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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

Eureka! The Government Wins Again

In 1854 a small group of miners staged a rebellion against the Victorian Government. It was an armed rebellion with a strong ideological purpose. Measured against today’s laws, it was plainly a terrorist offence. Nevertheless, in the complex weave of Australian values, it holds an honoured place in our history and heritage.

Eureka’s visible symbol is the flag of the Southern Cross. It was sewn by the miners’ wives and partners and remains a treasured part of our history. Now, it has become an offence for some Australians to show the Eureka flag.

This surprising result was produced by the Australian Building & Construction Commission. The ABCC ordered the removal of the flag saying ‘The flag represents the union and gives the impression that to work on the site you need to be a union member. This is therefore a breach of freedom of association’.

This is not only alarming, it is astonishingly stupid. First, consider the logical process involved: The flag is understood by some as representing a union; flying the flag therefore reminds people of the existence of the union; reminding people of the existence of the union gives people the impression that they have to join the union; giving them that impression (without more) deprives them of the choice not to join the union. Thus, showing the Eureka flag denies people the right not to join the union and breaches the freedom of association provisions of the *Workplace Relations Act*. If this logic is taken to its natural conclusion, the ABCC would prohibit any reference to unions at any workplace, on the footing that to be told of the existence of a union implies that you have no choice but to join. In the anti-union Utopia of the ABCC and its political masters, ‘freedom of association’ means that you are not allowed to know of the existence of the unions, although you are free to associate with them if you find out about them.

Moving away from the ideological stupidity of the ABCC, there is the small matter of free speech which used to be regarded as something we valued in this country. We can accept as a starting point that the freedom of association provisions of the *Workplace Relations Act* expressly restrict one aspect of free speech: it is not lawful to say ‘You must join the union’. But it is a stretch of imagination to say that flying an iconic flag expresses that prohibited idea.

Is it now unlawful in Australia to say things like ‘Unions exist’ or ‘It is good to join a union’? The ABCC’s recent ruling suggests that we may have reached that position.

Basic rights – liberty, free speech, the privilege against self-incrimination, the right to a fair trial – have always been accepted as part of the bedrock of Australian democracy. It is alarming to see how these values are being eroded, and it is alarming to see the process by which it is being done. By small degrees our freedoms are being whittled away.

The right to silence is disappearing. In 2002, ASIO was given power to permit the incommunicado detention of people for up to a week at a time, even though they are not suspected of any wrongdoing: it is enough if they are thought to have information about others who may have been involved in terrorist offences. The person may be taken into isolated custody, and will not have a free choice of legal help. They will not be permitted to tell friends or family where they are. They must answer questions or face 5 years imprisonment. When released, they are not permitted to tell anyone where they were or what happened to them, on pain of imprisonment. They can legally 'disappear' for a week.

Under provisions introduced in 2005, the Australian Federal Police can obtain a preventative detention order which results in a person being jailed for up to 14 days, without charge or conviction for any offence. The order is obtained in secret. The person is not allowed to know the evidence on which the order was obtained. Similarly, the AFP can obtain a control order against a person, in a secret hearing. This can involve house arrest for up to 12 months, without access to telephone or the internet. The subject of the control order has no right to know the evidence which was used against them.

Thus, a person's basic liberties can be grossly interfered with in circumstances where they have no opportunity to know the evidence on which the order was obtained, much less to challenge it.

The Federal Attorney-General has very wide powers to prevent one party in litigation from knowing what evidence the government has used against them; and he has wide powers to prevent a party from calling evidence which is relevant and helpful to that party's case.

As the case of Dr Mohamed Haneef demonstrated, the AFP can hold a person for questioning for several weeks, even though they did not ask Dr Haneef any questions during the first 11 days of his incarceration. Now there is a serious proposal that the AFP be given 'sneak and peek' warrants. These are warrants which are executed without the subject knowing that their premises or their computers have been searched. The main vice of these is that, if the terms of the warrant are exceeded, the subject of the warrant has no redress; they do not even know that they have been raided. Judicial oversight of the execution of a search warrant is the only possible way of guarding against misuse of the warrant.

History shows that basic liberties are lost not all at once but by small steps. It is time to take our liberties seriously, before they are taken altogether.

*Julian Burnside QC is President of Liberty Victoria*

## News

### Australian Government Misses Major Opportunity on Human Rights

On 25 July 2007, the Australian Government submitted a report to the United Nations on the performance of its human rights obligations under the two major international human rights treaties, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

The Human Rights Law Resource Centre, together with a coalition of Australian human rights organisations and community groups, criticised the report for failing to address how the rights contained in the treaties are reflected in the actual political, economic, social and cultural realities in Australia. On the international stage, Australia has committed to respecting and promoting the human rights. However, the Howard Government's report reflects an unwillingness to ensure that human rights are respected and protected.

Major omissions from the Australian Government's report include:

- no acknowledgement that Australia is the only developed nation without constitutional or legislative entrenchment of human rights in domestic law;
- insufficient recognition of the significant human rights issues facing Indigenous Australians;

- inadequate discussion of Australia's mandatory detention of asylum seekers, including the conditions of detention and lack of access to appropriate health care;
- little reference to counter-terrorism laws and measures and the extent to which they compromise some of the long-standing rights protected in the Australian legal system, particularly in light of the recent treatment of Dr Mohamed Haneef;
- no comment on the extended detention or treatment of David Hicks and Mamdouh Habib in Guantanamo Bay;
- no observation of the human rights abuses in mental health institutions and covert neglect in the wider community;
- no mention of the Australian Government's involvement in exposing its citizens to face the death penalty overseas;
- inadequate discussion of the impacts of the recent WorkChoices legislation on Australian workers;
- no exploration of the impact of the harsher penalty regime introduced by the Australian Government in its Welfare to Work legislation, and the effects of the legislation on parents and people with disabilities;
- inadequate discussion of issues affecting housing affordability and availability;
- no discussion of the increased focus on parents' rights, to the detriment of the interests of children, which has resulted from the Australian Government's changes to the family law regime; and
- no mention of the discrimination experienced by same-sex couples in Australia.

