status. Section 83 allows the Tribunal to grant, revoke or renew exemptions from any provision in the EOA subject to any conditions the Tribunal thinks fit. There are no explicit criteria in section 83 that VCAT must consider in determining whether or not to exercise its discretion to grant an individual exemption.

The Charter

Bell P held that the exercise of discretion under section 83 of the EOA must be exercised in light of the *Charter*. Section 38 of the *Charter* requires that VCAT, acting as a public authority, give proper consideration to human rights and act in accordance with human rights. Section 32 of the *Charter* imposes the additional obligation that all Victorian legislation, including the EOA, be interpreted consistently with human rights.

Bell P went on to discuss exemptions granted prior to the introduction of the *Charter*, noting that decisions of this nature must now be made compatibly with *Charter* provisions, especially s 8 equality rights as per the decision of Judge Harbison in *Royal Victorian Bowls Association Inc* [2008] VCAT 2415. In that decision Harbison J determined that:

the special interpretive obligation in s 32(1) of the *Charter* meant that s 83 of the *Equal Opportunity Act* had to be interpreted compatibly with human rights. This impacted on the scope of the discretion, which must be now also exercised compatibly with human rights.

This decision and others like it are regarded by Bell P as decisions of a general category, such as that considered in *Kracke v Mental Health Review Board* [2009] VCAT 646, being a category that 'encompasses decisions made pursuant to a statutory discretion conferred in open-ended terms.' The analysis then turned to whether the conduct or activity being considered is a special measure under s 8(4) of the *Charter* or, if not, whether the exemption would satisfy the reasonable limits test in s 7(2).

Equality rights in s 8 of the *Charter* are limited by the *Charter's* definition of discrimination as discrimination within the meaning of the EOA. However, s 8 of the *Charter* also reflects the equality rights as contained in art 26 of the ICCPR. The right to equality, as with all *Charter* rights, may be limited in accordance with s 7(2), whereby if the distinction is proportionate, reasonable and objective, then it will not be considered discrimination. Finally, a special measure under s 8(4) will not constitute discrimination for the purposes of s 8(3).

In the present case the exemption sought by Lifestyle Communities would limit the right to equality of everyone aged under 50 years. This would constitute discrimination based on age falling within the definition of discrimination for the purposes of the *Charter*. Allowing the exemption would exclude everyone under 50 years from admission to an accommodation village based on a stereotype of unsuitability. Countering this, Lifestyle Communities submitted that their application for an exemption was effectively a form of positive discrimination, falling within the special measures provision of s 8(4) of the *Charter*. It further submitted that, if s 8(4) was inapplicable, any limitation on equality rights was justifiable under s 7(2).

Bell P found that the special measure purpose under s 8(4) was not made out in this case for a number of reasons:

- Although a legitimate commercial purpose, the provision of accommodation services exclusively to people aged over 50 years regardless of their socio-economic disadvantage, accommodation need and present options does not translate to achieving the purpose of substantive equality.
- The evidence provided to the Tribunal was deemed to be inadequate as the application was supported almost entirely on the same information provided for the previous application yet in this application Lifestyle Communities was seeking an exemption covering a larger number of villages and a lowering of the exemption age.
- There was no demonstrated proof of the need for a special measure or of the connection between the need and the means for achieving it.
- The conceptual basis of the application was deemed to be deficient as Lifestyle Communities would have required evidence that at least a majority of people of the age of 50 years are disadvantaged as a result of age discrimination, something which they failed to do.

Turning to s 7(2) Bell P discussed the nature and importance of the purpose of the limitation sought and determined that in the present case that

every Victorian not over 50 years has an equal right to be protected from discrimination. It is a right of first importance. It would be limited if I were to grant the exemption sought.

Although Bell P determined that the purpose of the limitation, 'to provide safe, secure and quiet accommodation in gated communities to people aged over 50 years' is an important purpose, it is not determinative. Bell P went on to find that an exemption would not be reasonably proportionate in the present case, stating that 'it is hard to escape the conclusion that the premise of the admission principle is commercial', an improper foundation for the limitation of human rights. Excluding everybody under 50 years is a disproportionately harsh rule and no evidence was put forward as to why a less restrictive means was not reasonably feasible.

Substantive Equality

The decision contains a detailed discussion of the content of the Charter's equality rights, which Bell P described as 'the keystone in the protective arch of the charter.' In his discussion Bell P determined that:

The cardinal values protected by the right to equality are substantive equality, the universal humanity, autonomy and worth of the individual and their potential for personal and social development.

Bell P further suggested that:

The right to equality is 'not just about treating cases alike. Important as it is, that is just formal equality. The true purpose of the human right to equality is substantive equality, which is something much deeper.'

He also noted that purely formal equality can produce and entrench substantive inequality.

Australian anti-discrimination law has often been criticised for its failure to recognise that treating everyone the same does not produce real and meaningful equality and that sometimes affirmative action is needed to compensate for disadvantage caused by discrimination. By recognising the requirements of substantive equality, Bell J's decision in *Lifestyle Communities* moves to address this failure and strengthen Victorian anti-discrimination law.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VCAT/2009/1869.html>.

Dahni Houseman works with the Public Interest Law Clearing House. Rachel Ball is a lawyer with the Human Rights Law Resource Centre.

The Disability Act and the Right to Housing

Conroy v Yooralla Society of Victoria [2009] VCAT 1873 (7 September 2009)

The Applicant, Mr Conroy had a physical disability and had lived in a community residential unit operated by the Respondent (Yooralla Society of Victoria) for 12 years before receiving two notices to vacate under the *Disability Act 2008*. The first Notice alleged that the Applicant endangered the safety of other residents or staff; the second, that he caused serious disruption to the proper use and enjoyment of the premises by other residents.

Neither of the notices to vacate identified particular incidents which were the basis for the eviction but rather, described broadly, allegations dating back to 1997. The most recent allegation relied upon was 12 September 2008, 9 months before the relevant notice to vacate was issued.

Decision

Detail required in notice to vacate

Lambrick SM found that the Notices were invalid because they did not sufficiently identify the facts upon which the notices were issued.

