



INDEX

OPINION 1

NEWS..... 3

VICTORIAN CHARTER OF RIGHTS DEVELOPMENTS.... 5

OTHER CHARTER OF RIGHTS DEVELOPMENTS.... 6

CASE NOTES 6

HRLRC POLICY, ADVOCACY AND LAW REFORM 13

HRLRC CASEWORK..... 14

SEMINARS AND EVENTS... 14

EDUCATION, TRAINING AND RESOURCES..... 16

FOREIGN CORRESPONDENT 16

IF I WERE ATTORNEY-GENERAL... 18

Human Rights Law
Resource Centre Ltd
Level 1, 550 Lonsdale Street
Melbourne VIC 3001
P: + 61 3 9225 6695
F: + 61 3 9225 6686
E: hrlrc@vicbar.com.au
W: www.hrlrc.org.au
ABN: 31 117 719 267

- The Human Rights Law 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.

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

Opinion

A Human Rights Agenda for Kevin 07 in Australia 08

Twelve years. Twelve long, dark years. Over a decade during which Australia’s human rights performance was comprehensively set back. But at last it’s over. There is a lot of ground to be made up, things that need to be undone and undone things that need to be done. We are entitled to have high expectations of the new federal Labor Government but the human rights agenda is a big one. Where to begin? I suggest this agenda of priorities for law reform, program development, institutional renewal and international re-engagement as a good starting point for Kevin 07 in Australia 08. Not a human rights agenda for the full three year term, just for this first year, the starting points.

Law Reform

Our experience is that the existing federal constitution, statute law and common law have not been enough to prevent the enactment of laws violating human rights. The worst of those enactments must be addressed as the highest priority. That means changes to:

- the *Migration Act*, to remove all aspects of arbitrary detention, including the mandatory detention of certain asylum seekers, to restore the right of all those entering Australian territory to seek asylum as refugees and to extend the full benefits of Australian residence and citizenship to all those granted asylum without discrimination;
- the *Native Title Act*, to make it subject again to the *Racial Discrimination Act* and to restore rights to consultation; and
- the anti-terrorism legislation, to amend provisions authorising arbitrary detention and to make it subject to the *Racial Discrimination Act*.

More broadly, it’s time to adopt a national Bill of Rights. The Labor Party’s National Platform commits the Government to this and it needs to be done urgently. If ever there were any doubt that Australian law was inadequate to protect human rights, that doubt was dispelled when High Court judges said that laws brought before them breached fundamental human rights and yet they were powerless to do anything about it in the matter of *Al-Kateb*.

Some of the States and Territories have led or are leading the way. Particular praise is due to Jon Stanhope, Chief Minister in the ACT, who took the first courageous steps in the face of outright hostility from the then Federal Government and many of his State Labor colleagues. Now, this year, the Rudd Government has to begin the urgent process of fixing it federally.

Program Development

Good laws are essential to protect and promote human rights but are not sufficient. Programs too are required to address the serious deficiencies in human rights enjoyment and practice in Australia.

Without doubt the highest priority here has to be addressing Indigenous Australians' entrenched, historic experience of human rights violations. The first important step has been taken. Although the act was symbolic rather than substantive, the Rudd Government's decision to commence its term with the long overdue governmental and parliamentary apology to Indigenous peoples, especially those of the Stolen Generations, cannot be overestimated in its significance. Establishing a bipartisan 'national unity' process to seek ways forward is almost as significant. At last there is a good chance that as a nation we can come to terms with the past, make our peace with ourselves, remove the Indigenous race card from national political life, and begin to build a far better future. Success requires much more than good intentions and symbolic acts but this has been a very, very good start.

The second priority is the human right to education, especially school education. The Government has already recognised education as one of its social priorities. The programs that implement that recognition, however, have to be carefully targeted towards the most needy children in the areas of greatest disadvantage. By any measure, this requires that priority be given to children in rural and remote areas, both Indigenous and non-Indigenous, and in the poor outer suburbs of our cities. The National Inquiry into Rural and Remote Education, conducted by the Human Rights and Equal Opportunity Commission in the late 1990s, made recommendations that are still relevant and still largely unimplemented. The Dusseldorp Skills Forum's 2004 report on the right to education and the obligations of Australian Governments contributed further to this discussion. Appalling educational inequality violates the rights of children today and sentences them to lives of inequality in the future.

The third priority here is to begin work on a pressing issue, the human rights implications of climate change. At last we have a Federal Government prepared to acknowledge the significance of climate change. We are well aware that climate change will have environmental, economic and social impacts but less aware that it will also affect human rights. Yet little work has been done on this. The Government should request HREOC to undertake a public inquiry into this issue and report on what needs to be done to ensure that we are ready for the human rights challenges climate change will bring. It should start this year.

Institutional Renewal

And speaking of HREOC, this important national institution is in need of renewal. During the Howard decade it was systematically diminished and sidelined. Its budget was cut by 40% in 1998 as punishment for its politically unacceptable report on the removal of Indigenous children from their families. It spent the decade under the constant threat of re-structuring, with legislation in parliament but not passed and key leadership positions unfilled. The Commission needs to be renewed and restored to a central position in Australian national governance as the principal expert on human rights.

Renewal, however, cannot mean simply going back to where it was. Times have changed and the last decade has been too hard for that to be enough. The Commission's structure, functions, powers and resources need to be comprehensively, independently and publicly reviewed to ensure that it is truly renewed and restored. The review should be undertaken as a matter of urgency. The Commission has operated in uncertainty and it has been marginalised for far too long, given the importance of its work. It should be reviewed and the results of the review implemented this year.

International Re-engagement

Finally, this is the year to re-engage constructively with the international human rights system. The Howard Government moved Australia into an oppositional role in relation to almost all the major international human rights institutions and initiatives. This first confused and then alienated many traditional allies in positive human rights work that were accustomed to a strong Australian commitment to the international human rights system. Instead, Australia usually found itself in the company of a tiny minority of hostile States, basically the United States and its other dependent territories – Israel, Marshall Islands, Micronesia and Palau. After its national elections in 2005, Canada joined this select group, giving it somewhat greater credibility but no greater legitimacy. It's time for our declaration of independence.

We can start by supporting new international human rights treaties and declarations that we previously opposed: the treaty on independent inspections of places of detention (the *Optional Protocol to the Convention Against Torture*); the treaty permitting individual complaints of sex discrimination (the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*); the declaration on the rights of indigenous peoples; and the drafting of a new treaty to provide a system of individual complaints in relation to economic, social and cultural rights. Then we can ratify human rights treaties that we have not yet ratified: the *Convention on the Rights of Persons with Disabilities*; the *Convention on Enforced Disappearances*; and the *Migrant Workers Convention*.

We can engage more positively with the new Human Rights Council, including by issuing a standing invitation to its independent human rights experts, the Special Procedures, to make visits to Australia. We can revive our past practice of good, constructive collaboration with human rights treaty monitoring committees, beginning with a review of all the recommendations of the committees that we have rejected or ignored over the past decade.

The damage done to our international standing has been immense but it can be restored. That should be another priority for 2008.

Conclusion

The agenda I propose is not all that needs to be done, only what I see as the priorities, the absolute minimum, for this first year. It's the checklist by which I will assess the new Government's performance at the end of 2008. I hope others will share it.

Chris Sidoti currently chairs the United Kingdom Government's Northern Ireland Bill of Rights Forum. He has previously been the Foundation Director of the Australian Human Rights and Equal Opportunity Commission (1987-1992), Australian Law Reform Commissioner (1992-1995), Australian Human Rights Commissioner (1995-2000), and Director of the International Service for Human Rights (2003-07).

