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Resource Centre Ltd aims to:

1. Promote and protect human rights in Australia through litigation, advocacy, research, education and training.
2. Build capacity in the legal and community sectors to use human rights in casework, advocacy and service delivery.
3. Empower people that are disadvantaged or living in poverty by operating within a human rights framework.

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Opinion

Time to Get Real with the UN Declaration on the Rights of Indigenous Peoples

Almost a year ago to the day, on 13 September 2007, the Declaration on the Rights of Indigenous Peoples was adopted by the United Nations General Assembly. The Declaration enshrines a body of core minimum principles and common sense values, including the rights of Indigenous peoples to non-discrimination, freedom from genocide, forced assimilation and destruction of culture, intended to ensure Indigenous peoples can live with dignity and participate in and contribute to the broader community. 143 UN member nations voted for it. 4 voted against it – Canada, New Zealand, the United States and Australia.

Australia's opposition was vehement. Regrettably, this and subsequent commentary have had more to do with perpetuating myths than debunking them, however honestly those views are held.

According to Glenn Milne (*The Australian*, 10 March 2008) Australia, Canada, New Zealand and the United States opposed the Declaration because, unlike the countries that embraced it, they have substantial Indigenous populations. But so do the vast majority of the 143 countries that supported it – including most of the Latin American countries staunchly in favour. Unlike Canada, New Zealand the United States, Australia has no pre-existing human rights based instruments with its Indigenous peoples. And, amongst those countries as well, Australia has by far the highest rates of Indigenous incarceration and by far the lowest rates of Indigenous life expectancies. Whether that stems from Australia's lack of an Indigenous human rights instrument is of course a matter of debate.

According to *The Australian* on 23 August, in a speech to the Samuel Griffith Society that weekend, the Shadow Attorney General Senator George Brandis reportedly holds the view the Declaration includes provisions 'that go well beyond the rights recognised in Australian domestic law'. Claiming the Declaration requires Indigenous consent before approval of any projects affecting their land, without providing recognition for the rights of third parties, Senator Brandis also contends the Declaration 'not only seeks to set the interests of Indigenous people at a higher level than that enjoyed by the rest of the population, but beyond the extended regime in the *Native Title Act*'.

Senator Brandis is passionate about this issue and has expressed his opinions articulately. But if that is indeed what Senator Brandis said, he is categorically wrong. Article 46(1) of the Declaration could not be any clearer. Nothing in the Declaration

may be 'construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states'.

That means domestic laws prevail over the Declaration. And they always will.

Beyond this, there has been much misinformation, bordering on scaremongering, about the Declaration – from claims it will enable Aboriginal people to secede from the rest of Australia, to warnings it will give Aboriginal people special rights that are taken away from the rest of the population.

It is disappointing that the hysteria always seems to occur when important Indigenous matters of State are concerned.

Has anyone's backyard been attacked in the years since the belated recognition of native title in Australia in 1992? Did the 'bucket loads of extinguishment' of native title help the cause of reconciliation or 'close the gap' in the decade following the 10 point plan in 1998? And what has become of the flood of compensation the country was warned to brace for immediately in the wake of this years' apology?

As so much good will and as so much momentum is invariably lost debating the wrong issues, its time we all did our best to separate some of the important facts from fiction.

Fiction – By recognising a right to self determination the Declaration will create a separate Indigenous state within Australia and threaten Australia's territorial integrity.

Fact – A right of self determination will not lead to a separate Indigenous state. It simply allows Indigenous peoples to freely determine and pursue their political, economic, social and cultural development, subject to existing national laws. Put another way, it allows for Indigenous peoples to freely develop their own agendas, from the 'ground up', rather than having them forced upon them from the 'top down'.

Fiction – The Declaration creates an Indigenous right to veto over development activities.

Fact – The Declaration does not create a right of veto. The extent to which Indigenous peoples can have a say on matters impacting on their identity and their country will be determined by existing domestic laws.

Fiction – The Declaration creates new rights for Australian Indigenous peoples through the back-door, including new rights to compensation, far beyond what currently exists under Australian law.

Fact – There are no new rights contained in the Declaration. Take again the right of self-determination – it is already contained in human rights instruments to which Australia is a party, such as the *ICCPR* and the *ICESCR* and they certainly have not resulted in any secession. The principles enshrined in the Declaration of justice, democracy, respect for human rights, non-discrimination and good faith and the rights of redress and compensation for lands taken without the free, prior and informed consent of the peoples concerned, have always existed, ever since the adoption of the *Universal Declaration of Human Rights*. The Declaration serves a very useful purpose of codifying and articulating them in the context of Indigenous peoples.

As one of only 4 states to vote against the Declaration, Australia's opposition to it in 2007 continues to threaten the country's standing, legitimacy and authority on human rights issues, both internationally and regionally, precisely at the time when Australia is seeking to establish itself as an effective international citizen, a middle power leader, and an authority on human rights, democracy and the rule of law in the region.

Australia's long held opposition to the Declaration now looks set to change, with the Commonwealth expected shortly to formalise its support. When it's taken, the step of formally, albeit belatedly, supporting the Declaration will be very powerful symbolism for Australia. And it will of course strengthen, not diminish, our reputation within the international community as a country at the vanguard of promoting and protecting the basic human rights of all, particularly the most disenfranchised.

There are some wonderful reconciling opportunities presented by the Declaration, with its emphasis on Indigenous and non-Indigenous partnerships, consultation, cooperation and mutual respect. Now is the time to have a healthy discussion about the Declaration, to allow those opportunities to shine through.

A properly resourced, widespread education campaign about the Declaration is what is needed right now more than ever, to help all Australians, Indigenous and non-Indigenous, reach an informed understanding of its substance. Only then will the facts be able to speak for themselves.

Peter Seidel is a Partner in Public Interest Law with Arnold Bloch Leibler

News

Rudd Government Proposes Ratification of Optional Protocol to CEDAW

The Rudd Government has tabled a National Interest Analysis, which proposes that Australia accede to the Optional Protocol to the *Convention on the Elimination of All Forms of Discrimination Against Women*.

The Optional Protocol establishes two procedures: a communication procedure and an inquiry procedure. The communication procedure allows individuals or groups (or people acting on their behalf) to submit a communication to the Committee on the Elimination of Discrimination against Women alleging violations of the substantive rights protected under CEDAW. The inquiry procedure allows the Committee to initiate inquiries into reliable information indicating grave or systematic violations of CEDAW by a State.

Accession to the Optional Protocol would strengthen the protection of women's rights in Australia by providing a mechanism under which individual and more widespread violations of CEDAW could be examined, assessed and remedied. It would also signal Australia's re-engagement with the United Nations and commitment to international human rights standards.

The Centre's submission to the National Interest Analysis is available at www.hrlrc.org.au under Policy Work>Domestic Submissions>Protecting Women's Rights.

The proposal to accede to the Optional Protocol will now be considered by Parliament's Joint Standing Committee on Treaties, which will report by 10 November 2008.

Protecting Human Rights in the Asia-Pacific

The Human Rights Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade has announced an inquiry to examine international and regional human rights mechanisms and models for the Asia-Pacific in its new inquiry.

The Committee has called for submissions in accordance with the terms of reference. In particular, the focus will be on:

- the United Nations human rights system;
- regional mechanisms;
- roles for parliament; and
- the distinctive characteristics of the Asia-Pacific and its human rights landscape.

Submissions will be accepted until 20 November 2008. For further information, see http://www.aph.gov.au/house/committee/jfadt/asia_pacific_hr/index.htm.

Centre Appoints Senior Human Rights Lawyer

The Centre is delighted to announce the appointment of Emily Howie as a Senior Human Rights Lawyer, commencing January 2009.

Emily has worked as a Senior Associate with Allens Arthur Robinson, a legal adviser to the House of Representatives Legal and Constitutional Affairs Committee, and in the Trial Chambers of the International Criminal Tribunal for the Former Yugoslavia. She has substantial human rights litigation experience, including as a lead lawyer in *Roach v Cth* [2007] HCA 43, which established constitutional protection of the right to vote. She has also co-authored major submissions to the Charter of Rights inquiries in both Tasmania and Western Australia.

Emily's position will be funded by a generous Large Grant from the Victorian Legal Services Board.

Victorian Charter of Rights Developments

New Supreme Court Practice Note – Notification of Charter Matters

Section 35 of the *Charter* requires a party to a proceeding to notify the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission if a question of law or statutory

interpretation arises under the *Charter*. The *Charter* prescribes the form of notice to be given, but not the manner in which it must be given.

The Supreme Court has recently issued Practice Note No 3 of 2008 setting out the Court's expectations of practitioners in this regard. Failure to comply with the Practice Note requirements will be taken into account in relation to the question of costs, where relevant. According to the Practice Note, the Supreme Court's expectations are as follows.

- Practitioners should assess the need for a s 35 notice upon receiving instructions from their client or at the commencement of a proceeding
- Practitioners are expected to be in a position to inform the Court at the first directions, s 5 hearing or mention:
 - whether notice is required;
 - if notice is required, whether notice has been given or when it is intended that notice be given; and
 - if notice has been given, whether any response has been received from the Attorney-General.
- Where a *Charter* issue arises later in the proceedings, parties are expected to:
 - notify the Attorney-General and the Commission no later than 7 days after the issue comes to their attention;
 - immediately inform the Court of the notification by contacting the relevant judge's associate or Master; and
 - where necessary, apply for directions, particularly if an adjournment of dates fixed for hearing or trial is required.
- Where a *Charter* issue arises in relation to an urgent application, a s 35 notice should be issued at the earliest opportunity.
- Where the State is a party to proceedings, it is prudent to notify the Attorney-General of any issues arising under the *Charter*, even though this is not technically required due to s 35(2)(a) of the *Charter*.
- Practitioners are expected to file and serve the s 35 notice on all other parties to the proceeding on the same day that it is served on the Attorney-General and the Commission.
- Where *Charter* issues arise in appeal proceedings, notice must be given regardless of whether or not a notice has previously been given in relation to the proceedings.

