human rights law resource centre

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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.

Opinion

Australia's Policy on Human Rights:

An Open Letter to the Prime Minister of Australia from Human Rights Watch

Dear Prime Minister Rudd

Congratulations on your recent election as Prime Minister of Australia.

Human Rights Watch is a nongovernmental organization based in New York that monitors and reports on international human rights, refugee, and humanitarian law issues in more than 70 countries around the world.

We write to you outlining key areas of policy where we believe that Australia can and should do more to promote and protect human rights. On foreign policy, Australia is a significant political actor and donor in the Asia-Pacific region, so your government is well placed to play a leading role in promoting human rights at a regional and international level. Over the past decade, the Australian government was notably absent or obstructionist in such efforts. The significant international attention paid to your signing of the Kyoto Protocol and your statement at the Bali conference on climate change shows the clout Australia has and the ways in which it can be put to good use.

Any promotion of human rights, however, begins at home. Your government has an opportunity to distinguish itself on domestic issues by reversing some of the previous government's policies that undermined basic rights in areas such as refugees, Indigenous Australians, counter-terrorism, and discrimination against same-sex couples.

Counter-terrorism

Australia should amend its counterterrorism legislation to bring it into compliance with international human rights standards. The case of Dr Mohammed Haneef, an Indian citizen who was detained without charge for almost two weeks in July 2007 under the *Anti-Terrorism Act 2005* (he was then charged, but the charges were dropped), highlights the need to revisit Australia's approach to counter-terrorism. In order to combat terrorism more effectively, the government should reaffirm its commitment to human rights principles.

Human Rights Watch recommends that Australia reform the *Anti-Terrorism Act 2005* in the following ways:

- Revise control order procedures to ensure that individuals have access to all the information submitted to the courts for the purpose of securing control orders, that control orders are

limited in time, and that they do not effectively constitute house arrest. Imposing house arrest through control orders is tantamount to meting out criminal punishment without trial, violating the fundamental right to due process;

- Amend the law's overbroad provisions on sedition to avoid infringing the right to freedom of expression;
- Modify preventive detention procedures to allow detainees to promptly inform their family members and legal counsel that they are being detained and ensure their communications with lawyers are not monitored by the police;
- In line with the December 2006 report of the United Nations Special Rapporteur on Human Rights and Counter-Terrorism on Australia, narrow the law's definition of 'terrorist act', so that it covers only conduct carried out with the intention of causing death or serious bodily injury, or the taking of hostages.

Refugees

Human Rights Watch welcomes the pledge by the Labor Party to end the 'Pacific Solution' by closing the Nauru and Manus Island processing and detention facilities and to replace the temporary protection visa scheme. We are pleased to note that your government already granted political asylum to seven Burmese refugees who spent more than a year on Nauru Island, and we see this as a very positive sign of your intention to restore Australia's reputation as a country that provides refuge to the persecuted.

In order to ensure that Australia's refugee policy respects human rights and meets international obligations, we call on your government to:

- Close the Nauru and Manus Island facilities and offer asylum in Australia to any of the 89 people found to be refugees;
- End the policy and practice of mandatory detention of asylum seekers and introduce community-based supervision for people whose refugee application is pending, with detention used only as a last resort where there is a compelling security risk;
- End the practice of excluding parts of Australian territory from the Australian migration zone through 'territorial excision', which dictates that asylum seekers processed in excised places such as Christmas Island do not enjoy the same legal rights as those processed on mainland Australia. All asylum seekers under Australian jurisdiction should be able to file a claim for asylum and have full access to legal assistance, an independent appeal process, work permits, and community support;
- Replace the temporary protection visa scheme with a system that accords the same protection to all recognized refugees regardless of their manner of entry into the country.

Indigenous Australians

The quality of life for most Indigenous Australians remains unacceptably low, with a 17-year gap in life expectancy between Indigenous and non-Indigenous Australians, an infant mortality rate that is almost three times higher than the general Australian population, and rates of death from treatable and preventable conditions such as diabetes and respiratory illness ranging from three times to eight times higher than for non-Indigenous Australians. Although they live in one of the world's wealthiest countries, most Indigenous Australians do not have access to adequate health care, housing, food or water. Human Rights Watch welcomes your commitment to close the gap in life expectancy, and to formally apologize to the Stolen Generations. We call on your government to act immediately to:

- Make the existing Northern Territory National Emergency Response, designed to address child abuse and social breakdown in rural Indigenous communities, subject to the *Racial Discrimination Act 1975*. All government action taken should be consistent with the fundamental right to racial equality;
- Ensure, in deciding the future of the Northern Territory National Emergency Response, that Indigenous Australians are regularly consulted and play a central, formal role in addressing child abuse and social breakdown in their communities.

Discrimination against Same-Sex Couples

Australia was at one time at the forefront of international efforts to recognize the rights of lesbian, gay, bisexual and transgender (LGBT) people. Over the past decade, however, its record on this issue has fallen behind many other countries. The lack of legal recognition of same-sex relationships under federal law means that these Australians and their children face disadvantage and exclusion on a daily basis. We welcome the commitment by the new government to tackle this discrimination by implementing the recommendations of the Human Rights and Equal Opportunity Commission's report, *Same-Sex: Same Entitlements*. We call on the new government to remove all discrimination against same-sex couples by:

- Enacting legislation as a first-term priority that implements the recommendations of the HREOC report, so that same-sex couples and their children have equal access to benefits and entitlements in areas such as public sector superannuation, the Medicare and Pharmaceutical Benefits Scheme Safety Nets, income tax, and child support;
- Providing for effective educational programs to ensure that all those affected by the HREOC reforms are aware of the changes, particularly Commonwealth employees and agents who will be responsible for administering the new laws;
- Introducing federal anti-discrimination legislation that prohibits discrimination on the basis of sexual orientation and gender identity;
- Amending the *Marriage Act 1961* so that civil marriage in Australia is available to any two persons, regardless of their gender.

We thank you for your attention to these issues, and hope that your recent election will mark a turning point for Australia's record on human rights, both domestically and abroad. We look forward to a constructive relationship with your government.

Sincerely

Kenneth Roth

Executive Director, Human Rights Watch

*For the full-text letter, which also addresses foreign human rights policy, see hrw.org/english/docs/2007/12/17/austra17574.htm.

News

UN Committee adopts General Comment No 2 on Implementation of Prohibition against Torture and Ill-Treatment

The UN Committee against Torture has recently adopted General Comment No 2 regarding implementation of the prohibition against torture and other forms of cruel, inhuman or degrading treatment or punishment under art 2 of the *Convention against Torture*. General Comment No 2 will be an important source of guidance on the interpretation and application of s 10 of the Victorian *Charter of Human Rights*, which provides for protection from torture and cruel, inhuman or degrading treatment.