Section 76(6)(a) of the *Disability Act 2008* requires that a notice to vacate 'must specify the ground on which the notice is given'. Lambrick SM found that this requires that the notice contain a sufficient degree of detail to enable the tenant to understand the facts alleged as a basis for termination.

In his interpretation of the section, Lambrick SM considered the similarities between s 76(6)(a) of the *Disability Act* and s 319(d) of the *Residential Tenancies Act 1997*. Section 319(d) of the RTA states that a notice is not valid unless it 'specifies the reason or reasons for giving the notice'. Lambrick SM referred to the interpretation of this section by Bongiorno J in *Smith v Director of Housing* [2005] VSC 46, in which His Honour said (at 71):

The requirement laid down in section 319(d) the *Residential Tenancies Act 1997* is designed to require advice to be given to the tenant as to the reason the landlord demands possession with a sufficient degree of detail to enable her to understand the facts being alleged as a basis for terminating the tenancy. It requires no technical expression, no particular verbal formula and no particular legal knowledge to answer the question 'Why is this notice being given?' A basic facility for communication in plain English is enough.

Lambrick SM determined that this interpretation of the degree of detail required in a notice to vacate also applied to notices issued under s 76(6)(a) of the *Disability Act*.

The Respondent had contended that, on the contrary, the two sections had different meanings and intents. While the *Disability Act* refers to the 'grounds' on which the notice is given the RTA specifies that the landlord must outline the 'reasons' for the notice. The Respondent argued that the two words are fundamentally different and that the drafters had used the words with different intents.

Lambrick SM rejected this argument and determined that the words could be used interchangeably. He stated that 'it cannot have been the intention of the legislation, the stated purpose of which is to reaffirm and strengthen the rights of people with disabilities to fail to require the disability service provider to provide the basic facts when giving a notice to vacate'.

Lambrick SM concluded that neither of the notices issued to the Applicant gave sufficient detail of the basis on which the notice was issued.

Charter of Human Rights and Statutory Interpretation

Lambrick SM also considered s 32 of the *Charter of Human Rights and Responsibilities* in the interpretation of s 76(6)(a) of the *Disability Act*. Section 32 states that legislation must be interpreted in a manner compatible with human rights, so far as is possible to do so consistently with their purpose.

The Applicant referred Lambrick SM to s 13 of the *Charter* which protects the right of a person not to have their privacy; family or home arbitrarily interfered with.

Lambrick SM determined that the general application of statutory interpretation principles did not bring him to a conclusion that was contrary to the Applicant's right to privacy or inconsistent with the purpose of the *Disability Act*, so there was no need to re-interpret the provision using s 32 to attain human rights compatibility.

Notices to vacate based on historic conduct

Lambrick SM also found that a disability service provider is only authorised to give a notice to vacate where the resident is continuing to endanger the safety of other residents or staff or cause serious disruption at the time the notice is given. He found that the Respondent's reference to historical events in the Notices was not sufficient cause for eviction.

Lambrick SM stated that he considered that the prima facie interpretation of both of the phrases 'endangers the safety of' and 'is causing serious disruption to' required the prohibited activity to be ongoing at the time of service of the notice to vacate. He found that this was consistent with the purpose and scheme of the *Disability Act* which provides a mechanism for removal of the resident where there is a reasonable basis for concluding that the safety of residents or staff is endangered or that the resident is causing serious disruption – that is that the danger or serious disruption is continuing.

Lambrick SM rejected the argument that the notice was issued on the basis of a course of conduct, stating that if a disability service provider intends to rely on a course of conduct there would need to be some triggering event, contemporaneous with the notice to vacate, that would justify reliance on the earlier course of conduct.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VCAT/2009/1873.html>.

Caris Cadd is on secondment to the PILCH Homeless Persons' Legal Clinic from Freehills

Freedom of Information and the Public Interest

McIntosh v Victoria Police [2009] VCAT 1868 (16 September 2009)

In this case, Bell J held that the *Freedom of Information Act 1982* (Vic) should be interpreted consistently with the s 15 of the *Charter*, which recognises that the right to seek, receive and impart information is an aspect of the human right of freedom of expression.

Facts

In his capacity as the Shadow Minister for Police and Emergency Services, Andrew McIntosh MP applied for access to various reports and draft reports prepared by Commander Clegg for the unit of Victoria Police responsible for the placement of police officers. Victoria Police refused to disclose five documents to Mr McIntosh claiming the exemption under s 30(1)(a) and (b) of the *Freedom of Information Act 1982* (Vic), under which documents are exempt from disclosure if they are internal working documents and disclosure is contrary to the public interest.

Decision

Bell J examined the documents in light of the following principles:

- Section 15 of the *Charter*, which recognises that the right to seek, receive and impart information is an aspect of the human right of freedom of expression. The FOI Act should be interpreted consistently with this right (according to standard principles of interpretation and the interpretative obligation in s 32(1) of the *Charter*).
- The object of the Act is to recognise the right of the community to access information, and is limited 'only by exemptions which protect essential public interests'.
- The purposes of the exemption in s 30 include 'the efficient and economical conduct of government, protection of the deliberative processes of government, particularly at high levels of government and in relation to sensitive issues, and the preservation of confidentiality so as to promote the giving of full and frank advice'.

Bell J held that Documents 1, 2, 5 and 6 ('exempt documents') fell within the exemption in s 30 of the FOI Act and should not be disclosed. The exempt documents were internal working documents that contained sensitive information and set out options or recommendations to the Police and Emergency Services Unit by Commander Clegg about, amongst other things:

- confidential budgetary processes and the possible distribution of funding in terms of the allocation of police officers;
- the possible public reactions in certain geographical areas about decisions regarding the allocation of police resources to that area; and

- the management and allocation of police officers.

His Honour considered that the documents contained information that was deliberative in nature, and that it would be against the public interest to order the disclosure of such information, which could lead to 'captious and futile public debate'. Each of the exempt documents contained sensitive information that could lead to pointless public argument about 'what might have happened, rather than what did happen'. Bell J emphasised that what was important was the final decision, rather than the issues and options considered by the non decision-maker.