According to the Practice Note, the Attorney-General and the Commission have indicated that it ordinarily takes 14 days to respond to s 35 notices. To avoid delays, practitioners are encouraged to take this time-frame into account.

The Practice Note raises significant questions about the impact of s 35 on the effective use of the *Charter*. The nature of court proceedings is such that arguments are often crystallized only after proceedings commence and evidence is tested. Legitimate human rights arguments should not be frustrated simply because those arguments were not evident early in proceedings. As Jeremy Gans indicates in his Charterblog, it is not clear why a special rule is required to ensure that parties are informed of each others' *Charter* arguments when there are already civil procedure rules in place to ensure that pleadings set out the points that parties plan to argue.

Gans also notes that s 35 of the *Charter* does not prescribe any consequences for parties who fail to comply with the provision. When the Supreme Court issues practice directions, it is acting in an administrative capacity and is considered a public authority for the purpose of the *Charter*. As a result, Supreme Court practice directions should be compatible with human rights and give proper consideration to relevant human rights. In light of this obligation, it is concerning that the notification requirements and non-compliance implications stipulated in Practice Note No 3 are much more onerous than those provided in s 35, and may significantly discourage practitioners from making plausible human rights arguments, particularly in urgent proceedings.

The practice note fails to address the potential for s 35 to delay urgent proceedings or prevent *Charter* arguments from being raised in urgent proceedings, due to the delay that compliance with section 35

would entail. This concern was raised in *R v Benbrika & Ors (Ruling No 20)* [2008] VSC 80 (20 March 2008), a case in which reliance on the fair trial provisions of the *Charter* was abandoned largely due to section 35. Justice Bonjorno noted that:

Section 35 of the Charter contains no severance provision, nor does it contain any urgency exception such as are found in s 78B of the Judiciary Act 1903 (C'th). These are major impediments to the smooth operation of the Charter which need the urgent attention of the Legislature. The section needs to preserve a residual discretion in the judge to relieve a party from giving notice where to do so would unduly disrupt or delay a proceeding or for other good reason. This is, for obvious reasons, particularly important in criminal proceedings. Without such a power there is a real danger that the notice provisions of the Charter will be used to delay or even disrupt the orderly conduct of criminal trials.

When these issues arise in practice, the Supreme Court is required to interpret s 35 in a way that is compatible with human rights, so far as it is possible to do so consistently with its purpose. Time will tell whether this legislative direction will conflict with the directions given in the Practice Note.

The Practice Note is available at www.supremecourt.vic.gov.au under Practice and Procedure>Practice Notes and Statements> Practice Note No 3 of 2008.

Melanie Schleiger is on secondment to the Human Rights Law Resource Centre from Lander & Rogers

VCOSS Report: Using the *Charter* in Policy and Practice

VCOSS has released a new report, titled *Using the Charter in Policy and Practice: Ways in which community sector organisations are responding to the Victorian Charter of Human Rights and Responsibilities*.

The report examines changes that had been made by community sector organisations to incorporate the *Charter* – and human rights principles more broadly – into organisational policies, procedures or service delivery. It includes substantial appendices providing examples from the organisations surveyed including a Project Plan, a Human Rights Committee's Terms of Reference, a Watching Brief, and examples of revised policies.

It also includes a review of the barriers organisations have faced in successfully implementing the *Charter* and further resources that organisations felt would assist in its implementation.

The report follows a series of forums conducted in 2007 with DHS staff and funded community sector agencies, which intended to inform decision-makers about potential responsibilities under the *Charter* and to inform best practice in working within a human rights framework.

The report is available for download at www.vcooss.org.au.

Stephanie Cauchi, Policy Analyst – Human Rights & Justice, Victorian Council of Social Service

'Your Rights, Your Stories'

The Victorian Equal Opportunity & Human Rights Commission has launched a web-based campaign to collect stories about working and living with Victoria's *Charter of Human Rights and Responsibilities*. VEOHRC is seeking stories about:

- implementing human rights in organisations;
- using the *Charter* as an advocacy tool; and
- human rights issues for children and young people.

Stories will be published on VEOHRC's website and will provide a valuable source of information for the public, advocates and government. 'Your Rights, Your Stories' can be accessed at:

<http://www.humanrightscommission.vic.gov.au/human%20rights/your%20rights%20your%20stories/>.

Statements of Compatibility under the Victorian *Charter*

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

Below is an analysis of recent significant Statements.

Abortion Law Reform Bill 2008

The Abortion Law Reform Bill 2008, introduced into the Victorian Legislative Assembly on 10 September 2008, has attracted significant and detailed media scrutiny and public attention. There have been many outspoken comments by pro-life and pro-choice groups alike, and members of the Lower House crossed the floor in both directions when the vote on the Bill was taken (and passed). The significance of the Bill is that it seeks, for the first time in Victoria, to decriminalise the practice of abortion, where an abortion is conducted by a registered medical practitioner in accordance with certain prescriptions dependant on the stage of pregnancy.

No statement of compatibility

Notably, the Bill is the first piece of proposed legislation since 1 January 2008 not to be accompanied by a statement of compatibility under the *Charter*. This situation has arisen by virtue of s 48 of the *Charter*, which provides: 'Nothing in this Charter affects any law applicable to abortion or child destruction, whether before or after the commencement of Part 2.'

In her second reading speech in relation to the Bill, Women's Affairs Minister Maxine Morand said:

The effect of s 48 is that none of the provisions of the charter affect the bill. This includes the requirement under s 28 of the *Charter* to prepare and table a compatibility statement, and the obligation under s 32 of the *Charter* to interpret statutory provisions compatibly with human rights under the *Charter*.

Ambiguity of the drafting and impact of the 'savings clause'

Commentators such as Jeremy Gans have noted that the imprecise drafting of s 48 of the *Charter* has led to confusion as to its application. Gans notes that the section is an example of a 'self-referential' and 'self-contradicting law', with its ambiguous drafting making it unclear whether the provisions of the clause apply to the clause itself.

Interpreting the clause as applying to itself is nonsensical and unworkable. However, while a purposive interpretation of the section beyond the bare words is therefore required, there is considerable disagreement about the correct purposive interpretation.

Rationale behind section 48

According to Attorney-General Rob Hulls' second reading speech in relation to the *Charter*, s 48 was included to 'put beyond doubt that nothing in the charter affects the law in relation to abortion or the related offence of child destruction. The government... has never intended the *Charter*... to be used as a vehicle to attempt to change the law in relation to abortion'. The Explanatory Memorandum to the *Charter* states that the clause is intended to cover both statute law and any common law interpretation of statute law (regarding abortion or child destruction).

The intention behind s 48 may therefore appear to be an alternative approach to ensuring that 'right to life' arguments (based on s 9 of the *Charter*) are not used in considering whether an abortion is otherwise lawful, or in considering whether an offence relating to child destruction has been committed. By way of comparison, the ACT *Human Rights Act 2004* deals with this issue by expressly providing that the right to life contained in the Act only applies to a person 'from the time of birth'.

Is a statement of compatibility required?

The wording of s 48 of the *Charter* clearly seems to exclude the operation of the 'interpretation' provisions of the *Charter* (ie, ss 32 and 36) when the meaning of a law applicable to abortion or child destruction is being considered. In any event, these interpretation provisions only apply to statutory provisions (ie, Acts or subordinate instruments which have become law).

The provisions of the *Charter* requiring scrutiny of new legislation (ss 28 to 30), however, apply to Bills which are proposed to be, or have been, introduced into Parliament. By definition, these are not yet 'law'. Therefore, *Bills* applicable to abortion or child destruction are likely to be outside the scope of s 48 of the *Charter*. On this analysis, a statement of compatibility is required to be presented alongside any proposed Bill applicable to abortion or child destruction, and the Scrutiny of Acts and Regulations Committee must consider whether any such Bill is incompatible with human rights.

Consistent with this view, the Scrutiny of Acts and Regulations Committee noted in its report (9 September 2008) on the Bill that:

- '[Section] 48 is limited to 'any law applicable to abortion or child destruction'. The Bill is not (yet) law', and
- '[Section] 48 provides that nothing in the Charter 'affects' a law. Statements of compatibility have no legal effect [noting section 29 of the *Charter*]'.

By way of contrast with the Bill, an earlier private members bill in relation to abortion introduced in July 2007 (the *Crimes (Decriminalisation of Abortion) Bill 2007*) was accompanied by a statement of compatibility, which stated that the bill did not raise any human rights issues (and included reference to s 48 of the *Charter*).

Rights potentially affected by the Bill (and other laws applicable to abortion or child destruction)

The SARC report on the Bill addresses three areas of potential *Charter* incompatibility. The first area, relating to potentially unlawful limits on the rights of a foetus to protection, is wholly dependent upon whether or not a foetus has human rights under the *Charter*. Accordingly, the SARC referred this matter back to Parliament for clarification.

The latter two areas relate to potential limitations on the rights of medical practitioners and pregnant woman, in that:

- the Bill makes a 'late term' abortion lawful if two medical practitioners hold a reasonable belief that such an abortion is appropriate in all the circumstances, but also provides for potential prosecution if the medical practitioner's belief is in fact unreasonable; and
- the Bill requires medical practitioners holding a conscientious objection to abortion to refer patients requesting an abortion to a practitioner who has no conscientious objection.