A General Comment is an authoritative summary of the views of a human rights treaty body on the normative content and application of the treaty over which it has jurisdiction. Section 32(2) of the *Charter* provides that the jurisprudence of relevant human rights bodies may be considered in interpreting Victorian law; a provision which is consistent with the principle that expressions used in international agreements should be construed by domestic courts in a manner consistent with relevant international courts and panels (see, eg, *Rocklea Spinning Mills Pty Ltd v Anti Dumping Authority* (1995) 56 FCR 406; *Povey v Qantas Airways Ltd* (2005) 216 ALR 427).

Key features of General Comment No 2 include that:

- the prohibition against torture *and* ill-treatment is absolute and non-derogable;
- the obligations to prevent torture and ill-treatment are wide-ranging and include the taking of positive legislative, administrative, judicial, financial and other measures;
- the obligation to prevent torture and ill-treatment extends to any territory or facility under the *de jure* or *de facto* control of the state;

- the state bears responsibility for any acts of torture or ill-treatment by any of its officers, agents and private contractors;
- the state must take special measures to ensure that all persons within its custody or control – including people in prisons, hospitals, schools, child-care institutions, aged care services and disability services – are adequately protected from torture and cruel-treatment, including privately inflicted harm;
- the prohibition against torture and ill-treatment requires particular guarantees in relation to persons deprived of liberty. These guarantees include 'maintaining an official register of detainees, the right of detainees to be informed of their rights, the right promptly to receive independent legal assistance, independent medical assistance, and to contact relatives, the need to establish impartial mechanisms for inspecting and visiting places of detention and confinement, and the availability to detainees and persons at risk of torture and ill-treatment of judicial and other remedies that will allow them to have their complaints promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment.';
- the protection of marginalised and vulnerable groups – including women, children, people with disabilities, Indigenous people, gays, lesbians and transgender people, and ethnic and religious minorities – is part of the obligation to prevent ill-treatment; and
- the elimination of discrimination and on-going education and training is key to preventing ill-treatment and building a culture of respect for human rights.

The General Comment incorporates many of the observations and recommendations made by the Human Rights Law Resource Centre in its August 2007 submission to the Committee on the then draft General Comment. The Centre's submission, which was prepared with the substantial assistance of Clayton Utz, addressed issues including the non-derogability of the prohibition against ill-treatment, the nature of the positive obligations to prevent torture and ill-treatment, the rights of detainees, the protection of vulnerable groups, and the application of the Convention in the context of counter-terrorism laws and measures.

General Comment No 2 is available at http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.GC.2.CRP.1.rev4aev.doc.

The Centre's submission on the draft General Comment is available at www.hrlrc.org.au under Policy Work>HRLRC Submissions>Submission to UN Committee against Torture in response to Draft General Comment No 2.

Philip Lynch is Director of the Human Rights Law Resource Centre

Centre Receives Substantial Support from Helen Macpherson Smith Trust

The Human Rights Law Resource Centre has recently received a major grant from the Helen Macpherson Smith Trust. The Trust, a Victorian charity, has committed $100,000 over 3 years to assist the Centre to employ an additional lawyer to promote human rights for disadvantaged and vulnerable people in Victoria. For further information about the Trust, see www.hmstrust.org.au.

Centre Shortlisted for Australian Human Rights Law Award

The Centre is proud to have been short-listed for the 2007 Australian Human Rights Law Award conferred jointly by the Human Rights and Equal Opportunity Commission and the Law Council of Australia. The Centre was one of three short-listed finalists, with the Award being very deservedly made to Redfern Legal Centre for its substantial contribution to human rights, particularly Indigenous rights, through the practice of law. For more information about the Human Rights Medal and Awards, see www.humanrights.gov.au/about/hr_awards/.

Victorian Charter of Rights Developments

Victorian Charter of Rights Regulations and Rules Promulgated

On 11 December 2007, the Governor in Council promulgated the *Charter of Human Rights and Responsibilities (General) Regulations 2007* (Vic). The Regulations prescribe:

- the form for giving mandatory notice of a proceeding giving rise to *Charter* issues to the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission under s 35(1) of the *Charter*; and
- the form for giving mandatory notice to the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission that the Supreme Court is considering making a declaration of inconsistent interpretation under s 36(3) of the *Charter*.

The Supreme Court of Victoria has also recently made Rules, the Supreme Court (Chapter II Amendment No 8) Rules 2007, to provide for procedures with respect to referrals under s 33 of the *Charter*. Section 33 of the *Charter* enables lower courts to refer questions of law relating to human rights to the Supreme Court or Court of Appeal as appropriate.

Both the Rules and Regulations are available at www.hrlrc.org.au under Victorian Charter of Human Rights and Responsibilities>Charter of Human Rights and Responsibilities Act 2006 and other Primary Documents.

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.

Liquor Control Reform Amendment Bill 2007

The *Liquor Control Reform Amendment Bill 2007* seeks to reduce alcohol-related violence or disorder by amending the *Liquor Control Reform Act 1998* to allow:

- the Director of Liquor Licensing to designate areas where alcohol related violence or disorder has occurred in a public place, within 100 metres of licensed premises;
- the police to ban a suspected offender from a designated area, or from licensed premises in that area, for up to 24 hours;
- certain offenders to be excluded from a designated area or licensed premises for up to 12 months by court order; and
- the police to use reasonable force in enforcing banning notices and exclusion orders.

The Bill also provides that:

- licensees must keep music at a background level outside ordinary trading hours, except at private functions;
- a senior police officer may suspend a liquor licence for up to 24 hours in certain circumstances;
- restrictions are placed on advertising or promotion that is likely to encourage irresponsible drinking or is contrary to the public interest; and
- licensees can enter into a voluntary liquor accord, a code of practice which attempts to minimise harm arising from misuse or abuse of alcohol.

The Bill potentially engages the rights to liberty and security (s 21), freedom of movement (s 12) and presumption of innocence (s 25(1)) in the *Charter of Human Rights*.

According to the Statement of Compatibility prepared in relation to the Bill, the banning notice and exclusion order regime is justified, despite its potential impact on the right to freedom of movement and liberty, because the aim of the regime is to prevent further offences, the notices and orders are subject to discretionary considerations, and an individual cannot be restricted from an area in which they live or work.

However, in its report on the Bill's potential impact on *Charter* rights, the Scrutiny of Acts and Regulations Committee expressed concerns that the Bill does not limit the potential size of designated areas, only allows interim orders suspending a designation to be made in exceptional circumstances, and does not invalidate bans or orders made in relation to a particular designated area when the order to designate the area is later found to be invalid. This potentially infringes the rights to freedom of movement and liberty.

In addition, the SARC expressed concerns about the creation of strict liability offences of failing to comply with a ban, order or related police direction. This clearly restricts the right to the presumption of

innocence. According to the SARC, placing the onus on the defendant of proving the defences of reasonable mistake of fact or reasonably unavoidable circumstances is inappropriate, because traditionally the prosecution is required to prove the absence of such matters beyond reasonable doubt, which can be done by relying on circumstantial advice or admissions of guilt by the defendant.

