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The Human Rights Law Resource Centre Ltd aims to:

1. Contribute to the harmonisation of Australian law and policy with international human rights norms.
2. Build capacity in the legal and community sectors to use human rights in casework, advocacy and service delivery.
3. Empower people that are disadvantaged or living in poverty by operating within a human rights framework.

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

Opinion

**Indigenous Rights 40 Years On: Participation, Not Paternalism, Remains the Answer**

This year marks the 40<sup>th</sup> anniversary of the 1967 referendum that saw more than 90% of eligible Australians vote in favour of the recognition of Aboriginal and Torres Strait Islanders as fellow citizens. Our country's most successful referendum enabled Indigenous Australians to be counted in the national census of the population and gave the Commonwealth Government power to make specific laws in respect of Indigenous people.

While the referendum was a turning point in Australian history, commemorations of the event are also a stark reminder of the problems that still exist for Indigenous Australians. A significant gap exists between Indigenous and non-Indigenous Australians relating to, among other things, standards of living and health, political participation, the administration of justice, recognition of land rights and access to adequate housing and education.

Australian history is replete with interventions by the Commonwealth Government into the affairs of Aboriginal people, and in particular Aboriginal children which, with the benefit of hindsight, have been, at best, misguided and myopic, and at worst, tragic. The 'Stolen Generation' is an example of such misguided paternalism. If we are to avoid repeating history, the Prime Minister's drastic new measures aimed at curbing child abuse in Aboriginal communities should be subject to the most diligent scrutiny.

In the last month, the Commonwealth Government has declared a 'national emergency' in response to a report that revealed the widespread sexual abuse of children in some Aboriginal communities in the Northern Territory. The findings of the report have led to Commonwealth Government implementing drastic new policy measures, including:

- taking control of Aboriginal land and townships through renewable five year leases;
- banning the sale of alcohol;
- compulsory health checks for Aboriginal children under the age of 16;
- linking welfare payments to children's school attendance and to participating in clean up and repair activities;
- quarantining 50% of welfare payments for food and other essentials;
- increased police presence in particular Indigenous communities; and

- replacing Indigenous community living arrangements with enforced normal tenancy agreements.

Many of these paternalistic policies raise further serious concerns in relation to the human rights of Indigenous Australians, particularly the rights to self-determination, political participation, recognition of land rights and freedom from discrimination.

Despite recommendations in the Northern Territory report, the Commonwealth Government has neglected to consult meaningfully with Indigenous representatives and affected communities. For strategies to be effective, Aboriginal communities must be empowered, have ownership of the programs and be provided with sufficient support to enable them to run effectively.

A recently released report of the Combined Aboriginal Organisations of the Northern Territory warns that if the Government's emergency measures are implemented without community consent and ownership, there is a risk that problems such as alcohol addiction 'will be driven underground and that initiatives to help prevent child sexual abuse and family violence will be resisted'.

The exclusion of Aboriginal people from any decision making process on the issue confirms the Prime Minister's rejection of the idea of a human rights-based approach to social justice. The frightening aspect of Howard's approach is his own admission that he is trampling on constitutional rights: 'What matters more – the constitutional niceties or the care and protection of young children?' As Benjamin Franklin famously observed, 'A society that would sacrifice liberty for security deserves neither and will lose both.' As we are learning from the introduction of counter-terrorism laws, sacrificing basic freedoms in the name of the 'good of all' will always result in a gradual erosion of our fundamental human rights.

The issues faced by Indigenous Australians must be addressed in a human rights framework. Fundamental to good policy development is that all legislation, policies and programs developed and implemented by governments should be consistent with international human rights standards. This must begin with the recognition by the Commonwealth Government of the right of self-determination for Indigenous Australians.

The most significant problem with the Government's approach, faced not only by Aboriginal communities in the Northern Territory but also by Indigenous Australians in general, is the lack of capacity for engagement and participation in the political process. The outcome is bad policy that lacks an evidential basis and broad community acceptance.

The Commonwealth Government must take positive steps to ensure that Indigenous Australians enjoy the same basic human rights as non-Indigenous Australians. The resolution of wider problems in Aboriginal communities, such as access to education, adequate health care, joblessness, poor housing and the destruction of family, culture and community cohesion, will be integral to any effective strategy to stop child sexual abuse and violence.

The whole point of the 1967 referendum was to allow Canberra to assume the national leadership role with respect to Indigenous Australians. In 2007, 40 years on, the Commonwealth Government's paternal policies and rejection of a human rights-based approach to the issues faced by Indigenous Australians is incredibly disappointing. Development and human rights experience, both in Australia and around the world, has taught us that if those people most affected by policies are not involved in the decision-making process, then those policies will not succeed. As stated by Social Justice Commissioner, Tom Calma: 'Current Government policy treats Indigenous people as "problems to be solved" rather than as active partners in creating a positive life vision for our communities.'

The Commonwealth Government must take a leadership role in recognising self-determination of Indigenous Australians and developing a cooperative approach with Aboriginal communities. Community involvement in program design and decision-making will empower Indigenous people to participate in the political process and assume responsibility for issues that directly affect them and their community. If this does not happen, the same shocking and appalling headlines will continue to reappear in 10 or 20 years time.

*Ben Schokman is Human Rights Lawyer with the Human Rights Law Resource Centre.*

## News

### Centre Tops \$2.5 Million in Pro Bono Services but Needs your Financial Support

Since its inception in 2006, the Human Rights Law Resource Centre has provided and facilitated over 8000 hours of pro bono human rights legal services at a commercial value in excess of \$2.5 million; not a bad return on investment given an annual budget of less than \$160,000!

However, with your help, the Centre could do even more. In 2007/08, the Centre will only just break even. Further, there is still significant latent human rights lawyering capacity and commitment in the private sector, with the only constraint on accessing and leveraging this valuable resource being the Centre's financial and coordination capacity.

The Human Rights Law Resource Centre relies heavily on donations for its continued operation and growth and has been endorsed by the Australian Taxation Office as a deductible gift recipient.

If you would like to support the work of the Centre, please consider making a donation. Donations of \$2 or more are fully tax deductible. A donation form is available at

<http://www.hrlrc.org.au/files/HX6942U0UD/Make%20a%20Donation.doc>.

### Report on UK Government's Response to Court Judgments Finding Breaches of Human Rights

The House of Lords and House of Commons Joint Committee on Human Rights ('Committee') has recently published a report on the UK Government's response to court judgments finding a breach of human rights. These judgments include decisions of the European Court of Human Rights (ECtHR) and declarations of incompatibility with the *Human Rights Act 1998* made by courts in the UK.