News

UN Human Rights Experts Welcome Australia's Apology to Indigenous Peoples

The United Nations Special Rapporteur on the Human Rights of Indigenous People; the UN Special Rapporteur on Racism; the UN Special Rapporteur on Adequate Housing; and the UN Working Group on Arbitrary Detention issued the following statement on 18 February 2008:

We warmly welcome the speech delivered by Prime Minister Kevin Rudd at the Federal Parliament on 13 February 2008, offering an apology to Australia's Indigenous peoples for the pain and indignity they have endured as a consequence of past laws and policies. We are specially moved by the apology offered to the members of the Stolen Generation and their families, victims of a deliberate policy of assimilation of the Aboriginal culture that contradicted the basic human rights principles of equality and dignity. We welcome the Australian Government's commitment to build a common future with the Indigenous peoples of the country based on mutual respect. Australia's efforts to acknowledge historical injustices and to promote reconciliation set an example of how to enhance harmonious and cooperative relationships between Indigenous peoples and States, in the spirit of the UN Declaration on the Rights of Indigenous Peoples. This apology will strengthen the moral fabric of the country and reinforce the Aboriginal contribution to Australian society.

The UN Special Rapporteur on the Human Rights of Indigenous People; the UN Special Rapporteur on Racism; the UN Special Rapporteur on Adequate Housing; and the UN Working Group on Arbitrary Detention have made official visits to Australia in recent years. The Government of Australia is encouraged to benefit from the analysis and recommendations of these mandate holders in taking forward practical measures to protect and promote the rights of Aboriginal peoples. The reports of special procedures can be found at <http://www2.ohchr.org/english/bodies/chr/special/>.

Centre Appoints Human Rights Lawyer

Thanks to very generous 3 year grants from the Helen Macpherson Smith Trust and the R E Ross Trust to support the operations and build the capacity of Centre, we have recently engaged a new Human Rights Lawyer.

Applications for the position closed on 9 January 2008 and we received a significant number of high quality applications from across Australia and internationally.

We are delighted that Rachel Ball has been employed as a Human Rights Lawyer and will commence employment immediately following her return from the USA, where she is completing her LLM in Human Rights at Columbia University. Rachel previously worked as a lawyer at Mallesons Stephen Jaques. She also has experience volunteering and working with the Asylum Seeker Resource Centre, the Castan Centre for Human Rights, Human Rights First in New York and the World Bank in Washington.

We are also delighted that Anna Copeland will be working with us from March to July 2008. Anna is currently the Director of SCALES Community Legal Centre in WA – which received the Australian Human Rights Law Award in 2002 – and a lecturer in human rights at Murdoch and Curtin Universities. Anna will be taking leave from SCALES and Murdoch to spend 4 months with the Centre and will bring great expertise and over 12 years legal practice experience to the office.

Centre Making a ‘Significant’ and ‘Positive’ Impact on the Promotion of Human Rights

In January 2008, an *Independent Evaluation of the Human Rights Law Resource Centre* was published by Jackson Consulting and the Melbourne Law School.

The key findings of the Evaluation include that:

- There is a clear scope and need for a human rights law organisation, such as the Centre, both domestically and internationally.
- The Centre is a significant player in human rights in Australia and is increasingly influential in the international human rights arena.
- The Centre has very strong relationships with and support from the community, commercial and public sectors.
- The Centre has made a significant and positive contribution to the promotion of human rights through its case work, litigation, policy work and educational activities.
- The Centre's capacity to proactively and strategically litigate as a method of promoting and protecting human rights is a major distinguishing feature.
- The contribution of the Centre to law reform is evident and represents 'significant impact', particularly in raising the profile of these issues and contributing to public discourse on human rights.
- The Centre's publications are valued resources which disseminate detailed and wide-ranging information about human rights law issues.
- The planning and governance of the Centre have been 'exemplary'.

In terms of future directions for the Centre, the Evaluation recommends, among other things, that:

- The Centre should regularly review its priorities and activities to ensure that they respond to and take advantage of changing needs and opportunities.
- The Advisory Committee could have greater input into the Centre – given its experience, diversity and expertise – and its role may be enhanced by more frequent meetings.
- The focus of the Centre's stakeholder engagement strategy should be redirected from the establishment of relationships, towards the maintenance of relationships. In particular, there should be a renewed focus on relationships with the community sector, particularly community legal centres.
- The Centre should consider whether, in its policy work, it ought to provide a consensus view on the matters forming the content of submissions or whether, having consulted with interested parties, it should advocate an independent position.
- Further funding will be required if the Centre is to expand its activities or operations without diluting its effectiveness.

The Centre would like to thank its stakeholders and supporters for participating in the evaluation, which will be a very valuable review and planning tool.

The *Independent Evaluation* is available at www.hrlrc.org.au under About the HRLRC>Evaluation of Impacts and Outcomes.

Victorian Charter of Rights Developments

Statements of Compatibility under the Victorian Charter

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

Police Regulation Amendment Bill 2007

Under the *Police Regulation Amendment Bill 2007*, the Victorian Chief Commissioner of Police will be granted the power to order members of the police force to be tested for alcohol and drugs of dependence.

A member who refuses to comply will be deemed to have committed a breach of discipline under s 69(1) of the *Police Regulation Act 1958* (Vic). Test results will not be admissible evidence in court proceedings except in certain circumstances in health or disciplinary proceedings against the officer, certain compensation claims, or where the member tested caused death or serious injury whilst on duty.

The Bill engages the rights to life (s 9), liberty and security (s 21), privacy (s 13), humane treatment (ss 10 and 22), movement (s 12), and freedom from non-consensual medical treatment (s10(c)) in the *Charter of Human Rights*.

According to the Statement of Compatibility tabled with the Bill, the amendments enhance the rights to life, liberty and security, and humane treatment, as:

... [t]hese rights require that the state ... undertake effective investigations where a person is killed or injured by an action of the state or while in custody of the state.

The Scrutiny of Acts Committee agreed with the analysis, observing its consistency with recent interpretations of the right to life under the *International Covenant on Civil and Political Rights*. In *Velásquez Rodríguez v Honduras* (1989) 28 ILM 291, for example, the Inter-American Court of Human Rights found that the right to life encompasses both a negative obligation not to violate human rights, as well as a positive obligation to ensure that the state's legal and administrative structures promote the free exercise of human rights. This decision gives rise to an obligation on states to provide mechanisms for the investigation of deaths and injuries resulting from state action (see *Special Rapporteur Report E/CN.4/2005/7*; UN Human Rights Committee, General Comment No.31).

The Statement also recognises that the testing of police officers places limitations on their individual rights to liberty and security, privacy, movement, and freedom from non-consensual medical treatment. According to the Statement, these limitations are reasonable and justifiable under s 7(2) of the *Charter* because:

- they are balanced against the obligation to investigate deaths and injuries caused in the exercise of police powers;
- testing allows for treatment and rehabilitation; and
- testing assists in maintaining integrity, preventing corruption and enhancing public confidence in the police force (an objective that was strongly supported in the subsequent Legislative Assembly debates).

The Statement suggests that the right to privacy is not in fact limited, as testing will not occur in unlawful or arbitrary circumstances, and the use of test results in subsequent proceedings is restricted. The Committee agreed with this proposition.

However, the Committee took the view that the restrictions on the use of test results in fact limit an accused person's right to a fair trial (s 24 of the Charter). In the Committee's opinion, the restrictions would prevent an accused person from discovering or using a police officer's test results as part of a defence in a criminal proceeding.

The Committee referred to the Minister for Police and Emergency Services' second reading speech which stated that the restrictions on the use of test results were:

... [i]mportant to protect the administration of justice from ... irrelevant 'fishing' expeditions by criminal defence teams.