Finally, in its discussion on the operation of the s 48 'saving clause', the SARC report notes that by extending the definition of 'serious injury' in the *Crimes Act 1958* (Vic) to encompass destruction of a foetus, a number of existing criminal offences could be considered laws applicable to abortion or child destruction. For example, dangerous driving causing death or serious injury under s 319 of the *Crimes Act* could now be considered a law applicable to child destruction, perhaps in *all* circumstances (including where an offence did not *in fact* involve destruction of a foetus).

The Victorian Law Reform Commission's *Law of Abortion: Final Report* (March 2008) had previously identified the potential for this result to arise, stating that:

The Charter does not affect current and future Victorian law on abortion and child destruction. This encompasses both the express terms of any statute and any judicial interpretation of statute law.

The VLRC report also, however, introduced another potential interpretation arising from the ambiguous wording of s 48 of the *Charter*, in concluding that:

The Charter, therefore, has no effect upon the law of abortion in Victoria, and the rights contained in the Charter are not applicable in abortion cases.

It is one thing to exclude the operation of *Charter* rights from the interpretation of statutory provisions regarding abortion or child destruction, but another thing altogether to exclude entirely the protection afforded by other *Charter* rights which may be engaged in the context of abortion cases, such as the right to a fair hearing or the right to the presumption of innocence, simply because the case before the Court requires consideration of a statutory provision regarding abortion or child destruction. The VLRC reading of s 48 consequently could be seen as identifying a further ambiguity as to the effect of s 48.

Conclusion

If the Bill is passed by the Victorian Parliament, given the ambiguity of the drafting of s 48, the number of potential interpretations of that section's meaning and the significant interest in the public debate concerning abortion, it is likely that, the inter-relationship between the *Charter* and the new abortion laws will be tested further.

Peter Henley and Jonathan Kelp, Human Rights Law Group, Mallesons Stephen Jaques

County Court Amendment (Koori Court) Bill

The County Court Amendment (Koori Court) Bill 2008 seeks to establish a Koori Court division of the County Court of Victoria by amending the *County Court Act 1958* (Vic). The proposed Koori Court

division is to be modelled on the Koori Court division already in operation at the Magistrates Court and Children's Court. The Bill proposes that:

- the Koori Court division have jurisdiction in relation to sentencing, both for offences heard in the County Court and appeals in relation to sentences given in the Magistrates' Court;
- in order for the Koori Court to have jurisdiction over a criminal matter, the defendant must be Aboriginal, must have pleaded guilty to the offence and must have consented to the jurisdiction of the Koori Court, and the court must consider it is appropriate for the proceeding to be dealt with by the Koori Court;
- the jurisdiction of the Koori Court will not extend to sexual offences or a breach of a family violence intervention order or interim intervention order; and
- the sentencing procedure will involve an Aboriginal elder or respected person who can advise the court as to a sentence that is culturally appropriate.

This amendment engages the rights contained in ss 8 (recognition and equality before the law), 19 (cultural rights), 24 (fair hearing) and 25 (rights in criminal proceedings) of the *Charter*.

While the Statement of Compatibility deals with each of these sections of the *Charter*, as noted (among other matters) by SARC, it does not adequately deal with s 8(3) of the *Charter*, which provides:

Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

The proposed Koori Court division is designed to address the disadvantage and inequity that many Aboriginal people experience in the criminal justice system and therefore to the extent it operates in a discriminatory fashion, it would fall within the scope of s 8(4) of the *Charter*. In doing this however, the Bill proposes limiting access to the Koori Court to those Aboriginal defendants who have pleaded guilty to the offence. As a consequence, it would appear that further consideration as to the Bill's compatibility with section 8(3) of the *Charter* is required. It may be that in order for the Bill to be fully compatible with s 8(3) in seeking to address the disadvantage and inequity that Aboriginal defendants face, all Aboriginal defendants (not only those who have pleaded guilty) may need to be provided with access to the sentencing procedures established by the Bill.

Although the Bill is said to be compatible with s 24 (right to a fair hearing), the Statement of Compatibility does not deal adequately with s 25 (rights in criminal proceedings). In particular, the compatibility of the Bill with s 25(2)(k) of the *Charter*, which provides that a person should not be compelled to testify against themselves, is also not addressed in the Statement of Compatibility. Such analysis should be contained in the Statement of Compatibility even if the legislature considers that the entry of a guilty plea is an important aspect of the model on which the Koori Court division is based.

It is concerning from a *Charter*-compliance perspective that in order to gain access to the Koori Court division of the County Court, an Aboriginal defendant must plead guilty to their offence (rather than being found guilty or pleading not guilty to the particular charge laid). The effect of this may be that some defendants feel compelled to plead guilty to an offence in order to be dealt with under the Koori Court division, in circumstances where they would not otherwise plead in that manner. Further, it is unfortunate that the Statement of Compatibility has not analysed whether the right contained in s 25(2)(k) may reasonably be limited in these circumstances under s 7(2) of the *Charter*, which permits such limitations of *Charter* rights as can be demonstrably justified in a free and democratic society, based on human dignity, equality and in particular freedom.

Emma Wanchap, Human Rights Law Group, Mallesons Stephen Jaques

Corrections Amendment Bill 2008

The Corrections Amendment Bill 2008, which was introduced to the Legislative Assembly on 30 July 2008, creates a prisoner compensation quarantine fund for the purpose of paying victims of crime certain amounts that are recoverable by the victim from a prisoner.

The Bill amends the *Corrections Act 1986* to:

- quarantine, for a specified period, certain types of damages and awards to prisoners received as a result of a successful claim against the State or a private prison operator relating to a prisoner's custodial sentence (other than whilst on remand). The Bill will not affect damages payable in relation to medical costs, the cost of future care, false imprisonment or legal costs;

- provide for the public notification of successful claims by prisoners to enable victims of crime and other creditors to consider civil action to recover a debt or award against such prisoners (otherwise thought to have been without financial means). Victims will have 12 months in which to consider and commence legal proceedings against the prisoner;
- provide for the registration of victims to allow the disclosure of relevant information; and
- provide for payment out of the fund to victims and creditors of the prisoner in circumstances where a Court awards damages to a victim or a creditor has a valid claim against the prisoner.

The Statement of Compatibility identifies three *Charter* rights engaged by the above measures: the right to equality (s 8), the right to privacy (s 13) and property rights (s 20).

The right to equality

Section 8 of the *Charter* provides that every person has the right to enjoy his or her human rights without discrimination and provides that every person is equal before the law and is entitled to the equal protection of the law without discrimination. The Statement states that the status of being a prisoner is not a prohibited ground of discrimination under s 3 of the *Charter* and s 6 of the *Equal Opportunity Act 1995* (Vic) and therefore the Bill does not engage the right to equality under ss 8(2) and (3) of the *Charter*.

The right to privacy

Section 13 of the *Charter* provides that a person has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily. An interference with privacy will not be unlawful provided it is permitted by law, is not uncertain, and is appropriately circumscribed.

The clauses of the Bill which engage the right to privacy under s 13 of the *Charter* are:

- the provision allowing a victim to apply to the secretary to be notified of an award of damages to a prisoner;
- the provision requiring the secretary to publish a notice advising of an award of damages to a prisoner as soon as practicable after the award is made, with such notice to include the name of the prisoner and the money that has been paid to the Prisoner Compensation Quarantine Fund. The notice will be published in the Government Gazette, in a daily newspaper circulating generally around Victoria and in a daily newspaper circulating generally around Australia. The secretary may also publish the notice on the internet;
- the provisions allowing the secretary to forward a copy of the notice under clause 104Y to any victim who has applied to the secretary under clause 104X; and
- the provision allowing victims to apply to the secretary for information about a victim's claims fund within the initial quarantine period in respect of that fund.

The Statement contends that the notifications and publications required under the Bill are allowable limitations on the right to privacy in s 13 of the *Charter*, as s 13 is only engaged where the right to privacy is interfered with unlawfully or arbitrarily. The Statement contends that the interferences with privacy in the Bill are not unlawful as they will occur pursuant to powers conferred by legislation and will be reasonable in the circumstances.

In its report on the Bill, the Scrutiny of Acts and Regulations Committee observes that the information contained in notices required under the Bill – that the prisoner has been a victim of a civil wrong committed by the State and has been awarded damages – is potentially sensitive information, particularly given the vulnerabilities of many prisoners. The SARC also observes that the notice is a mandatory requirement regardless of the circumstances and, in particular, overrides any confidentiality clause contained in an agreement between the State and the prisoner (see new section 104ZB.) The SARC therefore considers that new s 104Y may infringe prisoners' *Charter* right against arbitrary interferences in their privacy.

Property rights

Section 20 of the *Charter* establishes a right not to be deprived of property otherwise than in accordance with law.

Clause 104V provides that the amount of an award of damages to a prisoner must be paid to the secretary immediately after the award is made, and be held in trust for the prisoner. Clause 104ZG provides that the secretary must not pay out any money in a prisoner compensation quarantine fund to a prisoner until the end of the quarantine period for the fund (defined in cl 104O as the period of 12 months following the publication in the Government Gazette of the notice in respect of the fund under cl 104W).

The Statement states that money payable to a prisoner as damages constitutes property within the meaning of s 20 of the *Charter*. However, the European Court of Human Rights has made clear that, in relation to in the equivalent provision in art 1 of the First Protocol to the *European Convention on Human Rights*, temporary seizures of property do not constitute deprivations of property. The Statement contends that as the Bill does not permanently deprive a prisoner of his or her property (given that damages are temporarily held in trust rather than permanently acquired from a prisoner), the Bill does not limit prisoners' property rights.

The Statement further concludes that although a prisoner may eventually be permanently deprived of his or her property if a victim or creditor is successful in pursuing action against the prisoner (and therefore payment is made out of the fund), that deprivation of property would occur by way of a Court order in favour of the victim or creditor, not by virtue of the provisions of the Bill.