Where the ECtHR finds that the UK has violated a right under the European Convention on Human Rights (ECHR), the UK has some discretion in deciding how it will comply with the judgment of the Court and secure the substance of the right in its domestic legal system.

When a UK court makes a declaration of incompatibility it is up to Parliament to decide whether it agrees that there is an incompatibility and, if so, how to remedy it.

The Committee notes that, in the case of both adverse decisions of the ECtHR and the issuance of declarations of compatibility by UK courts, the response of the Government is critical. It is the responsibility of Government to examine and, if necessary, amend the relevant law, policy or practice to remedy the breach, to prevent further violations, and to ensure adequate compensation for victims. The Committee aims in the report to assist the Parliament and Government in performing their roles.

The Committee expresses three major concerns arising from recent judgments against the UK by the ECtHR:

1. The lack of an effective remedy in UK law for negligent interferences with the right to private life (see *Keegan v UK* in relation to police powers of entry and search; *Wainwright v UK* in relation to strip searches in prisons).
2. The trial of civilians in military tribunals (see *Martin v UK*).
3. The adequacy of judicial review as a mechanism of appeal from administrative decisions having regard to the right to a fair hearing by an independent and impartial tribunal under art 6 of the ECHR (see *Tsfayo v UK*).

The Committee recommends a number of changes in law, policy or practice to avoid the risk of further breaches in these areas.

The Committee follows up on the implementation of the recommendations made in its 2005-2006 report. While the Committee considers that, overall, the UK Government's response to its conclusions and recommendations is satisfactory, it is critical of the Government's inaction and/or the limited information provided in regard to prisoner voting rights, transfer of prisoners, delays in criminal proceedings and delays in implementing ECtHR judgments.

The Committee highlights some systemic obstacles to effective implementation of court judgments finding breaches of human rights including: delays in implementation of the ECtHR judgments; the non-retrospective application of the *Human Rights Act* (which means that the Government is not required to remedy any breach that occurred prior to the Act coming into force in October 2000); and failure to re-

open proceedings following judgments of the ECtHR, including finding that convictions were obtained under legislation that was in breach of the ECHR.

The Committee recommends numerous measures to improve the UK's implementation of court judgments that find breaches of human rights. These include that the Government:

- remedy human rights breaches with more urgency in future;
- adopt clear policies on systematically responding to declarations of incompatibility;
- implement ECtHR judgments within three months and declarations of incompatibility within six months, or provide an explanation as to why a response cannot be made within these timeframes;
- make greater use of Remedial Orders to implement declarations of incompatibility rapidly;
- give priority to the speedy implementation of ECtHR judgments arising from pre-2000 events;
- allow the re-opening of proceedings in appropriate cases following judgments of the ECtHR;
- ensure that any legislative solutions afford a remedy to applicants affected by identified incompatibilities;
- maintain a database of outstanding ECtHR judgments against the UK and the general measures considered necessary to rectify the identified incompatibility; and
- improve the amount, quality and thoroughness of communications to the Committee.

The full text of the report is available at

<http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/128/128.pdf>.

*Gemma O'Loughlin is a volunteer with the Human Rights Law Resource Centre.*

## Victorian Charter of Rights Developments

### Centre Expands and Updates Charter Manual, Database and Resources

The Centre has recently expanded its range of online resources in relation to the Victorian *Charter of Human Rights*. The Centre's website, [www.hrlrc.org.au](http://www.hrlrc.org.au), now includes:

- A fully updated 80 page *Guide to the Victorian Charter of Human Rights* (current as at 20 July 2007);
- A searchable database of Victorian case law and notes relating to the *Charter*;
- A searchable database of select international and comparative case law and notes relevant to the *Charter*;
- Articles and commentary on the *Charter*, including a new article by Simeon Beckett, 'Interpreting Legislation Consistently with Human Rights';
- A register of Statements of Compatibility under the *Charter* compiled by the Victorian Equal Opportunity and Human Rights Commission; and
- A comprehensive study guide to international and comparative human rights jurisprudence relevant to the *Charter* under s 32(2).

### 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.

The Superannuation Legislation Amendment (Contribution Splitting and Other Matters) Bill 2007 aims to, among other things, allow members of the Victorian Emergency Services Superannuation Fund ('the Fund') to split contributions with their spouses. The Bill adopts the concept of 'spouse' found in corresponding Commonwealth legislation, which defines a 'spouse' as a married or de facto opposite-sex partner. Accordingly, Fund members with same-sex partners will be excluded from participating in contribution splitting under the provisions of the Bill.

The Bill engages s 8 of the *Charter*, which provides that every person is 'equal before the law and ... entitled to ... equal protection of the law without discrimination'. Discrimination under the *Charter* has

the meaning given to the term in the *Equal Opportunity Act 1995 (Vic)*, and thus includes discrimination based on a person's sexual orientation.

In introducing the Bill to Parliament, the Government acknowledged that the Bill discriminates on the basis of sexual orientation, and limits the *Charter's* equal protection guarantee. In the Statement of Compatibility accompanying the Bill, however, the Government stated that its provisions are a reasonable limitation on the right to equal protection of the law because:

- inconsistency with the Commonwealth scheme would be misleading, and result in adverse consequences (including unforeseen tax liabilities) for Fund members with same-sex partners;
- inconsistency would result in the Fund ceasing to be a complying superannuation fund under the Commonwealth scheme with 'dire taxation and financial consequences' for the Fund and its members; and
- the alternative option open to the Government – not to legislate to allow contribution splitting for any members – would unnecessarily deprive Fund members with opposite-sex partners of a potentially valuable benefit.

The Scrutiny of Acts and Regulations Committee disagreed with this analysis. The Committee concluded that the Bill was incompatible with the equal protection guarantee, and questioned whether such a Bill, which discriminated on the basis of a protected attribute and without further qualification, could ever be considered '*Charter-compatible*' on the basis of imposing 'reasonable limitations' on a *Charter* right. The Committee stated that even on the 'strongest and most cogent [reasonable limitations] analysis', the Bill's provisions might not be justified.

The Committee suggested that the Bill's sponsor utilise the *Charter's* override declaration mechanism. However, the Bill's sponsor, responding to the Committee's report, declined to adopt the suggested course. Noting that the Government strongly favoured making superannuation contribution splitting available to persons in same-sex relationships, but was constrained by the Commonwealth legislation, Minister for Finance, WorkCover and the TAC, Tim Holding, stated that:

- achieving consistency with a Commonwealth law may be a sufficiently important objective to justify limiting *Charter* rights; and
- this situation may not entail 'exceptional circumstances' sufficient to warrant an override declaration, which the Government considers is limited to circumstances such as 'threats to national security or a state of emergency that threatens the safety, security and welfare of Victorians'.