The SARC's report contained a number of questions regarding these issues, on which it will seek a response from the Minister.

The Statement also addresses the Bill's potential impact on the right to privacy (s 13), freedom of expression (s 15) and property (s 20). However the Committee found these issues did not warrant a special mention.

Catherine Krol, Summer Clerk and Jonathan Kelp, Solicitor, Human Rights Law Group, Mallesons Stephen Jaques

Freedom of Information Amendment Bill 2007

The *Freedom of Information Amendment Bill 2007* amends the *Freedom of Information Act 1982* (Vic) to:

- encourage information to be made publicly available on the internet;
- remove application fees;
- remove the ability to issue certain conclusive certificates;
- provide Ministers and agencies with the discretion to consult third parties potentially affected by the release of documents; and
- enable VCAT to make an order declaring a person to be a vexatious applicant.

The Statement of Compatibility considered how two key provisions of the Bill engage rights in the *Charter of Human Rights*.

Third party consultation

The amendment allowing Ministers and agencies to consult third parties affected by the release of documents potentially enhances the right to privacy (s 13(a) of the *Charter*), as the person affected can express their views on the release of documents relating to them.

Although the SARC report on the Bill did not address this issue, the bill also places further effective limitations on the right to freedom of expression (s 15 of the *Charter*), as Ministers and agencies will be given an additional 30 days to respond to FOI requests when this consultation process occurs. This delays the applicant's ability to receive information in a timely manner. However, the Statement contended that the extra time is important with respect to balancing the rights of third parties in respect of the relevant information with the rights of the FOI applicant.

This provision also limits the right to a fair hearing (s 24 of the Charter), as a third party who consents to information being released (during the consultation process) then loses their right for review of that decision by VCAT. As the third party is informed that they will lose this right before they are given the opportunity to consent, the Statement concluded that this does not constitute an undue limitation of the right.

The SARC report concludes that the introduction of the consultation process does not unduly infringe on any *Charter* rights because it effectively balances the rights of the FOI applicant and third parties affected by the release of information.

Vexatious applicants

The second key provision provides that vexatious applicants can be barred from making FOI requests, to prevent government resources being 'wasted' by processing 'unmeritorious' FOI applications. While this provision limits the right to obtain information, the Statement concludes that it is designed to protect 'public order' and therefore does not unnecessarily limit the right to expression.

Because the person declared vexatious may apply to VCAT to have this set aside, revoked or modified, the Statement considers that the amendment adequately protects the right to a fair hearing.

The SARC concluded that this provision is compatible with the *Charter* rights, because any limitations are reasonable and proportionate.

The Statement also stated that the right to expression is further supported by other provisions in the Bill, such as the removal of the application fee, and the limitation on the ability for conclusive certificates to be issued preventing access to information.

Chloe Johns, Summer Clerk and Jonathan Kelp, Solicitor, Human Rights Law Group, Mallesons Stephen Jaques

Department of Justice Human Rights Charter Website

On 1 January 2008, all public authorities will have to comply with new obligations under the *Charter* to consider relevant human rights when making a decision and to act in a manner that is compatible with human rights.

During 2007, departments and agencies have been training and educating public sector staff and public authorities in relation to these new obligations.

The Department of Justice has recently posted new information and resources about the *Charter* on its website. The information and resources are aimed at a range of audiences across the public sector and includes information about the obligations on public authorities, the coordination of the implementation of the *Charter* across government and the rights protected by the *Charter*. The Department of Justice has developed a range of communications materials to raise awareness of the charter across public authorities which are available on the website including

- Charter chatterbox: an activity with basic information about the Charter intended as a promotional and reference tool.
- FAQ Fact Sheet for Public Authorities: this document answers a number of the common questions about the Charter.
- Posters: these promotional posters are designed to raise awareness of the Charter within public authorities.
- Reference Card: this document contains key information about the Charter.
- Think Charter Public Authority Brochure: a short brochure about the charter intended for distribution to staff as an educative and promotional tool.
- Human Rights Video: this is an introductory video that expresses the Victorian Government's support for the Charter and gives general information about its relevance to government and its employees.

To access the materials and resources, go to www.justice.vic.gov.au/humanrights.

Summary prepared by the Human Rights Unit, Department of Justice, phone (03) 8600 0859.

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

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

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

For further information and to register, see www.humanrightscommission.vic.gov.au/pdf/VEOHRCHRCHARTERWORKSHOPS08.pdf.

VGSO Newsletter on Litigation, Remedies and Judicial Review under the Charter

The Victorian *Charter of Human Rights and Responsibilities* commenced operation, in part, on 1 January 2007. On 1 January 2008, the remaining provisions of the *Charter* will commence operation. These provisions require that public authorities give proper consideration to human rights and act

compatibly with the *Charter*, and that courts interpret legislation in accordance with human rights contained under the *Charter*. Legal proceedings are also possible in respect of any unlawful actions under the *Charter* from 1 January 2008. The Victorian Government Solicitor's Office has recently published a very helpful newsletter discussing these issues and provisions, including ss 4 (public authorities), 38 (obligations of public authorities), 39 (remedies and judicial review) and 49 (transitional provisions) in further detail. The newsletter can be accessed via www.hrlrc.org.au under Victorian Charter of Human Rights and Responsibilities>Articles, Materials and Commentary on the Charter>Articles, Advice and Commentary.

Other Charter of Rights Developments

Commonwealth Attorney-General to Consult on Federal Charter of Human Rights

Following his appointment as Commonwealth Attorney-General, the Hon Rob McClelland MP has confirmed that, during its first term, the Rudd Government intends to conduct a national consultation regarding the need for a federal Charter of Human Rights.

This commitment is a key plank of Labor's national policy on 'Respecting Human Rights and a Fair Go for All' which provides that 'Labor will initiate a public inquiry about how best to recognise and protect the human rights and freedoms enjoyed by all Australians.' It is also consistent with Labor's pre-election commitment to 'adhere to Australia's international human rights obligations' and to 'seek to have them incorporated into the domestic law of Australia'. Speaking to the *Sydney Morning Herald*, Mr McClelland said, 'We are only one of the only modern democracies without a charter of rights'. He said that a Charter would be 'part of developing a more accountable system of government'.

Details of the public consultation have not yet been announced.

ACT Moves to Strengthen *Human Rights Act 2004*

On 6 December 2007 the ACT's Attorney-General introduced the Human Rights Amendment Bill 2007 into the ACT Legislative Assembly. The Bill amends the *Human Rights Act 2004* to:

- create a duty on public authorities to act consistently with human rights (s 40B);
- define 'public authority' to include both core and functional public authorities and clarify that the following functions are to be taken as being 'of a public nature': the operation of detention places and correctional centres; and the provision of any of the following services – water supply, gas, electricity, emergency services, public health services, public education, public transport, and public housing (ss 40 and 40A);
- provide an opportunity for entities, not otherwise covered by the duty on public authorities, to 'opt in' to the duty to act in compliance with human rights (s 40D);
- provide a direct right of action flowing from a duty on public authorities to comply with human rights (s 40C);
- clarify the interpretive rules so that a human rights consistent interpretation must prevail as far as is possible consistent with the purpose of legislation (s 30);
- clarify the reasonable limits clause by setting out an inclusive list of factors to be considered in determining whether a limit on a right is reasonable (s 28(2)); and
- expand the obligation to give notice to the Attorney General and the Human Rights Commission to all legal proceedings in the Supreme Court in which interpretation of the HRA is to be argued (s 34).