By contrast, Bell J ordered that the undisclosed information in Document 4 should be disclosed. The document contained two undisclosed paragraphs about how incorrect information came to be supplied by Victoria Police. As it was a legitimate desire for the Shadow Minister to examine possibilities for the error, disclosure would not be contrary to public interest. In addition, Bell J noted that disclosure would not inhibit Commander Clegg from giving full and frank advice.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VCAT/2009/1868.html>.

Adrienne Lyle, Human Rights Law Group, Mallesons Stephen Jaques

Comparative Law Case Notes

Right to Liberty and Redress for Unlawful Detention

Morro & Ahadizad v Australian Capital Territory [2009] ACTSC 118 (10 September 2009)

Gray J of the Supreme Court of the Australian Capital Territory found that s 18(7) of the *Human Rights Act 2004* (ACT) ('ACT Act') creates an independent statutory right to compensation for unlawful arrest or detention. On the facts before him, however, he found that the tort of false imprisonment provided a sufficient remedy and that additional public law compensation under the *Human Rights Act* was not necessary.

Facts

Three plaintiffs brought claims of false imprisonment against the ACT. The false imprisonment arose out of breaches of ACT sentencing legislation and breaches of procedural fairness by the Sentence Administration Board of the ACT. The ACT admitted liability.

The question for his Honour concerned the proper basis of the compensation payable to each of the plaintiffs and, in particular, whether s 18(7) of the *Human Rights Act* creates a new statutory right to compensation. Section 18(7) states that 'anyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention'.

The ACT argued that the *Human Rights Act* does not provide a statutory right to compensation, and nor should a general right to compensation be implied. The ACT submitted that an interpretation of the *Human Rights Act* consistent with its purpose should be preferred. It submitted that the purpose of the *Human Rights Act* could be found in extrinsic materials such as the Attorney-General's presentation speech and the Explanatory Statement, which both clarify that the *Human Rights Act* was not intended to create a new right of action against a public authority.

Decision

His Honour held that s 18(7) of the *Human Rights Act* confers a substantive statutory right to compensation. He noted that the use of extrinsic materials is not a substitute for the text of the legislation. He referred to Spigelman CJ's statement in *Harrison v Melhem* (2008) 72 NSWLR 380 that:

The task of the court is to interpret the words used by Parliament. It is not to divine the intent of the Parliament. The courts must determine what Parliament meant by the words it used. The courts do not determine what Parliament intended to say.

His Honour concluded that statements in the extrinsic materials that the *Human Rights Act* was not intended to create a new right of action against a public authority were 'not consistent with at least the apparent meaning of s 18(7) of the *ACT Act* which on its face gives a statutory right to compensation'. He stated:

It is enough that amongst the general purposes of the *Human Rights Act* reflected in the long title is the protection of human rights. A specific provision in the *Human Rights Act* which gives effect to the

protection of a particular right by providing for compensation in the event of it being breached gives effect to that expressed purpose, in my view, should be interpreted accordingly.

He held that it was not necessary for him to determine whether a more general remedy could be implied into the *Human Rights Act*.

His Honour then considered the amount of compensation that should be awarded under s 18(7). He cited Elias CJ, who said in *Taunoa v Attorney General* [2008] 1 NZLR 429 that:

Where remedies for other wrongs arising out of the same facts are provided under separate claims, they may need to be taken into account in considering what is required for effective remedy of the independent Bill of Rights Act violation.

Gray J concluded that:

The fact that express provision for compensation has been made by s 18(7) of the *Human Rights Act* does not necessarily require a notion of public law vindication to be imported into the expression of a right to compensation if the existing remedy at common law would achieve that vindication.

He then stated that the unlawful detention referred to in s 18(7) of the *Human Rights Act* could be remedied by reference to the action of false imprisonment. He considered the scope of damages at common law for false imprisonment, namely general, aggravated and exemplary damages. He found that an award of exemplary or aggravated damages was not warranted. He awarded the plaintiffs general damages.

Relevance to the Victorian Charter

Section 21(2) of the Victorian *Charter* states that 'a person must not be subjected to arbitrary arrest or detention'. However, the Victorian *Charter* does not contain a provision that provides for compensation if this right is breached, such as that in s 18(7) of the *Human Rights Act*. *Morro v ACT* may therefore be of limited relevance to the Victorian *Charter*.

Similarly, any statements by his Honour relating to the implication of a general right to compensation such as that implied into the *New Zealand Bill of Rights Act 1990* (NZ) in *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667, a point which his Honour found he did not have to decide, would arguably not have been applicable to the Victorian *Charter*. This is because s 39(3) of the Victorian *Charter* provides that 'a person is not entitled to be awarded any damages because of a breach of this Charter'. Section 39(4) of the Victorian *Charter* states that section 39 does not affect any right a person may have to damages apart from the operation of that section.

Had this case been brought in Victoria, the result might have been similar, given that no additional damages were awarded for the breach of the right above and beyond those awarded in respect of the tort of false imprisonment. Differences in the operation of the Victorian *Charter* and the *Human Rights Act* may arise if additional damages, referable to the human rights breach and awarded above common law or other statutory damages, were awarded.

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

Jessica O'Brien is a lawyer with Allens Arthur Robinson

Right to Respect for Private Life and Equality in Prison

AB, R (on the application of) v Secretary of State for Justice & Anor [2009] EWHC 2220 (4 September 2009)

In this case, the Administrative Court of the High Court of Justice held that the continued detention of a pre-operative transgender woman in a male prison breached her right to privacy under art 8 of the *European Convention of Human Rights*.

Facts

The Claimant is a pre-operative transgender woman who was incarcerated in a male prison, serving a life sentence for offences committed while she was a man. The Claimant sought judicial review of a decision to keep her in a male prison and to not transfer her to a female prison.

The Claimant suffered gender dysphoria and had been granted a certificate under the *Gender Recognition Act 2004* (UK). The certificate provides that for all purposes the Claimant is a female.

The Claimant wanted to have gender reassignment surgery to complete her female transition. However, the Gender Identity Clinic would not approve her for surgery until she had lived as a woman for a period of time within a female prison. Accordingly, she argued that the decision not to transfer her to a female prison prevented her from attempting to meet the requisite conditions for surgery.

