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Human Rights Law  
Resource Centre Ltd  
Level 17, 461 Bourke Street  
Melbourne VIC 3000  
P: + 61 3 8636 4450  
F: + 61 3 8636 4455  
W: [www.hrlrc.org.au](http://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.

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Opinion

Australia Can Become a ‘AAA’ Human Rights Player

Australia has an opportunity and obligation to regain its reputation as a ‘AAA’ country when it comes to human rights, a high level government delegation from Australia has been told by the United Nations Human Rights Committee.

The delegation appeared before the UN Committee in New York on 23 and 24 March. The Committee, which comprises 18 independent human rights experts from across the world, commended Australia on a range of human rights advances, including the historic apology to the Stolen Generations, the abolition of the Pacific Solution and the current national human rights consultation.

The Committee expressed concern, however, that despite these advances the state of human rights for many disadvantaged groups in Australia remains precarious. Promises and policy changes need to be translated into concrete legislative action to prevent further erosions of fundamental rights and freedoms. In this regard, the Committee highlighted that Australia is alone among developed Commonwealth countries in its failure to legislatively or constitutionally protect human rights, and urged Australia to adopt comprehensive legal protection of human rights for all. A national Human Rights Act is necessary to protect fundamental rights and freedoms and ensure that all Australians can live with dignity and equality.

The Committee also raised a number of specific human rights concerns with the delegation including:

- the profound disadvantage experienced by Indigenous Australians in key areas including health, housing and education;
- the continued suspension of the *Racial Discrimination Act* in relation to the Northern Territory Intervention;
- the lack of adequate reparations to the Stolen Generations;
- the re-opening of the Christmas Island immigration detention facility, which it noted looks and feels like a high-security prison;
- the lack of access to adequate mental health care in many Australian prisons;
- the excessive use of force by police without adequate oversight, including the use of Taser guns and lethal force; and
- the co-operation of Australian law enforcement officials with overseas agencies, which may expose Australians to the real risk of the death penalty.

Overall, the Committee was very concerned about low levels of human rights protection in Australia, both in law and in practice. In many instances, the Committee noted that the promises and assurances made by Australia do not translate into real protection on the ground. They noted that profound disadvantage and discrimination have no place in Australia.

Taking note of these concerns, the Australian government appeared to take a positive and constructive approach to the review. This is critical as this review, the first of Australia by the Human Rights Committee since 2000, is an historic opportunity to take stock of human rights in Australia. It is an opportunity for the Australian government and civil society to work together with leading international human rights experts to improve the protection of fundamental values such as freedom, respect and a fair go.

The Australian delegation's closing remarks to the Committee were particularly encouraging. Mr Bill Campbell QC observed that 'Australia welcomes and needs this form of international scrutiny to ensure adherence with its Covenant obligations'.

Having acknowledged issues of disadvantage and human rights breaches in Australia, it is now incumbent on the Australian government to commit to take all steps necessary to adequately protect and promote human rights. It is time for the stated commitment to human rights leadership to be translated into concrete legislative and budgetary action.

The Committee will deliver its report card on Australia on or around 3 April. The report will include observations on positive aspects of Australia's human rights performance, together with constructive recommendations as to how it could more fully comply with the International Covenant on Civil and Political Rights.

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

## News

### OP to CEDAW: Women's Rights Strengthened Through Entry into Force of Optional Protocol

With the entry into force of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* ('Optional Protocol') for Australia, there was even greater cause to celebrate International Women's Day this year. In a major breakthrough for the protection and promotion of women's rights in Australia, women can now take advantage of the Optional Protocol's communication and inquiry procedures in circumstances where the Australian Government fails to take all appropriate measures to respect, protect and fulfil their rights to non-discrimination and substantive equality, as guaranteed under the *Convention on the Elimination of All Forms of Discrimination against Women* ('CEDAW').

The communication procedure enables individual women, groups of women, or persons acting on their behalf, to submit a complaint to the Committee on the Elimination of Discrimination against Women (the UN treaty body established to monitor States Parties' compliance with CEDAW) alleging violations of CEDAW by Australia. Before the Committee can examine the merits of a complaint, however, it must be satisfied that the communication meets the Optional Protocol's admissibility criteria, which include the requirement to exhaust domestic remedies.

The communication procedure is significant as it provides women with access to an international means of redress for violations of their rights to non-discrimination and substantive equality. For example, in *A.T. v. Hungary*, a woman who had been subject to 4 years of severe domestic violence was able to obtain redress for violations of her right to live a life free of gender-based violence and her right to be free of gender stereotyping. In *A.S. v. Hungary*, a Roma woman who had been forcibly sterilized in a public hospital had her rights to non-discrimination and equality vindicated as a result of submitting a communication to the Committee.

Under the inquiry procedure, individuals and organisations may submit information to the Committee alleging grave (ie, severe) or systematic (ie, widespread) violations of CEDAW rights by Australia. The Committee may then decide to undertake an inquiry into those allegations in order to determine whether or not a rights violation has taken place. As in the case of the Optional Protocol's communication procedure, the inquiry procedure enables the Committee to make determinations on alleged violations of

CEDAW. What distinguishes the inquiry procedure from the communication procedure is the opportunity afforded to the Committee to investigate allegations of systemic discrimination against, and inequality of, women. For example, in its first inquiry under the Optional Protocol, the Committee was able to investigate allegations of widespread abduction, rape and murder of women in Ciudad Juárez, Mexico. In finding Mexico in violation of CEDAW, the Committee was able to make recommendations on how it might seek to transform the discriminatory socio-cultural structures that enabled such violence to take place in a climate of impunity.

The 2008 report of the Senate Committee on Legal and Constitutional Affairs on the *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* highlighted a number of weaknesses in the legal protection and promotion of women's rights to non-discrimination and substantive equality in Australia. Where the current framework for eliminating discrimination and inequality fails women, they can now seek international redress for violations of their rights under the Optional Protocol. The possibility that the Optional Protocol will be used to allege a violation of CEDAW by the Australian Government may provide a further impetus to address the weaknesses that the Senate Committee identified in the current legal framework. Finally, the Optional Protocol's entry into force has strengthened the arsenal available to advocate for the elimination of all forms of discrimination against women and the realisation of substantive equality in Australia.

*Simone Cusack is Public Interest Lawyer at the Public Interest Law Clearing House*

### **Australia to Announce Support for UN Declaration on the Rights of Indigenous Peoples**

The Australian Government will make a formal statement of support for the *UN Declaration on the Rights of Indigenous Peoples* at Parliament House in Canberra on 3 April 2009.

Under the previous Government, Australia was one of just four countries to vote against the declaration when it was adopted by the UN General Assembly in September 2007.

According to Tom Calma, the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Declaration, which is not legally binding, 'reaffirms that Indigenous individuals are entitled to all human rights recognised in international law without discrimination'. 'It also acknowledges that without recognising the collective rights of Indigenous peoples and ensuring protection of our cultures, Indigenous people can never truly be free and equal,' Mr Calma said.

Indigenous Affairs Minister, Jenny Macklin, said that supporting the Declaration is an important step towards closing the gap between Indigenous and non-Indigenous Australians. 'We want Indigenous Australians to be partners in efforts to close the gap. For this to happen, we must recognise the unique place of Indigenous people in Australia,' she said. 'In supporting the Declaration, Australia will join with many other countries to show our respect for Indigenous people.'

### **US to Seek Seat on UN Human Rights Council in 'New Era of Engagement'**

The UN Secretary-General Ban Ki-moon has welcomed an announcement by the United States that it will seek a seat on the United Nations Human Rights Council, saying it embodies the country's commitment to a 'new era of engagement.'

'The Human Rights Council has a critical role to play in the protection and promotion of all human rights for all people, and the US has an important contribution to make to this end,' said Mr Ban. 'Full US engagement on human rights issues is an important step toward realising the goal of an inclusive and vibrant intergovernmental process to protect human rights around the globe,' he added.

### **To Clash or Complement? Religion and Free Speech at the UN**

The Australian Human Rights Commission and the Australian Multicultural Foundation are undertaking a project on Freedom of Religion and Belief in the 21<sup>st</sup> Century.

The project will examine and report on practical everyday experiences and observations illustrating how the right to freedom of religious expression is enjoyed. The project reflects the renewed scrutiny worldwide on the operation of the right to freedom of religious expression, as enshrined in the *ICCPR*, art 18 of which provides that 'everyone shall have the right to freedom of thought, conscience and religion'.

Race Discrimination Commissioner at the AHRC, Tom Calma, acknowledged the interrelationship between the right to freedom of religious expression and other human rights at the project's launch. He said, 'My point is that we are all directly and indirectly affected by our own freedom, and the freedom of others, to practice religion and exercise beliefs and the way in which these beliefs can influence the freedom of others to enjoy their human rights'.

The Special Procedures of the Office for the High Commissioner of Human Rights (OHCHR) recently issued a report to the General Assembly on the links between the right to freedom of religious expression and the right to free speech. The relationship between these rights, enshrined in arts 19 and 20 of the *ICCPR*, was the subject of an Expert Seminar in October 2008.

The issue was ignited by a series of high profile, international scandals. These include the publication of the controversial caricatures of the Prophet Muhammad in September 2005 and more recent online publication of the film 'Fitna' in March 2008, associating Muslims with violence and terrorism.

The issue of 'defamation of religions' had been increasingly raised in the Human Rights Council and the General Assembly. The report welcomed the shift in the seminar away from the issue of 'defamation of religions' towards the legal concept of 'incitement to religious hatred'.

The report emphasised that the rights to freedom of speech and to freedom of religious expression are interrelated. Indeed, the curtailment of the right to freedom of speech through laws restricting criticism of religious thought has led to the curtailment of the right to freedom of religious expression, especially for minorities. The report recommended that the relationship between these two rights be strengthened instead of curtailed.

Owing to factors such as 'Islamophobia' as well as growth of the Internet, the report recommended that the Human Rights Committee update its general comments on arts 19 and 20 of the *ICCPR*. The report referred to education – for example, inter-religious dialogue – in the context of improving the right to freedom of religious expression. The UN High Representative for the Alliance of Civilizations spoke of organisations such as the Alliance of Civilization Media Fund, which finances productions that challenge negative portrayals of minority groups. The report also envisaged future activities with stakeholders such as media representatives and journalists.

It was also recommended that national human rights institutions address the issue of cultural rights through activities such as a national monitoring scheme. The Human Rights Commission's project on 'Freedom of Religion and Belief in the 21<sup>st</sup> Century' should provide a valuable foundation for these activities.

*Simon Levett is an Australian human rights lawyer who has worked with the Special Procedures of the Office for the High Commissioner for Human Rights.*

### Review of VCAT – Have Your Say

The president of the Victorian Civil and Administrative Tribunal (VCAT), Justice Kevin Bell, is undertaking a review of the tribunal at the request of the Attorney-General. The review will look at access, operational and jurisdictional issues to determine how to better deliver to the Victorian community justice that is low-cost, efficient, quick and fair.

VCAT has undergone a number of significant changes since its inception in 1998. The tribunal has steadily acquired new jurisdictions (such as health professionals, working with children checks, and disability issues) and has recently added the human rights division to its original structure. In light of VCAT's expanding jurisdiction, it is not surprising that the number of matters brought before the tribunal has increased significantly over the last decade.