A copy of the Bill and its explanatory statement is available at www.legislation.act.gov.au/b/db_31588/default.asp.

Action Needed on a Charter of Rights for Tasmania

As reported in Edition 19, in October 2007, the Tasmanian Law Reform Institute published a report, commissioned by the Tasmanian Government, on *A Charter of Rights for Tasmania*. The Report recommends that a legislative *Charter of Human Rights* be enacted in Tasmania to promote a 'human rights dialogue across the three branches of government while ultimately maintaining parliamentary

sovereignty'. The Tasmanian Government has not yet formally responded to the Report or committed to the enactment of a Charter of Rights. This is despite the fact that the Report was informed by a record 407 submissions – the largest number of submissions received on any project undertaken by the Institute – of which 94.1% supported the enactment of a Charter.

The Human Rights Law Resource Centre urges the Tasmanian Government to endorse the Report and implement its recommendations.

Support for a Tasmanian Charter should be addressed to the Premier of Tasmania, the Hon Paul Lennon, and the Attorney-General for Tasmania, the Hon Steven Kons, both at Department of Premier and Cabinet, 11th Floor, 15 Murray St, Hobart, Tasmania, 7001.

Case Notes

Supreme Court of Victoria Considers Relevance of Human Rights to Sentencing

DPP v TY (No 3) [2007] VSC 489 (28 November 2007)

In sentencing a young offender found guilty of murder, Bell J of the Supreme Court of Victoria had regard to international human rights principles, including the rights of the child under the *Convention on the Rights of the Child*, in the exercise of his sentencing discretion.

Facts

At the time of the offence, TY was 14 years old. The victim, Christopher Williams, was 18 years old, and was celebrating his last day of school with a group of friends. On the afternoon of 21 October 2003, the victim and his 'happy-go-lucky' group of friends walked to a tram stop where TY was sitting with an adult friend.

TY, who 'did not go out looking for trouble that day', nevertheless had a propensity for getting into arguments and fights. When Christopher Williams and his friends approached the tram stop, TY made an abusive and insulting remark about Rachael, one of Williams' friends, to which Williams reacted verbally.

In his evidence, TY stated that he felt intimidated and believed he was going to get bashed by Williams or his friends. However, Bell J found no evidence that Williams or his friends had in any way behaved aggressively towards TY. In the spur of the moment, TY struck Williams twice to the head with a golf umbrella that he was carrying, driving the umbrella's sharp metal tip into Williams' brain. Williams was fatally wounded.

TY pleaded not guilty to the charge of murder and manslaughter, claiming he was acting in self-defence. The jury found him guilty of murdering Christopher Williams.

Decision

Justice Bell acknowledged that youth is a mitigating factor in the sentencing discretion. In doing so he referred to art 40(1) of the *on the Rights of the Child*. By becoming a party, Australia recognised:

> the right of every child … recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

His Honour stated that the Convention had not been incorporated into Australian law and so could not be a direct source of law. However, provided the subject matter of the case before the Court came within the scope of the human right, and was not inconsistent with relevant legislation or the common law, then that right could be a relevant consideration in the exercise of judicial powers and discretions. His Honour considered that, in this case, art 40(1) was in keeping with, and reinforced, general law.

Consequently, Bell J took the Convention into account, first, because 'the sentencing discretion will be the better for it … providing a further basis for, and to reinforce the existing principles of, giving primary emphasis to youth and rehabilitation as a mitigating factor when sentencing children'. Second, art 40(1) reinforces for courts that 'in the sentencing process, they can promote both [children's] positive development and the growth of their understanding of, and respect for, the human rights of others'.

Of course, in this case, taking international human rights into account would 'cut both ways'. The victim – barely 18 himself – had been denied the most 'precious human right'; the right to life. Further, Bell J noted that while youth was a mitigating factor, the more serious the crime the less flexible courts could be with their discretion.

In all the circumstances, TY was sentenced to 12 years imprisonment, with a minimum eight year non-parole period. Justice Bell recommended to the Adult Parole Board that TY serve his term in a youth justice centre rather than an adult prison.

Application to the Victorian *Charter*

This decision demonstrates how human rights principles are increasingly informing decision making in Victorian courts.

With the full operation of the *Charter* commencing on 1 January 2008, these considerations need not be secondary any longer, but rather can be direct and primary. Relevantly, section 17(2) of the *Charter* states that 'every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child'. Section 23(3) of the *Charter* requires that 'a child who has been convicted of an offence must be treated in a way that is appropriate for his or her age'. A future decision of this kind might well have regard of these rights, particularly given that the *Sentencing Act 1991*, like all legislation, will be required to be interpreted compatibly with human rights pursuant to s 32(1) of the *Charter* from 1 January 2008.

The decision is available at http://www.austlii.edu.au/au/cases/vic/VSC/2007/489.html.

Cecilia Riebl is a lawyer at Blake Dawson. She was recently conferred with the LIV President's Access to Justice Award for 2007.

Imprisoning a Journalist for Refusing to Disclose Confidential Sources in Court a Violation of the Right to Freedom of Expression

Voskuil v The Netherlands [2007] ECHR 64752/01 (22 November 2007)

The European Court of Human Rights recently held that the imprisonment of a journalist for refusing to disclose the identity of a confidential source constituted a violation of the right to freedom of expression under art 10 of the *European Convention*.

Facts

Voskuil, a journalist in Amsterdam, wrote an article concerning an incident in which police found an arsenal of weapons at a property and charged three people with arms trafficking. Voskuil's article quoted an unnamed police officer who suggested that police had staged a flood at the property to provide a basis for the search. The article raised serious questions about police conduct.

Voskuil was called to give evidence at the trafficking trial and asked to identify the police officer referred to in his article. Voskuil refused to answer questions that would identify the source. Although Voskuil had a prima facie right to refuse to disclose the source under domestic law, the Court had the power to compel disclosure if necessary in the interests of a democratic society.

Voskuil was ordered to answer the questions but refused to do so and was imprisoned for 17 days.

Voskuil appealed to the European Court of Human Rights claiming that his right to freedom of expression included the right to protect a confidential source, and that his imprisonment constituted a violation of this right.

Decision

A journalist's right to protect confidential sources stems from the right to freedom of expression enshrined in art 10 of the *European Convention*, particularly as interpreted in light of Recommendation R(2000) 7 on the right of journalists not to disclose their sources of information (adopted by the Committee of Ministers of the Council of Europe on 8 March 2000).