The Committee disagreed with this statement, referring to the fact that the rules of evidence already prevent such 'fishing' expeditions. The Committee referred to the case *R v Roberts & Urbanec* (2004) 9 VR 295 as an example, in which the defendants sought to adduce evidence that investigating police officers had been charged with drug offences. The Victorian Court of Appeal unanimously upheld the evidence being disallowed, on the grounds of irrelevance and privilege against self-incrimination.

The Committee also noted that the current rules of evidence allow judicial discretion in balancing the right to privacy and the right to a fair trial, such that evidence may be admitted if the public interest in doing so outweighs the individual officer's right to privacy. The provisions in the Bill do not; so an accused would be prevented from using evidence obtained from tests even if it was relevant and highly probative. The Committee referred to *Wakeley & Bartling v R* (1990) 93 ALR 79, in which the High Court found that a police officer's drug use might be a 'legitimate line of inquiry' for a defendant, and that prohibiting access to such evidence could constitute 'a substantial miscarriage of justice.'

Katie Allan, Summer Clerk, and Sam Porter, Articled Clerk, Human Rights Law Group, Mallesons Stephen Jaques

Other Charter of Rights Developments

Charters of Rights and the Criminal Justice System

The UK Office for Criminal Justice Reform has recently developed a range of online resources regarding the relevance and applicability of the UK *Human Rights Act 1998* to criminal justice law, policy and procedure. Given that the Victorian *Charter* and the ACT *Human Rights Act* are both modeled on the UK Act, these resources provide helpful guidance as to the potential applicability of these instruments to criminal justice issues in Victoria and the ACT.

The resources available include:

- Summaries of key human rights judgments of relevance to the criminal justice system;
- FAQs and Human Rights Acts Myths; and
- Briefing papers on the topical human rights and criminal justice system issues, including lawful use of force, prisoner access to education, hunger strikes and the duty to protect witnesses. Each briefing paper includes an overview of the relevant substantive human rights and case law.

The CJS Online resources are available at <http://frontline.cjsonline.gov.au/guidance/human-rights/>.

Dignity and Rights for People in Care

The UK's Social Care Institute for Excellence has recently published an online guide entitled *Promoting Dignity within the Law*. The Guide provides a comprehensive overview of the relevance and application of legislation, particularly the *Human Rights Act 1998*, to people using health and social care services.

The Guide is intended to help health and social care practitioners and services to understand human rights legislation and to develop policies and practices which promote the rights and dignity of people in care. The Guide also suggests ways in which apparent conflicts between the legal responsibilities placed upon practitioners and services, on the one hand, and the human rights of people who use services, on the other, may be resolved.

The Guide is at <http://www.scie.org.uk/publications/practiceguides/practiceguide09/law/index.asp>.

Case Notes

Human Rights and Mental Illness

Savage v South Essex Partnership NHS Foundation Trust [2007] All ER (D) 316 (Dec); [2007] EWCA Civ 1375 (20 December 2007)

The UK Court of Appeal has held that the right to life includes a positive obligation to actively safeguard life and that the negligent failure of a psychiatric hospital to take adequate steps to prevent the suicide of a patient amounted to a violation of that patient's right to life.

Facts

In the United Kingdom, persons suffering from mental illness or impairment can be involuntarily detained for treatment under s 3 of the *Mental Health Act 1983* (UK). This case arose from the suicide of a patient detained in the psychiatric ward of the Runwell Hospital, a public facility in Essex. After a number of thwarted attempts to leave the hospital, the patient eventually succeeded, and ultimately jumped in front of a train and was killed.

The patient's daughter, the plaintiff, commenced proceedings against the hospital in the High Court, alleging that the hospital or its employees were a public authority and had negligently failed to:

- take reasonable measures to prevent the risk of suicide; and
 - properly assess the risk of the deceased absconding from the hospital,
- in breach of the deceased's right to life under art 2 of the *European Convention on Human Rights*, which enshrines the right to life. The plaintiff sought damages for breach of ss 6-8 of the *Human Rights Act 1998* (UK).

The defendants applied for a preliminary determination of the proper test to establish a breach of art 2 of the *Convention*. At first instance, the High Court held that the test was one of 'gross negligence such as would be sufficient to sustain a charge of manslaughter'. It was common ground that the plaintiff's allegations did not amount to gross negligence, so this conclusion would have brought proceedings to an end. The plaintiff appealed to the Court of Appeal.

The Court of Appeal allowed the appeal, concluding that, in the circumstances, the proper test was one of ordinary negligence.

Decision

The scope of the right to life

Under article 2 of the *Convention*, '[e]veryone's right to life shall be protected by law'. The right to life encompasses both:

- the negative obligation to refrain from the intentional and unlawful taking of life; and
- the positive obligation to actively safeguard life.

The cases on art 2 distinguish between ordinary persons, on the one hand, and persons in the custody of the State, on the other. Article 2 requires a higher standard of care to be exercised in respect of persons detained by the state because of their special vulnerability. Thus, to establish a breach of art 2 in the case of ordinary persons, it is necessary to establish gross negligence, while in the case of detainees, it is necessary only to establish ordinary negligence.

The threshold test

The fundamental difficulty in this case was that the deceased was neither a prisoner in the strictest sense, nor an ordinary medical patient. The plaintiff submitted that the deceased's position was the same as a person detained in a prison, both being in the care of the state, detained under compulsion, and unable to leave the hospital or prison. In the hospital's submission, the proper comparator was not persons in prison, but other patients, because the treatment would 'in many cases' be exactly the same as that between voluntarily and involuntarily treated patients.

Ultimately, applying *Osman v United Kingdom* (1998) 29 EHRR 245, the Court unanimously concluded that the deceased's position was 'more akin to a person detained in prison than an ordinary patient in a hospital ... receiving treatment for [mental health] problems ... or otherwise'.

The critical factor was the vulnerability of both prisoners and patients detained under the MHA, who 'are under the control of the state in a way in which ordinary patients are not ... [and] in a different way'. There was no reason to afford persons involuntarily detained under the MHA 'any less rights under article 2 ... than those detained in prison'.

In response to the suggestion that health professionals 'might adopt a defensive approach to treatment' of involuntarily detained patients, the Court observed that, no matter what the position under the *Convention*, at common law, the same duty of care is owed to both.

Accordingly, the Court held that to establish a breach of art 2 the plaintiff must establish:

that at the material time the [hospital] knew or ought to have known of the existence of a real and immediate risk to the [deceased's] life ... from self-harm and that it failed to take measures within the scope of [its] powers which, judged reasonably, might have been expected to avoid that risk.

A 'real risk' is one that is objectively justified, and an 'immediate risk' is one that is present and continuing.

Implications for the Victorian Charter

Section 9 of the *Charter* gives effect to the right of life, to which '[e]very person has the right', and, similarly to the UK *Mental Health Act*, the Victorian *Mental Health Act* allows persons to be involuntarily detained for treatment. Assuming those responsible under the Victorian Mental Health Act are public authorities, for the purpose of the *Charter*, *Savage* gives guidance on the scope of their obligation to safeguard the life of involuntarily detained patients in their care.

Sam Porter and Merav Bloch, Human Rights Law Group, Mallesons Stephen Jaques

Discrimination on the Basis of Sexuality a Violation of the Rights to Privacy and Equality

EB v France [2008] ECHR 43546/02 (22 January 2008)

The Grand Chamber of European Court of Human Rights in *E.B. v France* held that the refusal to authorise an adoption application by a woman in a same-sex relationship, on the basis of her sexuality, amounted to a violation of arts 14 and 8 of the *European Convention on Human Rights*.