These changes, together with the recent 10 year anniversary of VCAT, make this an ideal time to conduct a review of the tribunal. The president has indicated that the review will consider whether VCAT is achieving its objectives, is taking advantage of its opportunities, and is equipped to face the challenges of a changing world. He has confirmed that key areas of interest include promoting VCAT as a centre of excellence in the use of alternative dispute resolution, looking at how the tribunal can assist self-represented litigants, and at how it can enhance its work by utilising new technology. More information can be found in Justice Bell's speech to the Law Institute in September 2008 ([www.vcatreview.com.au/speech](http://www.vcatreview.com.au/speech)).

The president has now launched the public consultation phase of the review (launched on 4 March 2009). The final report is due at the end of November 2009. Information about the review is available at [www.vcatreview.com.au](http://www.vcatreview.com.au). From the website the public can download the consultation paper and the 'have your say' paper, find out ways to make a submission, and register to attend events and forums to be held in regional Victoria and around Melbourne.

*Sara Law is Associate to Justice Kevin Bell, President of VCAT and Judge of the Supreme Court of Victoria*

## National Charter of Rights Developments

### Would an Australian Charter of Rights be Good for Business?

The Gilbert + Tobin Centre of Public Law's position paper, 'Would an Australian Charter of Rights be good for business?' (April 2009), analyses the impact that a Charter of Rights would have on business. This analysis is based on the dominant model for a Charter of Rights, adopted in comparable jurisdictions, such as the United Kingdom, New Zealand, Victoria, the ACT and elsewhere. It considers the following:

#### What obligations would a Charter impose on business?

Under the dominant Charter of Rights model, the primary responsibility for promoting and protecting human rights would remain with the Government. Generally speaking, a Charter of Rights would not directly impact on business or the private sector. It is likely that a business would only be bound by the Charter when it is classified as a 'public authority' or if it takes steps to bind itself to the Charter (either contractually or by opting in to the Charter regime). An individual is unlikely to be able to rely solely on the Charter to found a right to damages.

#### Would a Charter have a positive or negative impact on business?

Business is understandably concerned that any new law not impose unreasonable costs of compliance. However, if Australia were to adopt the dominant model of human rights Charter, the vast majority of businesses would face no compliance costs. For those few businesses that are bound by a Charter, these costs are likely to be minimal, and outweighed by the benefits. The paper shows that, on balance, the introduction of a Charter of Rights would be of very significant benefit to Australia generally, and to the business community specifically. There are three main advantages that a Charter would offer to the business community:

- **Economic benefits.** Savings in the Australian economy associated with minimising human rights breaches, and maximising economic participation, are likely to flow to Australian businesses in their capacity as the providers of goods and services, as employers, and in their dealings with the federal Government.
- **Corporate social responsibility.** 'Opting in' to a Charter of Rights regime would be a potent way for businesses to demonstrate their commitment to corporate social responsibility. A growing number of businesses in Australia and internationally are incorporating a human rights approach into their management practices. This makes economic sense, as research shows a direct correlation between a corporation's commitment to respect human rights and its long-term sustainability and financial success. This is manifested in a number of ways, including increased employee productivity and better relations with customers and shareholders.
- **Improved regulatory framework.** A Charter of Rights would improve Government decision making, enhancing due process and the level of transparency, responsiveness and accountability of government action. This would benefit business, because setting out a human rights framework for the operation of the public sector would provide a more stable regulatory environment. It would give added protection to individuals associated with a business in their dealings with the Government. For example, stronger protection of freedom of expression would benefit both journalists and media proprietors.

### Why should business participate in the national consultation on human rights?

The National Human Rights Consultation is currently considering whether Australia should have a federal Charter of Rights. The Consultation Committee wants to hear from all Australians. The business community is an important stakeholder in this debate, given it is the economic driver of the country, human rights are relevant to its operations, and its actions directly affect all Australians. To ignore human rights is a significant business risk. Active engagement will allow business to help shape the debate and have its say.

The Paper is available at [www.gtcentre.unsw.edu.au/Resources/cohr/goodForBusiness.asp](http://www.gtcentre.unsw.edu.au/Resources/cohr/goodForBusiness.asp).

*Ed Santow is Director of the Charter of Rights Project at the Gilbert + Tobin Centre for Public Law at the University of New South Wales*

### **Protecting Rights: How Do We Stop Rights and Freedoms Being a Political Football?**

A recent report from Unlock Democracy highlights how the *Human Rights Act 1998* (UK) has protected civil liberties in the UK since its introduction in 1998. The report, *Protecting Rights: How Do We Stop Rights and Freedoms Being a Political Football?*, by Francesca Klug and Helen Wildbore also examines why the *Human Rights Act* has become mired in political controversy in recent years.

An extensive appendix to the report lists 23 examples of how the *Human Rights Act* has been used to defend human rights, protect fundamental freedoms, promote transparency and accountability in government, and improve public service delivery and outcomes.

Commenting on the report, Director of Unlock Democracy Peter Facey, said:

The *Human Rights Act* is frequently abused while the positive contribution it makes to the lives of thousands of people every day is disparaged. The *Human Rights Act* is regularly attacked both for failing to prevent all abuses of state power and for infringing 'Parliamentary sovereignty' when it does. Its critics cannot have it both ways. Equally, people who call for it to be scrapped and replaced by a different Bill of Rights need to explain what rights of the *European Convention of Human Rights* they are opposed to.

No bill of rights will guarantee freedoms in testing times if people do not remain vigilant. There is a case for strengthening human rights legislation in the UK and we certainly need to inform the public more about what rights the *Human Rights Act* actually protects, but ultimately if the public and politicians are not prepared to stand up for rights they will wither.

The report is available at <http://www.unlockdemocracy.org.uk/wp-content/uploads/2009/03/2009klug.pdf>.

### **Rights and Responsibilities in the United Kingdom: Time for Constitutional Change?**

The UK Ministry of Justice has recently released a Green Paper, *Rights and Responsibilities: Developing our Constitutional Framework*, as a framework for a 'public consultation across the UK about the fundamental arguments for and against a new Bill of Rights and Responsibilities as well as the advantages and disadvantages of the individual components of any such Bill.' The Green Paper states that the consultation will be extensive and that the Government does not intend to bring forward legislation before the next general election.

The Green Paper is available at <http://governance.justice.gov.uk/>.

## **Victorian Charter of Rights Developments**

### **Emerging Change: The Operation of the Charter of Human Rights and Responsibilities**

On 30 March 2009, the Victorian Equal Opportunity and Human Rights Commission *2008 Report on the Operation of the Victorian Charter of Human Rights and Responsibilities: Emerging Change*, was tabled in parliament. The 2008 Report shows that while the *Charter* is starting to make a positive impact, more needs to be done to ensure people can stand up for their rights.

Commission Chief Executive Officer, Dr Helen Szoke, said people have used the *Charter* to gain access to vital services, challenge government policy and improve the way organisations operate.

The report found the *Charter* helped ordinary people get better services and resolutions to problems. For example, people with an intellectual disability were able to exercise their right to vote and young people with brain injuries were saved from being placed into aged care facilities.

'At some point everyone is in contact with government services such as education, policing and health services – so it is reassuring that human rights are now considered by the agencies responsible for providing these services,' Dr Szoke said.

Since January 2008, parliament has been required to make laws compatibly with the *Charter*. In 2008, 39 bills generated an exchange of views about their compatibility.

Dr Szoke said contrary to fears of interference in parliament's law making role, the *Charter* resulted in fairer laws that put human rights 'front and centre.'

'Making laws that are compatible with human rights, or clearly justifying any limitations placed on rights, means fairer laws that are more likely to work well,' she said.

However, the government's human rights report card is not all good news.

The Commission's report raises concerns about the exclusion of the Adult Parole Board, Youth Parole Board and Youth Residential Board from the operation of the *Charter*. 'We need more evidence to justify their continued exemption from for the *Charter*,' said Dr Szoke.

The report also raises concerns about the lack of community consultation in the process of law reform and recommends improvements to help local government deliver on human rights at the local level.

'The community has told us that respect for human rights is one of the most important ingredients in a livable community,' said Dr Szoke.

'The ongoing challenge is to integrate human rights into the everyday work of government and to make rights real for people every day.'

The Victorian Equal Opportunity and Human Rights Commission's 2008 Report on the Operation of the Charter of Human Rights and Responsibilities is available at [www.humanrightscommission.vic.gov.au](http://www.humanrightscommission.vic.gov.au).

*Dr Helen Szoke is CEO of the Victorian Equal Opportunity and Human Rights Commission*

### 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.

#### **Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009**

The Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009 seeks to amend seven different Acts to remedy provisions which are said to be potentially incompatible with human rights contained in the *Victorian Charter of Human Rights and Responsibilities Act 2006*.

The changes introduced by the Bill engage the right to the presumption of innocence (s 25(1) of the *Charter*), the right to equality (s 8) and the right to freedom of expression (s 15).

The most significant change introduced by the Bill seeks to better protect the right to be presumed innocent. The Bill removes or amends 'reverse onus' provisions, which require the defendant to either prove a defence, disprove an assumption or disprove an element of an offence in order to avoid liability, from four statutes.

The potential restriction on the right arises from the risk that a defendant may be convicted because they have been unable to prove a defence, even though there may be reasonable doubt as to their guilt. The particular circumstances of the offence and the matter to which the reverse onus applies will be relevant to an assessment of whether this limitation could be reasonable within the meaning of s 7(2) of the *Charter*, eg whether the matter is something within the knowledge of the defendant.

Accordingly, the Bill removes reverse onus requirements (in the form of deeming provisions) from the *Forests Act 1958*, such that the prosecution will be required to prove all elements of the particular offence. The Bill amends the *Australian Grands Prix Act 1994*, *Fair Trading Act 1999* and *Transport Act 1983* to change reverse legal onus provisions, which require the defendant to prove a defence or disprove an element of the offence on the balance of probabilities, to reverse evidentiary onus provisions, which only require the defendant to adduce evidence putting the matter in issue.

The Bill also amends the *Education and Training Reform Act 2006* by removing a requirement that only people under the age of 65 can be re-employed as teachers on an ongoing basis, on that basis that it

could constitute discrimination on the basis of age, contrary to the right to equality protected by s 8 of the *Charter*.

Finally, the Bill amends two Acts to further promote the right to freedom of expression. The *Victorian Urban Development Authority Act 2003* and the *Project Development and Construction Management Act 1994* both contain similar provisions creating offences where someone connected with VicUrban or a nominated project (respectively) communicates information related to either VicUrban or the project. The Bill amends those statutes to specify that the restriction only applies to information which is confidential. This is said to be less of a restriction on the right to freedom of expression which still protects confidential project information (the purpose of the provision).

The Statement of Compatibility accompanying the Bill (required under s 28 of the *Victorian Charter of Human Rights and Responsibilities Act 2006*) explains the effect on *Charter* rights of each of the amendments, and on that basis asserts that the Bill is compatible with the *Charter*.

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

### **Major Crime Legislation Amendment Bill 2008**

The Major Crime Legislation Amendment Bill 2008 amends the *Major Crime (Investigative Powers) Act 2004*, which was enacted as part of a comprehensive reform package seeking to combat organised crime and corruption.

Amongst other things, the Bill:

- extends the definition of 'organised crime offence' to ensure that serious and organised crime involving the abuse of children and paedophilia networks are captured as relevant offences for the purpose of coercive questioning powers under the Act; and
- establishes new procedures for the Court to follow in hearing an application for the revocation of a coercive powers order.

Human rights issues are raised by a number of provisions in the Bill, including:

- rights relating to privacy and self-incrimination, which are already engaged by the coercive powers regime operating under the Act; and
- the right to a fair hearing, specifically in criminal proceedings where the Court makes a decision in relation to coercive powers orders on the basis of information not revealed to the applicant.