The decision of the Secretary of State not to transfer the Claimant to the female prison was based on factors including:

- her offending history (including attempted rape of a female, as well as manslaughter);
- the lack of guarantees that the gender reassignment would proceed, because of the State's position that surgery was a 'clinical judgment' outside the control of the Prison Service; and
- the considerable cost of placing her in segregation in the female prison before she could integrate into the general population of the prison.

Decision

Article 8 of the *European Convention* recognizes the right to respect for a person's private and family life, home and correspondence.

The Court firstly considered whether art 8 was engaged. The Court noted that the rights proscribed under art 8 apply equally to every individual stating that 'the rights of transsexuals have been considered in a number of cases in both the UK and in Strasbourg and the recognition and protection which the Convention confers on their personal autonomy and human dignity is now unassailable, following earlier uncertainty.'

Noting that 'the essence of the claim is the interference with the Claimant's ability to progress to full gender reassignment by continued detention in a male prison', the Court held that art 8 was engaged because the interference with her autonomy was significant and personal. The interference was said to 'go to the heart of her identity' and be related to the offences she committed.

The Court then considered whether the limitation on the Claimant's rights under art 8(1) could be justified as proportionate under art 8(2).

The Court considered the justification for not transferring her to a female prison to be essentially for resource implications because the Secretary of State accepted that a biologically female prisoner who presented the same risks as the Claimant would be detained in a female prison.

The Court considered that 'when issues so close to the identity of a prisoner as here, so intimately concerned with her personal autonomy, the deployment of resources as a justification for the infringement of such rights must be clear and weighty in order to be proportionate'.

The expert evidence drew a clear link between the Claimant's offending behaviour, the gender dysphoria, and the severe frustration that is likely to result from the denial of the opportunity to apply for surgery. It was accepted that these factors may indeed increase the difficulties of living in a male prison and could lead to segregation in any event.

The Court held that the Secretary of State failed to consider these factors and the resource implications associated with the continued detention of the Claimant at a male prison. Instead, the Secretary of State had focused exclusively on the costs of placing the Claimant in segregation in a female prison. The Court was not satisfied that the resource considerations relied on by the Secretary of State were proportionate to justify the interference with the Claimant's personal freedom.

Accordingly, the Court held that the decision not to transfer the Claimant to a female prison was in violation of her art 8 rights.

Relevance to the Victorian Charter

This case has direct relevance for the interpretation of s 13 of the Victorian *Charter*, which similarly to art 8 of the *European Convention*, enshrines the right to respect for a person's private and family life, home and correspondence.

Victoria does not have a formal policy in relation to transgender prisoners. In practice, male to female transgender prisoners who have not undergone gender reassignment surgery will be detained in male prisons and vice versa. Accordingly, this decision may have significant implications for transgender prisoners in Victoria who want to reside in a particular gendered prison.

The decision is available at <http://www.bailii.org/ew/cases/EWHC/Admin/2009/2220.html>.

Prabha Nandagopal is on secondment to the Centre and Amnesty International from DLA Phillips Fox

Planning Law and the Right to a Fair Hearing

Thomson v ACT Planning and Land Authority [2009] ACAT 38 (2 October 2009)

On 2 October 2009, the ACT Civil and Administrative Tribunal ('ACAT') handed down a decision which discussed whether the limitation on ACAT's jurisdiction to hear applications for review of planning decisions breached the right to a fair trial as protected under the *Human Rights Act 2004* (ACT) (the 'HRA'). The Court held that the limitation on their jurisdiction was proportionate.

Facts

Ms Thomson (the 'applicant') lived in a house that backed on to a development site on which it was proposed to build a two storey apartment block. The apartments would overlook Ms Thomson's garden.

The plans for the apartment building were approved by the ACT Planning and Land Authority and Ms Thomson sought a review of the decision to approve the plans on the basis that the apartments would infringe her privacy.

The Authority argued that s 121(2) of the *Planning and Development Act 2007* (ACT) limited ACAT's jurisdiction to review decisions of the Authority and, specifically, excluded certain facts from being reviewed by ACAT.

ACAT considered that the arguments made by the respondent raised questions about the operation of the HRA, and noted that, pursuant to s 40B of the HRA, the Tribunal must give proper consideration to relevant human rights.

Decision

ACAT considered that two rights protected under the HRA may be relevant: the right to privacy and reputation (s 12) and the right to a fair trial (s 21).

ACAT dismissed arguments relating to the right to privacy on the basis that any infringement of Ms Thomson's right would not be arbitrary or unlawful as the issue of privacy was specifically addressed in the relevant planning code.

ACAT next considered the right to a fair trial and adopted the approach to interpretation taken by the ACT Court of Appeal in *R v Fearnside*, namely:

1. First, it is necessary to consider whether the legislation enlivens a human right;
2. If, the answer to question 1 is yes, it is necessary to consider whether the legislation contains a limitation which is reasonable within s 28 of the HRA; and
3. If the answer to question 1 is yes and the answer to question 2 is no, then it is necessary to consider and apply the interpretive principle in s 30 of the HRA, namely that they must, so far as it is possible to do so, interpret legislation in a way that is compatible with human rights.

Has the right to a fair trial been enlivened?

Section 21(1) of the HRA provides that:

Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

ACAT noted that, 'in deciding whether the right to a fair trial is enlivened or engaged by this case, it must be determined whether the applicant had "rights and obligations recognised by law".'

ACAT considered that there was at least a prima facie argument that the right to a fair trial was engaged by the limitation imposed on ACAT's jurisdiction as the right of a third party objector:

- has previously been recognised by the court in planning decisions; and
- has been recognised by the UK and European courts in relation to art 6(1) of the *European Convention on Human Rights*, which is the corresponding 'fair trial' provision.

Further, ACAT noted that the term 'rights and obligations' should be interpreted broadly so as to include novel claims and incipient rights.

ACAT considered that the word 'decided' in s 21 of the HRA requires that there be a dispute to be resolved. On the facts, ACAT held that Ms Thomson's initial appeal against the development approval indicates the presence of a dispute and that, on balance, the right to a fair trial was engaged.

Is the limitation on the right to a fair trial reasonable?

As the answer to question 1 of the *Fearnside* test was yes, ACAT next moved to consider question 2.