These instruments provide journalists with a right to refuse to disclose a confidential source. However, this right may be curtailed by laws necessary in a democratic society in the interests of national security or public safety, for the prevention or disorder of crime, for the protection of health or morals or for the

protection of the rights and freedoms of others. The circumstances justifying curtailment of the journalist's right must be of a sufficiently vital and serious nature.

Voskuil argued that the domestic court's reasons for compelling him to disclose a source were not sufficient under the *Convention* to warrant curtailment of his rights.

In assessing the journalist's rights, the European Court found that protection of journalistic sources is one of the basic conditions for press freedom:

> Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.

The Court found that such a right could only be curtailed where it is 'justified by an overriding requirement in the public interest'.

The Court found that such overriding requirements did not exist in this case. To the contrary, the Court found that compelling disclosure could only inhibit future sources from coming forward. This would prevent the journalist from exposing impropriety by Government authorities, which is exactly the type of issue about which society should be informed.

The Court found that the interests of a democratic society did not override the interests of the journalist in maintaining the confidentiality of the source in this case.

Implications for the Victorian *Charter*

Under Victorian law, there is currently almost no protection for journalists who refuse to disclose the identity of sources in the witness box. A journalist must answer questions put to him or her at trial where those questions are relevant to the proceeding, even where the answers to those questions may identify a confidential source. Failure to do so amounts to contempt of court and may result in imprisonment.

Recent amendments to uniform evidence legislation allow courts to permit non-disclosure if satisfied that the potential harm to a confidential source outweighs the desirability of the evidence being given. However, this is unlikely to provide any real protection where the identity of the source is important evidence in the case.

Does the *Voskuil* case indicate that the *Charter* will result in greater protection for journalists in Victoria? Possibly, but perhaps not to the extent that it does in Europe.

While s 15 of the Victorian *Charter* enshrines the right freedom of expression in similar terms to art 10 of the *European Convention,* there is no Victorian equivalent to 'Recommendation R(2000) 7 on the right of journalists not to disclose their sources of information provision'. Accordingly, the principles articulated in this important instrument would need, in effect, to be read directly into s 15 of the *Charter*.

Further, freedom of expression must be balanced against the right to receive a fair trial. The European Court did not consider this issue in *Voskuil*, as it was ultimately unnecessary to do so. However, it is possible in future cases that the right of an accused to a fair trial will circumscribe the power of journalists to protect sources – particularly where the journalist's evidence is likely to have strong influence on the conviction or acquittal of the accused.

Nevertheless, the case is promising. In June 2007, two *Herald Sun* journalists were convicted of contempt of Court for failing to disclose the identity of a confidential source under examination at a criminal trial. Although they escaped jail sentences the case highlighted the lack of protection for journalists in Victoria and Australia generally.

The journalists ultimately pleaded guilty to the charges because they had no clear defence available at common law. Had the case been run with the Victorian *Charter* in force, there is every chance a defence along the lines of the *Voskuil* case would have been raised. Whether it would have been successful is another matter.

Although Victorian human rights law has not developed to the extent that it has in Europe, this case demonstrates the potential reach of the *Charter* to the protection of journalists' sources.

John-Paul Cashen is a media lawyer in the litigation team at Corrs Chambers Westgarth lawyers

European Court Considers Scope of Right to Freedom of Assembly and Association

Galstyan v Armenia [2007] ECHR 26986/03 (15 November 2007)

The European Court of Human Rights has recently considered the content and application of the rights to freedom of peaceful assembly and association, holding that 'the right to freedom of assembly is a fundamental right in a democratic society' and that any exceptions to the right 'must be narrowly interpreted and the necessity for any restrictions must be convincingly established'.

Facts

On 7 April 2003, the applicant, Arsham Galstyan, participated in a Mother's Day protest against the policies and practices of the government, particularly in relation to women. After leaving the demonstration, he was arrested and charged for 'obstructing traffic and behaving in an anti-social way at a demonstration'. He was subsequently convicted and sentenced to 3 days of detention for 'obstructing street traffic, violating public order by making a loud noise, and inciting other participants of the demonstration to do the same'. In his complaint to the European Court he alleged, inter alia, that his arrest and detention unlawfully interfered with his rights to freedom of expression and freedom of peaceful assembly guaranteed by arts 10 and 11 of the *European Convention*.

Decision

The Court considered the issues of freedom of expression and peaceful assembly together, noting that the 'protection of personal opinions, secured by art 10, is one of the objectives of freedom of peaceful assembly as enshrined in art 11'.

The Court noted that there was no evidence that the demonstration was not intended to be peaceful or that it was prohibited or unauthorised. The Court held that by participating in the demonstration, the applicant availed himself of his right to freedom of peaceful assembly and that the conviction that followed therefore amounted to an interference with that right.

Having found a prima facie interference with the right to freedom of peaceful assembly, the Court then considered whether the interference was justified, which requires that it be 'prescribed by law', pursue a 'legitimate aim', and be 'necessary in a democratic society' for the achievement of that aim.

'Prescribed by law'

The Court stated that a rule or norm can only be regarded as a 'law' if it is formulated with sufficient precision to enable a person to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. In the present case, the applicant was convicted under a domestic law which prescribes a penalty for actions which disturb public order and peace. The Court considered that this norm is formulated with sufficient precision to satisfy the requirements of art 11 and therefore that the interference was 'prescribed by law'.

'Legitimate aim'

The Court found that the domestic law was directed towards 'public order' and the 'prevention of disorder' and that such objectives constituted legitimate aims.

'Necessary in a democratic society'

In considering whether the interference with the applicant's human rights was justified, the Court observed that 'the right to freedom of assembly is a fundamental right in a democratic society and is one of the foundations of such a society'. Having regard this, any exceptions to the right 'must be narrowly interpreted and the necessity for any restrictions must be convincingly established'. The Court stated that, in certain circumstances, charges or sanctions following from participation in an unauthorised demonstration or from inciting violence at a demonstration may be compatible with what is necessary in a democratic society. It further stated, however, that 'the freedom to take part in a peaceful assembly is of such importance that a person cannot be subjected to a sanction – even one at the lower end of the scale of disciplinary penalties – for participation in a demonstration which has not been prohibited, so long as this person does not himself commit any reprehensible act on such an occasion'.

On the facts of the present case, the Court found that the 'obstruction of street traffic' conviction followed from the applicant's physical presence at a demonstration held on a street where traffic had already been suspended by consequence of the demonstration. As to the conviction for making loud noise, the Court noted that there was no suggestion that this involved any obscenity or incitement to violence and,

moreover, that it is 'hard to imagine a huge political demonstration, at which people express their opinion, not generating a certain amount of noise.'

Having regard to the above, the Court concluded that 'the applicant was sanctioned for the mere fact of being present and proactive at the demonstration in question, rather than for committing anything illegal, violent or obscene in the course of it' and that this amounted to an interference with the applicant's right to freedom of peaceful assembly which was not 'necessary in a democratic society'.