Facts

The applicant (E.B.) was a 45 year old school teacher who, since 1990, had been in a stable relationship with another woman, R. On 26 February 1998, E.B. applied to the Jura Social Services Department for authorisation to adopt a child. In her application, E.B. noted her sexual orientation and her relationship with R. Despite French legislation expressly granting single persons a right to adopt, the adoption board recommended the application be refused on the ground that the child's best interests would not be served due to the lack of a paternal role model (paternal referent) and R's ambivalence or lack of commitment to the adopted child.

In March 1999, E.B.'s request for the decision to be reconsidered was dismissed and the decision was confirmed. E.B. then applied to the Besançon Administrative Court to have both the November 1998 and March 1999 decisions set aside, primarily on the basis that the psychologist from the Adoption Board had not met her. While she was successful in this appeal, the decision was subsequently reversed by the Administrative Court of Appeal and the Conseil d'Etat in the respondent's favour. In its reasoning, the Administrative Court and the Conseil d'Etat consistently included consideration of E.B.'s 'lifestyle' and its effect on the adoption process and future child.

Relying on arts 8 and 14 of the Convention (which respectively protect the right to privacy and non-discrimination), E.B. appealed to the European Court of Human Rights. She claimed that in exercising her right under French law for a single person to adopt, she suffered discriminatory treatment due to her sexual orientation. This, she alleged, amounted to interference with her right to respect for her private life.

The respondent denied that the refusal to grant authorisation had been based on E.B.'s sexual orientation and, therefore, that the refusal could not amount to discrimination. Instead, it stated that the refusal was based on the child's interests alone. It cited the lack of paternal role model as crucial, given that 'many professionals considered that a model of sexual difference' an important factor in a child's identity. In addition, the ambivalence of R was seen as a potential source of insecurity for the child.

Decision

By a majority of 10 to 7, the European Court found that the refusal to grant authorisation for the adoption violated art14 (prohibition of discrimination) in conjunction with art 8 (the right to respect for private and family life).

In response to the first ground (the lack of a paternal role model) the court noted its ultimate effect was to require E.B. to demonstrate the existence of a referent of the opposite sex among her family or close

friends. This, the court considered, had the potential to render ineffective the French legislation permitting adoption by single persons. In addition, while the court acknowledged the need to consider the availability of a paternal referent, it rejected the excessive weight given to this factor by the French authorities.

In response to the second ground (R's lack of commitment) the court agreed with the French government that the attitude of E.B.'s partner was relevant to ensure necessary safeguards for the child are in place. There was no evidence to indicate that this ground was based on E.B.'s sexual orientation and therefore reliance on this ground was not discriminatory.

However, the court found that the domestic authority's consideration of E.B.'s 'lifestyle' irrefutably indicated that her sexual orientation was a 'decisive factor leading to the decision to refuse her authorisation to adopt.'

In conclusion, the majority found E.B. had been discriminated against, as a distinction was drawn based on consideration of her sexual orientation. Consequently, E.B. was entitled to payment of EUR 10,000 for non pecuniary damage, plus an additional EUR 14,528 in respect of costs.

Implications for the Victorian Charter

In Victoria the *Adoption Act 1984* (Vic) restricts adoption to heterosexual couples, or, in the case of single persons, only where special circumstances are proven. In relation to heterosexual couples, s 11 of the Act prescribes only four categories of people in whose favour an adoption order may be made. These categories concern heterosexual couples only and do not contemplate same-sex couples or persons. In its *Assisted Reproductive Technologies and Adoption Final Report* of June 2007, the Victorian Law Reform Commission recommended amendments to the Act, to allow adoption orders to be made in favour of same-sex couples. While the report does not directly consider adoption by a homosexual person in similar circumstances to E.B, it recommends that single people be able to adopt subject to criteria consistent with those applying to a couple that seeks to adopt.

If the VLRC recommendations are indeed adopted, this decision may be instructive as to the scope of ss 8(2) and 17 of the Victorian Charter. These provisions relate to the right of an individual to enjoy his or her human rights free from discrimination and the protection of families and children, respectively.

Emma Wanchap and Emily Sykes, Human Rights Law Group, Mallesons Stephen Jaques

Equality of Arms and the Right to a Fair Hearing

Ragg v Magistrates' Court of Victoria and Corcoris [2008] VSC 1 (24 January 2008)

In a significant decision, the Supreme Court of Victoria has outlined the nature and scope of the principle of 'equality of arms' as an aspect of the right to a fair hearing. While the Court held that the Victorian Charter did not apply to the proceeding (as it was commenced prior to the entry into force of the operative provisions of the Charter), Bell J's discussion of the right to a fair hearing under art 14 of the ICCPR is likely to be highly relevant to any subsequent judicial consideration of s 24 of the Charter, which is closely modelled on art 14.

Facts

This case involved an application for judicial review against a decision of a magistrate to refuse to set aside a summons to produce evidence issued by the defence.

Nicholas Corcoris was charged with tax evasion by an officer of the Australian Federal Police, Jarrod Ragg. Prior to his committal hearing, Mr Corcoris issued two witness summonses to Mr Ragg to produce certain prosecution documents which Mr Corcoris argued may be relevant to and assist his defence. Mr Ragg applied to the magistrate to set aside the summonses on the grounds that they were too wide and would require the production of a large number of irrelevant documents. The magistrate refused the application and Mr Ragg sought judicial review.

Decision

The Court dismissed the application and ordered that the documents sought in the summonses be produced having regard to the defendant's right to a fair trial under international human rights law – particularly the right to equality of arms – and the prosecution's duty to disclose material documents.

The Court reiterated that international human rights may be relevant to the exercise of a judicial power or discretion – such as the scope and application of a magistrate’s power to strike out summonses – where the human rights instrument in question is relevant to the subject matter of the case and where the consideration of the instrument is not inconsistent with applicable legislation or the common law (see also *Tomasevic v Travaglini* [2007] VSC 337, [73]-[74] and *In re TLB* [2007] VSC 439, [16]-[20]).

The subject matter in the present case involved the disclosure of documents which were potentially relevant to the defendant’s fundamental right to a fair trial. Accordingly, Bell J held that the human rights specified in art 14(1) (right to a fair and public hearing before a competent, independent and impartial tribunal) and art 14(3) (right to minimum guarantees in a criminal proceeding) of the *ICCPR* were directly relevant to the question in the proceeding. Having regard to international and comparative human rights jurisprudence, Bell J stated that ‘equality of arms’ requires that both parties ‘be treated in a manner ensuring that they have a procedurally equal position to make their case during the whole course of the trial’. Justice Bell also considered that the defendant’s right to adequate facilities to prepare a defence – which includes access to any investigation and prosecution material that may be exculpatory or otherwise materially assist the defence – required that the summonses be allowed. While the right to disclosure of relevant material is not an absolute right, and may be balanced against competing interests such as national security or the need to protect witnesses, the rights of the accused in the present case favoured disclosure.

Implications for the Victorian Charter

Sections 24 and 25 of the *Charter*, which respectively enshrine the right to a fair hearing and certain minimum guarantees in criminal proceedings, are closely modelled on art 14 of the *ICCPR*.

Accordingly, although the Court held that the *Charter* did not directly apply to the present proceeding (as it was commenced prior to the entry into force of the relevant *Charter* provisions), Bell J’s discussion of the nature and scope of the right to a fair hearing under art 14 of the *ICCPR* is likely to be highly relevant to any subsequent judicial consideration of ss 24 and 25 of the *Charter*.

Justice Bell’s discussion of the interests which may be legitimately counterbalanced against aspects of the right to a fair hearing may also be relevant to a Court’s consideration of permissible limitations on the right to a fair hearing under s 7 of the *Charter*.