ACAT noted that, in determining whether the planning approval process is consistent with the right to a fair trial, it is necessary to look at the composite process for decision making, including the initial decision, and the factors considered in making that decision, the opportunity for input from third parties, and the availability and quality of the relevant review mechanisms. This composite approach impacts on the proportionality of the limitation on the right to a fair trial.

They noted that in drafting the Planning Act significant public consultation had been held into, amongst other things, the limited appeal right and that the Act had been drafted in light of the policy concern about the costs and uncertainty arising from planning appeals as well as the impact this would have on developers.

In the context of the planning rules, which required things such as privacy to be considered at the initial decision making process, and the public policy arguments, ACAT determined that the limited appeal rights set out in the Planning Act placed a reasonable limit on the right to a fair trial enshrined in s 21 of the HRA.

In accordance with the *Fearnside* test, as the answer the question 1 was yes, and the answer to Question 2 was no, ACAT did not move to consider question 3.

ACAT reviewed Ms Thomson's application in accordance with their limited review power and found that there was no reason why the development approval should not have been granted.

Relevance to the Victorian Charter

The interpretive method favoured by ACAT aligns with that taken by Bell J in the Victorian decision of *Kracke v Mental Health Review Board & Ors*. This approach is currently being considered by the Victorian Court of Appeal.

Section 24 of the Victorian *Charter* protects the right to a fair hearing. The right is expressed as follows:

A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

The wording of the right protected differs from that used in the HRA. While, the focus in the *Thomson* decision was on the expression 'rights and obligations' and the word 'decided', neither of which terms appears in the Victorian *Charter*, the decision is relevant for its discussion and analysis of the scope, content and interpretation of rights.

The decision is available at http://acthra.anu.edu.au/cases/Thomson_v_ACTPLA_AT_09.1_-_ACAT_38_%5B1%5D.pdf.

Victoria Edwards is on secondment to the Human Rights Law Resource Centre from Freehills

HRLRC Policy Work

Complementary Protection and Australia's Obligations of Non-Refoulement

The Senate Legal and Constitutional Affairs Committee has recently conducted an inquiry into the *Migration Amendment (Complementary Protection) Bill 2009*.

Complementary protection is the protection owed by a State that falls outside the scope of the Refugee Convention. Complementary protection obligations are found in the non-refoulement provisions of various human rights treaties, including the *International Covenant on Civil and Political Rights*, the *Convention on the Rights of the Child* and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

The Bill provides for a protection visa to be granted to a person where there is a real risk that he or she will:

- be arbitrarily deprived of his or her life; or

- have the death penalty imposed on him or her and it will be carried out; or
- be subjected to torture; or
- be subjected to cruel or inhuman treatment or punishment; or
- be subjected to degrading treatment or punishment.

Enactment of the Bill would be an important step towards the recognition of Australia's non-refoulement obligations. To date, these obligations have received insufficient legislative protection. This failure has been commented upon by the Committee against Torture, the Human Rights Committee and the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism.

On 28 September 2009, the Human Rights Law Resource Centre made a submission to the inquiry, entitled *The Right to Protection and the Obligation of Non-Refoulement*. The HRLRC's submission argues that, while the Bill will significantly improve and strengthen Australia's complementary protection regime, there are a number of issues which should be addressed before the Bill is passed into law. In particular, as currently drafted, the Bill:

- sets out a list of grounds upon which Australia will grant protection obligations which is narrower than the grounds for protection under international law;
- requires that risks be 'necessary and foreseeable' and constitute 'irreparable harm', in a manner that does not accurately reflect the position under international human rights law;
- inappropriately imposes a requirement of intent in the definition of cruel, inhuman or degrading treatment; and
- excludes protection for certain classes of people, despite the absolute and non-derogable nature of Australia's protection obligations.

The HRLRC submission is available at <http://www.hrlrc.org.au/content/topics/refugees-and-asylum-seekers/right-to-protection-and-obligation-of-non-refoulement-submission-on-complementary-protection-bill-sept-2009/>.

The Senate Committee tabled its report on the Bill on 19 October 2009.

Adopting and reflecting some of the submissions made by the HRLRC, the majority report recommends that the Bill be passed subject to:

- replacing the words 'irreparably harmed' and replacing them with the words 'subject to serious harm' [Recommendation 1];
- ensuring that the Bill does not 'exclude from protection people fleeing genital mutilation or domestic violence from which there is little realistic or accessible relief available in their home country' [Recommendation 2]; and
- amending the Bill to ensure that persons who are 'likely' to be subject to the death penalty are afforded protection, rather than just people who 'will' be subject to the death penalty [Recommendation 3].

The Senate Committee report is available at

http://www.aph.gov.au/senate/committee/legcon_ctte/migration_complementary/report/report.pdf

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

Human Rights and Human Security: Submission on Australia's National Security Laws

The Human Rights Law Resource Centre and Amnesty International have made a joint submission to the Federal Attorney-General's National Security Legislation Discussion Paper, which sets out the measures that the Government proposes to take to respond to a number of recent reviews of counter-terror laws.

Amnesty and the HRLRC acknowledge that governments have a duty to protect the rights, lives and safety of people within their territory. We do not question that perpetrators of violent or terrorist acts should be brought to justice. However the measures put in place to bolster national security, protect lives and prevent terrorist attacks should not unduly infringe on people's human rights. Too often, debate on counter-terrorism laws and measures presupposes that national security and human rights

are inherently in tension or even mutually exclusive. Fundamentally, however, human rights, human security and national security are closely associated and intertwined. The realisation of human rights creates the conditions necessary for human and national security, while national security is a necessary precondition to the realisation of human rights.

Amnesty and the HRLRC welcome the Government's consultation on its counter-terror law reforms, and submit that some of the reforms proposed in the NSL review are welcome improvements from a human rights perspective. However, many of the laws, even as amended in the NSL review, will continue to unduly infringe upon human rights. For example:

- Some terror-related offences are defined so broadly that the law effectively criminalises thought and speech, such as the 'praising' of a terrorist act or a mere threat to do an act that is preparatory to a terrorist act. These laws operate in a manner that constitutes an impermissible violation of freedom of expression.
- Under changes proposed by the NSL review, persons suspected of terrorism offences can be detained for up to 8 days without charge. While this is an improvement on the current laws, which contains no cap on time spent in pre-charge detention, the detention of a person without charge for 8 days is very likely to breach the prohibition against arbitrary detention.
- New search powers allow the police broad discretion to enter private homes without a warrant if they suspect on reasonable grounds that a 'thing' is on the premises that is relevant to a terrorist act (even one that has not occurred) and it is necessary to prevent the thing from being used in connection with a terrorist act. The lack of judicial oversight of police action, and the broad terms of the legislative power to enter premises significantly limits the right to privacy.
- Some offences of urging group violence on the basis of race, religion or national origin in the Criminal Code may infringe the right to freedom of speech, whilst at the same time not adequately protect against racial and religious vilification.