The Minister referred to the importance of transparency in the development of policy and legislation, and noted it was one of the underlying aims of the *Charter*. He stated that although 'the Government and the Committee may differ on how the relevant provisions of this Bill should be characterised', the underlying reasons for the Government proceeding with the amendments were clear and transparent.

It is worth noting that the Minister sought legal advice from counsel on the question of *Charter* compatibility and in settling the Statement of Compatibility, and referred to this advice in his response to the Committee's adverse report. The Minister stated that:

I have considered the Committee's view on this matter at length and appreciate its position. However, it is my belief that the analysis of reasonable limitations was thorough, incorporating specialist technical knowledge and expert legal advice. Therefore, while I have given serious consideration to the Committee's views, I do not consider it necessary to amend the Statement of Compatibility that has previously been settled by counsel.

In subsequent debate in the Legislative Assembly, *Charter* considerations received some (limited) attention. At the time of writing, the Bill had passed its third reading in the Legislative Assembly and was adjourned for debate in the Legislative Council.

The line between 'reasonable limitations' and incompatibility under the *Charter* remains unclear. However, the progress of this Bill goes some way to revealing the Government's position. Further, it demonstrates the constraints of state-based rights protection schemes in the absence of similar rights protection at the federal level.

*Samuel Porter and Jonathan Kelp, Human Rights Law Group, Mallesons Stephen Jaques.*

## Casenotes

### Supreme Court of New Zealand Considers Interaction of Rights to Privacy and Freedom of Expression

*Allistair Patrick Brooker v The Police* [2007] NZSC 30 (4 May 2007)

The Supreme Court of New Zealand has recently considered the extent to which privacy limits freedom of expression in the context of the *Bill of Rights Act 1990* (NZ).

#### Facts

The appellant, Mr Brooker, considered that a police constable had acted beyond her powers in the execution of a search warrant. To show his concern regarding the use of the warrant by the police constable he engaged in a public protest outside her home. In particular, Mr Brooker approached the constable's home at 9.20am in the full knowledge that she had just finished her night shift. He proceeded to knock on her door to ensure she was home and was then asked by the constable to move off her property. He did this almost immediately, however, he then sat on the grass median strip in front of her house and proceeded to sing and hold banners that proclaimed 'no more bogus warrants'.

The 'protest' lasted approximately 25 minutes, and was concluded by Mr Brooker being arrested for intimidation. He was charged and convicted of the offence of 'offensive behaviour or language' under s 4 of the *Summary Offences Act 1981* (NZ).

#### Issue

The Supreme Court of New Zealand was most concerned with what constitutes 'disorderly behaviour' and, in turn, the extent to which the right to privacy could limit freedom of expression in this case.

#### Findings

Mr Brooker's behaviour was found not to constitute disorderly behaviour. The Court considered this point in order to determine whether the behaviour of Mr Brooker was sufficient, first, to qualify as a criminal act under the *Summary Offences Act*, and second, to justify a limitation (pursuant to s 5 of the NZ Bill of Rights) on freedom of expression as provided for under s 14 of the NZ Bill of Rights. Tipping J reformulated the test for disorderly conduct to be 'disorderly if, as matter of time, place and circumstance, it causes anxiety or disturbance at a level which is beyond that which a reasonable person would be expected to bear.' Elias CJ and Tipping and Blanchard JJ found that due to the short duration of the 'protest', the quiet singing and Mr Brooker's adherence to requests by the police, Mr Brooker's behaviour was not beyond that which a reasonable person would be expected to bear.

The minority disagreed and found that the behaviour was an invasion of privacy as the protest was undertaken at a time when the constable was intending to sleep.

After dealing with disorderly behaviour and its effects on public order, each of Elias CJ, Blanchard and Tipping JJ considered the balance to be struck between freedom of expression and the right to privacy. The majority found that an 'expansive' meaning of 'disruptive behaviour' would be inconsistent with freedom of expression as provided for in the NZ Bill of Rights. Further, the majority found that although art 19 of the *International Covenant on Civil and Political Rights* permits restrictions on the freedom of expression, it would be difficult to accommodate this for two reasons. First, the section in question was not drafted to protect interests such as privacy or residential quiet. Second, the NZ Bill of Rights does not allow for this restriction in its provisions in any event. The majority found that Mr Brooker's behaviour was not enough to limit his entitlement to freedom of expression.

Again the minority disagreed with these findings and gave greater weight to s 5 of the NZ Bill of Rights, which allows restrictions on rights where they are reasonable and demonstrably justified. Both McGrath and Thomas JJ were concerned with the protest taking place in a residential area and impinging on the concept of 'home'.

#### Implications for the Victorian Charter

Section 32(2) of the *Charter* allows for the use of judgements from international foreign courts relevant to human rights when interpreting the *Charter* and its provisions. This case may be relevant to the

interpretation and application of ss 7 (limitations on human rights), 13 (right to privacy) and 15 (right to freedom of expression) of the *Charter*.

This judgment gives careful consideration to what is required to justify restricting a right, particularly one as important to a democratic state as freedom of expression. It underlines that when interpreting legislation it is essential to ascertain the legislative intent of the section and whether restricting a right such as freedom of expression was envisaged by the legislature. If this intent cannot be found, the majority in this judgement encourages interpretation of a piece of legislation to err on the side of caution when there is a possibility of restricting a right by operation, for example, of the right to privacy, which is contained in s 13 of the *Charter*.

The decision is available at <http://www.nzlii.org/nz/cases/NZSC/2007/30.html>.

*Emma Wanchap, Human Rights Law Group, Mallesons Stephen Jaques.*

## European Court of Human Rights Considers Principles Relevant to Pre-Trial Detention and Remand

*Melnikova v Russia* [2007] ECHR Application No 24552/02 (21 June 2007)

The European Court of Human Rights has held that pre-trial custody will only be lawful if there are 'relevant and sufficient' grounds for detaining a person. Prolonged pre-trial detention must be regularly reviewed and will only be justifiable in exceptional circumstances.