Finally, the decision is instructive as to how s 32(2) of the *Charter*, which enables the Court to consider relevant international and comparative human rights jurisprudence in interpreting a statutory provision, may be applied. In considering the nature and scope of the principles of equality of arms and the prosecutorial duty to disclose, Bell J has extensive regard to jurisprudence from the UN Human Rights Committee, the European Court of Human Rights, the Supreme Court of Canada, the UK House of Lords and the High Court of Australia, among others. This suggests that advocates should consider all relevant sources of human rights jurisprudence in interpreting a statutory provision and not constrain themselves to case law from the UK and New Zealand.

The full text decision is available at <http://www.austlii.edu.au/au/cases/vic/VSC/2008/1.html>.

Philip Lynch is Director of the Human Rights Law Resource Centre

Independence and Impartiality of Parole Board Insufficient for Fair Hearing

Brooke & Ors, R (on the application of) v The Parole Board & Anor [2008] EWCA Civ 29 (1 February 2008)

The UK Court of Appeal has held that the Parole Board does not possess the necessary independence required by art 5(4) of the *European Convention on Human Rights*. This decision may be relevant to a determination under s 24 of the Victorian *Charter* as to whether a court or tribunal is ‘competent, independent and impartial’.

Background

On 7 September 2007, the England and Wales High Court declared that the Parole Board did not have ‘demonstrated objective independence of the executive and of the parties’ required under *the European Convention on Human Rights*. The Secretary of State appealed the decision. There were three individual respondents, all serving prison sentences. They had been convicted of burglary, murder, and

sexual assault respectively. Each respondent's release depended upon the decision of the Parole Board.

Decision

The Court of Appeal analysed the nature of the Parole Board, tracing its gradual evolution from advisory body to 'court'. Historically, the Board's role was to assist the Secretary of State in exercising discretion about the release of prisoners. Today, 'there is no doubt that the major part of the Board's duties is judicial in nature.' [para 47]

In exercising its judicial functions, the Board must be (and be seen to be) independent and impartial. This is a requirement under the common law and under art 5(4) of the *European Convention* (which provides that 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.').

In determining whether there had been 'encroachments on the independence of the Board', the Court's approach was to survey key areas in which concerns had been raised, and appraise whether those concerns were warranted.

The Court of Appeal unanimously upheld the Divisional Court's finding that the Parole Board did not have the requisite independence from the Secretary of State. It then turned to the question of remedies, and, in response to the Secretary of State's complaint that the Divisional Court's declaration was 'too uncertain', set out a series of comments regarding 'required action'. The following is an overview of the key findings.

Directions

The Court held that '[t]he directions given by the Secretary of State were intended to go beyond mere guidance as to relevant matters to which the Board should have regards and direct the Board as to how it should carry out its judicial function of determining applications for release.' [para 60] The Court confirmed its previous finding that the Secretary's recommendations should be confined to guidance on matters that the Board would otherwise be required to consider 'as a matter of law'.

Appointment and Composition of Members

The Court made reference to a public speech in which the Secretary undertook to appoint a victim of crime or a person who had been involved with a victim support group to the Board, in order to inject a 'pro victim' angle into the Board's decision-making. The Court held that the Secretary could appoint Board Members, provided the appointment criteria and process were transparent, and the Minister refrained from appointing lay members because they 'demonstrate qualities that are not relevant to the Board's functions but which are likely to affect the Board's decisions.' [para 84]

Tenure

Members of the Board were appointed for a period of three years, and the Secretary of State had the option of extending each term by a further three years (to a maximum of six years). The Court held that this arrangement, of itself, did not compromise the independence of the Board. On the other hand, the Secretary's broad powers to remove members from Board did undermine its independence. The Court recommended (at minimum) '...the establishment of a procedure that ensures that a member's appointment is not terminated without good cause and subject to fair process.' [para 88]

Funding and Sponsorship

The Parole Board was previously sponsored by the Department of State, and, for the purposes of the Court of Appeal's decision, by the Ministry of Justice. The Court of Appeal held that sponsorship, of itself, did not constitute an encroachment on the Board's independence. However, the 'hands-on' approach of the sponsor was problematic. For example, the Court of Appeal was concerned that the Department severely restricted the Board's opportunity to interview applicants for release (despite the fact that the Board found the interviews extremely valuable, and were provided for by legislation). It was also concerned by the fact that the Secretary directed the Board to apply a different test in relation to risk than the test that was laid down by statute.

Implications for the Victorian *Charter*

The Court of Appeal's judgment in this case provides valuable, practical guidance about the circumstances in which a body exercising judicial functions will be considered insufficiently independent from the executive.

Questions concerning the independence of bodies exercising judicial functions are most likely to arise in the context of the right to fair hearing (s 24), and the right to liberty and security of person (s 21).

Section 21(7) of the *Charter* is equivalent to s 5(4) of the *European Convention*. It provides as follows:

Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must –

- (a) make a decision without delay; and
- (b) order the release of the person if it finds that the detention is unlawful.

It is important to note that, unlike the United Kingdom's *Human Rights Act 1998*, the *Charter* provides that courts and tribunals are only public authorities when they are acting in an *administrative* capacity. In addition, there are specific, transitional limits on the application of the *Charter* to Victoria's Parole Boards. As reported in Edition 22 of the Bulletin, pursuant to the *Charter of Human Rights and Responsibilities (Public Authorities) (Interim) Regulations 2007 (Vic)*, the Adult Parole Board, the Youth Parole Board and the Youth Residential Board are not 'public authorities' for the purposes of the *Charter*. These regulations will expire on 31 December 2008.

The decision is available at <http://www.bailii.org/ew/cases/EWCA/Civ/2008/29.html>.

Jessica Moir is a member of the Allens Arthur Robinson Corporate Responsibility Group

Psychiatric Detention in Prison

Pankiewicz v Poland [2008] ECHR 34151/4 (12 February 2008)

In this case, the European Court of Human Rights considered the legality of:

1. detaining a mentally ill prisoner pending transfer to a psychiatric hospital; and
2. the length of pre-trial detention

-- under arts 5(1) and 5(3) of the *European Convention on Human Rights*.

Facts

Mr Pankiewicz was detained at Nowa Sól District Court from 6 March 2003 to 30 March 2004 following suspicion he had uttered threats against his wife and the man with whom she was allegedly in a relationship. Grounds for detention included a reasonable belief Mr Pankiewicz had committed the offence, and the likelihood he would induce witnesses to give false testimony in his favour.

Mr Pankiewicz had a history of psychiatric illness. On 2 June 2003, the court ordered he undergo a psychiatric examination to determine if he could be held criminally responsible for his acts. His detention was extended a number of times, and he remained under medical care.

On 5 January 2004, the court found Mr Pankiewicz had committed the offence but because of an organic delusional disorder, he was not criminally responsible. The court ordered that Mr Pankiewicz be placed in Kościan psychiatric hospital. He remained in detention, untreated, because the hospital could not finalize a date for his admission. On 30 March 2004, some of two months and twenty-five days later, he was placed in Cibórz Psychiatric Hospital, as the Kościan hospital remained full.

The Zielona Góra Regional Court found that Mr Pankiewicz's stay in custody from 3 March 2003 to 5 January 2004 was a breach of Poland's *Code of Criminal Procedure* Article 264(3), which provides that if proceedings are discontinued by reason of insanity of the accused, preliminary detention may be maintained pending application of a preventive measure such as placement in a psychiatric facility. He had not been placed under the care of the State Treasury, the body normally responsible for detention of people whose cases were discontinued due to mental disorder. His compensation was (1) 25,609 Polish zlotys in pecuniary and non-pecuniary damage and (2) acknowledgement by authorities that the detention was unlawful. However, these remedies did not relate to 5 January to 30 March 2004.