Implications for the Victorian *Charter*

This decision may be relevant to the interpretation and application of s 15 (freedom of expression) and s 16 (freedom of peaceful assembly and association) of the *Charter*, particularly in so far as such rights may be limited pursuant to s 7.

The decision confirms that the rights to freedom of expression and assembly are fundamental to a free and democratic society and that any restrictions on these rights must be examined with particular care and scrutiny (see also *Vereinigung Bildender v Kunstler v Austria* [2007] ECHR 68354/01 (25 January 2007)). In addition to the observations of the European Court in the present case, comparative jurisprudence clearly establishes that the right to peaceful assembly may impose a positive obligation on public authorities to facilitate peaceful assemblies (see, eg, *R (Laporte) v Chief Constable of Gloucester Constabulary* [2004] EWCA Civ 1639) and to take action to protect peaceful demonstrators from counter-demonstrators (see, eg, *Platform Artze fur das Leben v Austria* (1991) 13 EHRR 204). The positive obligation of public authorities to secure genuine and effective respect for freedom of association and assembly is of particular importance to those with unpopular views or belonging to minorities because they are more vulnerable to victimisation (see, eg, *Baczkowski v Poland* [2007] ECHR 1543/06 (3 May 2007)).

Philip Lynch is Director of the Human Rights Law Resource Centre

Protest, Demonstration and the Right to Freedom of Peaceful Assembly

Balçik v Turkey [2007] ECHR 25/02 (29 November 2007)

This decision considered the extent to which it is permissible for a state to limit the right to freedom of peaceful assembly and association in the context of a public demonstration.

Facts

On 5 August 2000, the applicants assembled to read a press declaration against the introduction of 'F-type' prisons, which introduced solitary or small group isolation to prevent communication as a consequence of increased fears of terrorist activity and organised crime networks operating within the prison system.

Human rights organisations expressed concerns that the system would increase the risk of torture, as well as resulting in increased instances of psychological injury through isolation.

Following receipt of intelligence reports of the planned protest, members of the police force and the Rapid Intervention Force were deployed. The demonstrators were informed that their activities were unlawful as advance notice had not been provided as required by s 10 of the *Assemblies and Marches Act*.

After the demonstrators failed to disband, the police dispersed the group, allegedly with the use of truncheons and tear gas. The applicants and others were arrested, with two of the applicants requiring medical treatment. The applicants were subsequently detained for one day.

The applicants filed a petition against the arresting officers citing the unlawfulness of the arrest and the use of excessive force. A decision of non-prosecution in respect of the officers was issued. The public prosecutor subsequently filed a bill of indictment accusing the applicants of participating in an illegal demonstration and failing to disband.

Although acquitted, the applicants submitted a complaint to the European Court of Human Rights alleging violations of arts 3 (prohibition on cruel or degrading treatment), 9 (freedom of thought), 10 (freedom of expression) and 11 (freedom of peaceful assembly) of the *European Convention* on *Human Rights*.

Decision

Cruel Treatment or Punishment

The applicants alleged that the excessive and disproportionate use of force during their arrest amounted to ill-treatment contrary to art 3 of the *Convention*.

The Court deemed that such allegations must be supported by appropriate evidence. As five of the applicants failed to submit medical reports or other material to substantiate the allegations, this part of the application was inadmissible in respect of those applicants.

The allegation was deemed not to be manifestly ill-founded in respect of the complaints lodged by Ms Kirkoç and Ms Gül who submitted medical evidence of injuries sustained as a consequence of the use of force during the incident. The Court observed that as the police had received prior intelligence reports, it could not be agreed that the security forces were required to respond without preparation. It was also observed that while the group failed to disperse as required by the police, the demonstrators did not present a danger to public order. As such, the use of force amounted to a violation of art 3.

Freedom of Peaceful Assembly

All seven applicants alleged that the police intervention constituted a violation of arts 9, 10 and 11 of the *Convention*. The Court restricted its consideration to art 11, which provides for the right to freedom of peaceful assembly and association. While art 11(2) permits limitations on the right in the interests of national security, public safety and the like, the Court emphasised that any interference with the right will nevertheless constitute a breach unless it is 'prescribed by law' and is necessary in a democratic society for the achievement of one or more of the enumerated legitimate aims.

The State party suggested that since the applicants were acquitted of the charges they could no longer be regarded as 'victims'. In this respect, the Court noted that the fact that the applicants' acquittal occurred almost 5 years after the incident was of significance as the force employed and subsequent criminal prosecution could have deterred the applicants from participating in future protests. As such, the applicants were negatively affected by the State party's conduct, regardless of their acquittal.

The State party argued that its interference was prescribed by law and pursued the legitimate aim of preventing public disorder. Although the Court agreed that the interference may have pursued the legitimate aim of preventing public disorder, the Court disagreed that the interference was 'necessary in a democratic society'.

The Court observed that authorities have an obligation to implement appropriate measures to ensure the peaceful conduct of public demonstrations. The requirement that public demonstrations be subject to authorization and regulation was therefore not of itself contrary to the spirit of the article. However, while the Court noted that demonstrators should respect such applicable rules, a state is under a duty not to impose unreasonable indirect restrictions on rights, and also has positive obligations to ensure the effective enjoyment rights. As such, where demonstrators do not engage in violence, a certain degree of tolerance ought to be afforded if art 11 is not to be deprived of substantive force. Given the lack of evidence to indicate a danger to public safety posed by the demonstration in question, the fact that the authorities had prior knowledge and could have taken anticipatory measures, the authorities' haste in seeking to end the demonstration was unwarranted.

The Court therefore concluded that the intervention was disproportionate and unnecessary for the prevention of disorder within the meaning of art 11, and that there had therefore been a violation of the right to freedom of peaceful assembly.

Implications for the Victorian *Charter*

Section 16 of the *Charter* protects an individual's right of peaceful assembly and association. This decision affirms that public authorities must not only safeguard this right, but may be under a positive obligation to secure its effective enjoyment.

The decision may also provide guidance as to the permissible limitations of human rights under s 7 of the *Charter*. The decision emphasises that while a public authority may take appropriate measures to ensure the public safety of its citizens, unreasonable indirect intrusions into the right are not justified in a free and democratic society. This is particularly so where demonstrators do not engage in acts of violence.

Zoe Leyland and Jason Pobjoy, Human Rights Law Group, Mallesons Stephen Jaques

Grand Chamber of European Court Considers Nature and Scope of the Right to Non-Discrimination and Equal Enjoyment of Human Rights

DH and Others v the Czech Republic [2007] ECHR 57325/00 (Grand Chamber) (13 November 2007)

The Grand Chamber of the European Court of Human Rights has held that the education policy in the Czech Republic, which resulted in the majority of Roma children being placed in special schools designed for the mentally handicapped, violated art 14 of the *European Convention on Human Rights*. Article 14 of the *Convention* enshrines the right to non-discrimination and the equal enjoyment of human rights. The Court held that the education policy indirectly discriminated against the applicants on the basis of their race in relation to their right to education.