### Facts

The applicant, Yelena Melnikova, was detained on suspicion of fraud and was held in custody for 18 months pending trial. Repeated court applications for release were denied. She claimed that this detention amounted to a violation of art 5(1)(c) of the *European Convention of Human Rights*. This article relevantly provides that everyone has the right to liberty and security of person and that no one shall be deprived of liberty other than in accordance with a procedure prescribed by law for the purpose of ensuring that he or she is brought before the 'competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.' Article 5(3) further provides that 'Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of the Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.'

Melnikova argued that her pre-trial detention was not lawful within the meaning of art 5(1)(c) as it was not sanctioned by a proper authority in accordance with the procedure prescribed by law. She also complained under art 5(3) that there had been no reasonable grounds for her lengthy pre-trial detention.

### Decision

The Court stated that detention must be 'lawful' and 'in accordance with a procedure prescribed by [domestic] law', and further, be compatible with the purpose of art 5(1) (namely, to prevent persons being arbitrarily deprived of their liberty). The court also held that the conditions for deprivation of liberty under national law must be clearly defined, and that such law itself must be foreseeable in its application.

The Court found that holding a defendant in custody solely on the basis that a criminal case against him or her has been referred to a court amounts to a violation of art 5(1). Keeping defendants in detention without a specific legal basis or clear rules regulating the situation – with the result that they may be deprived of their liberty for an indefinite period without judicial administration – is incompatible with principles of legal certainty and protection from arbitrariness.

The Court also stated that decisions that deny an application for release are not the equivalent of a lawful decision to extend a term of detention. Applications for release filed by defendants do not exempt domestic authorities from authorising a person's detention 'in accordance with a procedure prescribed by law' (such as issuing a formal detention notice). Finding otherwise would place the burden to ensure a lawful basis for their continued detention on the defendant rather than the authorities.

In regard to art 5(3), the Court held that a person charged with an offence must always be released pending trial, unless the prosecution can show there are 'relevant and sufficient' reasons to justify prolonged detention. Further in this regard, the Court stated that:

- 'Lack of permanent residence' of a defendant may legitimise continuing detention, but only during the initial stages of an investigation – 'danger of flight necessarily decreases with the passage of time spent in detention'.
- The 'gravity of the charge(s)' and the 'severity of [a] potential sentence' will not in itself legitimise prolonged detention.
- The state must 'scrupulously examine' and address 'evolving circumstances' in order to legitimise the continued deprivation of liberty of a defendant. 'Mere repetition' of earlier rationales in the 'later stages of investigation' will not justify continued detention.
- Issues such as state of health, dependent children, and the availability of alternative preventative measures may also be features relevant to the lawfulness of pre-trial detention.

In the present case, the Court considered that while the applicant's detention may have been justifiable in the initial stages of the investigation, her continued detention was not justified by 'relevant and sufficient' reasons. The Court further held that the applicant's ongoing detention was not reviewed with the 'special diligence' required to justify ongoing detention.

### **Implications for the Victorian Charter**

Section 32(2) of the *Charter* permits Victorian Courts to use the judgements of foreign courts to assist in the interpretation of *Charter* rights. This judgment of the European Court may be relevant to the interpretation of s 21 of the *Charter*, which enshrines the right to liberty and security of the person and freedom from arbitrary arrest or detention. In particular, it is authority for the proposition that any pre-trial detention must be justified by 'relevant and sufficient' reasons and, further, that the reasons must take adequate account of the defendant's individual circumstances. A blanket policy, such as a policy that all persons charged with terror-related offences be remanded in custody (as seems to be the case with the 'Melbourne 13'), will not satisfy this test. The case is further authority for the principle that prolonged pre-trial detention must be regularly and freshly reviewed with particular scrutiny.

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

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### **The Right to Freedom of Expression in a Commercial Context**

The scope and application of the right to freedom of expression in a commercial context has recently been considered by the UK Court of Appeal and the Supreme Court of Canada. While neither court recognised a 'corporate right' to freedom of expression, both cases held that the right may be engaged by expression about commercial matters and, moreover, that the public have a prima facie right to 'hear' the expression (as opposed to a corporation having a right to 'express' the information). It is clear from both cases, however, that freedom of expression about commercial matters will be afforded a lower threshold of protection than expression about socio-political matters (see also the Statement of Compatibility issued under the Victorian *Charter of Human Rights and Responsibilities* in relation to the Major Events (Aerial Advertising) Bill 2007).

*Canada (Attorney General) v JTI-Macdonald Corp* 2007 SCC 30 (28 June 2007)

In this case, the Supreme Court of Canada upheld certain prohibitions on advertising and promotion of tobacco products as a legitimate infringement on the right to freedom of expression.

The tobacco manufacturer challenged, among other matters, legislation prohibiting false and erroneous tobacco advertising, promotions designed for young people, lifestyle and sponsorship advertising, and mandatory health warning labels.

Section 1 of the *Canadian Charter of Rights and Freedoms* guarantees that:

[T]he rights and freedoms set out [in this Charter must be] subject only to such reasonable limits proscribed by law as can be demonstrably justified in a free and democratic society.

Section 2(b) provides that '[everyone has] freedom of thought, belief, opinion and expression, including freedom of the press and other forms of communication'.

The court held that prohibitions on tobacco advertising and promotion clearly infringe the guarantee of freedom of expression – as enshrined in s 2(b) – but are a justifiable limitation under s 1, as the effects are 'proportionate'. The 'expression' (namely, inviting consumers, through advertising, to use a product that would almost certainly harm them) was of low value, whereas the objective ('nothing less than a matter of life or death for millions of people who could be affected') was of great importance. In each instance, the court stated that the objective was 'rationally connected' to the limitation and that the limitation was 'proportionate' and, therefore, that the limitation on free expression was 'demonstrably justifiable'.

The case is available at <http://scc.lexum.umontreal.ca/en/2007/2007scc30/2007scc30.html>.

*Boehringer Ingelheim Limited & Ors v Vetplus Limited* [2007] EWCA Civ 583 (20 June 2007)

In this case, the UK Court of Appeal held that the right to freedom of expression may be a relevant consideration in determining a commercial dispute over trade mark protection and comparative advertising.

The parties to the dispute both make and sell nutritional supplements for dogs. The appellant, Boehringer Ingelheim, sought an injunction to restrain the respondent, Vetplus, from comparative advertising which was critical of the appellant's product.

Dismissing the appeal, the Court held that the matter engaged the right to freedom of expression pursuant to s 12 of the *Human Rights Act 1998* (UK). Therefore, in accordance with s 12(3) of the Act, no injunction should be granted unless the court is satisfied that the applicant is 'likely' to be granted a final injunction at trial. Section 12(3) of the *Human Rights Act* provides that relief, which may affect the exercise of the right to freedom of expression, should not be 'granted so as to restrain publication...unless the court is satisfied that the applicant is likely to establish that publication should not be allowed'.