#### Extension of the definition of 'organised crime'

Clause 3 of the Bill amends the definition of 'organised crime offence' in the Act to include an indictable offence that is punishable by level 5 imprisonment (10 years maximum) or more and that has the purpose of obtaining sexual gratification where the victim is a child. The rationale behind this amendment is that organised crime groups involved in child abuse and pornography are not necessarily motivated by the purposes for offending currently listed in the Act (ie, obtaining profit, gain, power or influence). Expanding the definition seeks to ensure that all serious and organised crime involving the abuse of children and paedophilia networks is captured for the purpose of coercive questioning powers. Such an offence must also satisfy other existing criteria in the definition (that is, the offence must involve two or more offenders, require substantial planning and organisation and must form part of systemic and continuing criminal activity).

The Statement of Compatibility accompanying the Bill (required under s 28 of the *Victorian Charter*), does not address whether this extension of the existing coercive powers scheme is compatible with human rights protected under the *Charter*. In 2004, the Scrutiny of Acts and Regulations Committee ('SARC') identified numerous concerns about the coercive powers scheme proposed and ultimately adopted in the Act, in particular under its then reference to identify where proposed legislation 'trespasses unduly on rights and freedoms'. Its particular concerns included issues regarding the right to privacy and the right to avoid self-incrimination.

Clause 3 of the Bill extends the significant coercive scheme in the Act (enacted before the commencement of the *Charter*), in circumstances where SARC had already raised concerns about its impact on human rights, to a new category of criminal offence. As identified in the SARC report on the

Bill, the Statement should have included an explanation of the compatibility of the scheme in its extended form, with *Charter* rights.

#### Revocation procedure for coercive powers orders

Clause 4 of the Bill provides a process and procedure for the review and revocation of coercive powers orders. The provisions apply when the Chief Commissioner objects to the disclosure or production of 'protected information' at the hearing of the application. The Court has four options available in these circumstances; three of which involve the proceedings being conducted using information that is not revealed to the applicant or his or her legal representative. This may involve the non-disclosure to either or both parties of a confidential affidavit, or the hearing proceeding, without notice, in the absence of one or more of the parties.

The Statement acknowledges that by potentially preventing a person from presenting his or her case to the Court, clause 4 limits the right to a fair hearing under s 24 of the *Charter*. This limitation is justified on the basis that:

- the limitation is reasonable and protects the confidentiality of intelligence information where it is in the public interest to do so;
- the concept of a 'fair hearing' should take into account the interests of the victim and society, as well as those of the accused, and that the interests of the accused will be protected by the appointment of special counsel as provided in the Act; and
- there are no less restrictive means available to achieve the stated purpose of protecting the intelligence information.

However, SARC commented that the provisions are much further reaching than the provisions of the *Police Integrity Act 2008*, upon which they are based. Under the *Police Integrity Act*, confidential information unable to be disclosed to a litigant is required to be excluded from the proceedings altogether. By contrast, the SARC noted that under the Bill, confidential evidence may be considered and even used as the determining factor in reaching a decision, without the applicant being aware of the evidence and having an opportunity to respond. Significantly, clause 4 was not recommended by the special investigations monitor in the report upon which the bill was based.

In particular, SARC expressed concerns about circumstances in which evidence is too sensitive to reveal to the applicant, yet too crucial to the determination of the matter to consider fairly without input from the applicant. In such circumstances, provisions such as those contained in the Bill may require the Court to determine the matter without a fair hearing. The House of Lords recently held that a similar regime would be incompatible with the right to a fair hearing, unless the court had additional powers to either disclose the information to the applicant or determine the hearing in the applicant's favour, on grounds of fairness.

In its report SARC also listed a number of alternative regimes which could have been introduced legislatively, and observed that the Statement does not address why such alternatives (or any other) are not reasonably available for the purpose of protecting confidential intelligence information (as would appear to be required by s 7(2)(e) of the *Charter*).

*Charlotte Beeny, Human Rights Law Group, Mallesons Stephen Jaques*

## Victorian Charter Case Notes

### Mental Health and the *Charter*

09-085 [2009] VMHRB (23 February 2009)

In this case, which concerned the review of a community treatment order ('CTO') that prescribed a drug with serious side-effects, a number of significant issues arose in relation to the *Charter*:

1. Is the Board a 'public authority' and/or a 'court or tribunal' for the purposes of the *Charter*?
2. Are the authorised psychiatrist and the mental health services public authorities under the *Charter*?
3. What is the meaning and application of 'cruel, inhuman or degrading treatment' in s 10(b) of the *Charter*?
4. Does the limitations provision contained in s 7(2) of the *Charter* apply to s 10 rights?

5. What is the impact of s32 of the *Charter* on the Board's interpretation of the *Mental Health Act 1986* (Vic)?

### Facts

At the time of the hearing, P was subject to a CTO under which he involuntarily received weekly injections of Depo Provera, an antimalone hormone treatment designed to reduce sexual disinhibition. P had been receiving the injections, along with other treatment for schizophrenia, since 2001 when he was charged and later convicted of a sex offence. As a direct side effect of Depo Provera, P had developed severe osteoporosis. At the time of the hearing P lived in the community with his mother.

P appealed to the Board for review of the extension of his CTO. He argued that the administration of Depo Provera constituted cruel, inhuman and degrading treatment under s 10(b) of the *Charter* and that this limitation on his human rights, given the severe effect of the treatment, did not satisfy the proportionality test in s 7 of the *Charter*. P argued that the references to 'treatment' or 'treatment plan' in the *MHA* meant 'treatment that was not cruel, inhuman or degrading'. Consequently, the injections of Depo Provera could not be regarded as necessary treatment under s 8(1) of the *MHA* and should be stopped.

P also argued that the authorised psychiatrist had failed to take into account the effect of Depo Provera on P's human rights as required by s 19A of the *MHA* and that the Board should therefore order the authorised psychiatrist to revise P's treatment plan pursuant to s 35A.

P's appeal was opposed by the Werribee Mercy Mental Health Service and the Waratah Clinic – Inner West Area Mental Health Service (together 'the Service').

### Decision

#### Is the Board a 'public authority' and / or a 'court or tribunal' for the purposes of the *Charter*?

The Board reaffirmed its previous decision in *09-003* [2008] VMHRB 1 (8 July 2008) that the Board is a tribunal but not a public authority when conducting its hearing function. In doing so, the Board questioned the analysis of the Supreme Court of Victoria in *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346 (12 September 2008), stating that it 'may have arisen from an interpretation contrary to the logical and purposive analysis originally intended by the Victorian Parliament'. The Board distinguished itself from the Medical Practitioners Board which was the subject of the decision in *Sabet*. Consistent with its decision in *09-003*, the Board held that it was only acting in an 'administrative capacity' when conducting registry type functions.

#### Are the authorised psychiatrist and the Service public authorities under the *Charter*?

The Board found that the authorised psychiatrist and, by implication, staff employed at the Service, were public authorities for the purpose of the *Charter*. They were therefore bound by s 38 of the *Charter* to act and make decisions compatibly with the *Charter* rights of involuntary patients. The Board observed that it is therefore important that the authorised psychiatrist and management of the Service provide appropriate and ongoing training for staff in relation to human rights and their obligations under the *Charter*.

#### What is the meaning and application of the term 'cruel, inhuman or degrading treatment' in s 10(b) of the *Charter*?

The Board held that s 10(c) of the *Charter*, which provides that a person must not be subjected to medical treatment without their consent, does not limit the protection against cruel, inhuman or degrading treatment found in s 10(b). In doing so it rejected the Service's argument that the right to be free from cruel, inhuman or degrading applies only in a penal context.

The Board accepted that, as a general principle, measures which are therapeutic necessities will not be regarded as cruel, inhuman or degrading. Notwithstanding, it held that even a therapeutic intervention can potentially constitute cruel, inhuman or degrading treatment where the side effects of the treatment reach a 'minimum level of severity'. Since measures of therapeutic necessity do not involve deliberate infliction of pain or suffering, the threshold is a high one. In assessing whether this threshold has been met, regard should be had to all the circumstances, including the duration of the treatment, its physical and mental effects and the sex, age and state of health of the patient. Relying on the decision of the

House of Lords in *Regina v Secretary of State for the Home Department; ex parte Adam* [2005] UKHL 66, the Board held that treatment will be inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being.

In P's case, the Board held that the balance between therapeutic benefits of the treatment on the one hand, and the serious side-effects on the other hand was a delicate one, but that the treatment had not yet reached the level of severity which would put it in breach of s 10(b). That said, the Board expressed the view that further deterioration of P's bone density in accordance with the treatment plan could foreseeably cross this line and become cruel, inhuman or degrading treatment.

The implication of this finding was that the authorised psychiatrist and the Service were required to apply 'considerable care and attention' on a 'very regular basis' to monitoring and assessing the impact of the treatment plan on P's rights. The Board noted that as soon as the balance tilts such that the side-effects start to outweigh the therapeutic benefits, then the treating team must act to prevent the treatment from attaining the minimum level of severity which engages the prohibition. The more serious the potential risks of treatment, the more detailed and specific the outline in the treatment plan must be and the more intensive the monitoring process.

The Board formed the view that there were flaws in the development and implementation of the treatment plan which required further review and revision. It also found that there had been a lack of effective communication between various treating services. In light of this the Board ordered, pursuant to s 35A of the *MHA*, that the authorised psychiatrist review P's treatment plan to take into account the effect on P's rights and provide for greater accountability and monitoring.

#### Does the s 7(2) limitation provision apply to s 10 rights?

Though not essential to the Board's conclusion, the Board observed that it did not accept that s 10(b) was non-derogable and absolute and therefore outside the ambit of the s 7 limitation provision. As a matter of statutory construction the Board found that there was nothing in s 10 to suggest that it should be treated any differently from the other rights. However, the fact that international jurisprudence had treated similar rights as absolute did mean that in undertaking the proportionality analysis required by s 7(2), the starting point should be that a very high degree of justification is required to set any reasonable limits to the s 10 rights.

#### What is the impact of the *Charter* on the Board's interpretation of the *MHA*?

On the question of interpretation in accordance with s 32 of the *Charter*, the Board considered itself bound by the comments of Nettle JA in *RJE V Secretary to the Department of Justice* [2008] VSCA 265 and stated that this meant that, absent any ambiguity or prima-facie incompatibility between the legislation in question and a protected human right, ordinary principles of statutory interpretation should be applied. Notwithstanding this, the Board was of the view that the five step approach articulated in the New Zealand case of *Hansen v The Queen* [2007] NZSC 7, could continue to be applied by the Board to assist in the statutory construction task.

The Board accepted P's argument that the terms 'treatment' and 'treatment plan' in s 8 and s 19 of the *MHA* meant 'treatment that was not cruel, inhuman or degrading'. Interestingly, the Board did not apply the *Hansen* approach to reach this conclusion. Instead it found that 'essentially' the term 'treatment' had always been interpreted in this way by the Board and was therefore consistent with the *Charter* on ordinary principles of construction.

*Lisa Mortimer is on secondment to the Public Interest Law Clearing House from Allens Arthur Robinson*

### **The Treatment of Delay under the *Bail Act* post-*Charter*: Is Change Required?**

*DPP (Cth) v Barbaro* [2009] VSCA 26 (3 March 2009)

The Victorian Court of Appeal has considered whether the enactment of the *Charter* necessitates a change to the treatment of delay under the *Bail Act 1977* (Vic).