It is disappointing that the Australian Government has not used the report as an opportunity to conduct a comprehensive review of the measures it has taken to harmonise Australia's domestic law and policy with its international obligations.

The report presents an occasion for the Australian Government to monitor progress made in promoting the enjoyment of fundamental human rights in Australia and to plan and develop appropriate policies to fully implement the rights contained in the treaties. Regrettably, the Howard Government has not shown leadership in the development of effective human rights protections in Australia.

The Centre, together with a coalition of NGOs, will submit a 'Shadow Report' in response to the Australian Government's report to the United Nations treaty bodies later this year. The shadow report will seek to provide a more accurate and 'on the ground' perspective of the reality of human rights in Australia.

A Human Rights Background Briefing on the Report prepared by the Centre in partnership with a range of NGOs, is available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under Policy Work>HRLRC Submissions>NGO Response to Australian Government Submissions under the ICCPR and ICESCR.

The Australian Government Report is available at <http://www.ag.gov.au/www/agd/agd.nsf/AllDocs/4DCEB8DD30AFDE00CA25731E0015887C?OpenDocument>.

## Victorian Charter of Rights Developments

### Supreme Court Considers Right to Counsel under Charter

*Re Unumadu* [2007] VSC 258 (23 July 2007)

In an application for bail by Mr Unumadu before Bongiorno J of the Supreme Court of Victoria, His Honour highlighted the importance of the right of a person charged with a criminal offence to be entitled to legal assistance of their choice in accordance with s 25(2)(d) of the *Victorian Charter of Human Rights and Responsibilities*.

#### Summary

Mr Unumadu has been charged with murder and has been held in custody since February 2006. Mr Unumadu was due to be tried before the Supreme Court of Victoria in June 2007 but the Court was unable to hear the matter and it was adjourned. A trial date in November 2007 was offered, however, Mr Unumadu's counsel was unavailable at that time so the matter was set down for 29 January 2008.

Counsel for Mr Unumadu submitted that the extra time that Mr Unumadu would be incarcerated constituted 'exceptional circumstances' under s 13(2)(b) of the *Bail Act 1977* (Vic), and justified him being bailed. Counsel for the Crown suggested that Mr Unumadu had in fact acquiesced in his own detention in not accepting the November trial date.

His Honour accepted that Mr Unumadu has and will be incarcerated for a length of time that constitutes exceptional circumstances under the *Bail Act*. However, His Honour expressed reservations as to the accused himself and indicated that a grant of bail for Mr Unumadu posed an unacceptable risk, in accordance with s 4(2)(d) of the Act. Bail was therefore refused.

His Honour regarded the Crown's submission as to Mr Unumadu's acquiescence in not accepting the November trial date as untenable and suggested that such a proposition would

not only be unreasonable; after 1 January 2008 it would probably be contrary to s 25(2)(d) of the *Charter of Human Rights and Responsibilities Act 2006*. At least it would be contrary to the spirit of that provision, if not its letter.

### Conclusion

The Victorian Parliament and the Executive have been engaging in a human rights dialogue since the beginning of this year with the introduction of the initial phase of the *Charter*. Since 1 January 2007, Statements of Compatibility have been introduced into Parliament with each proposed Bill, and Human Rights Certificates have been prepared in respect of each proposed statutory rule. Although the *Charter* does not become fully justiciable until 1 January 2008, Victorian Courts are already beginning to enter into the human rights dialogue that is promoted by the *Charter* by engaging in discussion which emphasises the importance of the *Charter* and the human rights contained within it.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VSC/2007/258.html>.

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### 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.

#### Crimes (Decriminalisation of Abortion) Bill 2007

The Crimes (Decriminalisation of Abortion Bill 2007) seeks to abolish the offences of unlawful abortion. This requires the repeal of two relevant provisions in the *Crimes Act 1958* (Vic). The Bill also proposes to repeal any offence of unlawful abortion which exists under the common law.

The relevant provisions of the *Crimes Act*, on their face, criminalise all abortion in the state of Victoria. In *R v Davidson* [1969] VR 667, however, Menhennit J of the Supreme Court found that an abortion will be lawful where the accused held an honest belief on reasonable grounds that the abortion was both 'necessary' and 'proportionate'. The Bill is seen, at least in part, as an attempt to codify this common law right.

The Bill potentially engages the 'right to life and the right not to be arbitrarily deprived of life' protected by s 9 of the *Charter*. However, the Statement of Compatibility concludes that the Bill does not raise any human rights issues. This is because the *Charter* protects the human rights of 'persons', or 'human beings'. According to the Statement, 'persons' are 'regarded under Victorian law as existing from the time a child is born alive and exists separate from, and independent, of their mother'.

The Statement refers to s 48 of the *Charter*, which expressly provides that the provisions of the *Charter* do not affect the law applicable to unlawful abortion. Section 48 is a savings provision, which provides:

Nothing in this Charter affects any law applicable to abortion or child destruction, whether before or after the commencement of Part 2.

The Second Reading Speech also refers to a number of human rights-type considerations as justifying the Bill, although these were not addressed in the Statement. The Second Reading Speech suggests that the uncertain legal status of abortion is jeopardising the availability of 'quality pregnancy terminations' and reducing the number of practitioners and hospitals available to perform abortions.

This is said to cause particular difficulty for persons in rural areas, and potentially 'discriminates against women financially and geographically'.

*Ben Jellis, Human Rights Law Group, Mallesons Stephen Jaques*

### **Summary Offences Amendment (Body Piercing) Bill 2007**

The Summary Offences Amendments (Body Piercing) Bill 2007 seeks to prohibit children under 18 years of age from obtaining a body piercing without consent from the child's parent or guardian, except in certain circumstances, such as body piercing performed in good faith by a medical practitioner, nurse or registered Chinese medicine practitioner.

The *Charter* rights potentially engaged by the Bill are the right to freedom of expression (s 15) and the right to protection of families and children (s 17).

By prohibiting children from body piercing without parental consent, unless carried out for medical reasons, the Bill potentially limits the ability of children to express themselves.