Longmore LJ stated that '[t]here can be little doubt that the right of freedom of expression [can be] engaged...in a commercial dispute. Comparative advertising...is a permissible activity and such advertising necessarily entails the expression to others of matters of either fact or opinion or both'.

Jacobs LJ held that '[a] man who finds his trade mark disparaged by a rival trader in a comparative advertisement can obtain a prior restraining order only if he can show ... that the disparagement is wrong and misleading. Unless he can do that, then his rival, both for his own commercial interests and in the interests of the public, ought to be free to say that which he honestly believes'.

The case is available at <http://www.bailii.org/ew/cases/EWCA/Civ/2007/583.html>.

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### **European Court of Human Rights Considers Obligation to Facilitate Peaceful Assembly, Association and Expression**

*Bączkowski & Ors v Poland* [2007] ECHR Application No 1543/06 (3 May 2007)

The European Court of Human Rights has found that Poland violated its obligations to protect the right to freedom of assembly as a result of a failure to facilitate and accommodate a protest regarding discrimination against minority groups.

#### **Facts**

The Polish group, Foundation for Equality, sought a determination in the European Court of Human Rights that their right to peaceful assembly had been breached by Poland in its application of domestic administrative law. They sought a declaration in response to a decision by the Warsaw Mayor's Office to refuse permission for a march aimed at raising awareness of discrimination against minority groups, including homosexuals, due to an alleged failure to submit a 'traffic organisation plan' as required under art 65(a) of Poland's *Road Traffic Act*. A day before the march was to occur the Mayor's Office banned

stationary assemblies that protested against discrimination against homosexuals, under the *Assemblies Act of 1990*, whilst allowing other protests. In the month before this decision was taken the Mayor had publicly asserted that the 'propaganda of homosexuality is not tantamount to exercising one's freedom of assembly'. Despite the ban, the march went ahead, and the Polish Constitutional Court subsequently found the provisions of the *Road Traffic Act* to be incompatible with art 57 of the *Polish Constitution*, which guarantees freedom of assembly. The applicants subsequently sought a determination in the European Court of Human Rights, on the grounds that the administrative decision to ban the march was a breach of their freedom of assembly, that there were no adequate domestic remedies and that the ban was discriminatory.

### **Decision**

The European Court considered several issues in relation to freedom of assembly. The first issue was whether the applicants' rights were violated under art 11 of the *European Convention on Human Rights* which provides for the right to freedom of peaceful assembly.

The Polish Government contested the applicants' claim on the grounds that the applicants did not have status as victims and had failed to exhaust the available domestic remedies.

The Court rejected the first ground on which the application was contested because the applicants were 'negatively affected' by the decision to forbid the assemblies and that the Polish authorities' interference with the applicants' right to freedom of assembly was not prescribed by law and was therefore in breach of art 11.

The Court also found that there was no effective domestic remedy to amend a breach of the right to freedom of assembly. Article 13 of the Convention requires a State to make a domestic remedy available if a person's rights are infringed under art 11. In this instance, as any remedy to which the applicants might be entitled was only available after the date of the planned assembly had passed, they were not entitled to a domestic remedy that could prevent the original breach from occurring. In fact, the time of the available remedy became critical to the court's determination. The Court found that state authorities must give the decisions within reasonable time limits, which in the case, would have been before the planned assembly was due to occur.

Finally, the Court considered whether or not the decision to ban the march was discriminatory. Article 14 of the Convention provides for the enjoyment of rights and freedoms contained in the Convention, without discrimination on any ground. The decision to ban the applicants' march was discriminatory because none of the other organisations planning similar marches at the same time were required to submit 'traffic organisation plans'. The Court found it could not disregard the Mayor's publicly expressed personal opinion against allowing the march and that it could have affected the decision-making process. The decision to disallow the march impinged on the applicants' right to freedom of assembly in a discriminatory manner and was therefore in breach art 14 of the Convention.

### **Implications for the Victorian Charter**

Section 32(2) of the Victorian *Charter* permits Victorian Courts to consider the judgments of foreign or international courts when interpreting the *Charter*. The decision in this case may assist the Court in interpreting s 16 of the *Charter*, which provides for the right to peaceful assembly and freedom of association. It could also be relevant to interpreting the right to take part in public life without discrimination, which is protected under s 18(1) of the Victorian *Charter*, and could be relevant to the more general provisions of the charter dealing with discrimination.

Whilst the *Charter* may be effective protecting the substantive human rights that were in issue in the *Baczowski Case*, it is less clear whether Victoria has implemented adequate effective domestic remedies to address breaches of freedom of assembly (as was required in the *Baczowski Case* pursuant to art 13 of the Convention). This case illustrates the importance of the *Charter* in extending the protection of human rights under Victorian law into areas not previously covered by existing legislation, and how flow-on legislative changes may continue to be required in order to accommodate this new legal framework.

Even were it not for the *Charter*, Victorians faced with administrative discrimination of the sort that occurred here may have other legal remedies available to challenge such a decision. For example, judicial review of administrative action may be available.

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

*Georgina Molloy, Human Rights Law Group, Mallesons Stephen Jaques.*

## **HRLRC Policy, Advocacy and Law Reform**

### **Joint Standing Committee on Treaties Considers Human Rights Implications of Australia-Indonesia Security Agreement**

In June, the Joint Standing Committee on Treaties tabled a report on its inquiry into the Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation ('Treaty'). The Treaty provides a framework for security cooperation between Australia and Indonesia, including provisions on defence, law enforcement, counter-terrorism, intelligence, maritime security, aviation safety and security, proliferation of weapons of mass destruction, emergency cooperation and cooperation in international organisations on security-related issues.

The Centre previously made a written submission to the inquiry and gave evidence before the Committee at Parliament House in Canberra. The Centre's written and oral submissions focussed on the need to include human rights safeguards in the treaty, and concern with the apparent emphasis on principles of sovereignty and territorial integrity in the Treaty, seemingly at the expense of human rights protections.

In its final report, the Committee made several recommendations relevant to human rights in relation to the Treaty, including that the Australian Government:

1. '...continue to address widely expressed concerns about human rights in Indonesia with the Indonesian Government in appropriate international fora';
2. '...increase transparency in defence cooperation agreements to provide assurance that Australian resources do not directly or indirectly support human rights abuses in Indonesia'; and
3. '...encourage the Indonesian Government to allow greater access for the media and human rights monitors in Papua'.