The period from 5 January to 30 March 2004, which Mr Pankiewicz spent in detention without the aid of psychiatric care, therefore formed the basis of his claim to the European Court.

Mr Pankiewicz complained that he had been detained despite his mental illness, in breach of his right to freedom from deprivation of liberty and security under art 5(1) of the Convention. Mr Pankiewicz also complained that the length of detention was unreasonable in breach of art 5(3).

Decision

Article 5(1)

The legality of Mr Pankiewicz's detention required consideration of whether:

1. the domestic law was lawful; and
2. the detention was 'lawful' according to the terms set out in art 5(1).

The European Court accepted that Mr Pankiewicz's detention was lawful under domestic law because it prevented him inflicting harm on himself or others. It also accepted that the detention *prima facie* fell within the scope of art 5(1)(e), under which a party can be lawfully detained because of unsound mind.

However, the Court noted that in giving effect to art 5(1)(e), a reasonable balance must be struck between the competing interests of the detained and detaining parties. It accepted that it was unrealistic to require the Government to have a place immediately available in a selected psychiatric facility for Mr Pankiewicz. Nonetheless, Mr Pankiewicz was held in a detention centre which lacked adequate medical facilities and his admission to hospital was delayed for a significant period. Both of these acts were harmful to a person clearly in need of treatment. The Court found a reasonable balance was not struck and art 5(1) was violated.

Article 5(3)

Article 5(3) entitles everyone arrested or detained to trial within a reasonable time or to release pending trial. The European Court held that while the period Mr Pankiewicz had waited was long, the redress provided by the Zielona Góra Regional Court in respect of his complaint of the excessive length of his detention precluded any claim to breach of this section. Therefore, he could no longer claim to be a victim of a violation of this provision of the Convention.

Implications for the Victorian Charter

The *Charter* provides that a person must not be subjected to arbitrary arrest or detention under s 21(2), in terms which are very similar to those of art 5(1) of the Convention. However, unlike the Convention, the *Charter* does not enumerate circumstances in which deprivation of liberty is permitted, such as those involving persons of unsound mind. This case may prove illustrative for instances in which detention is necessary to prevent parties from causing harm to themselves or others, as well as the conditions under which the detention may be allowed to continue pending a party's admission into an appropriate facility. Sections 21(5)(a) and (b) of the *Charter* are almost identical to art 5(3) of the Convention. They provide that a person who is arrested or detained on a criminal charge must be promptly brought before a court and has the right to be brought to trial without unreasonable delay.

Louise Fahy is a Lawyer with DLA Phillips Fox

HRLRC Policy, Advocacy and Law Reform

Alternate Report to UN Committee on Economic, Social and Cultural Rights

In conjunction with the National Association of Community Legal Centres, the Centre is coordinating a major NGO report to the UN Committee on Economic, Social and Cultural Rights regarding Australia's implementation of, and compliance with, the *ICESCR*.

The report, which has been drafted in partnership with over 50 non-government organizations, considers issues including Indigenous rights, homelessness, access to adequate health care, prison conditions, asylum-seeker and refugee issues, disability rights, Welfare to Work, and same-sex entitlements.

Mallesons is providing pro bono assistance with researching, editing, designing and printing the NGO report, which will be submitted to the UN in late-March 2008.

HRLRC Casework

Access to Adequate Mental Health Care in Prison

With the pro bono assistance of Allens Arthur Robinson, the Centre is working together with the Brimbank Melton Community Legal Centre to assist an inmate at Barwon Prison to access appropriate mental health care. The prisoner is a 26 year old male who suffers from severe delusion and paranoia. He has been in prison on and off for the last seven years, including being held in solitary confinement for the last three years which has contributed significantly to his mental health state.

The Centre considers that the prisoner should be transferred to an appropriate facility where he would be able to receive specialist mental health treatment. A prisoner's lack of access to adequate mental health treatment raises issues in relation to s10 (protection from cruel, inhuman or degrading treatment) and s 22 (right to humane treatment when deprived of liberty) of the Victorian *Charter of Human Rights and Responsibilities*, which became fully justiciable on 1 January 2008.

Centre Gives Evidence regarding Transparency and Accountability in Prison Administration and Management

On 6 February, the Centre's Director, Phil Lynch, gave evidence as an expert witness in support of a Freedom of Information application for access to a report prepared by the Corrections Inspectorate regarding separation orders and high security and management units in Victorian prisons. The matter is being heard in the Victorian Civil and Administrative Tribunal, with the applicant, Western Suburbs Legal Service, being represented by Corrs Chambers Westgarth on a pro bono basis.

The Director's witness statement considered Victoria's obligations in relation to transparent and accountable prison management and conditions in light of the human rights standards enshrined in the Victorian *Charter of Human Rights*, the *ICCPR*, the UN Standard Minimum Rules for the Treatment of Prisoners, and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

The witness statement is available at www.hrlrc.org.au under Casework>Domestic Casework.

Seminars and Events

The Future of International Human Rights Protection: Reflections from the UN Special Rapporteur on Human Rights and Counter-Terrorism

with Professor Martin Scheinin, UN Special Rapporteur on the Promotion of Human Rights while Countering Terrorism

Date: 5.45 for 6.00 – 7.45pm, Tuesday, 18 March 2008

Venue: Clayton Utz, Level 18, 333 Collins Street, Melbourne

Cost: \$20 / \$10 concession

Registration is essential. Use Booking Form available at www.hrlrc.org.au.

2008 Human Rights Dinner

with Gay McDougall, UN Independent Expert on Minority Issues and Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner

Date: 7.00 for 7.30pm, Friday, 4 April 2008

Venue: Essoign Club, Owen Dixon Chambers East, Level 1, 205 William St, Melbourne

Cost: \$90 / \$50 for community organisations

Registration is essential. Use Booking Form available at www.hrlrc.org.au.

Human Rights and Environmental Law

This is the Environment Defenders Office first public seminar for 2008 and will look at rights and responsibilities under the new Victorian *Human Rights Charter* and, in conjunction, examine the

implications for the *Planning and Environment Act 1987*. Speakers include Ben Schokman (DLA Phillips Fox Human Rights Lawyer, Human Rights Law Resource Centre), Simon McGregor (Barrister) and Mimi Marcus (Lawyer, Maddocks).

Date: 5.45 for 6.00 – 7.30pm, Wednesday, 27 February 2008

Venue: 60L Green Building, Ground Floor, Meeting Room 1, 60 Leicester Street, Carlton

RSVP: Verity McLucas, EDO Victoria, (03) 8341 3100 or verity.mclucas@edo.org.au.

Uganda: From Child Soldiers to Human Rights

with Archbishop John Odama

The University of Melbourne Human Rights Forum and Caritas Australia present a public lecture on the issue of Human Rights in Uganda.

Archbishop John Odama is renowned for his peace building efforts in the brutal conflict that has raged for over twenty years in northern Uganda. Child soldiers, sexual slavery and forced labour are all common occurrences in Uganda. The Archbishop has played an instrumental role negotiating between the two main warring parties; the Lord's Resistance Army and the Ugandan government forces.

Archbishop Odama is the President of the Catholic Justice and Peace Commission and has briefed the United Nations Security Council on the situation in Uganda.

Date: 6.00pm (refreshments), 6.30pm-7.30pm (lecture) on Thursday, 28 February 2008

Venue: Room G08, Ground Floor, Melbourne Law School, University of Melbourne, 185 Pelham St, Carlton

RSVP: human-rights@unimelb.edu.au by Tuesday, 26 February 2008.