Finally, although it covers many issues, the NSL review does not address some of the most controversial elements of Australia's counter-terror laws, such as the control order and preventative detention order schemes; the excessively broad powers of ASIO to detain and question people, including non-suspects; the process for listing of terrorist organisations and reviewing such listing; and the offence of association with a terrorist organisation.

The joint submission is available at <http://www.hrlrc.org.au/content/topics/counter-terrorism/counter-terrorism-and-human-rights-submission-to-national-security-legislation-review-oct-2009/>.

Emily Howie is a Senior Lawyer with the Human Rights Law Resource Centre. Prabha Nandagopal is on secondment to the Centre from DLA Phillips Fox.

Indigenous Rights: Submission on Compulsory Acquisition of Alice Springs Town Camps

In a submission to the Indigenous Affairs Minister, the Hon Jenny Macklin MP, the Human Rights Law Resource Centre has strongly urged the Minister not to exercise her discretionary power to compulsorily acquire Aboriginal town camps in Alice Springs.

In August this year, the Minister wrote to Alice Springs town camp residents giving notice of her proposal to compulsorily acquire their land. For over 12 months the Minister has been seeking to acquire 40-year subleases over the town camps. When these negotiations broke down, the Minister threatened the exercise of her compulsory acquisition power. Under the Minister's power, if the Commonwealth acquires the land of the town camps then all existing rights over the land held by Aboriginal people will end.

In its submission, the HRLRC strongly urges the Minister not to exercise her extraordinary power to compulsorily acquire the Alice Springs town camps because to do so would:

- breach a number of Australia's international obligations to respect and promote the human rights of Aboriginal Australians;
- not be effective in achieving the Federal Government's objective of improving the lives of the residents of the Alice Springs town camps;

- seriously damage and undermine the relationship between the Federal Government and Aboriginal Australians; and
- be likely to damage Australia's international reputation.

The HRLRC submission is available at <http://www.hrlrc.org.au/content/topics/equality/indigenous-rights-submission-on-compulsory-acquisition-of-alice-springs-town-camps/>.

Ben Schokman is a Senior Lawyer with the Human Rights Law Resource Centre

Economic and Social Rights: Submission on the ACT Human Rights Act 2004

The ACT Government conducted an inquiry into the operation of the ACT *Human Rights Act 2004* and particularly sought input into the debate on protecting economic, social and cultural rights within the Act.

The HRLRC made a submission to the inquiry, arguing that all ESC rights in the *International Covenant on Economic, Social and Cultural Rights* should be protected in the Act. However, if the ACT Government decides not to include all ESC rights in the Act, it should at a minimum protect:

- the right to an adequate standard of living – including adequate food, clothing and housing;
- the right to the enjoyment of the highest attainable standard of physical and mental health; and
- the right to education.

The National Human Rights Consultation, the biggest federal consultation on any issue in Australia's history, found that these three rights matter most to Australians, because they are the rights at greatest risk, especially for vulnerable groups in the community.

The protection and promotion of ESC rights will require the ACT Government to take steps to the maximum of its available resources, with a view to progressively realising ESC rights. A range of remedies, including judicial remedies, should be available for the violation of ESC rights.

The HRLRC submission is available at <http://www.hrlrc.org.au/content/news/latest-news/submission-on-the-5-year-review-of-the-act-human-rights-act/>.

Emily Howie is a Senior Lawyer with the Human Rights Law Resource Centre

Women's Rights: Submission on Equal Opportunity for Women in the Workplace

Earlier this year the Federal Minister for the Status of Women announced a Review of the Equal Opportunity for Women in the Workplace Agency ('EOWA') and its underlying legislation (the EOWW Act).

The review comes at a time when indicators show a decline in women's workplace equality. Currently, only 8.3% of Board Directorships are held by women and the pay gap between male and female full-time earners has increased to 17.2% cent.

The Centre's submission to the review, *A Human Rights Approach to Equality for Women in the Workplace*, argues that the EOWW Act would be a more effective and powerful instrument if it were to reflected international human rights standards.

A human rights approach to equality for women in the workplace would require that legislation, regulation, monitoring and reporting systems be developed with a focus on positive measures to achieve substantive equality. The Centre made 23 recommendations in this regard, including that:

- employers should be required to report on 'priority issues' (such as training opportunities, remuneration and parental leave) and ensure that issues identified are addressed within specified timeframes;
- the role of the EOWA should be extended to allow it to instigate investigations of non-compliance with workplace equality programs;
- accountability mechanisms should be implemented; and
- a quota system for female representation on government-controlled boards should be introduced.

The Centre would like to thank Clayton Utz for their substantial assistance in the research and drafting of the submission, which is available at <http://www.hrlrc.org.au/content/news/latest-news/womens-rights-submission-on-equal-opportunity-for-women-in-the-workplace/>.

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

HRLRC Casework

Centre Makes Persuasive Submissions in Landmark Decision on the Application of the Charter to Non-Government Bodies

In November 2008, the Centre was granted leave to appear as amicus curiae in a matter concerning the meaning of ‘public authority’ under the Victorian *Charter*. This is a question of great significance, as it is public authorities who are bound to act compatibly with and give proper consideration to human rights. The issue arose in the context of an application by Metro West Housing Services Ltd, a private non-profit company, for orders of possession against two groups of vulnerable tenants.

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.

In a landmark decision on 9 October 2009, Bell J, President of VCAT, declared that Metro West is a public authority bound by the *Charter* (see *Metro West v Sudi (Residential Tenancies)* [2009] VCAT 2025). This decision has significant implications for the operation of the *Charter* in respect of private entities – both commercial and non-profit – providing services of a public nature.