The Centre's written and oral submissions were cited several times in the Committee's report. In particular, the report noted the Centre's recommendation that the Treaty include recognition that the Treaty will be interpreted to promote universal respect for, and observance of, human rights and freedoms. The report also recognised the Centre's submission that the emphasis on sovereignty and territorial integrity in the Treaty should not remain without balancing those provisions with human rights safeguards.

However, the Committee ultimately supported the Treaty in its current form and recommended that binding treaty action be taken. The Committee refused to recommend that the Treaty be amended to include specific human rights recognition or safeguards, stating:

The Committee acknowledges that a reference to human rights would be of symbolic value to the Agreement. However, it is not convinced that the Agreement should be rejected unless human rights provisions are added. Both Indonesia and Australia have extensive human rights obligations under international law and the absence of a reference to human rights in the Agreement does not imply that these obligations cease to apply...

There is nothing in the Agreement which is inconsistent with Australia's human rights obligations nor does the Agreement attempt to exclude the operation of any recognised human rights. On the contrary, such obligations are indirectly referenced through Article 2(6), which states that 'nothing in this Agreement shall affect in any way the existing rights and obligations of either Party under international law', and in effect, maintains Australia's and Indonesia's human rights obligations in addition to the obligations acquired under the Agreement.

Many interest groups, including the Centre, expressed grave concern that art 2(3) of the Treaty was specifically aimed at vulnerable groups within Indonesia such as West Papuans. Article 2(3) provides:

The Parties, consistent with their respective domestic laws and international obligations, shall not in any manner support or participate in activities by any person or entity which constitutes a

threat to the stability, sovereignty or territorial integrity of the other Party, including by those who seek to use its territory for encouraging or committing such activities, *including separatism*, in the territory of the other Party. [Emphasis added]

In response, the Committee stated that it was satisfied that art 2(3) will not limit the expression of support for West Papuan human rights or independence in Australia, provided it is in accordance with Australian law. The report went on to state that:

Although the Committee cannot speak to Indonesia's understanding or expectations of Article 2(3), it is satisfied that its purpose is to provide a binding commitment by the Australian government not to support the secession of Papua.

As to the informal sharing of intelligence contemplated by the Treaty which, in the Centre's submission, risked the imposition of the death penalty upon Australians in Indonesia, the Committee stated that it was satisfied with the existing safeguards in place through mutual assistance legislation and the AFP guidelines. However, it had 'some outstanding concerns that information shared lawfully under police-to-police cooperation may inadvertently result in the death penalty being carried out'.

In a dissenting report, Senator Andrew Bartlett criticised the Treaty in its present form as creating unrealistic expectations between the parties as to the extent to which each party is prepared to act upon the obligations created. In particular, Senator Bartlett stated that 'we cannot wish away human rights concerns just because they make our relationship uncomfortable...history has given us enough examples to show that such an approach usually does not work in the long run'.

The Committee report is available at <http://www.aph.gov.au/house/committee/jsct/6december2006/report.htm>.

*Mathew Tinkler is a Lawyer with Minter Ellison. He appeared before the Committee on behalf of the Human Rights Law Resource Centre.*

### **Sentencing Advisory Council Considers Relevance of Victorian Charter of Human Rights to Post-Sentence Supervision and Detention of High-Risk Offenders**

The Victorian Sentencing Advisory Council has now released its *Final Report and Recommendations on High Risk Offenders: Post-Sentence Supervision and Detention*.

As discussed in Edition 11 of the Bulletin, in February 2007, the Centre made a submission to the Council regarding the implications of a scheme of post-sentence supervision and detention for the right to freedom from arbitrary detention enshrined by s 21 of the Victorian *Charter* and the right to humane treatment when deprived of liberty protected by s 22 of the *Charter*. The Centre's submission also considered the permissibility of limitations on these rights pursuant to s 7 of the *Charter* and relevant international and comparative human rights jurisprudence.

The Council's Final Report concludes, by majority, that 'regardless of how a continuing detention scheme is structured, the inherent dangers involved outweigh its potential benefits, particularly taking into account the existence of less extreme approaches to achieving community protection, such as extended supervision.' The Report also concludes, however, that if a continuing detention scheme is to be introduced regardless, it should be designed to protect the community rather than punish the offender and, so far as possible, should be consistent with the *Charter*.

The Council's Final Report makes numerous significant references to the *Charter* and the Centre's submission. In particular, the Centre's submission appears to have been persuasive on the issues of the content and application of s 21 of the *Charter* (particularly the issue as to the 'arbitrariness', 'reasonableness', 'necessity' and 'proportionality' of detention) and the relevance of the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* to the application of s 7 of the *Charter*.

The Council's Final Report is available at <http://www.sentencingcouncil.vic.gov.au/wps/wcm/connect/Sentencing+Council/Home/SENTENCING+-+High-Risk+Offenders+Post-Sentence+Supervision+and+Detention+Review>.

## HRLRC Casework

### Centre Renews Call for Country Visit by UN Special Rapporteur on the Rights of Indigenous People

Further to the report in Edition 9, the Centre, together with a coalition of Indigenous and human rights organisations, has renewed its call for the UN's Special Rapporteur on the Human Rights of Indigenous People to make his first ever visit to Australia.

The Special Rapporteur has responded that the situation of Indigenous rights in Australia is 'being followed by a number of Special Rapporteurs, who are analysing the possibility [of a country visit] and the best ways to act together'.

In the last month, the Australian Federal Government has declared a 'national emergency' in response to a report that revealed the widespread sexual abuse of children in particular Aboriginal communities in the Northern Territory. The findings of the report have led to the implementation by the Federal Government of drastic new policy measures, including:

- taking control of Aboriginal land and townships through renewable five year leases;
- banning the sale of alcohol;
- compulsory health checks for Aboriginal children under the age of 16;
- linking welfare payments to children's school attendance and to participating in clean up and repair activities;
- quarantining 50% of welfare payments for food and other essentials;
- increased police presence in particular Indigenous communities; and
- replacing Indigenous community living arrangements with enforced normal tenancy agreements.

Despite recommendations in the report that the Federal Government consult with Indigenous representatives and affected communities, no such consultation has taken place.

Many of these paternalistic policies raise further serious concerns in relation to the human rights of Indigenous Australians, including the right to self-determination, political participation, land rights, access to adequate housing and education and freedom from discrimination.