Accordingly, the Statement concludes that the Bill is compatible with the *Charter*.

Robert Kovacs, Human Rights Law Group, Mallesons Stephen Jaques

Other Charter of Rights Developments

A Bill of Rights for the UK?

The UK Joint Committee on Human Rights has just recommended that the UK adopt a 'Bill of Rights and Freedoms' to build on those protections already afforded by the UK *Human Rights Act 1998*. The Committee's Report, *A Bill of Rights for the UK?* (August 2008) represents the views of the cross-party committee of MPs and Lords. Labour, Conservatives and Cross-Benchers alike have said that 'there are many groups in society, such as older people and adults with learning disabilities, whose human rights are insufficiently protected....A Bill of Rights and Freedoms is desirable to provide necessary protection to all, and to marginalized and vulnerable people in particular'.

The Committee considered evidence from a range of witnesses about whether there is a need for a Bill of Rights, who the Bill of Rights should cover, what it should include, whether it should incorporate economic, social and economic rights, the relationship between Parliament, the executive and the courts and how Government should consult the public about a future Bill.

Of significance to the debate in Australia on the legislative protection and recognition of human rights, the Committee notes that adopting a Bill of Rights provides a moment when society can define itself and set out a shared vision of a desirable future society. The Committee states:

We suggest that a Bill of Rights and Freedoms should give lasting effect to values shared by the people of the United Kingdom: we include liberty, democracy, fairness, civic duty, and the rule of law.

In addition to those rights already protected in the HRA, the Committee recommended that the right to trial by jury and the right to administrative justice be included in the Bill. There should also be detailed rights for children and public consultation on including specific rights for other vulnerable groups such as the right to a healthy and sustainable environment.

One of the biggest controversies was whether the Bill should include social and economic rights. The Committee concluded, 'We believe that there is strong public support for including rights to health, housing and education.' In recognising the difficulties in including these rights, for example regarding the extent to which the courts could and should make decisions about issues normally determined by politicians, the Committee set out an approach to counter those problems. The Committee suggests that the Bill should initially include the rights to education, health, housing and an adequate standard of living. Government would then have a duty to progress towards realising these rights and would need to report that progress to Parliament. Individuals would not be able to enforce these rights through the courts, but the courts would have a role in reviewing the measures taken by Government.

Of further relevance to an Australian consultation on the legal protection of human rights, the Committee emphasised that the process by which the UK Government consults on the Bill is vital to achieving public consensus and commitment. The Committee highlight the Victorian consultation into the *Charter*, particularly the consultation's effective engagement of the public.

The report is available at <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/165i.pdf>.

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

Victorian Charter Case Notes

Obligations of Courts and Tribunals to Unrepresented Litigants

Seachange Management Pty Ltd v Bevnol Constructions & Developments Pty Ltd & Ors (Domestic Building) [2008] VCAT 1479

The Victorian Civil and Administrative Tribunal has allowed an application to reconstitute the Tribunal, on the basis that a respondent to the proceedings would not receive a fair hearing before a particular Tribunal Member. The Tribunal's decision stated that the *Charter* has reinforced the positive duty of courts and tribunals to provide assistance to litigants in person.

Facts

Seachange Management Pty Ltd filed proceedings in VCAT against Bevnol Constructions & Developments Pty Ltd in relation to defective work under a building contract. Bevnol counterclaimed, and one of the respondents to Bevnol's counterclaim applied to have a Senior Member of the Tribunal disqualified on the basis of perceived or actual bias. The respondent's allegation of bias relied on the Senior Member's conduct in the interlocutory stages of the proceedings. In particular, the respondent relied upon the Member's language and tone towards the respondent, the Member's refusal to allow the respondent to pursue certain points and the lack of assistance afforded to the respondent by the Member.

The application for disqualification was dismissed. The respondent then applied to reconstitute the Tribunal dealing with the substantive proceeding, pursuant to s 108(4) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

Decision

The Tribunal held that the discretion to reconstitute the Tribunal in a particular proceeding will be exercised where a party has a reasonable apprehension that they will not receive a fair hearing before the Tribunal, as presently constituted. This required consideration of the nature of a fair hearing and, in particular, the Tribunal's duty to provide assistance to litigants in person.

The Tribunal held that it had a general duty to ensure a fair hearing, and that the provision of a fair hearing was at the very heart of the Tribunal's obligations to the parties who appear before it. This general duty was given effect by various provisions of the VCAT Act, under which the Tribunal was required to act fairly and according to the substantial merits of the case, and was bound by the rules of natural justice.

The Tribunal found that the impartiality of the Tribunal was central to a fair hearing and, therefore, any allegation of actual or apprehended bias would be relevant to a decision to reconstitute a Tribunal. In relation to apprehension of bias, the Tribunal held that a Member would be disqualified if a fair-minded observer might reasonably apprehend that the Member might not bring an impartial mind to the resolution of the question before the Tribunal.

The Tribunal further noted that the obligation of the Tribunal to assist litigants in person constituted an important part of the Tribunal's general duty to ensure a fair hearing. This obligation imposed a positive duty on the Tribunal to give such assistance as is necessary to ensure the proceedings are fair. The application of the duty will depend on the litigant (including the litigant's intelligence and understanding of the case), the nature of the case and the institutional framework governing the relevant court or tribunal. Further, the duty to assist may extend to issues of law as well as procedure. However, the judge or tribunal member must be careful not to become the advocate of a self-represented litigant and must keep in mind the need to afford procedural fairness to other parties.

The Tribunal held that although the respondent had studied law and had occasionally received assistance from a solicitor acting for Seachange, these considerations did not absolve the Tribunal from providing such assistance to the respondent as was necessary to ensure a fair hearing.

The Tribunal allowed the respondent's application to reconstitute the Tribunal, on the basis that a fair-minded observer might reasonably apprehend that the Senior Member in question would not bring an impartial mind to the resolution of the respondent's dispute. This was due to:

- the unacceptable tone and language used by the Senior Member towards the respondent;
- the Senior Member's repeated failure to accord the respondent procedural fairness, including repeated interruptions of the respondent's submissions and the fact that the Senior Member gave no assistance to the respondent in developing certain interlocutory applications and submissions; and
- the cumulative effect of the numerous comments made by the Senior Member about the respondent's need to attend hearings and his lack of representation.

Relevance to the Victorian Charter

The Tribunal's decision stated that the *Charter* has reinforced the duty of courts and tribunals to provide assistance to litigants in person. Other than this, the Tribunal's decision did not consider the application of the *Charter*.

However, the Tribunal's decision provides useful guidance to the substance of the right to a fair hearing, contained in s 24(1) of the *Charter*. This section provides that parties to both civil and criminal proceedings have the right to have the proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. In particular, the Tribunal's decision indicates that a party's right to a fair hearing will be breached where a fair-minded observer might reasonably apprehend that the relevant judge or member might not bring an impartial mind to the resolution of the particular question. This may be established by evidence of past proceedings before the judge or member, with a focus on their language, comments and general treatment of the relevant party.

Further, the Tribunal's decision emphasised the centrality of the duty to assist litigants in person to the right to a fair hearing. The Tribunal demonstrated that although the application of the duty will depend on the circumstances of the case, the scope of the duty is potentially broad and may require the relevant judge or member to take significant positive steps to ensure the proceedings are fair.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VCAT/2008/1479.html>.

Edwina Chin is a member of the Mallesons Stephen Jaques Human Rights Law Group

VCAT Considers Exemption under Equal Opportunity Act

BAE Systems Australia Ltd (Anti-Discrimination) [2008] VCAT 1799 (11 September 2008)

VCAT has granted a restricted exemption from employment-related provisions of the *Equal Opportunity Act 1995* (Vic) to a defence-related contractor, allowing the contractor to discriminate against its employees on the basis of nationality.

Facts

BAE Systems Australia Ltd is part of a UK-owned group which designs, manufactures and provides support for advanced defence systems, including aircraft and ships, guided missiles and weapons, radar and other electronic communication systems.

BAE's main customer is the Australian Defence Force, meaning that BAE has access to certain information classified as secret or sensitive by the Australian government. Further, many of the contracts entered into by BAE with the ADF involve products, components, technology and technical data sourced from the US, which BAE obtains under contract with US-based suppliers. BAE is therefore subject to a range of requirements in its defence-related work, including:

- Commonwealth legislation and Australian government policy;
- US legislation and US government policy; and
- contractual requirements mandated by both Australian and US legislation and policy.

These requirements (collectively, 'security requirements') include obligations to obtain security clearances for BAE employees, to maintain a list of the nationalities of BAE employees, to notify the Australian Department of Defence of the nationality of certain BAE employees and to prevent the disclosure of specified information to non-Australian or non-US citizens.

BAE applied for an exemption under the Act to enable BAE to discriminate on the grounds of nationality against employees and contract workers in relation to defence-related projects, to the extent required by the security requirements.

Decision

The Tribunal held that, in deciding whether to grant an exemption under the Act, it must consider the nature of the freedom from prohibited discrimination conferred by the Act, the objectives of the Act and whether the interests served by the exemption are sufficient to justify the conduct sought to be exempted. The Tribunal emphasised that the purpose served by an exemption must be powerful if it is to be used as a justification, and that any reasonably available non-discriminatory alternative to the proposed exemption would be relevant. Further, the Tribunal stated that the decision to grant an exemption was not simply a question of whether the application of the prohibitions in the Act would produce an unreasonable result.

The Tribunal found that if BAE did not comply with the relevant security requirements, BAE would be subject to heavy penalties, that certain licences and approvals would be withdrawn and that BAE would lose the ADF as a customer.