However, the Statement of Compatibility makes the following points:

- The common law requires consent before an invasive procedure such as body piercing occurs on an under age person.
- The Bill requires the interests, health and welfare of children to be paramount concerns.
- The reasons for considering the best interests of children to be the paramount right requiring protection include complications arising from piercing procedures reported by the Australian Medical Association, the grave consequences potentially resulting from infections associated with body piercing, and the existing regulation of the tattooing of persons under 18 years of age.
- The Bill does not contain an absolute prohibition on body piercing of children, but in fact allows piercing as long as the child's parent or guardian has given their prior written consent.

The Statement implies that, by requiring parental consent prior to body piercing, the Bill supports the right to protect children. To the extent that the right to protection of children in this context conflicts with the right to freedom of expression, and the latter right is accordingly limited, the Bill is said to achieve a proportionate and appropriate balance between the competing rights.

*Thea Schwartz, Human Rights Law Group, Mallesons Stephen Jaques*

### **Magistrates' Court and Coroners' Court Acts Amendment Bill 2007**

The Magistrates' Court and Coroners' Court Acts Amendment Bill 2007 makes various amendments to the *Magistrates' Court Act 1989*, the *Magistrates' Court (Family Violence) Act 2004* and the *Coroners Act 1985*.

The only amendment engaging *Charter* human rights is the proposed re-establishment of a scheme providing access to coroners' records in certain circumstances, to be implemented by way of amendments to the *Coroners Act*. The amendments provide that:

- prior to the completion of a coronial investigation or inquest into a death or a fire, the coroner may direct that the coroner's file be made available to particular people (at the coroner's discretion); and
- after the completion of an investigation or inquest, the coroner's record and file is to be accessible to the public unless the coroner orders otherwise.

According to the Second Reading Speech, the Bill confirms existing arrangements under which the State Coroner's Office operates, and is therefore said to 'provide clarity about the accessibility of coroner's records'.

The right to privacy (s 3(a) of the *Charter*) is engaged by the Bill. It is likely that documents forming part of the coroner's record or file will contain information of a personal nature concerning a number of individuals which is capable of identifying those people.

According to the Statement of Compatibility, this limitation on the right to privacy is necessary to ensure the 'quasi-judicial' State Coroner's Office can continue to operate on an open and transparent basis.

The Statement claims that the limitation on the right to privacy is balanced by promotion of the right to freedom of expression (s 15 of the *Charter*), which includes 'the freedom to seek, receive and impart

information and ideas'. Accordingly, the Statement states that the Bill will ensure information obtained by the coroner, which may have implications for the community, can be released to the public.

The Statement for this Bill does not appear to fully analyse the relevant issues in the course of determining that the Bill is *Charter*-compatible. In particular, no reference is made to the fact that s 15(3) of the *Charter* specifically includes a caveat on the right to freedom expression aimed at ensuring privacy and reputation is protected, such that:

Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary to respect the rights and reputation of other persons...

Further, it appears the reference to the right to freedom of expression has been included as the sole justification for the limitation on the right to privacy. However, this does not adequately explain the relationship between the limitation and its purpose. The Statement also states that no alternative, less restrictive means are available to ensure the Coroner's Office can operate on an open and transparent basis, without any evidence that this issue has been fully considered.

*Jonathan Kelp, Human Rights Law Group, Mallesons Stephen Jaques*

## Casenotes

### Strip Searching may Constitute Torture or other Cruel, Inhuman or Degrading Treatment or Punishment

*Frerot v France* [2007] ECHR Application No 70204/01 (12 June 2007)

In a judgment handed down on 12 June 2007, the European Court of Human Rights held that particular strip searches conducted on the applicant violated the prohibition on degrading treatment in art 3 of the *European Convention on Human Rights* ('ECHR'). Further, certain restrictions placed on the applicant's correspondence violated the right to privacy protected by art 8 of the ECHR.

#### Facts

The applicant was a French national and former member of 'Action Directe' (an extreme left, armed movement), who had been incarcerated since 1987 in 13 different prisons. In 1994, the applicant sought the annulment of certain provisions in a series of circulars from the Ministry of Justice that regulated strip searches and prisoners' correspondence. He claimed that the body search procedures annexed to a 1986 circular were contrary to human dignity and violated the French Code of Criminal Procedure. That claim was dismissed by the *Conseil d'Etat* in 2000.

The proceedings here concerned particular strip searches at the Fleury-Mérogis and Fresnes prisons. At Fleury-Mérogis, the applicant was forced to open his mouth during a strip search. When he refused to do so, he was placed in a disciplinary cell. Over the following months, he was made to open his mouth during a number of strip searches — imposed in various circumstances, and sometimes without warning. While imprisoned in Fresnes, he was subjected to strip searches each time he left the visiting room. These searches included a new requirement of 'leaning forward and coughing'. Refusal to do so resulted in his placement in a disciplinary cell.

#### Issue

The applicant lodged an application against France, claiming violations of his rights under arts 3 (prohibition of inhuman or degrading treatment), 8 (right to respect for correspondence), 13 (right to an effective remedy) and 6 (right to a fair trial within a reasonable time).

#### Findings

##### Strip searches

The Court held that the body search procedure described in the 1986 circular was not *generally* inhuman or degrading. Despite acknowledging that prisoners subjected to body searches might view the procedure as an attack on their dignity, the Court held that even full body searches might sometimes be necessary in a prison to assure security, defend order or prevent crime.

The Court examined the provisions of the circular, and noted the legitimate purposes that were said to justify the searches, such as ensuring that objects or toxic substances were not concealed. It held that the overall strip search procedure, including the 'lean forward and cough' requirement (to permit visual inspection of the anus 'in the specific case of a search for prohibited objects') was lawful, but only if such searches were conducted where 'absolutely necessary' and where there were 'serious reasons' to suspect a prisoner was hiding an object or substance in that part of the anatomy.

However, the particular strip searches undergone by the applicant in Fresnes were held to be degrading treatment within the meaning of art 3. Of the 13 prisons in which the applicant had been detained, Fresnes was the only prison to subject him to anal inspections. Moreover, the practice of systematically subjecting each prisoner to such a search upon return from the visiting room reflected a presumption at Fresnes that all prisoners returning from the visiting room were concealing objects.