Defending Human Rights

with Hinal Jilani, UN Special Representative on Human Rights Defenders

The University of Melbourne Human Rights Forum's International Visitor for 2008, Hina Jilani, will be delivering a public lecture on the role of human rights defenders in promoting the international human rights framework. Ms Jilani is the Special Representative of the UN Secretary-General on Human Rights Defenders. She is an advocate of the Supreme Court of Pakistan and founder of the Women's Action Forum, the first legal aid clinic in Pakistan, and the Human Rights Commission of Pakistan. Ms Jilani was a member of the International Commission of Inquiry on Darfur established by the UN Security Council and the United Nations Expert Group on Darfur.

Date: 6.00pm (refreshments), 6.30pm-7.30pm (lecture) on Tuesday 1 April 2008

Venue: Melbourne Law School, 185 Pelham St, Carlton

RSVP: human-rights@unimelb.edu.au by Thursday, 27 March 2008 with 'Jilani' in the subject line.

The Impact of the Victorian Charter of Rights on the Criminal Justice Sector

Through a series of presentations, open debate and audience participation, this Criminal Justice Research Consortium forum will examine the impact the Charter has had on various organisations in the Victorian criminal justice sector and consider how wide ranging its effect's will be in the future.

Speakers include John Lesser (Mental Health Review Board), Di Sisely (Australian Centre for Human Rights Education), Kelvin Anderson (Corrections Victoria), David Marnie (Melbourne Citymission) and Pene Mathew (ACT Human Rights Commission).

Date: 7.00 – 9.00pm, Tuesday, 4 March 2008

Venue: Monash University Law Chambers, 472 Bourke Street, Melbourne

Registration and payment is essential at <http://cjrc.monash.org/activities/seminars/human-rights-charter.html>.

Education, Training and Resources

Charter of Human Rights Workshops for Community and Non-Government Organisations

The Victorian Equal Opportunity and Human Rights Commission is running a series of free Charter of Human Rights and Responsibilities Workshops for community and non-government organisations from February – June 2008. The workshops are designed to help community organisations understand and apply the rights and obligations contained in the *Charter*, including:

- ensuring human rights standards are maintained and upheld;
- promoting access and equity, especially for disadvantaged and marginalised people; and
- meeting legal obligations.

For further information and to register, see

<http://www.humanrightscommission.vic.gov.au/pdf/VEOHRCHRCHARTERWORKSHOPS08.pdf>.

Foreign Correspondent

Australia Thwarting Progress on Remedies for ESC Rights Breaches?

As foreshadowed in the last Bulletin, one of the most interesting developments in the UN human rights system during February was the progress made at the Working Group to draft an Optional Protocol to the *International Covenant on Economic, Social and Cultural Rights*. For one week states gathered to negotiate the text of this new draft protocol, which will establish a communications procedure for individual and group victims of economic, social and cultural rights (ESC rights) violations, bringing these rights on par with civil and political rights. After years of discussion and negotiation, it is refreshing to see the Working Group members clearly express a desire to finalise the drafting process in 2008, in time for the 60th anniversary of the *Universal Declaration of Human Rights*.

NGOs, however, are concerned to ensure the momentum to adopt an instrument does not become the driver to accept drafting compromises which will potentially have a detrimental effect for human rights in the future. In this regard, it has been alarming to see Australia join the ranks of China, Russia, the USA, and others who oppose creating an instrument which would subject all ESC rights to review by a complaints procedure. Australia prefers an 'à la carte' approach, whereby states may pick and choose which rights should be subject to the complaints procedure, in contrast to the majority of states which support a comprehensive approach to which rights are included. While it may sound like a small difference, the flow on effects for domestic litigation and implementation of ESC rights could be broad – having some rights being the subject of universal justiciability and not others will unjustly skew the interrelatedness and interdependence of all human rights, and will lead to the prioritisation of some rights over others, making some more difficult to enforce at the local level. It is, in effect, a rewriting of the Covenant, which clearly establishes all rights as equal. It does not bode well for victims of violations of the right to adequate housing, the right to education, food, water, social security, health, and other rights such as workers rights, and their search for equal access to justice.

Another of the key negotiation issues is whether or not the Committee on Economic, Social and Cultural Rights (CESCR), which will be the body to receive communications under the new Optional Protocol, should be directed to apply a certain standard when considering communications, and whether this standard should include a broad margin of discretion. Binding the Committee's ability to develop its own jurisprudence and standards of review, and necessitating that it give broad deference to the executive governments, is not seen by all as the most appropriate way in which to establish a flexible and progressive UN instrument. Jurisprudence shows us that there are some instances where a certain margin of appreciation is appropriate, but other instances where the judicial body (or in this instance, the quasi-judicial treaty body) should be given the flexibility to determine the appropriate level of review based on the facts before them and the well-established law they are applying. Yet the Australian position is that the states parties should control CESCR's role as closely as possible.

Discussions are also still progressing regarding the admissibility criteria for complaints, including the standing for non-governmental organisations, and whether or not NGOs could be allowed to submit a form of 'amicus' like submissions. Again, the Australian experience has much to offer in this regard, as our Courts have often recognised the value of amicus submissions and third party involvement in cases

which involve issues of general relevance to the community, particularly where the policy implications are such that the human rights of many may be affected, or where NGOs have particular expertise to offer.

The great disappointment is that the Australian delegate at the Working Group is playing a 'constructively critical' role, acting along with a few other allies in being an obstructionist voice in the drafting process – raising concerns about general justiciability of ESC rights (issues long ago dismissed by academics and practitioners alike) to support arguments for why ESC rights should not be treated equally, and why the CESCR should have its hands tied in the process of considering the merits of each case. This is despite the fact that such distinctions and constraints are not imposed in other similar UN instruments, such as the *Disabilities Convention*, the *Convention on All Forms of Discrimination Against Women*, and the *Convention on the Elimination of all Forms of Racial Discrimination*, which all recognise ESC rights equally, and which all ensure equal access to justice for all victims of ESC rights violations.

The Working Group will meet next week to further negotiate the draft, before meeting in April for a final week. Many hope that the Australian representatives will play a more progressive and productive role in the future sessions of the Working Group.

Claire Mahon is an Australian international human rights lawyer based in Geneva, Switzerland. She works as a consultant for NGOs and the UN, and as a research associate at the Graduate Institute of International and Development Studies.

The Optional Protocol to the Convention Against Torture: A Practical Tool to Prevent Ill-Treatment in Australia

With over 140 State parties, the *Convention against Torture* is one of the most widely ratified human rights treaties. This should be an indication of the support given to the idea of absolute prohibition of torture throughout the world. However, it is common knowledge that many of those countries party to the Convention have failed to comply with their obligation to 'to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction' (art 2.1).

The *Optional Protocol to the Convention against Torture* (OPCAT), which provides for the establishment of a system of regular visits to places of detention to be carried out by independent international and national bodies, was adopted by the UN General Assembly on 18 December 2002. It enables experts to examine first-hand the treatment of persons deprived of their liberty, and to make recommendations on the basis of their observations. While independent and regular monitoring is no miracle solution, regular visits to all places of deprivation of liberty, including immigration detention facilities, together with a cooperative response by government officials, can contribute to a broad reduction in cases of ill-treatment.

With now 34 ratifications and an additional 33 signatures, the preventive scheme provided for in the OPCAT is rapidly taking form. The new international visiting body — the UN Subcommittee for the Prevention of Torture (SPT) — is now operational. Its 10 independent members were elected in December 2006, and conducted their first field missions in the second half of 2007. In the meantime, many States Parties have made significant progress in defining their own National Preventive Mechanisms (NPMs).