#### **Facts**

The appellant, Pasquale Barbaro, was remanded in custody in August 2008 on charges relating to drug importation and trafficking. The charges are within the category of serious offences under s 4(2) of the

Bail Act, which requires a court to reject an application for bail unless satisfied that there are exceptional circumstances that justify the grant of bail.

The trial is not expected to be heard until the last quarter of 2010, more than two years after the initial charges, because of the ‘complexity of the circumstances out of which the charges against Mr Barbaro arise and ... the scale of evidence ... on which the Crown will need to rely’.

The Magistrates Court dismissed Mr Barbaro’s first application for bail on the basis that there was an unacceptable risk of flight.

In a second application, in which Mr Barbaro offered:

- twice the amount of surety (\$2 million) than offered initially;
- to be electronically monitored; and
- to be bound by strict conditions (including a curfew, restrictions on travel, and twice daily reporting to a local police station),

the Magistrates Court granted bail, satisfied that, with the additional conditions, the risk of flight was no longer unacceptable.

On appeal to the Supreme Court of Victoria (Trial Division), Forrest J quashed the grant of bail, concluding that the risk of flight was unacceptable notwithstanding the new conditions.

Mr Barbaro appealed to the Court of Appeal.

### Decision

The Court dismissed the appeal, agreeing that none of the additional conditions of bail removed the ‘clearly unacceptable risk’ of flight.

At the first bail application, Mr Barbaro argued that the anticipated delay between the charges and the trial had to be taken into account when assessing unacceptable risk, and that the anticipated delay should also be considered in the context of the *Charter*.

Under s 21(5)(b) of the *Charter*, a person ‘arrested or detained on a criminal charge ... has the right to be brought to trial without unreasonable delay’. Section 25 entitles a person ‘charged with a criminal offence ... to the minimum guarantee ... to be tried without unreasonable delay’.

In the first application, in response to a question from the magistrate about whether the *Charter* ‘really take[s] matters any further than what existed before [the Charter] came into effect’, Mr Barbaro’s counsel responded:

No, it just underlines it ... in a fairly decisive sort of way so that it’s not really a matter of just paying lip service for delay in accordance with the *Charter*, it has to be given meaning because it superseded the provisions of the *Bail Act*.

Giving reasons for rejecting the application, the magistrate expressly stated that he had taken the *Charter* into account.

It is not clear from the Court of Appeal’s reasons whether the *Charter* was raised in the second application or on appeal before Forrest J. Nonetheless, before the Court of Appeal, Mr Barbaro relied on a passage from Bongiorno J’s reasons in *Gray v DPP* [2008] VSC 4, [10] that ss 21 and 25 of the *Charter* were ‘highly relevant to the question of bail’.

Counsel argued that ‘the court should view the provisions of the *Charter* as “informing” the application of the provisions of the *Bail Act*’; but, in response to a question from the Court, counsel did not contend that the *Charter* mandated a modification of the pre-*Charter* approach to assessing delay, as outlined in *Mokbel v DPP (No. 3)* [2002] VSC 393. In *Mokbel*, the court noted that:

The issue of detention by reason of unacceptable risk is an issue which must be balanced with the likelihood of the allegations against an accused man being brought before the court in the near future. The question of unacceptable risk is to be judged according to proper criteria, one of which is the length of delay before trial; that is, although the risk might be objectively the same in at different times, the question of unacceptability must be relative to all the circumstances, including the issue of delay.

As Vincent J said in *Medici* ... this is not an occasion ‘for the court to act as Pontius Pilate by washing its hands of the matter’. As I have said previously, it is not sufficient to say ‘we will wait and see’. The community will not tolerate the indefinite detention of its citizens with no prospect of charges being tried within a reasonable period.

The Victorian Attorney-General, who intervened under s 34 of the *Charter* and drew the Court's attention to 'overseas authorities dealing with cognate human rights guarantees', 'in substance' submitted that the *Charter* did not require a change to the existing treatment of delay.

The Court agreed, concluding that no departure was required. Adopting the approach in *Mokbel*, an actual or anticipated delay may be 'of such a magnitude that risks which would, in other circumstances, be regarded as unacceptable may properly be viewed as acceptable. ... Whether, and when, the delays in a particular case can be so characterised will depend on the circumstances.'

#### **Application of the Victorian *Charter***

Although the effect of delay on applications for bail has been considered at least three times previously (see *Gray v DPP* [2008] VSC 4; *Re Kent* [2008] VSC 431; and *Re Dickson* [2008] VSC 516), in this case the Court's reasons refer to *Gray* only, and only in passing. The decision leaves a number of questions about the *Charter* unanswered, including:

- When are the rights granted under ss 21 and 25 triggered?
- If there is a long delay between charges and trial, against whom should a remedy be sought, and what is the appropriate remedy?
- Can the presumption against bail under s 4(2) be 'interpreted in a way that is compatible' with *Charter* protected rights, as required by s 32(1) of the *Charter*?

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VSCA/2009/26.html>.

*Zoe Leyland, Human Rights Law Group, Mallesons Stephen Jaques*

#### **Supreme Court Considers Retrospective Operation of the *Charter***

*State of Victoria v Turner* [2009] VSC 66 (4 March 2009)

In this case, the Supreme Court of Victoria considered whether it was bound by the interpretive provision in s 32 of the *Charter* when determining whether the Victorian Civil and Administrative Tribunal made an error of law in a decision relating to a proceeding commenced prior to 1 January 2007.

#### **Facts**

This case was an appeal under s 148 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* from an order of VCAT relating to a complaint of discrimination by Rebekah Turner against the State of Victoria.

Turner suffers a learning disorder resulting from a brain dysfunction and made a complaint to the Equal Opportunity Commission of Victoria on 14 February 2005 alleging that the State, through the Department of Education and Early Childhood Development, indirectly discriminated against her. The complaint related to the imposition of a condition that Turner access education without a teacher's aide. Turner alleged that she was unable to comply with this condition, but that others without the impairment could.

The Commission referred the complaint to VCAT in May 2005. The hearing of the complaint took place over 28 days between July and December 2006. On 22 May 2007, VCAT published its orders and reasons. Directions hearings to deal with remedies took place in December 2007 and, on 7 February 2008, VCAT published further orders and reasons in this regard. The State sought leave to appeal, which was granted on 25 June 2008. In its notice of appeal dated 8 July 2008, the State set out 17 questions of law in which it alleges that VCAT fell into error.

#### **Decision**

Kyrou J allowed the State's appeal in part and adjourned the proceeding to enable the parties to make submissions on orders.

In respect of the *Charter*, counsel for Turner submitted that as the State's appeal was commenced after 1 January 2008, s 32 of the *Charter* applies and the Supreme Court was bound to interpret s 136 of the *Equal Opportunity Act 1995 (Vic)* in a manner which is compatible with the right to effective protection against discrimination in s 8 of the *Charter*.

Counsel for the State argued that, even though the appeal constitutes a 'fresh' proceeding which was commenced after 1 January 2008, the *Charter* did not apply to the Supreme Court determining whether VCAT made an error of law. Kyrou J agreed with the State. Even though VCAT handed down its decision and reasons on 7 February 2008, as the proceeding was commenced prior to 1 January 2008 VCAT was not bound to interpret the *EO Act* in a *Charter* compliant manner, and thus nor was the Supreme Court in examining whether VCAT had made an error of law. Kyrou J stated:

To use the *Charter* to give a provision such as s 136 of the *EO Act* an interpretation that differs from the interpretation that the Tribunal was bound to apply based on the law as it stood at the time the Tribunal made its decision, would, in effect, give the *Charter* retrospective operation. There is nothing in the *Charter* that indicates that it intended to have such operation or to change the nature of an appeal to this Court on a question of law from the Tribunal.

### **Application of the Victorian *Charter***

It was not disputed in this case that an appeal under s 148 of the *VCAT Act* was a fresh proceeding and an exercise of the original jurisdiction of the Supreme Court. The reason that the *Charter* was not relevant in this case was therefore not an application of the transitional or commencement provisions to the Supreme Court proceeding. The *Charter* was not relevant to the issues to be determined because s 148 of the *VCAT Act* invoked the judicial power of the Supreme Court to review whether a tribunal has made an error of law. The Supreme Court was therefore bound to consider the law as it stood at the time VCAT made its decision, which was prior to the commencement of the *Charter*. While not relevant on the facts of this case, the Supreme Court would have still been bound by the *Charter* to the extent that it had functions under Part 2, for example the right to fair hearing at s 24 of the *Charter*.

Kyrou J stated that there is nothing in the *Charter* that indicates that it was intended to have retrospective operation. This is consistent with *BAE Systems Australia Limited (Anti - discrimination)* [2008] VCAT 1799 (11 September 2008) and is broadly consistent with UK jurisprudence on this topic: *Wilson v First Country Trust Ltd (No 2)* [2003] 3 WLR. It is important to note, however, that the House of Lords did not lay down a rigid rule against retrospectivity in *Wilson*, but rather held that whether the interpretation provisions in the *Human Rights Act 1998* (UK) apply to pre-commencement events depends on a 'fairness principle' and the context and facts of the individual case before the court.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VSC/2009/66.html>.

*Helen Beatty is a lawyer with Allens Arthur Robinson*

### **Disability Convention, Legal Capacity and Domestic Law**

*Nicholson & Ors v Knaggs & Ors* [2009] VSC 64 (27 February 2009)

The Victorian Supreme Court adopted a human rights approach to the issue of legal capacity for those who have disabilities. In accordance with the *UN Convention on the Rights of Persons with Disabilities* (the 'CRPD'), Vickery J accepted the wide construction given to legal capacity and found that courts must ensure that the rights of people with disabilities are given support that is proportional to their needs and that conflicts of interest and undue influence do not occur.

### **Facts**

Betty Dyke left a large estate when she died in 2004. In her 1985 Will she made small monetary gifts to family and friends and left the bulk of her estate to charities. Betty Dyke made two further Wills in 1999 and 2001 in which she bequeathed her entire residuary estate to three couples and removed the charities that stood to benefit from her 1985 Will. A codicil in March 2000 appointed three executors, including one man, whom the Plaintiff submitted Betty Dyke had always strongly disliked. A further codicil in December 2000 added Betty Dyke's solicitor as an executor. Betty Dyke suffered two disabilities later in life. She had acute pain caused by curvature of the spine for which she self-medicated and she later developed dementia as a symptom of Alzheimer's disease.

### **Decision**

The Victorian Supreme Court found that Betty Dyke lacked testamentary capacity in respect of the 2001 Will and the December 2000 codicil and that undue influence was exercised on her in relation to the

1999 Will. In reaching this decision, Vickery J considered international instruments to which Australia is a party and the role of the common law in protecting human rights.

Vickery J found that, whilst the Victorian *Charter of Human Rights* does not recognise freedom to testamentary disposition, the 'freedom to dispose of property after death in the way a person chooses has been recognised for centuries under the common law.' Testamentary disposition 'is one of the freedoms that shape our society, and an important human right.'

Importantly, Vickery J considered the effect of the *Convention on the Rights of Persons with Disabilities*. Australia has ratified the CRPD but has not incorporated it into domestic law. Vickery J followed the approach of interpretation established by McHugh J in *A v Minister for Immigration and Ethnic Affairs*, which held that the *Vienna Convention on the Law of Treaties 1969* can be used to interpret treaties that have been ratified but not incorporated. The proposition that international law may be used to guide the development of the common law was qualified by the fact that it should not be used as a 'backdoor' means of incorporating international treaties.