As such, the Court understood that prisoners like the applicant might feel as if they were victims of arbitrary measures. The concomitant feelings of anxiety, inferiority and serious encroachment on personal dignity during the searches amounted to a degree of humiliation that exceeded reasonable procedures and amounted to 'degrading treatment' within the meaning of art 3.

The Court awarded the applicant €12,000 for non-pecuniary damage.

#### Correspondence

The Court found a violation of art 8 of the ECHR in relation to restrictions on the applicant's correspondence. The decision of the Governor of Fleury-Mérogis prison not to deliver a letter from the applicant to a friend at another prison, on the basis that it 'did not correspond to the definition of the notion of correspondence' was an 'interference' with the applicant's art 8 right. That interference was unlawful, especially in light of the provision in the French Code of Criminal Procedure that, generally, 'prisoners may write to any person of their choice, and receive letters from any person'.

Finally, the Court considered the definition of 'correspondence' in the circular to be incompatible with art 8. By excluding 'all letters ... whose content does not specifically and exclusively concern the addressee', an entire class of correspondence was unduly excluded.

#### Length of hearing

The Court held that six years of proceedings at the one level of jurisdiction was excessive, and did not satisfy the 'reasonable time' requirement in art 6.

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

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

The Court's decision in *Frérot* may be relevant to a Victorian court's consideration of ss 10 (protection from torture and cruel, inhuman or degrading treatment), 13 (right not to have correspondence unlawfully or arbitrarily interfered with), and 22 (humane treatment when deprived of liberty) of the *Charter*.

The Court's close scrutiny of the Ministerial circulars and conditions of the strip searches may assist Victorian courts when they are required to balance the legitimate safety and security purposes of body searches with the necessity of intrusion into the most intimate areas of the person. The Court's supplementary finding regarding the length of proceedings may also be of relevance when considering the right to a fair hearing under s 24.

*Rebecca Pereira, Human Rights Law Group, Mallesons Stephen Jaques*

#### **UK High Court Considers Relevance of Right to Private Life to Planning, Development and Land Acquisition for London Olympics**

*Sole v Secretary of State for Trade and Industry & Ors* [2007] EWHC 1527 (Admin) (30 May 2007)

This recent decision of the England and Wales High Court concerned an application for judicial review of a compulsory acquisition order ('CPO') made by the London Development Authority, and confirmed by

the Secretary of State for Trade and Industry, for the purpose of development for the London Olympics and a further development, known as The Legacy.

### **Background to the Application**

Planning permissions were granted in October 2004 for the proposed Olympic and Legacy developments which included the condition that the development would not be commenced until a residential relocation strategy had been approved by local planning authorities. However, while a draft relocation strategy was submitted to the planning authorities, as a result of the revision of the Olympic and Legacy Master Plans, the London Development Agency decided that it would submit a fresh application for planning permission and so the draft relocation strategy was not approved.

Subsequently, a CPO inquiry, to which the claimant was an objector, was undertaken by an Investigator of the Secretary of State. Residents raised a wide range of issues, including in relation to relocation, and claimed that the CPO should not be confirmed due to the London Development Authority's failure to provide an effective relocation strategy. The Inspector's report rejected the residents' objections and recommended that the CPO be confirmed. The Secretary of State accepted the Inspector's conclusions and recommendation, adopting the reasons given by the Inspector.

### **The Claimant's Case**

The claim was brought under s 23 of the *Acquisition of Land Act 1981* (UK) which provides that any person aggrieved by a CPO may apply to the High Court to question its validity on the ground that authorisation of the CPO was not empowered by the Act or that a relevant requirement was not complied with in relation to the order. The Claimant sought to quash the CPO insofar as it related to the Clays Lane Estate, where the Claimant lived, so that the Secretary of State might consider using his power under s 13C of the Act to defer confirmation of the CPO until an appropriate relocation strategy had been approved.

The Claimant raised two main grounds of challenge:

1. that the Secretary of State, through his Inspector, misdirected himself in relation to the 2004 planning permission; and
2. that he erred in law in not reaching a proportionate decision in relation to the interference with the Claimant's right to private life, family, home and correspondence provided by art 8(1) of the *European Convention on Human Rights* as incorporated by the *Human Rights Act 1998*.

### **Decision**

The Court found that the first ground of challenge was unsubstantiated, as the Inspector had understood and given proper consideration to the 2004 planning permission.

In respect of the second ground, the Court gave substantial consideration to whether the Inspector's and the Secretary of State's decision making processes were justified and proportionate, in light of the certain interference with the claimant's art 8(1) rights.

Article 8(2) of the ECHR provides that an interference with the right to private life by a public authority is justified and proportionate if that interference is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.

The Court summarised the Secretary of State's conclusions (as reached by the Inspector) that, in light of the totality of the evidence, the clear case for regeneration, the widespread public benefits and the economic benefits to the country that would flow, together with the absence of any alternative means of achieving those benefits, the London Development Authority's proposals were a proportionate interference with the art 8 rights of the affected residents.

The Court itself then concluded that while the interference with the claimant's art 8 rights was substantial, the importance of the Olympics and Legacy project, its economic and other benefits, and the urgency of its timing, made the case for compulsory acquisition overwhelming and the interference with the claimant's art 8 rights justified and proportionate.

### Implications for the Victorian *Charter*

In a Victorian context, this decision has relevance to environment and planning law, and also to the scope and application of s 7 of the *Charter* concerning permissible limitations on human rights, and s 13 concerning the right to privacy, family and the home.

The decision is available at <http://www.bailii.org/ew/cases/EWHC/Admin/2007/1527.html>.

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### European Court Considers Access to a Court and Legal Aid as Elements of the Right to a Fair Hearing

*Ciorap v Moldova* [2007] ECHR Application No 12066/02 (19 June 2007)

*Bakan v Turkey* [2007] ECHR Application No 50939/99 (12 June 2007)

Two recent decisions of the European Court of Human Rights regarding the scope and content of art 6 of the *European Convention on Human Rights* have confirmed that the right to a fair hearing subsumes a right of access to the courts.