The Tribunal held that the exemption was necessary to enable BAE to comply with its obligations under the security requirements, with two exceptions. First, although BAE was entitled to implement a system of photographic passes which identified each employee's nationality by means of colour-coding, the passes could not show the employee's nationality in uncoded form. While it was necessary for BAE's security staff to know the nationality of the workforce, the Tribunal held that for all others, a person's nationality could not be more than 'a matter of idle curiosity'. Secondly, the Tribunal refused to allow the exemption to extend to permitting termination of employment on the basis of the security requirements. The Tribunal found that termination of employment would not be necessary for BAE to comply with the security requirements.

BAE was granted an exemption from certain employment-related provisions of the Act, on the following conditions:

- it must take all steps reasonably available to avoid the necessity of engaging in the discriminatory conduct;
- it must take all reasonable steps to avoid or limit harm or loss to employees affected by transfers due to the exemption;
- information relating to security passes, security clearance levels or access to controlled information must be restricted to certain security staff, on a 'need to know' basis;
- it must amend its employment policies to refer to the exemption and clarify that the purpose of requiring information regarding nationality is solely to enable compliance with the security requirements; and
- it must report in writing to the Tribunal and the Victorian Equal Opportunity and Human Rights Commission every six months in respect of the operation of the exemption.

Relevance to the Victorian *Charter*

The Tribunal considered three issues under the Victorian *Charter*:

- whether BAE was covered by the *Charter*, in light of the operation of the *Charter's* transitional provisions;
- the relevance of the obligation to interpret laws consistently with human rights under s 32(1); and
- whether, as a public authority, BAE was acting incompatibly with human rights under the *Charter*.

The Tribunal held that BAE was not covered by the *Charter*, as its application for an exemption was made before 1 January 2008. With respect, this is incorrect as s 49(2) makes it clear that the *Charter* may be relevant to proceedings from 1 January 2007.

In relation to s 32 of the *Charter*, which requires statutory provisions to be interpreted so far as is possible in a way compatible with human rights, the Tribunal held that it was not intended to apply to proceedings commenced before s 32 came into operation on 1 January 2008. This is consistent with House of Lords jurisprudence on the same issue, which holds that the interpretative obligation may be given retroactive effect in certain cases: *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816.

Finally, the Tribunal held that even if the *Charter* did apply, BAE would not be in breach of s 38, which makes it unlawful for public authorities to act incompatibly with human rights. The Tribunal did not determine whether BAE was in fact a 'public authority'. However, the Tribunal held that BAE would nonetheless fall within the exception contained in s 38(2), as BAE 'could not reasonably have acted differently' as a result of a statutory provision.

Given the Tribunal's approach to the *Charter*, the Tribunal did not consider the application of any substantive rights under the Charter to BAE's conduct. In particular, it would have been interesting to see how the right to equal and effective protection against discrimination (contained in s 8(3) of the *Charter*) would have affected the Tribunal's exercise of its discretion to grant an exemption from the *Equal Opportunity Act*. However, the Tribunal left open the possibility of considering the *Charter* in relation to any application by BAE to renew the exemption granted, in approximately three years' time.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VCAT/2008/1799.html>.

Edwina Chin is a member of the Mallesons Stephen Jaques Human Rights Law Group

Disciplinary Proceedings and the Presumption of Innocence

Sabet v Medical Practitioners Board [2008] VSC 346 (12 September 2008)

The Supreme Court of Victoria considered that the Medical Practitioners Board of Victoria was a public authority as well as a tribunal under s 4 of the *Charter*. The Court held that the Board did not breach a medical practitioner's right to be presumed innocent in disciplinary proceedings determining his capacity to practice medicine.

Facts

The Board is a statutory authority which regulates the medical profession. The Board suspended the registration of a medical practitioner (Dr Sabet) pending further investigations, under s 40 of the *Health Professions Registration Act 2005* ('HPRA'). Dr Sabet had been the subject of allegations of sexual assault by two female patients, one of whom had laid criminal charges.

Dr Sabet challenged the Board's decision to suspend him from practicing medicine in the Supreme Court under the *Administrative Law Act 1978* and, in addition, relied upon s 38 of the *Charter* claiming that the Board failed to give proper consideration to the presumption of innocence afforded by s 25(1) of the *Charter*.

Decision

Application of section 38 to the Board as a public authority and a tribunal

Section 38 of the *Charter* provides that it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. The question as to what is a 'public authority' is therefore critical.

Hollingworth J considered the Board to be a public authority within the meaning of s 4(1)(b) of the *Charter* as it performs functions of a public nature, is established by statute and is publicly funded, and its functions are inherently public insofar as it regulates and supervises medical practitioners.

Her Honour then turned to consider the application of s 4(1)(j) of the *Charter*, which provides that a court or tribunal is not a public authority except when it is acting in an administrative capacity (as against a judicial or quasi-judicial capacity). The *Charter* only applies to courts and tribunals acting in a non-administrative capacity to the extent that they have functions under Part 2 and Division 3 Part 3 of the *Charter* in which section 38 does not fall.

In determining the meaning of 'administrative capacity', the parties agreed that it was appropriate for the Court to analyse the concept of 'administrative capacity' in line with what is understood at common law as 'administrative power'. The essence of judicial power is the determination of disputes between

parties regarding the existence of a legal right or obligation and the application of the law to facts as determined. Her Honour considered the Board to be exercising administrative power in making this decision because it was regulatory in nature and was not a final determination of Dr Sabet's right to practice medicine, nor whether he had committed any offence.

Consideration of the Board's conduct vis à vis the right

In analysing whether the Board had contravened s 38 of the *Charter* Hollingworth J considered the following three questions:

1. Has the *Charter* been engaged? (The 'engagement question')
2. If so, did the public authority oppose any limitation on the right? (The 'limitation question')
3. Was any such limitation reasonable and justified within the circumstances set out in section 7(2)? (The 'justification question')

Engagement Question: Was the Board required to have regard to the presumption of innocence?

Hollingworth J did not consider the right contained in s 25(1) of the *Charter* to be engaged in this matter. Section 25(1) provides that 'a person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law'. In examining s 25, in the context of the *Charter*, Hollingworth J considered that it was likely that the section is only intended to apply to criminal proceedings and as such, did not apply to the Board.

The Court left the question open as to whether the right could have any indirect application to public authorities so as to prohibit them from making public statements affirming the guilt of the accused which may prejudice the outcome of a criminal trial.

Limitation Question: Did the Board interfere with right to presumption of innocence?

Even if the right was engaged, Hollingworth J considered that the Board could not be said to have interfered with that right, stating that the critical inquiry is whether Dr Sabet's right to the presumption of innocence was interfered with, not whether his capacity to practice medicine was interfered with.

The Court considered that the presumption of innocence would not operate to prevent a public authority from acts or decisions based on the possibility of guilt, in this case preventing the Board from evaluating material before it and forming an opinion incompatible with innocence in respect of the criminal charges.

Justification Question: Reasonableness of any limitation

If the right had been engaged and limited, the Court considered that it would be necessary to determine whether any such limitation was reasonable in accordance with s 7(2) of the *Charter*. This requires specific regard to be had to the factors set out in s 7(2) (not to general notions of proportionality). Hollingworth J reiterated that section 7(2)(e), which requires consideration of any less restrictive means reasonably available to achieve the purpose of the limitation, does not require the adoption of the least intrusive means. Instead, the relevant question is whether the chosen measure falls within a range of reasonable alternatives.

Dr Sabet argued that an agreement restraining his practice under the HPRA would be a less restrictive means of limiting his capacity to practice medicine. The Court held that this was not a means of limiting the interference with the right to be presumed innocent but the right to practice medicine. As such, it was not relevant in considering whether a less restrictive means of limitation was available pursuant to s 7(2)(e) of the *Charter*.

Conclusion

Sabet is the first time a court has held in relation to the *Charter* that 'administrative capacity' is 'administrative power' at common law. It also provides guidance as to a court's approach to determining whether a public authority has acted in contravention of section 38 of the *Charter*.

Monique Carroll and Helen Beatty are lawyers with Allens Arthur Robinson

Comparative Law Case Notes

Torture, the Right to a Fair Trial and Extraterritorial Obligations

R (B Mohamed) v Foreign Secretary [2008] EWHC 2048 (Admin) (21 August 2008)

The England and Wales High Court has held that the UK Government has a positive duty to take steps to ensure that a United Kingdom resident about whom the UK Government had exculpatory material had access to that material for the purpose of defending charges under the *US Military Commissions Act of 2006*.

Facts

Binyan Mohamed, a United Kingdom resident (but not a British national) was arrested in Pakistan in 2002 and has been held by the US in Guantanamo bay since September 2004. In August 2007, the UK requested his return from the US. This request was declined.

In May 2008, he was charged with offences for which he could face the death penalty under the *US Military Commissions Act of 2006*. Mr Mohamed contended that the evidence against him is inadmissible because it was obtained while he was detained for two years, during a period in which he was subjected to torture and cruel, inhuman or degrading treatment by Pakistani and Moroccan authorities, with the connivance of the US Government, as well as to such treatment by the US Government itself.

Mr Mohamed applied to the High Court of England and Wales for an order against the UK Foreign Secretary for the disclosure of information in confidence to his lawyers in the Guantanamo Bay proceedings, on the basis it could support his contention as to the inadmissibility of the evidence against him. The information had been requested, but the Foreign Secretary refused to provide it, stating that he was under no duty to do so, and citing concerns about potential damage to national security.

The Foreign Secretary did identify documents which could be considered exculpatory; informed Mr Mohamed's lawyers of this; and provided them to the US Government. However the documents had not been made available in the Military Commission proceedings to Mr Mohamed's lawyers.