Consistent with the submissions of the Centre, Bell J held that the definition of ‘function of a public nature’ should be interpreted and applied widely and generously with the *Charter’s* purposes in mind, including the protection of vulnerable individuals and groups. He further held that the focus of the inquiry should be on the function being performed, rather than the nature of the organisation exercising that function or the relationship between the organisation and the state per se.

Applying these principles in the present case, Bell J found that the provision of social housing to people at risk of homelessness is an important function which government exercises on behalf of the community in the public interest:

Disadvantaged people in need of social housing and at risk of homelessness are among the most vulnerable in the community. Their human rights are imperiled by their circumstances.

His Honour concluded that the function of providing social housing, which includes the management of transitional housing tenancies, is a function of a public nature. Bell J also considered the terms of the service agreement between Metro West and the state, and the governance structure of Metro West, concluding that Metro West was responsible under the agreement to the government for the provision of social housing to people at risk of homelessness, and was publicly funded to do so.

The Centre was provided with outstanding pro bono assistance in this case by Freehills (Jennifer Riley and Malcolm Cooke), together with Ron Merkel QC and Alistair Pound of Counsel. The tenants were

represented on a pro bono basis by the PILCH Homeless Persons' Legal Clinic and the Tenants' Union of Victoria.

Phil Lynch is Director of the Human Rights Law Resource Centre

Seminars and Events

The Responsibility to Protect: Prevention and Intervention in response to Mass Atrocity Crimes

27 and 28 November 2009, Melbourne

The Human Rights Law Resource Centre and the Institute of Legal Studies at the Australian Catholic University present a major conference on 'The Responsibility to Protect: Protection and Intervention in response to Mass Atrocity Crimes'. The conference will be held on 27 and 28 November 2009 at the Australian Catholic University, Melbourne.

Confirmed speakers for this major conference include the **Hon Gareth Evans AO AC**, the **Rt Hon Malcolm Fraser AO AC**, the **Hon Bob McMullan MP** (Parliamentary Secretary on International Development Assistance), **Prof Ramesh Thakur** (Canadian Commission on Intervention and State Sovereignty), **Prof Alex Bellamy** (Director of the Asia-Pacific Centre for the Responsibility to Protect), **Prof Joseph Camilleri**, **Prof Spencer Zifcak** and **Phoebe Wynne-Pope**.

Background: At the United Nations Summit in 2005, the world's political leaders agreed to adopt the principle of the responsibility to protect. This principle, and its practice, is designed to ensure that every possible step is taken by individual nations, and by the international community, to ensure that mass atrocity crimes, such as those which occurred in Rwanda, Kosovo and East Timor, will not occur again.

In January 2009, the Secretary-General of the United Nations delivered a report to the UN General Assembly in which he fleshed out the meaning and operation of the new principle. Distinguishing it from the prior doctrine of humanitarian intervention, the report emphasized that the primary responsibility for preventing mass atrocities rested with the nation state concerned. However, where a state is unable or unwilling to take preventative steps, the responsibility must shift to the international community to ensure that genocide, crimes against humanity, war crimes or ethnic cleansing do not eventuate.

The purpose of this conference is to explain the parameters of this new principle of international law and political practice, to address the practicalities and problems of its implementation, to consider its potential application in the Asia-Pacific region, and to tackle again the vexed question of military intervention for humanitarian purposes.

The conference will be of interest to those concerned with international law, international relations, international aid and development, Asia-Pacific politics, and Australia's role in ensuring security and well-being in our immediate region.

For further information see www.acu.edu.au/acu_national/the_university/conferences/r2p/.

Protecting and Promoting Women's Rights: Using the Optional Protocol to the Women's Convention

17 November 2009, Melbourne

In December 2008, Australia became a party to the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*. This treaty establishes two procedures – a communication procedure and an inquiry procedure – to enforce women's rights to non-discrimination and equality.

This seminar, presented jointly by PILCH and the Australian Human Rights Commission, will examine how the communication and inquiry procedures can be used to better protect and promote women's rights, both domestically and internationally. It will explain how these procedures operate and provide detailed information on how to use them. The seminar will consider key jurisprudence decided under the Optional Protocol and reflect on lessons for advocates.

Date: 9.30am – 12.30pm, Tuesday, 17 November 2009

Venue: Allens Arthur Robinson, Level 27, 530 Collins Street, Melbourne

RSVP: By 1 November to Simone Cusack on (03) 8636 4415 or at simone.cusack@pilch.org.au.

The seminar will be presented by Dr Cassandra Goldie (Director, Sex Discrimination Unit, Australian Human Rights Commission), Simone Cusack (Public Interest Lawyer at PILCH and an independent consultant to the World Health Organization) and Lucy McKernan (Co-Manager of the Public Interest Law Scheme at PILCH).

Alan Missen Oration: 'Human Rights and the Church'

23 November 2009, Melbourne

Liberty Victoria invites you to the Annual Alan Missen Oration by Tim Costello. Tim Costello's oration is on 'Human Rights and the Church', a very pertinent topic with the Federal Government considering the recommendations of the National Human Rights Consultation Report and Liberty's current campaign – *Human Rights ACT Now!*

Date: 6pm on Monday, 23 November 2009

Venue: Capitol Theatre, 113 Swanston Street, Melbourne

RSVP: By 20 November to info@libertyvictoria.org.au or (03) 9670 6422

Sri Lanka: Human Rights Issues and Media Representation

10 November 2009, Melbourne

This seminar, jointly presented by Amnesty International Australia, the Human Rights Law Resource Centre, Victorian Trades Hall Council, the Alfred Deakin Research Institute, the Herb Feith Foundation and the Centre for Peace and Conflict Studies, will consider human rights issues and media coverage in Sri Lanka.

Speakers include Associate Professor Rohan Bastin (School of History Heritage and Society, Deakin University), Associate Professor Damien Kingsbury (School of International and Political Studies, Deakin University), Associate Professor Jake Lynch (Director, Centre for Peace and Conflict Studies, University of Sydney), David Manne (Co-ordinator of the Refugee & Immigration Legal Centre) and David Feith (Author of 'Conflict in Sri Lanka' (1986) and 'Tamil Nationalism in Sri Lanka' (forthcoming)).