The European Court has consistently held that, pursuant to the requirement that rights be interpreted and applied in a manner which renders them 'practical and effective, not theoretical and illusory' (see, eg, *Goodwin v United Kingdom* (2002) 35 EHRR 447, [73]-[74]; *Airey v Ireland* (1979) 2 EHRR 305, 314), the right to a fair hearing may subsume a right of access to the courts and to legal aid and representation (see, eg, *Golder v United Kingdom* (1975) 1 EHRR 524).

In *Ciorap*, the European Court found a violation of art 6 in circumstances where an applicant who alleged that he had been tortured in custody was denied access to a domestic court. Mr Ciorap had sought to bring proceedings before a domestic court regarding his treatment in detention but the Supreme Court refused to examine his complaint because of his failure to pay the prescribed court fee. The European Court considered that, in view of the serious nature of his claim (namely, that he was force fed), he should have been exempted from paying the fee, regardless of his ability to pay.

In *Bakan*, the applicant, Mrs Bakan, sought to bring proceedings in the Turkish administrative court regarding her relative's death. Her relative, Mehmet Şerif Bakan, has been killed by a stray bullet fired by security forces in 1995. The administrative court refused her application for legal aid on the ground that the action was ill-founded. It then asked Mrs Bakan to pay within 30 days court fees amounting to EUR 170. In 1998, the court ruled Mrs Bakan's application not duly lodged on account of her failure to pay the court fees.

In finding that this amounted to a violation of art 6, the European Court observed that the amount of the court fees represented a considerable sum for the applicant, particularly as she no longer had any source of income following her relative's death. The Court further considered that the refusal of the request for legal aid had totally deprived the applicant of the possibility of taking her case to court. In light of both of these considerations, the Court found that the State had not discharged its obligation to regulate the right of access to a court in a manner compatible with the requirements of the right to a fair hearing.

### Implications for the Victorian *Charter*

These decisions may be relevant to the interpretation and application of s 24 of the *Charter*, which provides that 'a person charged with a criminal offence or a party to a civil proceeding has the right...to a fair hearing'.

On a narrow view, the term 'party to a civil proceeding' used in the *Charter* is more limited in its application than a term such as the 'determination of rights and obligations in a suit at law' used in art 6 of the *European Convention* and art 14 of the *ICCPR*, and will not subsume a right of access to the courts; the right to a fair hearing is only a right belonging to a person who is already before the court.

The better view, however, is that 'party to a civil proceeding' under s 24 of the *Charter* should be interpreted to include a *potential* party to a proceeding in circumstances where the denial of access to a court or legal aid would amount to the denial of a fair hearing itself. This broader interpretation is consistent with the requirement pursuant to s 32(1) of the *Charter* that all statutory provisions must be interpreted compatibly with human rights (this interpretative principle relevantly applying to s 24 of the

Charter itself). It is also consistent with the fact that the right to a fair hearing under international law is considered by the Human Rights Committee to be fundamental and non-derogable (see, eg, HRC, *General Comment 29: States of Emergency (Article 4)*, UN Doc CCPR/C/21/Rev.1/Add.11 (2001) [11]).

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

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### **Attempted Suicide in Custody: UK Court of Appeal Discusses Positive, Negative and Procedural Obligations arising from the Right to Life**

*JL, R (on the application of) v Secretary of State for the Home Department* [2007] EWCA Civ 767 (24 July 2007)

This case concerned the investigative duties imposed upon authorities by art 2 of the *European Convention on Human Rights* (the right to life) following the injury or death of an individual whilst in custody. In particular, the case turned on whether an obligation to carry out an 'enhanced investigation' was subject to a threshold test of 'arguability'. The content of an enhanced investigation has certain features: (i) the State itself must commence the investigation; (ii) the investigation or inquiry must be public and open to public scrutiny; (iii) the investigator must be independent of those persons involved; and (iv) the family must have proper opportunity to participate (*R (on the application of Amin) v Secretary of State for the Home Department* [2003] UKHL 51). In the present case, although a primary investigation had taken place, it was argued that this was insufficient to meet the requirements of art 2, namely to conduct an enhanced investigation.

The Secretary of State for the Home Department submitted that there must be a threshold trigger as to arguability of the possibility that the state may be in breach of its positive obligation to protect life before the obligation to investigate arises. The appellant argued that the obligation derived from the accountability of a state for a person injured or killed in its custody, and that it was simply not possible or logical for someone to take a proper decision on arguability without the proper investigation having taken place.

#### **Facts**

JL, a young man, attempted suicide while in custody in Feltham Young Offenders Institution. Although unsuccessful, he was left with permanent and serious brain-damage. In the weeks leading up to the attempted suicide, he was noted to be depressed, anxious and at high risk of suicide. A 'self harm at risk' file was opened with regard to him, but was subsequently closed following a review. However, the chaplaincy, who were quite deeply involved with JL, and who had expressed concerns about his risk of self-harm, were not consulted in making this decision.

Following the event, the London area manager of the prison service directed a retired governor within the prison service to investigate what had happened. He submitted his report to the area manager a few months after the attempted suicide, but this investigation was not revealed to JL or his relatives until disclosed by the Treasury Solicitor on 26 January 2005.

#### **Findings**

Walker LJ delivered the judgment of the Court. At the outset he alluded to the difficulty of deciding the question of threshold in isolation from the question of the content of the investigation. However, he rejected as 'unreal' the suggestion that, before the State was required to conduct an enhanced investigation into someone who was injured or died in custody, that there must be some *prima facie* or arguable case raised. He found that the death or serious injury of a person in custody gives rise to an obligation to conduct an investigation although the content of that investigation would depend on the circumstances and different investigative triggers may operate at different stages of the inquiries which follow the event. Walker LJ held that the accountability of the State extended to explaining how the death in custody occurred, not just to simply being accountable for the breach, and that following from this 'it makes no sense to allow the State to be the judge as to whether an investigation should commence on the basis of whether there is an arguable case against it before an investigation has been carried out as to what the facts are.'