Decision

The Court found there was a duty to disclose the information, applying the principle set down in a commercial case — *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133. In that case, the House of Lords held that if a person is involved in the tortious acts of others so as to facilitate their wrongdoing, he or she may come under a duty to assist the person who has been wronged by (among other things) giving him or her information.

In applying that case, the Administrative Court identified five issues:

- was there (arguable) wrongdoing;
- was the UK Government, however innocently, involved in the arguable wrongdoing;
- was the information necessary;
- was the information sought within the scope of the available relief; and
- should the Court exercise its discretion in favour of granting relief?

In respect of these five issues:

- the Foreign Secretary conceded there was an arguable case of wrongdoing, which was sufficient;
- the Court found the facilitative conduct of UK intelligence service was sufficient involvement;
- the information was not merely necessary, but essential if Mr Mohamed was to have a fair trial by the Military Commission;
- specific information was held to fall within the scope of available relief, but not more general information; and
- the Court decided to exercise its discretion, noting that relief under the *Norwich Pharmaceuticals* principles was an exceptional remedy and its application in these circumstances unprecedented.

Notwithstanding the decision to exercise its discretion, the Court gave the Foreign Secretary the opportunity to file a public interest immunity certificate ('PII Certificate'), prior to a further hearing on 27

August. It is ultimately for the Court to determine, having reviewed any PII Certificate, whether the public interest immunity applies to exempt documents from disclosure.

The Foreign Secretary filed a PII Certificate, citing concerns about future intelligence-sharing with the US. The Court, in a second judgment published on 29 August 2008, noted that the US Convening Authority had requested the relevant documents, which would therefore be disclosed to Mr Mohamed's lawyers if charges were brought: this was all the High Court could have achieved in any event. However, it required the Foreign Secretary to file a second PII Certificate which addressed the abhorrence and condemnation accorded to torture and cruel, inhuman or degrading treatment, an issue which the Court considered was not addressed either expressly or implicitly in the PII Certificate.

The Court gave the Foreign Secretary until 5 September to file a further PII Certificate, after which it would decide whether the public interest immunity applies. A final decision had not been made at the time of writing this case note, but is expected imminently.

The decision is available at

http://www.judiciary.gov.uk/docs/judgments_guidance/mohamed_full210808.pdf.

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Right to Legal Representation in Civil Proceedings

Commonwealth v Davis Samuel Pty Ltd [No 3] [2008] ACTSC 76

The ACT Supreme Court has missed an opportunity to consider the meaning of the right to a fair hearing in s 21(1) of the *Human Rights Act 2004 (ACT)* in the context of an application for adjournment of a civil matter based on reasons including lack of legal representation.

Facts

The proceedings related to an action by the Commonwealth to recover moneys illegally taken from it in 1999 and transferred to a number of persons, including companies associated with the Applicants. The proceedings had been delayed while related criminal trials were conducted.

When the Commonwealth sought to revive the action, Registry staff indicated that a 3-week period from 10 June 2008 was available. This date was communicated to the active defendants, and the hearing dates were set.

After a series of adjournments a directions hearing was held on 14 March 2008. All but two defendants (including the Applicants) were represented, and opposed the action being listed on 10 June 2008, arguing chiefly that:

- the action would take up to 6 to 8 weeks;
- related civil penalty proceedings in the NSW Supreme Court against some of them had not concluded; and
- there was not enough time to prepare.

The Commonwealth argued it would be prejudiced by any adjournment, due to:

- the damage the delay would cause to its reputation; and
- the cross-claim by defendants claiming \$4.3 billion from the Commonwealth, which was a contingent liability and which had constantly to be disclosed.

It also noted that the hearing had been given at least 3 months in advance.

No issues were raised at this directions hearing concerning the defendants' ability to pay for legal representation.

The application to reschedule the dates was dismissed, and the action was listed for hearing to commence on 10 June 2008 together with an order that any application to vacate the hearing date be filed and served by 25 March 2008.

No such application was made until 16 May 2008, when the Applicants made an application for vacation of the hearing date, citing the reasons including the following:

- the Applicants' original solicitor had retired;

- no funds were available to the Applicants to engage other solicitors or experienced counsel at that time, but they 'expect[ed] to have sufficient funds by the end of 2008';
- the Applicants would not receive a fair hearing without legal representation; and
- if the Applicants were unable to obtain funding for representation, they would represent themselves, but, if so required, the time available would be too short for them to prepare properly.

The Commonwealth opposed the application.

Decision

Justice Refshauge stated that the decision to grant an adjournment is a discretionary, and to succeed, the Applicants must make out their case and provide adequate evidence of the relevant circumstances which include, but are not limited to:

- the current position of the Applicants;
- the situation in which they would find themselves if the application for adjournment were refused;
- reasons why the Applicants were in their present position, and how that came about (especially any responsibility of the Applicants for it); and
- the position the other parties would be in if the application were granted.

His Honour also noted that his consideration

must have regard to the paramount duty to see that the Applicants are not denied a fair trial nor access to the court as protected by the *Human Rights Act 2004* (ACT).

After briefly considering the decision of the European Court of Human Rights in *Airey v Ireland* (1979) 2 EHRR 305, he concluded:

Thus, I find that the question to be asked in this context is whether the absence of legal representation will effectively abrogate the applicants' access to a court, which is protected under s 21 of the *Human Rights Act 2004* (ACT), though it has been held not to be an absolute right.

After noting the decision to vacate proceedings is 'a discretionary one and [would] depend on all the circumstances', he stated:

All this must have regard to the paramount duty to see that the Applicants are not denied a fair trial nor access to the court as protected by the *HRA* and that, balancing all the relevant considerations, justice is done.

Applying the test, Refshauge J dismissed the application, having regard to the facts that he was not satisfied that:

- the Applicants were unable to secure appropriate representation;
- if they could not brief counsel, the Applicants would be denied meaningful and effective access to the court;
- the Applicants would not be ready,

-- given the Applicants had known since late 2007 that the trial was likely to proceed on 10 June 2008, and also because of the potential prejudice to the Commonwealth and other defendants.

Relevance to the Victorian Charter

Article 21(1) of the *Human Rights Act 2004* (ACT) is identical in form to s 24(1) of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic).

Unfortunately, Refshauge J did not give specific consideration to the requirements of the *Human Rights Act 2004* (ACT). The content of the right to a fair hearing contains many elements, including, relevantly:

- equal access to, and equality before, the courts;
- the right to legal advice and representation; and
- the right to procedural fairness;

Relevant jurisprudence indicates that access to the justice system should not be prejudiced by reason of a person's inability to afford the cost of independent advice or legal representation. While the right to a fair hearing does not impose an obligation on a state to provide free legal assistance in civil matters, it may require the state to make the court system accessible to everyone. Nevertheless, the complexity of

some cases may actually require legal aid to ensure a fair hearing: see, eg, *Airey v Ireland* [1979] 6289/73 ECHR 3 (9 October 1979). Further, any failure to provide legal aid to those who may otherwise be unable to access legal representation is likely to contribute to significant inefficiencies and additional costs in the civil justice system.

The facts of this case raised questions as to the meaning of the right to a fair hearing in the context of the ability of a party to a civil proceeding to obtain adequate representation in complex litigation and the powers and discretions of the court in setting hearing and filing dates. A discussion of whether a deferral of the hearing date *in lieu* of the provision of legal aid, if only by way of *obiter dicta*, would have provided useful guidance as to the meaning of s 21(1) of the *Human Rights Act 2004* (ACT) and s 24(1) of the *Victorian Charter*.

The decision is available at http://www.courts.act.gov.au/supreme/judgments/davis_samuel3.htm.

Peter Henley is the coordinator of the Mallesons Stephen Jaques Human Rights Law Group

HRLRC Policy Work

Implementation of Concluding Observations of UN Committee against Torture

Earlier this year Australia appeared before the UN Committee Against Torture as part of its regular reporting obligations as a party to the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*.

The Committee issued its Concluding Observations on Australia, including 27 specific recommendations, in May 2008. The Committee made recommendations in relation to various areas of Australian law, policy and practice, including: immigration and asylum-seeker law; refoulement, extradition and expulsion; Indigenous Australians; prisoners and conditions of detention; and counter-terrorism laws and practice.

In response to the Concluding Observations – and in line with its stated commitment to engage positively with the UN human rights treaty bodies – the Australian Government initiated a consultation on follow-up action to the Concluding Observations. The Government called for suggestions as to what action should be taken in response to the Committee's recommendations.

The Centre's submission to the Government considered the specific areas addressed by the Committee and highlighted the need for protections against torture and ill-treatment to be legislatively entrenched. Examples of recommendations made by the Centre include:

- that the *Migration Act 1958* (Cth) should be amended to comprehensively prohibit the refoulement of a person from Australia in circumstances where they may be exposed to a risk of torture or other cruel, inhuman or degrading treatment or punishment;
- that the Australian Government should review, update and implement recommendations from the *1991 Royal Commission into Aboriginal Deaths in Custody*; and
- that Australia should comprehensively review all counter-terrorism laws and practices to ensure that they are in compliance with international human rights standards.

The Centre's submission also recommended that the Australian Government develop domestic mechanisms to independently monitor and report on the implementation of the Concluding Observations of UN treaty bodies.

The HRLRC Submission is available at www.hrlrc.org.au under Policy Work>Domestic Submissions>Torture: Implementation of Recommendations of UN CAT in Australia (Sept 2008).

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

Independent Reviewer of Terrorism Laws

The Centre has made a submission to the Senate Legal and Constitutional Committee in support of the *Independent Reviewer of Terrorism Laws Bill 2008*.

The Centre considers that the operation, effectiveness and implications of terrorism laws should be subject to independent review to ensure that there is transparency in the manner in which those laws

are interpreted, and to ensure that there is public confidence in the manner in which those laws are applied.