Vickery J found that art 12 of the CRPD can be applied to testamentary capacity. Article 12(2) states that 'persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.' Following art 32 of the Vienna Treaty, Vickery J used extrinsic sources to find that legal capacity in the CRPD is construed more widely than it is currently interpreted by Australian common law, to mean 'the capacity to exercise rights and undertake duties in the course of individual conduct.' However, this construction is subject to the limitations set out in art 12(4) of the CRPD, which requires 'safeguards' for people with disabilities when exercising their legal capacity, so that they are free from 'conflict of interest and undue influence.' Vickery J interpreted this article to mean that 'some people with disability need support to make decisions in the exercise of their legal rights.'

Vickery J recognised that people with disabilities are vulnerable to undue influence when they receive this support. Testamentary undue influence is established when the influence 'moves from being benign' to when 'it can no longer be said that in making the testamentary instrument the exercise represents the free, independent and voluntary will of the testator.' Vickery J established a test to determine whether testamentary undue influence has occurred where the evidence is circumstantial. The test requires that 'the Court must be satisfied that the circumstances raise a more probable inference in favour of what is alleged than not, after the evidence on the question has been evaluated as a whole.'

An additional safeguard is required, being that the testator must have knowledge and approval of the will. Vickery J approved the principle in *Nock v Austin*, that where this is in question the propounders have the burden of removing the suspicion.

### Analysis

Vickery J's construction of legal capacity has significant effects for people with disabilities. With this interpretation, people with disabilities are viewed as having the same legal rights as others. Where support is required it must be found to be proportional to their needs, given all the circumstances, and that where it is suspicious it must be established that the testator had knowledge of the contents of the Will.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VICSC/2009/64.html>.

Jessica Williamson is a Law Student at La Trobe

## Comparative Law Case Notes

### Prohibition against Arbitrary Detention and the Right to Procedural Fairness

*A and Ors v United Kingdom* [2009] ECHR 3455/05 [Grand Chamber] (19 February 2009)

In a case relating to the detention of non-national terror suspects in the UK, the European Court of Human Rights held that:

- detention pending deportation cannot be justified under art 5(1)(f) of the *European Convention on Human Rights* and is therefore a violation of the right to liberty (under art 5(1)) unless some action is actually being taken with a view to the deportation of the detainee; and

- where allegations against detainees are in general terms and the critical evidence is undisclosed to those detainees (even in the interests of national security) such that the detainee cannot effectively challenge the allegations, the right of a detained person to challenge the lawfulness of his/her detention before a court (under art 5(4)) is breached due to a lack of procedural fairness.

### **Facts**

In the aftermath of 11 September, the UK Government considered that there was 'an emergency of a most serious kind threatening the life of the nation' and accordingly passed *The Anti-terrorism Crime and Security Act 2001*. The Act allowed the Secretary of State to issue a certificate stating that an individual foreign national was a threat to national security. These individuals were then arrested and detained until satisfactory deportation arrangements were made, or they chose to leave the UK. The Act provided that the measures were temporary and would cease once the emergency ended. The individual certificates were reviewed every six months. The certificates could be challenged before the Special Immigration Appeals Tribunal ('SIAC').

The House of Lords declared that the Act was incompatible with the *Human Rights Act 1998* (UK). However such a declaration does not affect the validity of the law and no compensation was available under domestic law.

### **Decision**

The Court held that the Act violated the right to liberty and the right of detained persons to challenge the lawfulness of their detention before a court.

#### Right to Liberty

Article 5(1)(f) provides that the right to liberty is not breached where a person 'against whom action is being taken with a view to deportation or extradition' is detained according to law. The Court held that detention is only justified under this article for so long as deportation or extradition proceedings are in progress and only where such proceedings are prosecuted with due diligence. Compliance with national laws is not enough, in addition the detention must not be arbitrary. To avoid being arbitrary detention must be 'carried out in good faith ... closely connected to the ground of detention relied on ... the place and conditions of detention should be appropriate and the length ... should not exceed that reasonably required for the purpose pursued.'

The UK Government acknowledged that all but two of the applicants could not be deported due to a risk that they would be treated in breach of art 3 (which prohibits torture or inhuman or degrading treatment or punishment) in their countries of origin. The Court held that, 'keeping the possibility' of deportation 'under active review' was not sufficient to comply with art 5(1)(f). Although the UK had purported to derogate from its obligations under this article, in accordance with art 15, this derogation was invalid as it was disproportionate to the threat and discriminated between nationals and non-nationals.

#### Procedural Fairness

Article 5(4) provides that a detained person has the right to challenge the lawfulness of his/her detention before a court. The Court held that this requires that proceedings be adversarial and that there be 'equality of arms' between the parties. However these rights can be limited in the public interest, for instance where evidence cannot be disclosed the interests of national security. Where this occurs it must be counterbalanced so that the detainee can effectively challenge the allegations made. Procedural fairness requires that a detainee be informed of sufficient detail to permit him/her to effectively challenge those allegations.

The Court considered that the SAIC, as an independent court which had all the information before it, was best placed to ensure no information was unduly withheld. It also accepted that the special advocates (who were entitled to view the closed information and to make submissions on the detainee's behalf in relation to procedural matters and the substance of the case) did play an important role in counterbalancing the difficulties caused to the detainees. This was limited, however, where the detainee was not provided with sufficient information to enable him/her to effectively instruct the special advocate.

The Court concluded that where the allegations were specific and the closed material was not heavily relied upon, the detainees should have been able to respond to the allegations and there was no breach of art 5(4). However, where the allegations were general or unspecific, and the closed material was heavily relied upon, the detainee was not accorded procedural fairness in breach of art 5(4).

#### **Relevance to the Victorian *Charter***

The Court's decision has implications for the following *Charter* rights:

- the right to liberty and security of person (s 21); and
- the right to a fair hearing (s 24).

The right to liberty and security of person prohibits arbitrary detention and therefore could be interpreted to prevent detention pending deportation where no steps are being actively and diligently taken to effect the deportation.

The right to a fair hearing requires a detainee to be accorded procedural fairness. Use of undisclosed materials, even in circumstances where a specially appointed lawyer can view the undisclosed information but cannot then liaise with the detainee may violate this right if insufficient detail is made known to the detainee to enable him/her to challenge the allegations against him/her.

*Aruni Jayakody and Jane Tipping, Human Rights Law Group, Mallesons Stephen Jaques*

### **House of Lords considers Human Rights Implications of Potential Torture of Terror Suspects**

*RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10 (18 February 2009)

In this case the House of Lords dismissed appeals by RB and U, Algerian nationals, from the Court of Appeal which had allowed their appeals from the Special Immigration Appeals Commission ('SIAC') and remitted their cases to it for reconsideration. The House of Lords also allowed an appeal by the Secretary of State for the Home Department from the Court of Appeal which had allowed Omar Othman's (aka Abu Qatada, a Jordanian national) appeal on the basis that his expulsion would contravene art 6 of the European *Convention on Human Rights*.

#### **Facts**

The case relates to three men, RB, U and Othman whom the Secretary of State for the United Kingdom wished to deport on the ground that they were a danger to national security. The original applications were dealt with before SIAC, a special purpose body which is statutorily enabled to consider deportation cases involving national security matters. Each of the men contended that the deportation would infringe their rights under the ECHR. The relevant rights which the men contended would be infringed by deportation were art 3 (prohibition on torture or inhuman or degrading treatment or punishment), art 5 (liberty and security of person) and art 6 (rights of persons charged with criminal offences).

At first instance, SIAC had held that the UK government was entitled to rely upon assurances from the authorities in Algeria and Jordan that the men would not suffer torture or inhuman or degrading treatment. On appeal to the Court of Appeal, all three men had been successful.

#### **Decision**

The House of Lords unanimously held that the appeals by RB and U should be dismissed and the appeal of the Secretary of State in Othman be allowed, thereby reinstating the decision of SIAC in all three cases. Although all the Lords delivered separate opinions in this case, the leading opinion of the House of Lords was delivered by Lord Phillips, the Senior Law Lord. The main issues considered by His Lordship were the role of the Court of Appeal in considering SIAC decisions, the fairness of SIAC's procedures (particularly its closed evidence procedures), the reliance upon assurances by Algeria and Jordan in relation to the treatment of the three men, and the application of arts 5 and 6 as well as the *Convention relating to the Status of Refugees* to the situation of the three men.

Initially, the House of Lords considered the procedures used by SIAC — these allowed for open and closed hearings. The SIAC rules also provided for the use of Special Advocates, who were able to communicate freely with the appellants up to the time that he or she was served with closed material.

The SIAC procedure was modelled on comments by the European Court of Human Rights about a similar procedure used in Canada. In the assessment of Lord Phillips,

The United Kingdom has gone further to protect those facing deportation than the *Convention* requires. In SIAC it has instituted a specialist tribunal that by its composition is peculiarly well equipped to resolve the issues of fact that arise in the context of immigration decisions that involve issues of security and to apply the relevant law to the facts found. In addition a right to the Court of Appeal has been granted in relation to questions of law.

The House of Lords therefore found that SIAC's use of closed material did not deny the appellants their right to a fair hearing. The appeals to the Court of Appeal are circumscribed by s 7 of the *Special Immigration Appeals Commission Act 1997* such that they are to be 'on any question of law material to that determination'. For this reason, the House of Lords held that it was inappropriate for the Court of Appeal to open up questions of fact for reconsideration on their merits — instead confining the Court of Appeal's role in such cases to one of strict legal review only.

As a consequence, the relevant bases upon which the SIAC decisions could be attacked were:

...on the ground that they failed to pay due regard to some rule of law, had regard to irrelevant matters, failed to have regard to relevant matters, or were otherwise irrational...[and also] on the ground that their procedures had failed to meet requirements imposed by law. (Phillips para 73)

An alternate description, offered by Lords Hoffmann and Hope, was whether 'no reasonable tribunal could have reached such a conclusion on the evidence.'

#### Article 3 — prohibition against torture

The principal challenge to the deportation decision by SIAC was its decision that assurances could be relied upon to discharge the art 3 ECHR prohibition on torture. Loosely, the 'assurances' referred to were statements at a high level that the appellants would not be tortured. It was accepted that Algeria and Jordan were states whose human rights record demonstrated that without such assurances, there was a real risk of an art 3 violation. The reliance upon assurances was challenged as:

...it was irrational and unlawful for SIAC to rely on assurances for two independent reasons: first because Algeria had not been prepared to agree to independent monitoring of the manner in which the appellants would be treated; secondly because, on their true construction, the assurances did not promise that the appellants would not be subjected to inhuman treatment. [In addition]...as a matter of principle, assurances could not be relied upon where there was a pattern of human rights violations in the receiving State coupled with a culture of impunity for the State agents in the security service and the persons who perpetrated these violations. It was further submitted that in all the circumstances SIAC's reliance on the assurances that had been given was irrational.

Lord Phillip held that SIAC could be expected to scrutinise the use of assurances carefully given that art 3 rights were in issue. In considering the attack upon SIAC's reliance on assurances as irrational, Lord Phillip considered the decisions of SIAC in relation to all three appellants and found that SIAC had not been irrational in relying upon the assurances.

In addition to the art 3 arguments, Othman sought to rely upon the Refugee Convention, however this was rejected on the basis that 'Othman's conduct since coming to [the UK] deprived him of the protection afforded by the Refugee Convention.'

In the context of Othman's arguments regarding arts 5 and 6, the relevant test was that there was a 'real risk of flagrant breach of that article'.