Walker LJ found that the primary investigation must be conducted by a person independent of those implicated in the facts. The circumstances of the case would dictate whether a further inquiry in the nature of a public hearing in which the next of kin of the injured or deceased person could play a part was necessary. Where a death has occurred, this decision may be made by the coroner. Where serious injury has occurred, this decision will depend on the facts as discovered by the independent investigator, but it is at this stage that 'something' more than death or serious injury whilst in custody will dictate whether an enhanced inquiry is required to be held. However, Walker LJ stressed that the word 'something' was 'best not expressed in the words "an arguable case."' He described 'something' as being met when 'the State or its agents potentially bear responsibility,' or where, 'in the particular circumstances ascertained by the independent investigator "it is not plain that the State or its agents can bear no responsibility."' Even where the investigator concludes that the State had no responsibility, it 'could only be in such a plain case where there was no potential for liability that investigation with the D-type requirements [i.e. an enhanced investigation] should not be necessary. It is the obligation of the State to account which it seems to me places the trigger or bar as low as I would place it.'

In this case, the Court found that the investigation conducted did not have the sufficient degree of independence, and furthermore, that on the facts already discovered, an enhanced investigation was necessary to meet the requirements of art 2. The decision to remove JL from the 'at risk of self harm' list, especially in light of the concerns of the chaplaincy, and the background statistics which indicated a high rate of suicide during incarceration, required the full facts to be considered, culpability to be examined, and the practice of not consulting with the chaplaincy to be reviewed.

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

The decision of the court in this case may assist Victorian courts in interpreting the content of s 9 of the *Charter* (the right to life), being the equivalent provision to art 2 of the ECHR, when dealing with the investigation of the suicide and self-harm of individuals whilst incarcerated. It may also help the Courts in deciding whether any investigation into a breach of ss 10 (protection from torture and cruel treatment or punishment) or 22 (right to humane treatment when deprived of liberty) by the relevant authority is sufficient to meet its obligations under the *Charter*.

The decision is available at <http://www.bailii.org/ew/cases/EWCA/Civ/2007/767.html>.

*Nicholas Chandler, Human Rights Law Group, Mallesons Stephen Jaques*

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

### ***Fostering a Human Rights Culture – Centre Makes Major Submission to Inquiry into Proposed Western Australian Human Rights Act***

The Centre has recently made a major submission to the Consultation Committee for a Proposed Western Australian Human Rights Act. The submission was written and researched with the substantial assistance of Andrew Gun, Fiona Harma, Emily Howie, Elisabeth Sobon, Romy Weisfelt and Gerard Woods of Allens Arthur Robinson.

The Centre's submission, entitled *Fostering a Human Rights Culture*, strongly supports the introduction of a Western Australian Human Rights Act. Australia is the only Western democracy without a national human rights instrument. In the absence of a unified and dedicated Commonwealth human rights law, State and Territory Governments have begun to introduce laws for the protection of human rights. Further, the Federal Opposition has indicated that, if it wins office in the 2007 election, it intends to begin consultation on a Commonwealth human rights instrument.

Introducing the Human Rights Act will enhance Western Australia's democracy. It will provide a yardstick by which to measure the performance of all levels of government, the courts and the community. It will also assist disadvantaged people, who are more likely to deal directly with the public service. New laws, policies and public programs will be measured against the Human Rights Act to ensure that human rights are safeguarded. Government departments and agencies will have to consider the impact that their day-to-day operations are likely to have on human rights.

The experience in comparative jurisdictions such as the United Kingdom, the Australian Capital Territory and, most recently, Victoria is that legislative human rights instruments have a significant impact on

public sector culture, improving the community's experience of government. Some of the benefits ascribed to Charters include:

- a 'significant, but beneficial, impact on the development of policy';
- enhanced scrutiny, transparency and accountability in government;
- better public service outcomes and increased levels of 'consumer' satisfaction as a result of more participatory and empowering policy development processes and more individualised, flexible and responsive public services;
- 'new thinking' as the core human rights principles of dignity, equality, respect, fairness and autonomy can help decision-makers 'see seemingly intractable problems in a new light' (see generally, Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006); British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007); Audit Commission (UK), *Human Rights: Improving Public Service Delivery* (October 2003)).

If enacted, the Human Rights Act will constitute an historic leap forward for the protection of human rights in Western Australia. It will demonstrate Western Australia's commitment to improving social justice and fairness, particularly for the disadvantaged, and display a commitment to Australia's international human rights obligations. The introduction and operation of the Human Rights Act will also confer on Western Australia a body of knowledge and experience that will place it in a position of influence in the development of any Commonwealth Charter.

Australia's ratification of the *ICCPR* and the *ICESCR* has created international law obligations that require all arms of the federal system – including Western Australia's government (legislature, executive and judiciary) – to respect, protect and fulfil human rights.

The Human Rights Act will foster a society that values and respects human rights and social justice – a society that will be inherited by future generations of Western Australians.

The Centre's submission is available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under Policy Work>HRLRC Submissions>Fostering a Human Rights Culture: Submission to WA Human Rights Act Inquiry.

### Indigenous Human Rights – Submission to Senate Inquiry into Northern Territory 'Emergency Response' Bills

On 10 August 2007, the Centre made a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Northern Territory National Emergency Response Bill 2007 and Related Bills.

The submission focuses on the incompatibility of the legislation with Australia's international human rights obligations, including the rights to non-discrimination, adequate housing, health, social security, self-determination and land rights.

The Centre is particularly concerned that the Australian Government has entirely neglected to consult with Indigenous representatives and affected communities about the proposed legislation. This approach raises serious concerns in relation to the fundamental right of Indigenous peoples to self-determination and to participate meaningfully in decisions which affect them.

As the UN Office of the High Commissioner for Human Rights has written in their *Guidelines on a Human Rights Approach to Poverty Reduction Strategies*:

Lack of political rights is both a cause and a consequence of poverty. Socially and politically excluded people are more likely to become poor, and the poor are more vulnerable to social exclusion and political marginalization...Active participation in political decision-making processes plays a role in expanding political freedoms and empowering people, which in turn contributes towards combating social exclusion and political marginalization.