The Centre supports the adoption of an independent reviewed model similar to that operating in the United Kingdom. The UK Independent Reviewer has provided a valuable source of expert commentary on the operation of terrorism legislation in the UK. However, the Centre notes that inherent in the functions of the UK Independent Reviewer is an obligation to have regard to international human rights standards and obligations in assessing the operation and implications of terrorism laws.

While Australia remains the only Western developed democracy without a legislative or constitutional Charter of Human Rights, the Centre submits that, to ensure that the Independent Reviewer provides a meaningful contribution to the operation and understanding of the terrorism laws, the functions should be expressly defined to require the Independent Reviewer to have regard to international human rights standards and obligations.

The Centre's submission is available at www.hrlrc.org.au under Policy Work>Domestic Submissions>Counter-Terrorism: Submission to Independent Reviewer of Terrorism Laws Bill (Sep 2008).

Same-Sex Relationships Bill a Step in the Rights Direction

On 15 September 2008, the Centre made a submission to the Senate Legal and Constitutional Affairs Committee on the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Bill 2008*. The purpose of the Bill is to eliminate discrimination against same-sex couples and the children of same-sex relationships in 68 Commonwealth laws. The Centre congratulates the Australian Government on these proposed reforms, which will address and reduce discrimination.

However, the Bill does not fully eliminate discrimination against individuals who are in same-sex relationships because it does not enable same-sex couples to marry and it does not prohibit discrimination on the grounds of sexual orientation and status as a same-sex couple. While the Centre is encouraged by the proposed amendments, the submission recommends that further steps be taken to ensure that discrimination against individuals on the grounds of their sexual orientation and status as a same-sex couple be eliminated entirely.

The Centre's submission is available at www.hrlrc.org.au under Policy Work>Domestic Submissions>Equality Rights: Submission to Senate Inquiry into the Same-Sex Relationships Bill (Sep 2008).

Melanie Schleiger is on secondment to the Human Rights Law Resource Centre from Lander & Rogers

HRLRC Casework

Inquiry into Conditions of Detention in Tasmanian Prison

The Centre, Freehills, Greg Barns and Stephen Estcourt QC of counsel are continuing to advocate for improved prison conditions for a prisoner held within a discipline regime in a Tasmanian prison. The conditions may breach the common law duty of care, the *Corrections Act 1997* (Tas) and various human rights recognised by international law. Direct advocacy and media pressure have resulted in the Tasmanian Ombudsman announcing an investigation into the conditions. Acting swiftly, Freehills have provided the Ombudsman with a suggested scope of review for the investigation and recommendations for improvements. In the interim, Freehills have also requested that the Attorney-General provide specific changes to the current conditions, including provision of supper (between the current dinner at 4pm and breakfast at 7am), the ability for the prisoner to purchase items from the prison canteen, increased availability of physical training equipment and that restraints be only used when strictly necessary (the prisoner is currently shackled whilst in the confines of the prison complex). Freehills' and counsel's exceptional work, in providing detailed, specific and evidenced-based recommendations and utilising a range of pressure points has produced an excellent outcome.

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

Seminars and Events

2008 Protecting Human Rights Conference

Date: 3 October 2008

Venue: Melbourne Law School, 185 Pelham Street, Carlton

Cost: \$150 / \$75 concession

This conference will focus on developments in relation to legislative protection of human rights at state and territory and national levels in Australia, in particular, the recently enacted Victorian *Charter of Human Rights and Responsibilities 2006*, and the Australian Capital Territory's *Human Rights Act 2004* and also the draft Bills being considered in Tasmania and Western Australia. It will include discussion of similar Acts in other countries.

Key confirmed speakers include: the Hon Rob McClelland MP, Attorney-General for Australia; the Right Hon Chief Justice Dame Sian Elias, New Zealand; and the Hon Justice Marcia Neave, Victorian Court of Appeal. For further information, see <http://acthra.anu.edu.au/news/Conference2008.htm> or <http://cccs.law.unimelb.edu.au/>.

How Universal is the UDHR? The Future of Human Rights in the 21st Century

with Prof Hilary Charlesworth, Director, Centre for International Governance and Justice, ANU

Date: 7.15 for 7.30pm, 2 October 2008

Venue: Darebin Arts and Entertainment Centre, Cnr Bell St and St Georges Rd, Preston

RSVP: Essential to dialogue@latrobe.edu.au or (03) 9479 1893

National Access to Justice and Pro Bono Conference

Date: 14-15 November 2008

Venue: Sydney Masonic Centre, 66 Goulbourn St, Sydney

Cost: \$380 for community organisations, \$440 (early bird before 30 Sept), \$660 (after 30 Sept)

This conference, jointly convened by the Law Council of Australia and the National Pro Bono Resource Centre, will discuss issues relating to access to justice, human rights, the rule of law and pro bono practice.

Key confirmed speakers include: the Hon Rob McClelland MP, Attorney-General for Australia; Robin Knowles CBE QC, Chairman of the England and Wales Bar Pro Bono Unit; Ron Merkel QC; and the Hon Jelena Popovic, Deputy Chief Magistrate of Victoria.

For further information, see <http://www.a2j08.com.au/index.html>.

Human Rights and Comparative Disability Law

As part of its 'Practising Law in the Public Interest' program, La Trobe Law School is offering an intensive subject on 'Human Rights and Comparative Disability Law' on 4-5 and 8-10 December 2008.

The subject will be taught by Professor Marcia Rioux, Director of the York Institute of Health Research and Graduate Director of the Program in Critical Disability Studies, and will examine recent developments in international and comparative disability law.

Classes will be held at La Trobe University's City campus, 215 Franklin Street, Melbourne.

For further information, contact the Academic coordinator, Assoc Prof Lee Ann Bassar on 9479 2171 or at l.bassar@latrobe.edu.au.

Corporate Responsibility Litigation

This October, EarthRights International, (www.earthrights.org) a Washington D.C. based NGO, will be bringing the landmark human rights case, *Bowoto v Chevron*, to trial in Federal Court in San Francisco. Almost 9 years in the making, and in the face of over a dozen attempts by Chevron to have the lawsuit thrown out and numerous pre-trial hurdles, the case will be heard before a jury on 27 October 2008.

ERI, together with co-counsel, will present evidence that Chevron was complicit in gross human rights abuses committed against Nigerian villagers who peacefully protested environmental abuses and other harm caused by Chevron's oil production activities. The protest took place at a Chevron drilling platform.

It will be alleged that Chevron paid and ferried members of the notorious Nigerian military and 'kill and go' mobile police to the platform in Chevron-leased helicopters and Chevron personnel supervised the operation. It will further be alleged that two protesters were shot and killed in the brutal attack – including one who was shot in the back - and others were injured.

ERI are using the tools of the US litigation process, including the Alien Tort Statute, (ATS) to hold Chevron accountable for serious human rights violations. The ATS permits lawsuits in US federal courts for violations of international law. In this way ERI seeks to apply domestic and international law to hold corporations and others accountable for their actions, in defence of human rights and the environment.

ERI certainly has its work cut out for it, as it takes on the corporate-Goliath Chevron. As a small non-profit NGO, it is in urgent need of funds to manage this important and precedent-setting environmental and human rights case. For more information on the case, and to support the work of ERI, please go to http://www.earthrights.org/donate_your_support_to_bowoto.html.

Jacqui Zalcborg works with ERI

Human Rights Resources

Victorian Charter of Human Rights Train-the-Trainer Materials Online

With the support of the Victoria Law Foundation, the Centre has developed an online package of materials to equip lawyers to educate workers in community organisations about the *Charter* to:

- understand human rights and how they are protected in the *Charter*;
- identify relevant human rights in real life scenarios;
- understand how the *Charter* can be used as an advocacy tool for the empowerment of clients and the achievement of social justice; and
- understand what organisations must do to comply with the *Charter*.

The materials include:

- Presenters' Manual
- PowerPoint Presentation
- 14 Case Studies (with Answer Guides included in the Presenters' Manual)
- 2 page Fact Sheet on the Rights in the Charter
- 20 Rights Specific Fact Sheets (which consider, in relation to each right: What does the right mean?; and How is the right relevant to my work?)
- 11 Themed Fact Sheets on: disability services; drug users; education; homelessness; mental health; older people; prisoners; public housing; rights in relation to the police; young people in the criminal justice system; and young people in care.

The materials are available at www.hrlrc.org.au under Victorian Charter of Human Rights and Responsibilities>Train-the-Trainer Program.

Foreign Correspondent

Developments at the UN and in International Human Rights Law

New High Commissioner for Human Rights Makes First Public Address

Ms Navanethem (Navi) Pillay began her term as the UN High Commissioner for Human Rights on 1 September. Her first public address, delivered at the opening of the 9th Session of the Human Rights Council, was her first real chance to explain her views on human rights to the international community, and give us some insights into the agenda she may develop as High Commissioner (HC). Describing herself as a jurist and a human rights defender, the HC said that the pursuit of human rights combines

the measured and deliberate pace of the law with the urgency and passion of advocacy, and that she would draw from her personal experience growing up as a second-class citizen in apartheid South Africa. The HC highlighted the important nexus between human rights and related issues such as development, security, peace and justice. She began from the premise that the credibility of human rights work depends on its commitment to truth, with no tolerance for double standards or selective application. She also emphasized the interdependence of civil and political rights, and economic, social and cultural rights, referring to globalization and the food crisis as examples of how abuses of one set of rights reverberate on other rights.

Ms Pillay commented on a controversial issue that's currently occupying a lot of discussion time in Geneva: the preparations for the anti-racism review conference scheduled for April 2009, which is the follow-up to the 2001 World Conference against Racism held in Durban. Apparently some governments have been threatening not to participate in the 2009 conference and the HC made it abundantly clear to those governments that she does not believe 'all or nothing' is the right approach. She explained her concern that if differences are allowed to become pretexts for inaction, the hopes and aspirations of the many victims of intolerance would be dashed – perhaps irreparably.