#### Article 5 — deprivation of liberty

It was argued that art 5 was flagrantly breached by the likelihood that Othman might be held for 50 days without charge upon return to Jordan. Lord Phillips rejected this as being insufficient to constitute a 'flagrant breach', stating that 'in that context a "flagrant breach" is a breach whose consequences are so severe that they override the right of a state to expel an alien from its territory.'

#### Article 6 — fair trial

A breach of art 6 was argued by Othman in relation to the SIAC decision. In respect of art 6, SIAC considered the following:

If deported Mr Othman faced a re-trial in respect of both charges on which he had been convicted in his absence. He made two objections to the trial process that he would face. The first was that he would be

tried by the SSCt and that this was not an independent and impartial tribunal nor one before which the prosecutor would be independent and impartial. The second objection was that he would be at real risk of being convicted on the basis of the statements made by Mr Al Hamasher and Mr Abu Hawsher and that these statements had been obtained by torture.

Lord Phillips characterised the right in art 6 as procedural in nature and noted the lack of authoritative guidance for what constituted a 'flagrant breach' of the right. Although Jordanian law placed the burden of proof that evidence used in a trial had been obtained by torture upon the defendant, the House of Lords found that this was insufficient to ground a claim of a 'flagrant denial of justice'.

#### Refugee Convention

The House of Lords agreed with the assessment of SIAC that Othman could not claim protection under the Refugee Convention as he fell within the art 1(F)(c) exception to the Convention, being 'guilty of acts contrary to the purposes and principles of the United Nations' by virtue of his terrorist activities.

#### **Relevance to the Victorian Charter**

The House of Lords made it clear in their consideration of the issues relevant to the cases that the confined avenues of review for SIAC decisions meant that the threshold for the appellants in demonstrating that SIAC had erred in its decision to deport them was very high, and the facts would not be retested on their merits. The three ECHR articles have their corresponding provisions in the *Victorian Charter of Human Rights and Responsibilities* however it is important to note that immigration law in Australia is a Commonwealth matter, not subject to the *Charter*. Therefore, although the Commonwealth has relied upon diplomatic assurances in the past in relation to torture and capital punishment, these would not come under the aegis of the *Charter*.

The decision is available at <http://www.bailii.org/uk/cases/UKHL/2009/10.html>.

*Allen Clayton-Greene is a Law Clerk with Allens Arthur Robinson*

### **ACT Court of Appeal Considers Human Rights Interpretative Principle**

*R v Fearnside* [2009] ACTCA 3 (24 February 2009)

This case establishes the principle that the requirement, set out at s 30 the *Human Rights Act 2004* (ACT), to interpret laws compatibly with human rights, requires that laws be interpreted compatibly with human rights as reasonably limited under the HRA, rather than with human rights in their entirety.

#### **Facts**

It is alleged that Fearnside, an appointee of the Australian Federal Police, intentionally and unlawfully administered to a prisoner, Fiona Corrigan, an injurious substance, namely capsicum spray, with intent to cause her pain or discomfort, contrary to s 28 of the *Crimes Act 1900* (ACT).

There was evidence that Ms Corrigan, who was naked as a result of being sprayed by another officer at an earlier point in time, splashed herself with water from the toilet bowl in her cell in an attempt to alleviate the pain and discomfort. Fearnside considered that this evidence, if presented to a jury, would be prejudicial to his case. As such, Fearnside decided that he would seek a trial by judge alone, rather than a trial by jury.

Section 68B(1)(c) of the *Supreme Court Act 1933* (ACT) provides that '[a]n accused person in criminal proceedings shall be tried by a judge alone if ... the election is made before the Court first allocates a date for the person's trial'. It was at the directions hearing on 9 October 2007, that a trial date was fixed. Despite Fearnside making a decision to elect to be tried by judge alone before 9 October 2007, no election was made. Further, Fearnside, or his legal advisors, stated in the questionnaire that parties to criminal proceedings are required to complete before trial, that no election had been made for trial by judge alone.

As Fearnside did not wish to be tried by jury, he made an application to the court seeking to vacate the trial date so that the right to elect to be tried by judge alone would be revived. On Fearnside's application, Higgins CJ made such orders, namely vacating the trial date and giving leave to Fearnside to elect to be tried by Judge alone. In accordance with these orders, Fearnside made his election.

The Crown immediately sought orders that, amongst others, Fearnside's election for trial by Judge alone be declared ineffective.

### Decision

The Court upheld the appeal on the basis that the decision to accept Fearnside's election for trial by judge alone was wrong in law because, since it was made after the Court first allocated the trial date, it did not comply with s 68B(1)(c) of the SCA. This decision turned on the interpretation of s 68B(1)(c). While Fearnside argued that the section allowed for the reviving of the right to elect to be tried by a judge alone where the trial date was vacated, the Court held that the right was lost as soon as the Court **first** allocated a date for trial. This decision was reached on the basis that the word '*first*' as used by the section in the phrase, '*before the Court first allocates a date for the person's trial*', must be given work to do.

In reaching this conclusion, the Court decided that the s 30 interpretive principle, that requires laws to be interpreted compatibly with human rights, did not need to be applied. This decision was reached after consideration was given to the relationship between the s 30 interpretive principle and the s 28 limitation provision under the HRA, which provides that human rights may be subject to reasonable limits. The question that the Court considered was whether the interpretive principle required laws to be interpreted consistently with human rights as reasonably limited or with human rights in their entirety. The Court held that since both the human rights enshrined in the HRA and the limitation provision are set out in the same part of the HRA, the relevant human right for the purposes of applying the s 30 interpretive principle is the human right as reasonably limited. Accordingly, the court held that the methodology to be adopted in interpreting legislation is: 1. Does the section to be interpreted enliven a human right; 2. If so, does the section constitute a reasonable limit on the human right; 3. If not, apply the interpretive principle. This approach favours the methodology adopted in the New Zealand case of *R v Hansen* [2007] 3 NZLR 1, over the approach adopted in the New Zealand case of *Moonen v Film and Literature Board of Review (No 1)* [2000] 2 NZLR 9.

The court adopted this methodology in the present case and found that the s 30 interpretive principle did not need to be applied as s 68B(1)(c) of the SCA did not, as claimed by Fearnside, enliven the right to a fair trial enshrined in s 21(1) of the HRA. The court explained that there are two aspects of the right to a fair trial: that the body deciding the criminal charges is competent, independent and impartial and that the hearing itself is fair. The court held that, as a jury is a competent, independent and impartial body, it cannot be said that the section impinges on the first aspect of the right and that, as having a matter tried before a jury does not affect the fairness of the hearing itself, it cannot be said to impinge on the second aspect of the right.

### Relevance to the Victorian Charter

As the limitation provision and interpretive obligation under the HRA are substantively similar to those in the Victorian Charter, there is now Australian authority that the principle of legislative interpretation articulated by the majority in *R v Hansen* [2007] 3 NZLR 1 should apply in Victoria.

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

*Leana Papaelia, Human Rights Law Group, Mallesons Stephen Jaques*

## HRLRC Policy Work

### A Human Rights Based Approach to Mental Health Law

On 8 May 2008 the Minister for Health announced a review of the *Mental Health Act 1986* (Vic). In December 2008 a Consultation Paper designed to stimulate discussion and raise key issues was released. In March 2009, the Human Rights Law Resource Centre made a submission to the review, entitled *Dignity, Equality, Freedom and Respect: A Human Rights-Based Approach to Mental Health*. The submission focuses on the aim articulated in the Consultation Paper: 'that the new Act appropriately protects human rights in light of the Charter and Australia's international human rights obligations.' The HRLRC considers that the best way to promote the effective, holistic treatment and care of people with mental illness in Victoria is through a human rights framework.

The MHA is more than 20 years old and reflects an outdated and inappropriate approach to the care and treatment of people with mental illness. The legislation is inconsistent with the Government's human rights obligations and legalises and entrenches unacceptable discrimination against people with mental illness.

The submission does not address each of the issues covered in the Consultation Paper. Instead, it focuses on those issues that are most comprehensively dealt with in international human rights law and jurisprudence, including: involuntary orders; consumer participation; restraint and seclusion; external review; monitoring consumer well-being; and confidentiality and information-sharing.

The Centre's submission is available at [www.hrlrc.org.au](http://www.hrlrc.org.au).

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

### **JSCOT Recommends Ratification of OP to Disability Convention**

On 12 March 2009 the Joint Standing Committee on Treaties tabled its report on the *Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities* and recommended that Australia accede to the Optional Protocol.

The Optional Protocol establishes two procedures designed to supplement the *Convention on the Rights of Persons with Disabilities* and strengthen and promote its implementation. The communication procedure allows individuals or groups to submit a communication to the Committee on the Rights of Persons with Disabilities alleging violations of the substantive rights protected under the CRPD. The inquiry procedure allows the Committee to initiate inquiries into reliable information indicating grave or systematic violations of the CRPD by a State Party.

Consistently with the Centre's submission to the inquiry, JSCOT reported that the Optional Protocol would provide an additional mechanism to protect and promote the rights of persons with disabilities and would demonstrate Australia's commitment to human rights.

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

### **Senate Recommends Further Consultation to Improve Protection Against Disability Discrimination**

On 26 February 2009, the Senate Legal and Constitutional Affairs Committee tabled a report on the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008. The Bill's primary objective is to implement the recommendations of the Productivity Commission in its 2004 review of the *Disability Discrimination Act 1992* ('DDA'). The Bill also removes the 'dominant purpose' test from the *Age Discrimination Act 2004*.

The Human Rights Law Resource Centre made a major submission to the inquiry, which welcomed the Bill but urged the Government to further protect the rights of persons with disabilities. In particular, our submission asked the Committee to reconsider the definitions of direct and indirect discrimination in the DDA. This key recommendation has been accepted by the Committee and the Centre's submission is cited approvingly throughout the Senate report.

The Committee recommended that the Bill be passed with one amendment and made the following additional recommendations.

1. That the Government undertake additional consultation with stakeholders and give further consideration to refining the test for direct discrimination in the DDA, and in particular:
  - a. the removal of the 'comparator' test; and
  - b. whether the definition of discrimination contained in the *Discrimination Act 1991* (ACT) should be adopted in the DDA. (This would remove a number of complications with the current definitions of direct and indirect discrimination, such as the disadvantageous effect that the current definition of indirect discrimination has on people who manage to overcome the discriminatory effects of a condition or requirement through their own extraordinary efforts or those of their carer).
2. That the Government consider the inclusion in either the DDA or related guidelines of examples to better illustrate the intended operation of the 'comparator' test in subsection 5(1) of the Bill.

3. That the Government consider implementing the Productivity Commission's recommendation that the *Human Rights and Equal Opportunity Commission Act 1986* should be amended to allow disability organisations with a demonstrated connection to the subject matter of a complaint to initiate complaints in their own right and proceed to the Federal Court or Federal Magistrates Court if required.
4. That the Australian Electoral Commission expedite the implementation of more accessible voting procedures for voters with a disability.

This report follows closely after the Committee's recent major report into the effectiveness of the *Sex Discrimination Act 1984*. In that inquiry the Committee recommended an innovative new approach to equal opportunity and anti-discrimination laws, including a focus on the elimination of systemic discrimination and a shift away from the current reactive, complaints-based system. The Centre hopes that the Government will continue to pursue much needed legislative reform in this area to further protect and promote the right to equality.