Moving from outright rejection to constructive engagement

For many years, combating ill-treatment has been one of the priorities of Australian human rights foreign policy. Between 1992 and 2000, Australia was an active and supportive member of the UN Working Group that negotiated the draft OPCAT. Subsequently, however, Australian diplomats pulled out of this process and grew increasingly vocal in their opposition to this proposed instrument, calling it impossible to reconcile with efforts aimed at rationalizing the UN treaty body system. The same line of argument, based on a fundamental misconception of the nature of the Protocol, was used in 2004 when the Joint Standing Committee on Treaties (JSCOT) held hearings on this matter.

The SPT is of an entirely different nature from traditional UN human rights treaty bodies, including the Committee against Torture (CAT), which spends almost all of its time in Geneva examining country reports and only carries out country visits on an exceptional basis, namely in presence of 'well-founded indications that torture is being systematically practised' in a State party (art 20). In sharp contrast with

this working method, the SPT will spend most of its time making in-country visits and advising States Parties and NPMs on the effective implementation of the OPCAT at the domestic level.

The OPCAT is of particular relevance to the South Pacific, a region which, unlike Europe, does not boast a regional visiting body. Since it was established in 1990, the European Committee for the Prevention of Torture (CPT), a body of independent experts responsible for carrying out visits to all 47 member States of the Council of Europe, has developed an expertise equally recognized throughout the region by State actors and civil society organisations.

While Australia is certainly not a country with serious problems of ill-treatment, sporadic incidents remind us of the need for permanent vigilance. This acknowledgement of the existence of a residual risk in every country is what led many Western democracies, including several European States regularly visited by the CPT, to ratify and implement the OPCAT.

It is clear that federal and decentralized States face special challenges in the implementation of the Optional Protocol. However, as serious as the challenges may be, they are not insurmountable. It should be noted that several of the 34 States Parties to the Protocol — including Argentina, Brazil, Mexico, Spain and the United Kingdom — are countries with federal or decentralized structures.

Implementing the Optional Protocol in Australia

The OPCAT stipulates that States Parties undertake to designate or establish one or several national preventive mechanisms within one year from the date of ratification. In a country such as Australia where more than one level of government has jurisdiction over places of detention, it is possible for several bodies to be involved in a coordinated structure. Moreover, choosing a multiple or decentralized NPM structure may help to rationalize the costs associated with travel by experts.

In Australia, a number of Australian institutions have developed in-house expertise in this area. To give but a few examples, the Human Rights and Equal Opportunities Commission has the power to visit federal prisoners, even if they are kept in state or territory-run correctional facilities. At the state level, the Office of the Inspector of Custodial Services of Western Australia, which is required by its founding law to inspect each detention facility in Western Australia at least once every three years, is another institution whose know-how could be put to contribution in defining a NPM able to provide for the full coverage of all people deprived of their liberty in the country.

Conclusion

Australia has had a positive reputation when it comes to protecting and promoting human rights throughout the world. However, in recent years and most regrettably in the case of the OPCAT, Australia has taken positions at odds with most other pro-human rights democracies. This lack of support for a groundbreaking treaty to help prevent one of the worst abuses of human rights has been a missed opportunity for Australia to maintain its leadership role in the protection of human rights. Indeed, in addition to the benefits that becoming party to the OPCAT would yield for both Australia and Australians, ratification by such an influential State would certainly have a positive impact on other countries of the Asia-Pacific region.

In May 2008, Australia's 3rd periodic report will be reviewed by the CAT. In the list of issues to be considered on that occasion, the Committee asks the State whether there is any development about its position on the OPCAT since the March 2004 JSCOT report. Back then, only 3 States had ratified the OPCAT. The context having evolved significantly, in Australia and elsewhere, it is to be hoped that the Australian government will do what it takes to correct this situation.

Philippe Tremblay is the Asia-Pacific Programme Officer for the Association for the Prevention of Torture (Geneva)

If I Were Attorney-General...

Human Rights and People Trafficking

If I were Attorney-General, I would bring a human rights-based approach to the issue of trafficking in people, putting human rights at the centre of Australia's policy and practice on this issue.

It is estimated that between 600,000 and 800,000 people are trafficked in Asia each year, including 250,000 from South East Asia. This trade in human misery is overwhelmingly driven by poverty and is underpinned by lack of respect for the rights of those trafficked. The response to human trafficking should meet this head on, by placing human rights firmly at the centre of Australia's policy and practice response, consistent with the *UN Principles and Guidelines on Human Rights and Human Trafficking*.

Australia has made significant progress in combating human trafficking in recent years. There is an existing legislative and policy framework to build upon and weave a rights-based approach through. This include legislation, such as amendments to the *Criminal Code*, the ratification in 2005 of the *UN Protocol to Prevent and Suppress Trafficking in Persons, Especially Women and Children* and a number of policy documents, such as the Action Plan to Eradicate Trafficking in Persons released in 2004. Australia has also been an active participation in regional trafficking projects such as the Asia Regional Cooperation to Prevent People Trafficking Project (ARCPPT) and AusAID's Asia Regional Trafficking in People Project (ARTIP).

Despite this, Australia's response to human trafficking fails to address the abuse of human rights which is at its core. Instead the focus is primarily on strong law enforcement. The solution to trafficking (at least in popular political debate) is often presented as simply the apprehension and prosecution of individual perpetrators. The successful prosecution of traffickers is an important element of the response to trafficking. But it is the trafficked person, not the perpetrator, who should be at the centre of strategies to eliminate trafficking. A rights-based approach is one way to achieve this.

The Attorney-General is uniquely placed to coordinate the various portfolios involved in the response to human trafficking to encourage a consistent, rights based approach and to review legislation using a rights frame. In particular, I would move quickly to address the situation under the current visa system that makes the protection and support of trafficked persons conditional on them being both able and willing to make a 'significant contribution' to a criminal investigation or prosecution. Australia's visa regime should align with the UN High Commissioner for Refugee's statement that victim protection must be considered separately from witness protection, and that trafficked persons should be entitled to adequate protection under any circumstances, irrespective of any decision to instigate judicial proceedings.

In addition, Australia's current approach to human trafficking requires a shift in focus so that it begins to effectively protect the rights of *all* trafficked persons, not just specific groups. The *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* refers to the trafficking of 'persons', not just women and children. But in practice the focus is on women and girls and men are overlooked. Similarly, while the 2005 Act acknowledges labour trafficking, the focus of the Australian response has been on trafficking for sex.

As Attorney-General, I would champion a response to human trafficking which takes into account the complex factors, conditions and rights violations that lead to human trafficking in the first place. I would promote an approach which acknowledges the realities of trafficked persons, who have generally had many other rights violated before, during, and after being trafficked. A truly effective approach to eliminating trafficking must encompass and respond to these realities. By taking a human rights approach, my Department and the Government would be able to offer responses to trafficking which address the poverty-related rights abuses which underpin and work to eradicate the conditions which allow trafficking to flourish.

Trafficking should be explicitly defined as a human rights violation, rather than one manifestation of other broader violations. Ultimately, trafficking should be 'mainstreamed' as a full status human rights violation, rather than just an issue affecting women and children. Dealing with human trafficking in this way could also demonstrate the way in which a human rights-based approach can be taken to many of the key issues facing Australia today, including immigration, foreign affairs and Indigenous affairs. As Attorney-General, my ultimate aim would be to see Australia bring a rights-based framework to all law and policy making.

Fiona McLeay is General Counsel of World Vision Australia. Human trafficking is a key focus of World Vision Australia's current campaigning activity.