On gender inequality, advocates were pleased that the HC delivered a particularly strong message, stating no effort should be spared to persuade countries to repeal laws and practices that continue to reduce women and girls to second-class citizens. She referred specifically to the passage of Security Council Resolution 1820, which builds on Security Council Resolution 1325 which specifically and historically recognizes the link between sexual violence and peace and security.

Annual Discussion on the Integration of a Gender Perspective in the Work of the Human Rights Council

The Human Rights Council's 9th Session continues this week, and updates on the general discussions and decisions at this event will be reported in the next Bulletin. In the meantime, however, one of the most notable special features of this session has been the annual discussions on gender integration. This event took place on 12 September and focused particularly on the work of the UN Special Procedures.

The discussion was opened by the new High Commissioner and moderated by the Permanent Ambassador of Colombia to the UN in Geneva. Each expert panelist made a 15 minute presentation followed by an interactive debate with Member States and Observers (including NGOs and National Human Rights Institutions). The panelists were Ms Gulnara Shahinian (Armenia), the Special Rapporteur on contemporary forms of slavery; Mr James Anaya (USA), the Special Rapporteur on indigenous people; Ms Najat M'jid Maala (Morocco), the Special Rapporteur on the sale of children, child prostitution and child pornography; and Mr Sandeep Prasad, Human Rights Advisor and gender expert of Action Canada for Population and Development.

The debate was considered by many to be very useful in identifying current challenges in integrating a gender perspective into the work of the Human Rights Council, and it gave some momentum to specific proposals to advance these issues within the Council. These proposals include the possible creation of a 'gender focal point' (which will actually consist of a group of states) within the Council, the establishment of a special procedures mandate on laws that discriminate against women, and the recording of conclusions and recommendations to be used in future discussions, which would allow for more focused follow-up. We hope that these measures will be practical enough to really progress the way gender issues are considered in the context of all human rights concerns.

The Working Group on the Right to Development

The Working Group on the Right to Development met in Geneva from 18 to 22 August 2008. This Working Group is a subsidiary body of the Human Rights Council. It is assisted by a high-level task force which helps monitor progress on the implementation of the right to development. In recent years the Working Group and task force have focused on Millennium Development Goal (MDG) 8 which deal with 'a global partnership for development', and have developed a set of criteria to evaluate global partnerships on themes as varied as aid and trade cooperation, debt relief, technology transfer and access to essential medicines in developing countries. The criteria are a work in progress and are being progressively developed and refined, including through lessons learned from pilot applications to different partnerships. The Working Group adopted a number of conclusions and recommendations,

including a detailed workplan on refinement of the criteria and further application to different partnerships.

The Social Forum

The Social Forum was held from 1 to 3 September 2008 and was attended by more than 140 representatives from Member States, UN funds, programmes, and specialised agencies, and other intergovernmental bodies, as well as NGOs and civil society organisations. The Social Forum was an initiative of the former Sub-Commission on the Promotion and Protection of Human Rights, and it was preserved by the Human Rights Council as a vital space for dialogue between the government representatives, civil society (including grass-roots organizations and international organizations). Under the main themes of 'poverty and human rights' and 'social dimension of the globalization process', the Social Forum heard 28 expert presentations on a wide range of topics and their relationship to poverty, including the normative framework of human rights and extreme poverty; foreign debt; international trade policies; the role and responsibility of the State, NGOs and transnational corporations in poverty eradication; international assistance and cooperation in poverty reduction and eradication; decent and favourable work conditions; good governance/corruption; access to affordable essential drugs and health care; climate change; and food security, the food crisis and the right to food. The presentations on each topic were followed by an open debate, which allowed the participants to engage with the expert speakers, to exchange views and concerns, and to make proposals.

Organizations Call Upon the ICTY to Prosecute Radovan Karadzic for Rape and Sexual Violence

In July 2008, Radovan Karadzic, the former leader and commander of the Bosnian Serbs was indicted by the Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY). Karadzic is, allegedly, the mastermind of the war in Bosnia, which involved a campaign of ethnic cleansing, including the use of rape and sexual violence against women.

There is substantial concern, especially within survivor communities, that the campaign of rape, forced pregnancy and sexualized violence inflicted upon Bosnian women will not be properly prosecuted by the Tribunal. The current indictment against Karadzic, prepared in 2000 under the stewardship of the former Chief Prosecutor Carla Del Ponte, contains a cursory charge of sexual violence. However, this predates the jurisprudential developments, as well as numerous cases involving convictions for, and guilty pleas to, rape and other sexual violence, for which Karadzic, as supreme commander and political leader, could be held responsible. As a result, in recent weeks, calls have been made urging the Prosecutor, Serge Brammertz, to ensure the full prosecution of gender-specific crimes.

The ICTY is notable for its signal contributions to international jurisprudence, in particular, recognizing rape and other sexualized violence as torture and enslavement as part of war crimes and crimes against humanity, thus ensuring its place among the gravest crimes. Additionally, there have been significant convictions and guilty pleas based on charges of sexual violence. In an earlier statement, Brammertz promised to 'ensure that (the indictment) reflects the current case law, facts already established by the court, and evidence collected over the past eight years.' We are now awaiting confirmation that the indictment has been amended by the Chief Prosecutor to reflect the full extent of sexualised violence against Bosnian women, such as including sexual violence as a war crime, a crime against humanity, and elements of genocide and torture.

Melinda Ching Simon is an Australian human rights lawyer currently working in the Women's Rights and Gender Unit at the UN Office of the High Commissioner for Human Rights in Geneva

If I Were Attorney-General...

Prisoners' Rights Would be Protected Too

Australia's prisons suffer from chronic overcrowding and a lack of basic health services. There are prisoners in Tasmania who are not getting three square meals a day. The Queensland Parliament is considering a Bill that makes it even harder for prisoners to complain about sexual harassment, vilification and discrimination, and Victoria has just passed legislation that further decreases prison accountability. If I were Attorney-General, I would meet with my State and Territory counterparts and

the Ministers for Corrections and ask them why our regard for the human rights of prisoners has plunged so low?

Following this discussion, I would seriously reconsider the appropriateness of engaging private business to operate our State prison services and conduct an immediate inquiry into this issue. I would then overhaul the current system of prison accountability, implementing a scheme of regular independent inspections, public reporting and monitoring of prison conditions and management. I would also consider alternatives to detention, such as restorative justice and therapeutic jurisprudence.

However, on the top of my list of things to do would be to immediately repeal the *Corrections Amendment Act 2008* (Vic), which denies justice to prisoners who have been abused or wrongfully treated and does nothing to benefit the victims of crime that it claims to assist. I would then breathe a sigh of relief that this abominable law lasted only two weeks (having been passed by the Victorian government on 12 September 2008).

Under the Act any compensation paid to prisoners by the State or private prison operators is quarantined for at least twelve months and publicised in newspapers and on the internet, purportedly for the benefit of victims with potential claims against the prisoner. This perversely links a victim's chances of obtaining compensation to the wrongful treatment of their offender. The victim must rely, first, on their abuser being abused in turn and, second, on the prisoner making a claim for compensation that they are unlikely to ever receive.

The Act will result in various human rights breaches, including invasion of privacy, increased litigation costs, and the indignity of having the perpetrator of a wrong confiscate what they have been ordered to pay as recompense. This will deter prisoners from pursuing damages, irrespective of how badly they have been treated. Women prisoners sexually assaulted by prison guards, prisoners denied medical care, prisoners bashed and abused in circumstances that could have been prevented and others are unlikely to pursue a claim knowing that any compensation will compulsorily be taken from them and advertised in a newspaper.

This compounds the multiple and interrelated forms of serious disadvantage already faced by approximately half of Victorian prisoners in custody, including major mental illness, trauma from childhood sexual abuse, homelessness and unemployment, as well as illiteracy and a lack of education.

Worse still, by deterring compensation claims, the Act makes our prisons and prison officers even less accountable. This is of particular concern given reports by the Victorian Ombudsman indicating that complaints about Victoria's private prisons have increased by as much as 400% in the past two years, and some prisons are 'not fit for human habitation'. In February this year, Professor Richard Harding described the current system of monitoring abuse and corruption in Victoria's jails as 'well short of what a democratic society is entitled to.'

Currently, civil law remedies that are available to prisoners, such as remedies under anti-discrimination legislation, provide the only independent and publicly transparent examination of prison practices. This public scrutiny is vitally important given that prisons are custodial institutions shielded from public view, with potential victims who face multiple barriers to accessing justice. It is therefore essential to not only repeal the Act, but also to strengthen the powers of the Ombudsman or establish an independent prison watchdog with powers to release detailed public reports about prison conditions and management.

It is equally essential that specialised legal services for prisoners receive further funding. Prisoners have complex legal needs, so access to specialised legal services is imperative. A recent report by the Law and Justice Foundation of NSW noted that a lack of resourcing resulted in each inmate having only five or 10 minutes to discuss their case with the visiting legal advice service. So I would increase funding to those services and ensure that prison policies do not unnecessarily hinder access to legal resources and advice. Alternative methods of providing access to community legal services should also be considered, such as through video conferencing facilities.

Human rights belong to us by virtue of our humanity and are not forfeited on entering jail. As the New Zealand Human Rights Commissioner Rosslyn Noonan says, 'People are sent to prison as punishment not for punishment. Their punishment is the deprivation of liberty and they should not be subjected to behaviour that would be criminal outside a prison.'

Melanie Schleiger is on secondment to the Human Rights Law Resource Centre from Lander & Rogers. The views expressed in this article do not necessarily represent the views of the firm.