The Committee report is at:

[http://www.aph.gov.au/Senate/committee/legcon\\_ctte/disability\\_discrimination/report/report.pdf](http://www.aph.gov.au/Senate/committee/legcon_ctte/disability_discrimination/report/report.pdf).

*Melanie Schleiger is a lawyer with Lander & Rogers and a Board member of the Human Rights Law Resource Centre*

### Submission to Inquiry into Australia's Judicial System and Access to Justice

On 5 February 2009, the Senate ordered the review of Australia's judicial system, the role of judges and access to justice.

The Human Rights Law Resource Centre's Submission to the Access to Justice Inquiry analyses and discusses the Terms of Reference with particular reference to the right to a fair hearing, as enshrined in art 14 of the *International Covenant on Civil and Political Rights*. The right to a fair hearing is a fundamental human right, is instrumental to the effective protection of all other human rights, and must be central to any discussion of access to and administration of justice.

Following the introduction of similar 'right to fair hearing' provisions in charters of human rights in other jurisdictions (in particular in the United Kingdom and state jurisdictions such as Victoria and the Australian Capital Territory), an analysis of the jurisprudence developed in these jurisdictions is useful for determining the content of the right to a 'fair hearing' and evaluating the implications for access to justice in Australia.

Accordingly, through a discussion and analysis of the content of the right to a fair hearing, the submission aims to assist in guiding potential reform relating to the following Terms of Reference the subject of the Inquiry:

- (a) the ability of people to access legal representation;
- (b) the adequacy of legal aid;
- (c) the adequacy of funding and resource arrangements for community legal centres;

and to a lesser extent:

- (d) the cost of delivering justice;
- (e) the timeliness of judicial decisions; and
- (f) measures to reduce the length and complexity of litigation.

The discussion also touches on issues that are relevant to:

- (g) the procedure for appointment and method of termination of judges;
- (h) the term of appointment of judges; and
- (i) the appropriate qualifications of judges.

The Centre's submission is available at [www.hrlrc.org.au](http://www.hrlrc.org.au).

*Helen Conrad is on secondment to the Human Rights Law Resource Centre from Mallesons Stephen Jaques*

## HRLRC Casework

### Indigenous Rights: Committee on the Elimination of Racial Discrimination Requests Urgent Action on Northern Territory Intervention

The UN Committee on the Elimination of Racial Discrimination has requested that the Australian Government take urgent action to ensure that the Northern Territory Intervention complies with the *Convention on the Elimination of All Forms of Racial Discrimination*. In an open letter dated 13 March 2009, the Committee calls upon the Australian Government to report in four months' time on the progress it has made to reinstate the *Racial Discrimination Act 1975* (Cth) and to build a new relationship with Aboriginal Australia.

The Committee's letter was sent in response to a Request for Urgent Action that was made to the Committee on behalf of a group of 20 Indigenous Australians affected by the Northern Territory Intervention. The Request for Urgent Action argued that the suspension of the *Racial Discrimination Act* and the Australian Government's failure to consult adequately with affected Aboriginal communities violates arts 2, 5, 6 and 7 of CERD. Details of the Request for Urgent Action are available at [www.hrlrc.org.au](http://www.hrlrc.org.au).

The Committee's urgent procedures mechanism is designed to respond to situations requiring immediate attention to prevent or limit serious violations of CERD.

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

## Seminars and Events

### 'Dignity, Equality and Inclusion: Engaging with the UN Convention on the Rights of Persons with Disabilities and its Committee of Experts'

with Prof Ron McCallum AO, UN Committee on the Rights of Persons with Disabilities

**Date:** 5.45 for 6.00pm, Tuesday, 28 April 2009

**Venue:** DLA Phillips Fox, Level 21, 140 William Street, Melbourne

**Cost:** \$20 / \$10 concession

**RSVP:** By 21 April 2009 using Booking Form at [www.hrlrc.org.au](http://www.hrlrc.org.au) under 'Seminars and Events'

Ron McCallum AO is Professor of Labour Law at Sydney Law School and is an inaugural member of the UN Committee on the Rights of Persons with Disabilities.

The Committee, which is comprised of 12 independent international human rights and disability experts, is established under the *UN Convention on the Rights of Persons with Disabilities*. It is responsible for monitoring and promoting implementation of the Convention. Australia became a party to the Convention in July 2008 and Prof McCallum attended the Committee's 1<sup>st</sup> Session in Geneva in February 2009. Prof McCallum has experienced blindness since birth and is Deputy Chair of Vision Australia. He was Dean of Sydney Law School from 2002 to 2007 and the inaugural president of the Australian Labour Law Association.

### RMIT Forum – 'From Human Rights to Human Service Delivery Work'

**Date:** 2.30 – 5.00pm, Friday, 1 May 2009

**Venue:** RMIT City Campus, Multi Function Room, Building 8 (Swanston St) Level 4 (behind the cafe)

**RSVP:** [youthworkrmit@gmail.com](mailto:youthworkrmit@gmail.com)

A free forum exploring the possibilities of human rights charters for human service delivery workers with speakers including:

- Susan Ryan AO (chair of the Australian Human Rights Group), speaking about the need for comprehensive human rights protection in Australia and the campaign currently happening in Australia;
- Jason Rostant (Manager of human rights education at the Victorian Equal Opportunity and Human Rights Commission), exploring if human rights can be effective tools for change, and using human rights to frame advocacy, improve services and enable participation;

- Paul Ramcharan, reflecting on the capacity of human rights to improve disability advocacy;
- Rachel Ball (lawyer at the Human Rights Law Resource Centre), highlighting some of the 'good news stories' that have emerged from the use of the Victorian Charter of Human Rights and Responsibilities Act; and
- Deb Pietch (Project Manager for the Human Rights Charter implementation project within DHS), discussing the process of implementing Human Rights Charters within large organisations and the learnings along the way.

### Specialised Human Rights Program at the Academy on Human Rights and Humanitarian Law, American University Washington College of Law

25 May to 12 June 2009, Washington DC

The Specialized Human Rights Program of the Academy on Human Rights and Humanitarian Law at American University Washington College of Law will offer 17 courses taught by 33 leading experts in the field among these: Manfred Nowak, UN Rapporteur on Torture; Juan Méndez, President of the International Center for Transitional Justice; Sylvia Steiner, Judge, International Criminal Court; Antonio Cançado Trindade, Judge, International Court of Justice.

Courses are tailored to meet the needs of professionals, practitioners and students specializing in human rights. Participants can enroll for academic credit approved by the American Bar Association, CLE credit, a Diploma or a Certificate of Attendance.

Concurrent with the program, the Academy sponsors Human Rights Month which offers additional academic opportunities through conferences, site visits at prominent international organizations and a human rights film series. The Academy also hosts special events such as a welcome and closing reception, a tour of the national monuments and a dinner cruise along the Potomac River.

In 2008, the program welcomed 185+ participants from 24 countries, with varied backgrounds and differing levels of experience. The program provides a venue for total immersion into the realm of human rights and humanitarian law. Participants leave the program with a better understanding of contemporary human rights issues facing the world and an invaluable network of contacts.

See [www.wcl.american.edu/hracademy](http://www.wcl.american.edu/hracademy) for more information or email [hracademy@wcl.american.edu](mailto:hracademy@wcl.american.edu).

### Castan Centre Annual Conference – ‘The Changing Human Rights Landscape’

The Castan Centre is proud to announce a strong line up of speakers for its 2009 annual conference, *The Changing Human Rights Landscape*. The conference will take place on 17 July 2009 at the State Library in the heart of Melbourne. Registrations will open on Monday 20 April 2009.

If you would like to register your interest in attending the conference now, please email [castan.centre@law.monash.edu.au](mailto:castan.centre@law.monash.edu.au). If you would like to inquire about sponsoring the conference, please email [marius.smith@law.monash.edu.au](mailto:marius.smith@law.monash.edu.au).

The following four sessions have been confirmed:

- **Session 1 - A National Consultation on Human Rights**  
The Hon Robert McClelland, Australian Attorney General on '*Promotion and Protection of Human Rights*'
- **Session 2 - A Health Check on the Victorian Charter of Human Rights and Responsibilities**  
Alistair Pound, Barrister, on '*The Victorian Charter of Rights and Responsibilities so far: A lawyer's perspective*'  
The Hon Justice Chris Maxwell, President, Court of Appeal on '*The Victorian Charter of Rights and Responsibilities so far: A judge's perspective*'
- **Session 3 - Australian Re-engagement with International Law**  
The Hon Robert Hill, Australian Ambassador and Permanent Representative to the United Nations (retiring April 2009) on '*Howard to Rudd: Australia's record of international engagement*'  
Professor Hilary Charlesworth, Director, Centre for International Governance and Justice, Australian National University on '*Assessing Australia on the world stage*'

- **Session 4 - International Law Update**

Professor Chris Sidoti, former Australian Human Rights Commissioner, Visiting Professor Griffith University, Visiting Professor, University of Western Sydney on *'The UN Human Rights Council - The story so far'*

Professor Sarah Joseph, Director, Castan Centre for Human Rights Law on *'International Human Rights cases 2008-2009'*

## Human Rights Resources

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

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

- Daniel Ziffer, 'Rights Record Under Scrutiny in UN Seat Bid', *Sydney Morning Herald* (Sydney), 22 March 2009 at <http://www.smh.com.au/world/rights-record-under-scrutiny-in-un-seat-bid-20090321-94z4.html>.
- James Eyers, 'Lack of Domestic Legislation Could Hamper Bid for Seat', *Australian Financial Review* (Sydney), 20 March 2009.
- Tom Arup, 'United Nations to Query Australia on Possible Human Rights Breaches', *The Age* (Melbourne), 13 March 2009 at <http://www.theage.com.au/national/united-nations-to-query-australia-on-possible-human-rights-breaches-20090312-8wid.html>.
- Phil Lynch, 'Improving Lives', *ABC Online*, 11 March 2009 at <http://www.abc.net.au/unleashed/stories/s2492180.htm>.

## Foreign Correspondent

### Developments at the United Nations and in International Human Rights Law

#### Global Financial Crisis

While the Global Financial Crisis has dominated the world's financial news, it has also been a hot topic of conversation in the human rights world. On 20 February a Special Session of the Human Rights Council was convened to discuss 'the impact of the global economic and financial crises on the universal realization and effective enjoyment of human rights.' The High Commissioner for Human Rights, Navi Pillay, spoke to the Council about how the financial crisis risks affecting vulnerable groups, including migrants, refugees, indigenous peoples, minorities and persons with disabilities, women and children. She explained that such marginalized individuals and groups are often adversely affected, for example by being at the frontline for job losses, and can find accessing social safety nets difficult. Many states also expressed concerns about how the Global Financial Crisis will affect the achievement of the Millennium Development Goals.

On 23 February, delegates voted on a proposed resolution which called for states to 'broaden the participation of developing countries in international economic decision-making and norm-setting'. It also called on all States to refrain from reducing official development assistance and international funding and from imposing protectionist measures; to note that the crises does not diminish their responsibilities to respect human rights; and to ensure that those at risk and the most vulnerable are assisted and protected in a non-discriminatory manner. 34 States voted in favour of the resolution, while the European Union members and aligned countries (Canada, Switzerland, Republic of Korea, Japan and Mexico) abstained – a rather disappointing result given the emphasis throughout the discussions on the importance of consensus on such an issue.

The human rights implications of the Global Financial Crisis were again brought to our attention on International Women's Day, on 8 March, when the UN Special Rapporteur on Violence against Women issued a press release focusing on the way in which women and girls, particularly those affected by economic problems, face an increased risk of societal and domestic violence, particularly when men experience job losses or other stresses made more prevalent in these harsh times.