Facts

Between 1996 and 1999 the 16 applicants, of Roma origin, were placed in special schools for children with learning disabilities. The applicants were referred to special schools after undergoing intellectual capacity tests, which deemed them unsuited to the mainstream schooling system. Parental consent to the transfer was obtained by signing a pre-completed form. The practical effect of attending a special school was to preclude the applicants from attending secondary schools other than vocational schools and to decrease their chances of finding employment.

The applicants contended that their placement in special schools was not based on any mental impairment, but on grounds of real or perceived language and cultural differences between Roma and other people. They relied upon statistics which indicated that the percentage of Roma children in special schools was disproportionately high.

Decision

The Court reiterated that discrimination means 'treating differently, without an objective and reasonable justification, persons in relevantly similar situations.' Where legislation has this effect there is no need to prove an intention to discriminate. It also emphasized that discrimination can be direct (expressly discriminatory) or indirect (not expressly discriminatory however the practical effect is disproportionately prejudicial to a particular group). Racial discrimination was considered to be of particular concern requiring 'special vigilance and a vigorous reaction'.

Because of the difficulty an applicant may face when trying to show differential treatment, particularly in cases of indirect discrimination, the Court stated that in such cases less strict evidentiary rules should apply. Further, the court may consider reliable and significant statistical evidence in order to establish a rebuttable presumption of discrimination which the State must then disprove or justify on objective grounds.

The Court also took into consideration the vulnerable position of the Roma people which it stated required special consideration be given to their needs and their different lifestyle in regulatory frameworks and in cases before the courts.

'Objective and Reasonable Justifications'

The Court rejected the Czech Republic's submission that the placement of Roma children in special schools was based on objective grounds. The intellectual capacity tests which provided the basis for the placement in special schools were highly controversial and potentially biased. The results of the tests were not assessed in light of the special characteristics and learning needs of the Roma children. For this reason the tests could not be used to justify the differential treatment in breach of art 14.

While the Court accepted that the establishment of special schools did not have a discriminatory intent, it held, however, that there was a lack of procedural safeguards in place to ensure the Government took into account the special needs of members of disadvantaged groups when implementing its education policy. In the absence of effective procedural safeguards, the special schooling system was outside the legitimate margin of appreciation allowed to States when administering public services and institutions. Because the education received in special schools exacerbated rather than alleviated the difficulties faced by the Roma children, the differential treatment was not objectively and reasonably justified and the means used were not proportionate to the aim pursued.

'Consent'

The Court reaffirmed that, if a waiver of a right guaranteed by the *Convention* was permitted, the waiver must be unequivocal and based on fully informed consent. Because the applicants' parents were also members of the disadvantaged, often poorly educated Roma group, the Court was not satisfied that they were capable of giving the required consent. This was exacerbated because the consent form was pre-completed and contained no information about the alternative education streams and the differences between those streams and the special schools, thus preventing the parents from assessing their options and the consequences of their decision. Thus, the criterion for a waiver of the right to be free from discrimination was not established.

Implications for the Victorian *Charter*

This decision may be relevant to the interpretation of s 8(2) of the Victorian *Charter* which provides that everyone 'has the right to enjoy his or her human rights without discrimination'. This prohibits differential treatment in matters falling within the ambit of a human right unless such differential treatment is justified on reasonable and objective grounds: see also *R (on the application of Clift) v Secretary of State for the Home Department* [2006] UKHL 54 (13 December 2006).

While there is already a large body of law surrounding the meaning of discrimination in Victoria due to the existence and application of the *Equal Opportunity Act 1995,* Victorian Courts may rely on this decision as a basis for allowing statistical evidence to prove the existence of indirect discrimination and to require an administrative body to rebut a presumption of discrimination established by an applicant. It may also encourage Courts to take notice of particularly vulnerable groups in the community and require legislators and policy makers to consider the special needs of these groups in order to avoid and/or remedy indirect or systemic discrimination.

Jane Tipping and Jessica Bowman, Human Rights Law Group, Mallesons Stephen Jaques

State Failure to Adequately Protect from Defamation a Violation of the Right to Privacy

Pfeifer v Austria [2007] ECHR 12566/03 (15 November 2007)

In a judgment handed down on 15 November 2007, the European Court of Human Rights held that a state's failure to adequately protect a person from defamation amounted to a breach of art 8 of the *European Convention on Human Rights,* which enshrines the right to respect for private and family life. The judgment also considered the balance between the right to private life and reputation, on the one hand, and the right to freedom of expression on the other.

Facts

In 1995, the applicant published an article in which he harshly criticised P for writing an anti-Semitic article. P attempted to sue the applicant for defamation in 1998, but failed.

In April 2000, the Vienna Public Prosecutor's Office charged P under the *National Socialism Prohibition Act* in relation to the 1995 article. However, P committed suicide shortly before the trial began.

In June 2000, M, the editor-in-chief of a right-wing magazine, published an article alleging that the applicant was part of a 'hunting society' that had caused P to take his own life. In 2001, the applicant sued the magazine for defamation, though was unsuccessful.

In the meantime, M wrote an open letter to subscribers of his magazine asking for financial support. In this letter, he again alleged that applicant was part of a 'hunting society' that drove P to his death. The applicant instituted a second set of defamation proceedings, which failed on the basis that M's open letter was protected by art 10 of the *Convention*, which protects the right to freedom of expression.

The applicant lodged proceedings against Austria in the European Court, alleging a breach of art 8 of the *Convention* for failure to protect his reputation against defamatory allegations made by M.

Decision

Majority

The Court reiterated that the protection of 'private life' extends to the protection of one's reputation, and to certain interactions in the public context even where the individual is a public figure. The Court also

reiterated the positive obligations of the State to ensure that an individual's right to respect of private life is observed.

Where the situation is such that a publication affects an individual's reputation, the Court is required to consider the balance between art 8 and the art 10 right to freedom of expression. In this case, what fell for consideration was whether the publications by M were outside the scope of acceptable expression under art 10, and whether the Austrian courts failed to protect the applicant's rights under art 8.

The Court disagreed with the findings of the Austrian courts, and held that the publication was defamatory. M's comments were not merely value judgments, as they clearly established a causal link between the applicant and P's death, and accused the applicant of conduct tantamount to criminal behaviour. Even if M's comments were to be viewed as a value judgment, the Court considered that the comments lacked sufficient factual basis.

As such, the Court found a violation of art 8, and held that the Austrian courts failed to strike a fair balance between the competing interests involved. The Court awarded the applicant €5,000 for non-pecuniary damage.

Judge Loucaides (dissent)

Judge Loucaides dissented on the basis that M's comments did not exceed the limits of acceptable criticism under art 10. In his Honour's view, M's comments could not be interpreted as attributing blame for P's death to the applicant. The term 'hunting society', while strong, did not signify a group who aimed to destroy P's existence. At most, the article connected the applicant with P's decision to take his own life.