Date: 6pm – 8pm, Tuesday, 10 November 2009

Venue: Lecture Theatre K321 (Halstead Theatre), 3rd floor, Building K, Monash University, Caulfield

RSVP: To David Feith on (03) 99034397 or david.g.feith@gmail.com.

Resources and Reviews

Pertinent, Progressive, Provocative – Subscribe to the *Alternative Law Journal*

The *Alternative Law Journal* is a quarterly refereed journal which focuses on social justice, human rights, access to justice, progressive law reform and legal education. The *Journal* has a diverse readership among legal practitioners, judges, policy makers, law students and legal studies students.

The latest issue, themed *The Architecture of Justice*, contains articles on highly topical issues such as Indigenous property rights, same-sex equality, gender equality, disability discrimination, domestic violence, greening workplaces, and war crimes in Iraq.

For further information and to subscribe for the very low rate of \$77.00 per year (for individuals), go to www.altlj.org.

Human Rights Jobs

Centre on Housing Rights and Evictions – Coordinator of Asia Programme

COHRE is a Geneva-based non-governmental international human rights organisation working to promote and protect the human right to adequate housing. COHRE has offices in Switzerland, Brazil, Ghana, Cambodia and Sri Lanka, and staff in over a dozen countries.

COHRE wishes to recruit a Coordinator for its Asia Programme based in Phnom Penh, Cambodia. The Coordinator is a senior staff position responsible for the integrated goals and professional management standards of this international organization. The Coordinator is the chief representative of COHRE in the Asia region responsible for leading the organization's work, developing its vision, and for overseeing the work of staff colleagues based in Phnom Penh.

The responsibilities of this position include: programme (design, implementation, monitoring and evaluation), finance (supervising accounting staff and reviewing financial reports), fundraising (proposal development and donor relations), and administration and personnel (supervising office management, ensuring proper administrative practices, and recruiting, supervising and evaluating staff).

Salary will be negotiated according to experience. Those interested in this position should send a current CV and letter of application to vacancy@cohre.org. Only short-listed candidates will be contacted.

If I Were Attorney-General...

Improving Australian Democracy with a Human Rights Act

As Attorney-General, my first priority would be to formulate a Government response to the report of the National Human Rights Consultation, chaired by Fr. Frank Brennan. The 450 page report is extensive and contains a very wide-ranging series of recommendations. Some are controversial and there has already been a lot of related traffic across my desk. I received a delegation from the Churches, led by Cardinal Pell, who was concerned about the impact that the recommendation that Australia adopt a Human Rights Act might have on religious organizations. Catherine Branson QC, President of the Australian Human Rights Commission has made it clear, on behalf of her constituency, that the Commission strongly supports the Consultation Panel's principal recommendations. I expect a petition of thousands from Get-Up any day now. The politics of this are not easy.

There are things in the report I don't like. For example, the Panel recommends that we develop a national human rights education plan in order to promote what they call a 'human rights culture'. I think I know what they're getting at but the language has a certain all-embracing fervour about it that I find unattractive. I am committed, however, to educating Australians much better about our constitutional, governmental and human rights framework.

This is much needed if the Panel's independent polling suggesting that Australians still have much to learn about these things is anything to go by. I'm also a bit bothered by the Panel's suggestion that we should consider ourselves as 'rights-holding entities'. I'm not sure that doing so would advance our image of ourselves or our conception of the nation terribly far. I don't identify as an entity.

My more general impression, however, is that the report is informed, thoughtful, rigorous and compassionate. It provides a sound and sensible foundation for protecting the fundamental human rights of all Australians. And I am impressed by the very large numbers of people who took the time to make their views known. No other inquiry in Australia's history has generated this degree of interest and involvement.

Wisely, the Panel conducted independent polling concerning Australians' views as to whether their human rights are adequately protected and whether they support the enactment of comprehensive human rights legislation. The fact that more than 80% supported that option weighed heavily with the Committee and it does with me too.

So, it is my intention to recommend to Cabinet that the Government introduce a Commonwealth Human Rights Act. The Act would protect the fundamental human rights of Australians that national governments of every political complexion have promised to observe when they ratified all seven major UN human rights treaties.

The Committee suggests that many of its recommendations may be set in place even without the introduction of a Human Rights Act. That may be so, but it is my view that none of those recommendations will be as effectively implemented unless there is a statutory foundation for human rights protection.

For example, human rights education in schools will only be effective if school kids understand that their human rights are embodied in law and that, therefore, society regards them as reflecting values to which

all Australians are firmly committed. The Panel recommends that the Federal Government should conduct an audit of all federal legislation to determine whether it is consistent with our international human rights obligations. But surely it would be better if this audit was conducted by reference to specific, national human rights legislation than to try and audit by reference to more general, internationally mandated standards. Similarly, the Panel recommends that a new Joint Committee on Human Rights be established in the Federal Parliament. This Committee would review all Bills for compliance with human rights. This is a great recommendation that would do much to strengthen the Parliament's role in holding the Government to account. But, as the adviser to the equivalent British Committee made clear during a visit to Australia, the Committee will only have the influence it should if it is backed by enforceable, national human rights law which also provides for judicial remedies where appropriate.

Finally, I'm reassured by the fact that the Panel has recommended that the ultimate say on the validity of legislation will rest with the Parliament rather than the Courts. Of course, as a politician, I would say that. But there is a point of principle here as well; we live in a Westminster and not a Washington system of government. And in this system we need to recognize that legislative supremacy must in the end rest with the Parliament.

Having said that, however, I'm not at all troubled by the Courts ruling on whether federal laws are consistent with the rights set down in an Australian Human Rights Act. The Parliament will write the legislation. The Courts will interpret it. That is as it should be. Armed then with the considered views of the relevant Minister, the parliamentary human rights committee and the judiciary, the Parliament will be in the best position possible to determine whether, and in what way, its legislation should best be amended to conform with the fundamental human rights to which we, as Australians in all our diversity, have declared our common commitment.

Now, to persuade the Prime Minister...

Professor Spencer Zifcak is Allan Myers Chair in Law and Director, Institute of Legal Studies, Australian Catholic University