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 Australian 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 Centre's submission is available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under Policy Work>HRLRC Submissions>Indigenous Human Rights: Submission to Senate Inquiry into NT 'Emergency Response' Bills.

## HRLRC Casework

### Obtaining a Security Assessment from ASIO

The Centre is acting for an Australian citizen in relation to a potential claim against ASIO. The individual has been offered employment with departments of the Federal Government. Both offers of employment are conditional upon receiving a security clearance from ASIO. The period of time for a security assessment to be completed is usually 4 or 5 months, however a security assessment has not been obtained from ASIO for 2 years. The individual has not previously been the subject of any adverse assessment by ASIO.

Potential proceedings against ASIO may involve pursuing a writ in the nature of mandamus in the Federal Court to compel ASIO to provide a security assessment. The Centre is receiving pro bono assistance from Julian Burnside QC and Rowena Orr of Counsel, and from Maurice Blackburn Cashman who are instructing in the matter.

### Provision of Adequate Medical Services under the Charter

The Centre is assisting a middle-aged woman to receive affordable therapy for severe contractures that she has developed in her hand. The nursing home resident has an acquired brain injury and, in the event that appropriate medical services are not provided, it is likely that radical surgery will be required, which may consist of severing the tendons in her fingers or even amputation of the hand. The Centre is exploring what options may be available to the individual in light of the Victorian *Charter of Human Rights and Responsibilities*. Specifically, the *Charter* rights that may be engaged include ss 10 (protection from cruel, inhuman or degrading treatment), 13 (right to privacy) and 21 (right to security of person).

Similarly, the Centre is also assisting an inpatient at the Thomas Embling Hospital who is seeking access to medical treatment in relation to a liver condition. The Hospital has failed to arrange for appropriate medical services to be provided, and the Centre is seeking to compel it to provide the treatment. In addition to the rights referred to above, this matter also raises issues in relation to ss 9 (right to life) and 22 (right to humane treatment in detention) of the *Charter*. The Centre is being assisted on a pro bono basis by Clayton Utz in this matter.

## Seminars and Events

### 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).

### Human Rights Arts and Film Festival 2007: Rights, Camera, Action

Submissions are now open for the inaugural Human Rights Arts and Film Festival. The Festival is looking for evocative and memorable features, documentaries and shorts which explore this year's human rights themes of Freedom of Expression, Right to Livelihood, Right to Life, Liberty and Security

and Human Rights in Australia. For submission guidelines, visit [www.hraff.org.au](http://www.hraff.org.au) or [www.myspace.com/humanrightsfestival](http://www.myspace.com/humanrightsfestival). Send all enquiries to [films@hraff.org.au](mailto:films@hraff.org.au).

## Education, Training and Resources

### What's New on the HRLRC Website?

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

- Lord Robert Walker, 'What Difference can a Human Rights Charter Make?', Paper to the Human Rights Law Resource Centre, Melbourne, 15 August 2007
- Carlo Carli MP, 'The Victorian *Charter of Rights and Responsibilities* and Scrutiny in Victoria', Paper to the Australia-New Zealand Scrutiny of Parliament Conference, August 2007
- Pamela Tate SC, 'The *Charter of Human Rights and Responsibilities*: A Practical Introduction', Paper to the Victorian Bar, 7 March 2007
- Brian Walters SC and Simon McGregor, 'The *Charter of Human Rights and Responsibilities*: A Practitioners' Guide', Paper to the Victorian Bar, 10 August 2007

All of the articles are available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under Victorian Charter of Human Rights and Responsibilities>Articles, Materials and Commentary on the Charter>Articles and Commentary.

### **UN Covenant on Civil and Political Rights: CCPR Commentary by Manfred Nowak**

With the recent enactment of the ACT *Human Rights Act 2004* and the Victorian *Charter of Human Rights and Responsibilities 2006*, together with the proposed development of Human Rights Acts in Tasmania and Western Australia, it is both inevitable and important that domestic law be informed by international and comparative human rights jurisprudence.

The jurisprudence of the United Nations Human Rights Committee is likely to be particularly influential. Each of the existing and proposed domestic human rights acts enshrines civil and political rights that are primarily sourced from the *International Covenant on Civil and Political Rights*. It is an accepted principle of domestic law that it is legitimate to have regard to the opinions and decisions of bodies established to receive reports or determine claims under the treaty over which it has jurisdiction (see, eg, *Commonwealth v Bradley* (1999) 95 FCR 218, 237 [39] per Black CJ; *Commonwealth v Hamilton* (2000) 108 FCR 378, 387 [36], 388 [39]). It is also well established that it is desirable, as far as possible, that expressions used in international agreements be construed in a uniform and consistent manner by both municipal courts and international courts and panels (see, eg, *Rocklea Spinning Mills Pty Ltd v Anti Dumping Authority* (1995) 56 FCR 406, 421E; *Povey v Qantas Airways Ltd* (2005) 216 ALR 427, 433 [25] per Gleeson CJ, Gummow, Hayne and Heydon JJ). These principles of interpretation are codified in the Victorian *Charter* and the ACT *HRA*, which, at s 32(1) and s 31(1) respectively, direct practitioners and courts to consider 'International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right' in the interpretation of human rights and statutory provisions.

The Human Rights Committee is, of course, the human rights treaty body established under the *ICCPR* to monitor its implementation, interpret and develop its normative content, and receive and determine individual complaints under its *First Optional Protocol*. The judicial authority of the Committee has been recognised by both domestic courts (see, eg, *Tavita v Minister of Immigration* [1994] 2 NZLR 257; *Cornwell v The Queen* [2007] HCA 12, [175]-[176] per Kirby J) and parliaments (see, eg, Explanatory Memorandum to the Victorian *Charter*).

There is no doubt that the jurisprudence of the Committee is complex and, at times, difficult to access. It is developed incrementally through Concluding Observations on states' reports (of which there are over 350), General Comments on treaty provisions (of which there are now 32) and, of course, the Views of the Committee on individual communications (of which there have been more than 1500).