The Special Rapporteur on the Human Rights of Indigenous People has recently visited Mexico, Canada, South Africa and New Zealand. The Rapporteur investigates the situation of Indigenous peoples and makes recommendations regarding the realisation of human rights. He reports to the UN Human Rights Council. Country visits are normally carried out where an invitation is issued by the national government.

The treatment of Indigenous peoples in Australia is reaching a critical time. The Centre urges the Australian Government to issue a formal invitation to the Special Rapporteur to visit Australia to open a constructive dialogue between Indigenous communities, the Government and civil society about the promotion, protection and fulfilment of the fundamental rights and freedoms of Indigenous Australians.

### Victoria Legal Aid Provides Funding for Prisoners' Voting Rights Case

The Centre is delighted that Victoria Legal Aid ('VLA') has agreed to make a grant of funds to partially cover the costs of the prisoner voting matter, *Roach v The Commonwealth*.

Pursuant to its guidelines, VLA may make a grant of aid in a public interest or test case which involves 'a legal issue that affects or is of broad concern to a significant number of disadvantaged people', or 'an untested or unsettled point of law that affects a significant number of disadvantaged people'.

The Guidelines further provide that, in considering applications, VLA will have regard to the nature and extent of the likely benefit to the applicant and the disadvantaged section of the public. Benefit may be assessed, inter alia, in terms of protection of basic human rights. In order for a grant of assistance to be made, the case must be reasonably arguable.

The proceedings in *Roach v The Commonwealth* raise questions of great constitutional importance, including:

- the scope of Parliament's power to deprive individuals of their entitlement to vote in federal elections; and

- the extent to which the entitlement to vote can be considered an incident of the freedoms of political communication and/or political participation implied in the *Constitution*.

These questions have not been resolved by the High Court. By their nature, they go to central aspects of Australia's system of government. Clarification of the power of Parliament to limit the franchise, and of the way in which an entitlement to vote is related to implied freedoms of political communication and/or political participation, is of benefit not only to the individuals concerned but to the Australian public as a whole. These questions also concern fundamental human rights: the importance of an entitlement to vote in elections and thus participate in the government of one's country is reflected in art 21 of the *Universal Declaration of Human Rights* and art 25 of the *International Covenant on Civil and Political Rights*.

For further information regarding VLA funding for public interest and test case matters, see [www.vla.vic.gov.au](http://www.vla.vic.gov.au).

## Seminars and Events

### 'The Responsibility to Protect: The Evolution of a New International Norm' with the Hon Gareth Evans AO QC – 13 August 2007

The Hon Gareth Evans AO QC is President of the International Crisis Group, a global NGO working to prevent and resolve deadly conflict.

Gareth Evans was a member of Australian Parliament for 21 years, including 13 years as a Minister, holding the portfolios of Attorney General and Minister for Foreign Affairs, among others.

As Foreign Minister, Gareth Evans became known internationally for his work in developing the UN peace plan for Cambodia, brokering the international Chemical Weapons Convention and founding APEC.

In this seminar, Evans will discuss the emerging responsibility of states and the global community to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

The lecture will be followed by a public discussion with **Justice Chris Maxwell**. Justice Maxwell is President of the Victorian Court of Appeal and a former adviser to Gareth Evans.

The seminar will be held from 6 – 7.45pm on 13 August 2007 at Allens Arthur Robinson, Level 34, 530 Collins St, Melbourne.

For further information, including a booking form, see [www.hrlrc.org.au](http://www.hrlrc.org.au)

### 'Freedom, Respect, Equality, Dignity: What Difference can a Human Rights Charter Make?' with Lord Robert Walker of the House of Lords – 15 August 2007

In this lecture, Lord Robert Walker of the UK House of Lords will reflect on his experience 'judging' human rights under the *Human Rights Act 1998* to consider the difference that a Charter of Human Rights can make to the enjoyment and protection of human dignity, respect, equality and freedom.

This seminar is co-presented by the Victorian Equal Opportunity and Human Rights Commissions. It will be held from 12.30 – 2pm on 15 August 2007 at Mallesons Stephen Jaques, Level 50, 600 Bourke St, Melbourne.

For further information, including a booking form, see [www.hrlrc.org.au](http://www.hrlrc.org.au)

### Protecting Human Rights Conference – 25 September 2007

This conference is jointly presented by the Centre for Comparative Constitutional Studies (Melbourne Law School), the Gilbert + Tobin Centre of Public Law (UNSW) and RegNet (ANU). It will discuss developments in the protection of human rights by Australian charters and human rights acts.

The conference provides an important opportunity to examine the Victorian Charter of Human Rights, the ACT Human Rights Act and other bills of rights. Leading Australian and international speakers will also address the future of the protection of human rights, such as economic, social and cultural rights, in Australia and other countries. The day is aimed at both a legal and non-legal audience.

More information, including the full conference programme and registration form is available at <http://cccs.law.unimelb.edu.au> (under News and Events) or from [law-cccs@unimelb.edu.au](mailto:law-cccs@unimelb.edu.au).

## Education, Training and Resources

### **Review of *Litigating Economic, Social and Cultural Rights: Legal Practitioners Dossier* by Malcolm Langford and Aoife Nolan**

The Centre on Housing Rights and Evictions ('COHRE') is an international NGO focusing on the right to adequate housing. Through its 'ESC Rights Litigation Programme', COHRE supports legal efforts to secure social and economic rights of individuals. As part of this programme, COHRE has produced the *Legal Practitioners Dossier*, a practical reference guide for advocates for using economic, social and cultural rights ('ESC rights') in courts and tribunals.

It uses case studies, jurisprudence, examples of enforcement mechanisms, and opinions of international bodies, particularly the UN Committee of Economic Social and Cultural Rights, to demonstrate the justiciability of ESC rights.

The guide begins with a helpful general consideration of legal issues commonly arising in litigation of ESC rights. These include identifying sources of ESC rights, the nature and scope of rights and obligations, and crafting appropriate remedies. The guide also considers defences used by governments, critiquing arguments that courts are not institutionally equipped to make the wide-ranging enquiries on public policy choices and resource allocation issues involved in adjudicating ESC rights.

The guide then looks more specifically at the right to legal aid in ESC rights litigation, and analyses in depth the substantive legal content of four key rights (social security, adequate housing, health and education) and obligations imposed on States to respect, protect and fulfil these rights. This is followed by a special case study on the economic and social rights of children. This provides readers with a sense of how the application and interpretation of ESC rights may vary with the nature of the particular right claimed and the type of claimant.