#### Universal Periodic Review

In early February, the 4<sup>th</sup> Session of the Human Rights Council's Universal Periodic Review ('UPR') was

conducted, and 16 states were examined (Azerbaijan, Bangladesh, Cameroon, Canada, China, Cuba, Djibouti, Germany, Jordan, Malaysia, Mauritius, Mexico, Nigeria, Saudi Arabia, Senegal, and the Russian Federation). During this session, there was some controversy regarding in particular the reviews of China and Cuba – the speakers list for both sessions was quickly filled by countries wanting to engage in the dialogue, although many of the interventions seemed to have been stacked to provide positive congratulatory messages, rather than objective critiques of the countries' track record on implementation of human rights obligations.

The end of this session marks the one-third point for the first UPR cycle – now 64 of the 192 UN member states have been examined – prompting some to reflect on the successes and challenges to date. While the concept of addressing the human rights situation in every country of the world is an amazing opportunity to transparently address concerns about implementation on the basis of equality, the process has clearly been more successful with the states who chose to positively engage in the process, and those who would not otherwise be under the scrutiny of the Human Rights Council, than with others who use their political power to circumvent critical outcomes. The President of the Human Rights Council has noted that:

While there is always room for improvement, the UPR has made significant progress well beyond the conference rooms. Several states who have undergone their review have already begun implementing recommendations...and adopted new policies, programmes and measures aimed at improving the human rights in their countries for the benefit of their citizens.

### **First Session of the Committee on the Rights of Persons with Disabilities**

The First Session of the Committee on the Rights of Persons with Disabilities was held from 23-27 February in Geneva. The 12 expert members of the Committee, including Australian Professor Ron McCallum, discussed their draft rules of procedure, reporting guidelines, and the process of beginning consideration of state reports in 2010.

### **Human Rights Council 10<sup>th</sup> Session**

The 10<sup>th</sup> session of the Human Rights Council is underway in Geneva – now entering its final week. For the first time, the Council is being held in a new specially created room – the Human Rights and Alliance of Civilizations Room at the Palais des Nations – controversial because of its enormous cost, paid for from the Spanish Government's overseas aid budget, and the interesting art work on the ceiling which leaves most in the room fearing they will soon be impaled by a falling stalactite. The Council session began, as usual, with a High Level Segment, where dignitaries from around the world come to talk about the implementation of human rights in their countries and the global priorities. Then the High Commissioner, Mrs Navi Pillay, presented her report on the global human rights situation, and many of the Special Rapporteurs and Independent Experts have presented their annual thematic reports and reports on country missions. Several interesting interactive dialogues have also been held, in particular the first annual interactive dialogue on the rights of persons with disabilities, where the discussion focused on the ratification and implementation of the Convention on the Rights of Persons with Disabilities. The other key events were a full-day discussion with two panels on children's rights, convened to mark the 20<sup>th</sup> anniversary of the Convention on the Rights of the Child, and another panel event on the right to food.

As the final resolutions were yet to be adopted at the time of writing, I will report next month about some of the significant outcomes of this 10<sup>th</sup> session of the Human Rights Council, including the adoption of the reports of the Universal Periodic Review sessions.

### **Durban Review Conference**

Controversy continues to attach to the Durban Review Conference, to be held in Geneva in April. This event will be a chance to review progress and assess implementation of the Durban Declaration and Program on Action, adopted at the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. After many negotiations in preliminary working groups, a draft text of the outcome document is now under consideration. While there are tensions about how many issues, not least of all religious intolerance, will be dealt with, governments are considering whether or not to participate – Israel is boycotting the event, Canada has already said it won't attend, and Australian newspapers report that Prime Minister Kevin Rudd has been under pressure from senior Israeli

diplomats not to send a delegation. Despite early indications from the Obama Administration that the US would participate, it seems nothing can stem the flow of governments who are disengaging, as the USA and others have now confirmed they will not participate, and EU states may also be considering pulling out.

### **Sexual Orientation at General Assembly**

The main session of the General Assembly finished on 24 December 2008, after the adoption of over 50 resolutions on human rights issues. One of the most historic was the adoption of the first ever UN statement on human rights violations occurring on the basis of sexual orientation. At the General Assembly, 66 countries, including Australia, affirmed 'the principle of non-discrimination, which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity,' and denounced 'violence, harassment, discrimination, exclusion, stigmatization and prejudice . . . because of sexual orientation or gender identity.' The groundbreaking statement also called for gay sex to be decriminalised, despite it currently being banned in approximately 77 countries (and a crime subject to the death penalty in 7 countries). More recently, the USA reversed its previous opposition and issued an endorsement of the statement on 19 March.

### **NGO and Civil Society Reports**

Some noteworthy NGO reports have hit the media and our inboxes over the last month.

First, the International Commission of Jurists presented its extensive study on counter-terrorism and human rights, the work of an independent panel of eminent judges and lawyers. The report, *Assessing Damage, Urging Action*, is the outcome of 16 hearings held around the world, examining the impact of counter-terrorism policies. It calls for remedial action, including the rejection of the 'war on terror' paradigm and upholding the rule of law and criminal justice.

Another key report issued recently is the Human Rights Watch *World Report* which summarises the human rights situation in over 90 countries.

The International Service for Human Rights has also published its immensely useful *Human Rights Monitor 2008*, which reviews the substantive work, functioning, and key deliberations of the Human Rights Council, the UPR, the Advisory Committee, the treaty bodies, the General Assembly and the Security Council, during 2008.

The Office of the High Commissioner for Human Rights also recently published its new *Handbook for Civil Society*, an invaluable resource on how civil society actors can work with the UN Human Rights system.

### **Bashir Arrest Warrant**

It would be remiss to end without mentioning the key news of interest to those who continue to follow how violators of human rights are held to account – the International Criminal Court announced on 4 March its decision to issue an arrest warrant for President Omar Hassan Ahmad al-Bashir of Sudan, for crimes against humanity and war crimes. He is the first sitting head of state to ever be indicted to the ICC.

*Claire Mahon is an Australian international human rights lawyer based in Geneva, Switzerland, where she works as a consultant for NGOs and the UN. She is the Coordinator of the Project on Economic, Social and Cultural Rights at the Geneva Academy of International Humanitarian Law and Human Rights, and an Adjunct Clinical Professor of Law at the University of Michigan Law School in the USA.*

### **If I Were Attorney-General...**

#### **'If I were the King of the World, tell you what I'd do...'**

Just a line from an old Three Dog Night song that's been running through my head ever since I was asked to write this article (some of you might remember 'Joy to the World' from the 70's). A therapist would probably have a field day with the association but I think, being given carte blanche in the Attorney-General's seat (albeit only in my mind), is as much like being 'King of the World' as I could imagine.

But before I go on, please let me just say at the outset that I'm neither a lawyer nor a politician and as such, have only a lay knowledge of what an Attorney can and cannot do. In view of this, I feel I must make a kind of 'pre-emptive acknowledgement' that some of the things I will do and some of the changes I will make during my 'reign' as Attorney, might for all I know, be entirely impossible, impractical – or, heaven forbid, even illegal! I also acknowledge that I cannot quote from the various *Acts* I will change, nor would I even know some of the many laws I will doubtless break. However, I do trust that in the spirit of this series of articles, your disbelief might be suspended for a short while, and the appropriate legislative amendments enacted and the necessary laws changed in your minds to give me the power to do pretty much whatever I like!

And I would like to start with an area that has particular significance to me on a deeply personal level...prisons.

Way back in 2005, when I was less than a year into a four year prison term, I learned that corrections were putting together a little \$25 million package for the women's correction system called '*The Better Pathways Strategy*'. All very well and good, but did these measures actually result in any decrease in re-offending? To be fair, perhaps it's too soon to tell yet, but my initial response is that 'The Better Pathways Strategy', if not the 'way forward' to decreased recidivism that it promised, was at least aptly named – the process did deliver some very fine footpaths within the prison!

Jokes aside though, Better Pathways *did* deliver upgrades to the Medical Centre, the Centre for Education, Industries, the Programs Building and the Visit Centre, as well as refurbishing the old Special Needs Unit (this was re-named Maarmak and re-designated as a '24/7 Mental Health Care facility'), however none of these upgrades have yet proven to be any more beneficial to women in terms of outcome than the old system did. Basically, it was a lick of paint and a promise.

So then...

My first official act as AG would be to sack corrections, abolish prisons and rename the buildings 'Reflection Centres'. Naturally, some maximum security facilities (maybe one for the men and a small one for women somewhere) would need to remain designated as 'maximum' to house violent or sex offenders (we can't let all the *really* bad ones out) but as this means less than 15% of women currently incarcerated (in my experience, I'd put this figure at less than 5%), I would recommend Reflection models begin immediately in women's facilities and gradually roll on into the various men's facilities. Women in custody have traditionally received the 'blunt end of the stick' (or the left-overs) as far as services, programs and accommodation in minimum security beds are concerned, so in this reform at least, women would be the first to reap the benefits.

The new Reflection Centres for women would no longer be staffed by corrections officers. They would be operated entirely by professionals and civilians. Current prison officers would be given the opportunity to re-train as educators, vocational trainers, personal development facilitators or welfare workers, with those not availing themselves of the opportunity being re-designated as 'security guards' who would no longer work within the facility or be in contact with the women. These staff would be re-deployed to security details on the perimeter. All 'prison-type' security would begin and end at this perimeter which would be situated out of sight of the Centre. Security concerns such as drugs or weapons can be easily addressed from this location but the hyper-surveillance and the hyper-vigilance of the previous corrections model has no place within a Reflection Centre.

The new Reflection Centres will deliver arts programs, such as dance, theatre and music. They will also offer educational programs, such as computers, graphic arts and other vocational courses, as well as secondary, TAFE and tertiary tuition. There will be programs to support mothers and children (provision will be made at all Reflection Centres for children to remain with their mothers); drug and alcohol programs; specialised women's health programs complete with visiting doctors and other health and mental health professionals; sports programs and leisure activities. Non-government organisations would also be invited to involve themselves in Reflection Centre life, providing invaluable links with community and bringing a sense of 'normalcy' to the environment.

Lastly, but most importantly of all, there will be specialist counselling and personal development programs to enlighten, empower and enable women, to heal them and make them whole. After all, isn't that what re-integration means, to return the 'part' to the 'whole'? What good is it to the 'whole' if we continually return damaged or broken people?

In view of this, there will be no 'stick'. Participation in any Reflection Centre activity will be entirely voluntary. However, there will be a 'carrot' – in the form of a revamped remission system whereby early 'graduation' can be earned through voluntary participation in educational or therapeutic programs and the necessity for post-graduation 'supervision' limited or lessened.

But, in nearing the end of this article, I'm getting a little ahead of myself. 'Offenders' would first need to be referred to Reflection Centres by the Courts and for that to happen with any degree of success, the judiciary, the media, in fact the whole of society, would need to 'do a 180°' in their perceptions of the current corrections model and embrace, wholeheartedly, my own vision of 'justice'.

Perhaps they just need a little time for reflection...

*Joy to the fishes in the deep blue sea,*

*Joy, to you and me...*

*Vickie Roach is completing a PhD at Swinburne University and works at the Koorie Heritage Trust. She completed a four-year prison term at the Dame Phyllis Frost Centre in 2008. In 2007, Ms Roach established a constitutional right to vote in the watershed High Court decision in Roach v Australian Electoral Commission [2007] HCA 43.*