For these reasons, the 2<sup>nd</sup> revised edition of Manfred Nowak's *CCPR Commentary*, published by N P Engel, will be absolutely invaluable to domestic human rights practitioners. Manfred Nowak is the

United Nations Special Rapporteur on Torture, Director of the Ludwig Boltzman Institute of Human Rights at the University of Vienna and a member of the International Commission of Jurists.

At 1277 pages, *CCPR Commentary* is a substantial tome and the authoritative text on the *ICCPR* and the work of the Committee.

Parts I, II and III of the text deal with the substantive human rights provisions of the *ICCPR*. Each provision is discussed and analysed in considerable detail by reference not only to the jurisprudence of the Committee itself, but also the travaux préparatoires and the jurisprudence of persuasive international, regional and comparative human rights bodies, such as the European Court of Human Rights and the Inter-American Human Rights Court and Commission. Part IV of the text discusses international enforcement provisions, with particular reference to the practice and procedure of the Committee, while Parts V and VI discuss provisions relevant to the interpretation, application and mechanics of the *ICCPR*.

In addition to considering the *ICCPR* article-by-article, *CCPR Commentary* also examines the *First Optional Protocol* in detail. With the Committee having rendered decisions on over 1500 cases under this *Protocol*, of which more than half have been deemed admissible and decided on the merits, this is a very useful discussion.

*CCPR Commentary* also includes a number of very useful appendices and tables. Appendices include the full texts of the *ICCPR*, the *First Optional Protocol*, the *Second Optional Protocol*, the Committee's *Rules of Procedure* and General Comments, while the tables include a subject-matter index and a case index (with the most important cases indicated in italics).

Internationally, it is well recognised that the work of the Human Rights Committee is increasingly rigorous, professional, critical, dynamic and therefore persuasive. Particularly during the early years of the Victorian *Charter* and the ACT *HRA*, a time when 'the development of an Australian jurisprudence drawing on international human rights law is in its early stages' (*Royal Women's Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85, [71] per Maxwell P), it is critical that domestic courts and practitioners have close regard to the *ICCPR* and the Committee's jurisprudence. If this is to be the case, *CCPR Commentary* by Manfred Nowak is an absolute 'must have'.

For further information or to order *CCPR Commentary*, contact [N.P.Engel@EuGRZ.info](mailto:N.P.Engel@EuGRZ.info).

*Philip Lynch is Director of the Human Rights Law Resource Centre*

## If I Were Attorney-General...

### The Role of the Attorney General is to Act as Guardian of the Public Interest and the Rule of Law

In all of those countries to which Australians most usually see ourselves as related politically and socially – particularly the UK, New Zealand and Canada – there has been a tension in the role of Attorney-General. The tension is between the office-holder's position as a senior member of the executive and a senior member of the legislature; between the role as the first law officer of the Commonwealth and as a senior politician in the governing party.

In the USA, Senator Patrick Leahy, Chair of the Senate Committee on the Judiciary, in considering the appointment in 2001 of a new Attorney-General, spoke of the role of the Attorney as 'not the President's counsel... The attorney general is there for every one of us.' However, in that country, the Attorney-General is not an elected member of the executive, rather he or she is appointed through a public hearing process.

By contrast, in the UK, the role of the Attorney-General has been said by the House of Commons Constitutional Affairs Committee in 2007 to 'combine... legal administration and the provision of independent legal advice with the political duties of being a member of the Government'. Other roles by the Committee in its report of the *Constitutional Role of the Attorney General* include 'representing the public interest in civil proceedings' and a 'guardian of the Rule of Law'.

In New Zealand, the Crown Law Office in its 2002 Briefing Paper to the Attorney-General referred to this position as 'a unique role that combines, on the one hand, the obligation to act on some matters independently, free of political considerations, with, on the other hand, the political partisanship that is otherwise properly associated with other Ministerial office.'

In Canada, the Federal Attorney-General has a role in Cabinet that has been referred to as the 'guardian of the public interest'.

In balancing the potential for conflict inherent in the role of Attorney-General, I would seek to ensure, first, that there were sufficient checks and balances in place to safeguard the separation of power between the three branches of government – the legislature, the executive and the judiciary – and, second, that there were sufficient limits on the power of the executive to interfere with the rights and interests of the people.

As Attorney-General, whether at a state or federal level, I would strongly advocate to my Cabinet colleagues the importance of human rights as a core values framework for government and democratic processes. I would also seek their support to conduct widespread community consultation about the meaning and relevance of human rights, the best way to promote and protect rights, and mechanisms to properly balance the power of the three branches of government with the will of the people.

We have watched the development in Australia of mechanisms that use human rights as just such a framework with the enactment of human rights laws in the ACT and Victoria. These laws establish mechanisms for review of legislation and policy against a human rights framework. The mechanisms involve both the executive in previewing legislation and reporting to the legislature on the compliance of that proposed legislation with the human rights framework, and the judiciary in determining any breach of human rights and observing any inconsistency of legislation with the framework while leaving the remedying of that inconsistency to the legislature. In both jurisdictions, the models empower each of the three branches of government to work in different ways to ensure human rights protection and promotion.

In advocating for such standards and processes and for engagement with the community on the development of a human rights framework, I would be fulfilling the vital role of the Attorney as 'guardian of the rule of law', 'guardian of the public interest' and 'counsel' to the people. Acknowledging that the introduction of a human rights framework has the potential to limit the power of the executive in particular, as Attorney, I would seek to remind my colleagues that those who hold positions within the executive – whether elected or as appointed public servants – do so as servants and representatives of the people.

In order to reinforce the separation of powers between the judiciary and the executive, I would seek to understand alternative judicial appointment mechanisms operating in other jurisdictions and would be keen to develop a mechanism that ensured greater separation of the appointment process from the political sphere.

And finally, I would seek to provide mechanisms to better empower the community to use the legal system in public interest issues through a review of current standing and costs rules in respect of public interest proceedings. I would aim to introduce mechanisms that enabled enhanced access to justice through more effective representative processes.

*Robin Banks is Chief Executive Officer of the Public Interest Advocacy Centre and Director of the Public Interest Law Clearing House (NSW)*