A key theme of the guide is the interdependence and connection of ESC rights with realisation of other human rights. Even where ESC rights are not specifically protected, courts have implied particular ESC rights from other human rights. ESC rights can also provide interpretive guidance on other laws, or be enforced through legislation which provides remedies for violations of the right to non-discrimination in social and economic fields. This analysis is particularly useful for jurisdictions where ESC rights are not directly enshrined in a constitutional or legislative framework, such as in Australia.

Parts II and III consider separately international and regional human rights procedures and provide guidelines for their use. In relation to each mechanism, relevant legal instruments, applicable standards, adjudicatory bodies and procedures are outlined. The guide also provides useful practical resources for litigation, including summaries of leading cases, and links to contact details of individuals and organisations with expertise in the area of ESC rights.

The guide provides a concise but comprehensive coverage, useful to lawyers seeking an overview of the law in this area, and raising important issues for Victoria to take into consideration when deciding whether the *Charter of Human Rights and Responsibilities* should be expanded to include ESC rights. Importantly, the guide is marked by both its readability and accessibility to a wide audience, providing a valuable tool for advocates and those seeking to use legal avenues to defend economic, social and cultural rights.

The *Legal Practitioners Dossier* is available on COHRE's website at <http://www.cohre.org/litigation>.

*Tanaya Roy is a volunteer lawyer with the Human Rights Law Resource Centre.*

### **Human Rights Community Grants Program**

The Victorian Equal Opportunity & Human Rights Commission has \$25,000 to give to community organisations for human rights projects.

The grants are designed to support community organisations to educate about human rights, and to promote awareness of the Victorian *Charter of Human Rights and Responsibilities*.

The Commission will grant up to \$5,000 to community organisations for projects that further the community education objectives of the *Charter*.

One of the key new roles of the Commission under the *Charter* is to inform and educate Victorians about their human rights and responsibilities.

Commission chief executive, Dr Helen Szoke, said the grants program was an innovative way of raising awareness of human rights within the community.

'Human rights are an essential element of any democratic and inclusive society. We hope that community organisations that receive these grants can pass on knowledge and awareness of human rights to their communities,' she said.

'The *Charter* is a step forward for Victorians, and this program is an exciting opportunity for community organisations to become involved and create awareness of human rights.'

Only registered non-profit organisations may apply for a grant. Applications close 17 August 2007. The program guidelines and application form are available from the Commission website at <http://www.humanrightscommission.vic.gov.au/> or from George Bisas on (03) 9281 7128.

## If I Were Attorney-General...

### Time to Ismaʿ and Take Action on Discrimination and Vilification against Arab and Muslim Australians

Australia has changed for all of us since the events of 11 September 2001, whether it is what we see on the television or having to take our shoes off at airport security checks. However, for a lot of Muslim and Arab Australians the post-September 11 Australia is a particularly different place.

In 2003, based on reports from Muslim and Arab community organisations of increasing anti-Muslim and anti-Arab prejudice, the Human Rights and Equal Opportunity Commission launched the Ismaʿ project. Ismaʿ means 'listen' in Arabic. The aim of the project was to explore whether Muslim and Arab Australians were experiencing discrimination and vilification after September 11, the Bail bombings and the gang rape trials in Sydney. The project also looked at the impact of any such discrimination and made recommendations for future action.

The findings of the Ismaʿ report, released in 2004, are shameful. In his foreword to the report, Dr William Jonas, former Acting Race Commissioner of HREOC, describes Arab and Muslim Australians being 'abused, threatened, spat on, assailed with eggs, bottles, cans and rocks, punched and even bitten'. This situation has worsened since the London Bombings in 2005, the Cronulla Riots in 2005/2006 and the events of the last month. Women in Islamic dress, including the hijab, niqab, chador and burqa, reported being particularly at risk. People identifiable as Arab or Muslim experienced discrimination and vilification in employment, at school and university, in shopping centres, on public transport and on the street.

What is even more heart breaking is the affect of the violence, discrimination and vilification on Arab and Muslim Australians. Participants in the Ismaʿ project reported 'a substantial increase in fear, a growing sense of alienation from the wider community and an increasing distrust of authority'.

Given the experiences of innocent people as a result of these prejudices, you would hope that the law provides Arab and Muslim Australians with comprehensive protection. You would be wrong. While federal and state discrimination law generally protects people who have been treated badly because they are Arab, the situation for people who experience discrimination or vilification because they are Muslim is not so certain.

While the law is a bit unclear, it is very unlikely that people who are treated badly because they are Muslim are able to get an effective remedy under federal discrimination laws. State discrimination laws have patchy coverage. All states and territories, except New South Wales and South Australia, make it unlawful to discriminate against someone on the grounds of religion. While New South Wales law does cover people who have been discriminated against or vilified on the basis of their 'ethno-religious origin', it is unlikely that this extends to people who have been treated badly solely because they are Muslim. This gap is particularly problematic given that approximately half of Australia's Muslim population lives in New South Wales. The coverage of religious vilification laws is even sparser, with only Victoria, Queensland and Tasmania making it unlawful to vilify someone because of their religion.

So the message is that if you don't get a job in the local supermarket in New South Wales or South Australia because you are wearing the hijab, the law thinks that's fine. If you are screamed at on the street in Perth, Sydney, Adelaide, Darwin or Canberra and called a 'nappy head' or told that 'all Muslims should go home' you cannot make a vilification claim. Just when you needed it most, the law fails to protect you.

If I were the Federal Attorney-General I would think that was worth doing something about.

It is a basic human right to live a life free from discrimination. The prohibition against discrimination and the right to comprehensive protection from discrimination is enshrined in a number of international conventions, including the *International Covenant on Civil and Political Rights* and the *International Covenant of Economic, Social and Cultural Rights*. It is time for action on the part of government and the broader community to protect Arab and Muslim Australians from the persecution they are currently experiencing. It is clearly a very complex and deep-rooted problem. The IsmaꝻ report outlined a number of areas that require work, such as improving legal protection, promoting public awareness through education, addressing stereotypes and misinformation in public debate, ensuring community safety through law enforcement, empowering communities and fostering public support and solidarity with Arab and Muslim Australians. The report also made 10 recommendations for action. The first one calls for the introduction of a federal law making discrimination and vilification on the grounds of religion or belief unlawful. If I were Attorney-General, I think that would be a good place to start.

*Teena Balgi is co-convenor of the National Human Rights Network of the National Association of Community Legal Centres and a solicitor at Kingsford Legal Centre in Sydney.*