Judge Schäffer (dissent)

Judge Schäffer dissented on the basis that Austria did not fail to uphold the applicant's rights under art 8. It was not incorrect for the Austrian courts to place greater emphasis on M's freedom of expression. In his Honour's view, the term 'hunting society' did not imply premeditation or that the applicant caused P's death. Although M's comments harshly criticised the applicant for P's death, they were not to be understood as an accusation of criminal behaviour.

Implications for the Victorian *Charter*

This decision may be relevant to a Victorian court's consideration of ss 13 (protection of privacy and reputation) and 15 (right to freedom of expression) of the *Charter*. In particular, the decision may assist a Victorian court's interpretation of the *Defamation Act 2005* (Vic) and the criminal defamation provisions of Part I of the *Wrongs Act 1958* (Vic).

Meng He and Rebecca Pereira, Human Rights Law Group, Mallesons Stephen Jaques

HRLRC Policy, Advocacy and Law Reform

Review of the *Equal Opportunity Act 1995* (Vic)

The Victorian Attorney-General has commissioned an independent review of the *Equal Opportunity Act 1995* (Vic). The Review is being undertaken by Julian Gardner, the former Public Advocate for Victoria. A Discussion Paper, which outlines the key questions to be considered by the Review, is available at www.justice.vic.gov.au.

With the pro bono assistance of Clayton Utz, the Centre is preparing a major submission to this Review. In broad terms, the Centre is concerned to ensure that any proposed amendments are compatible with Australia's obligations under international human rights law, including the right to equality before the law and effective protection from discrimination (under arts 2(1) and 26 of the *ICCPR*) and the right to an effective remedy where those rights are breached (in accordance with art 2(3) of the *ICCPR*). Without limiting these general concerns, the Centre's submission will consider whether:

- the range of attributes protected by the Act should be expanded to include all those attributes which constitute an 'other status' for the purpose of the *ICCPR*, including criminal record, homelessness and source of income;
- the Commission and VCAT should be conferred with broader powers to investigate and remedy discrimination, including systemic discrimination; and

- the test of standing should be broadened to allow for 'class actions', representative complaints, and complaints by organizations or groups with a 'special interest' in the matter.

Submissions to the Review are due by 14 January 2008 and will inform a Report to the Attorney on how the Act should be reformed to better promote the right to equality and improve protection from discrimination.

HRLRC Casework

Centre Provides Expert Evidence on Prison Conditions and Standards

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

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

The matter is set down for hearing from 4 February 2008.

Seminars and Events

2008 Human Rights Seminar Series

The Centre is again planning a stimulating and diverse Human Rights Seminar Series for 2008. Confirmed speakers include former High Court Chief Justice, Sir Gerard Brennan (12 March), UN Special Rapporteur on Human Rights and Counter-Terrorism, Prof Martin Scheinin (18 March), and UN Independent Expert on Minority Issues, Gay McDougall (4 April). Further details will be released closer to the dates.

Education, Training and Resources

What's New on the HRLRC Website?

The Centre's website has been substantially updated over the past month and now includes the following important features:

Breaking Human Rights News – Updated Daily

The Centre's website now provides direct access to a free, comprehensive human rights news service. The service, which is updated daily, includes feeds from the following international and domestic sources:

- UN News Service
- UN Office of the High Commissioner for Human Rights
- European Court of Human Rights
- Human Rights Watch
- Amnesty International and Amnesty International Australia
- Australian Human Rights and Equal Opportunity Commission

Searchable Database of Case Law relevant to Victorian *Charter of Human Rights*

The Centre maintains a database of case notes of significant decisions of domestic, international and comparative courts and tribunals that may be relevant to the Victorian *Charter of Human Rights and Responsibilities Act 2006*. These case notes are drawn from previous editions of the Centre's monthly *Human Rights Law Bulletin* and include decisions from the Human Rights Committee, the European Court of Human Rights, and courts and tribunals in the UK, Canada and New Zealand.

The database now contains over 50 cases which can be searched by year, court or tribunal, relevant section of the *Charter*, or topic or keyword by clicking on 'Document Library' on the toolbar at the top of the home page. Each case includes a comprehensive summary, including an analysis of the relevance of the case to the Victorian *Charter*, and a link to the full text of the decision where available. Alternatively, you can view all of the cases in the database in alphabetic order at www.hrlrc.org.au under Victorian Charter of Human Rights and Responsibilities>Database of Select International and Comparative Case Law relevant to the Charter.

New Materials and Articles

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

- Jeremy Gans, 'Evidence Law under Victoria's Charter', University of Melbourne Legal Research Studies Paper 260 (2007);
- Fiona McKenzie, 'The Victorian Human Rights Charter and Statutory Power', Victorian Bar, 14 December 2007;
- Pamela Tate SC, 'A Practical Introduction to the Charter of Human Rights and Responsibilities', Paper to Victorian Government Solicitors, Melbourne, 29 March 2007;
- VGSO, 'Remedies and Transitional Provisions', Charter of Human Rights Newsletter No 5 (December 2007)

The articles can be accessed via www.hrlrc.org.au under Victorian Charter of Human Rights and Responsibilities>Articles, Materials and Commentary on the Charter>Articles, Advice and Commentary.

Graduate Program in Human Rights Law 2008

The Melbourne Law School Graduate Program in Human Rights offers one of the widest ranges of human rights subjects in Australia. Subjects are taught by leading practitioners and academics from around Australia and the world. For 2008, the program includes subjects taught by Justice Zak Yacoob (South African Constitutional Court), Prof Martin Scheinin (UN Special Rapporteur on Human Rights and Counter-Terrorism) and Prof Susan Marks (London School of Economics).

For further information, see www.masters.law.unimelb.edu.au.

Universal Human Rights Index – www.universalhumanrightsindex.org

The Universal Human Rights Index provides instant access for all countries to human rights information from the United Nations system. The index is based on the observations and recommendations of the following international expert bodies:

- the seven Treaty Bodies monitoring the implementation of the core international human rights treaties (since 2000); and
- the Special Procedures of the Human Rights Council (since 2006).

Information can be searched and accessed by country, by rights and by body.

While the concluding observations by the treaty bodies and reports by the special procedures are currently accessible on the website of the Office of the United Nations High Commissioner for Human Rights and the Official Document System of the United Nations, the Index complements these websites by greatly facilitating access to these documents. It is now possible to search the documents by keyword, right, country and body and to find directly the relevant paragraphs of the document. Further, for the first time, observations and recommendations of the independent experts are now interlinked.

To access the Index, visit www.universalhumanrightsindex.org.

If I Were Attorney-General…

An Attorney-General for Human Rights

For more than a decade I disagreed with a great deal of what the Commonwealth Attorney-General was doing and, not surprisingly, I indulged from time to time in a daydream about how I would do things differently (or, in some cases, just do something). Of course it was only ever a daydream – not only was there no prospect of my ever being the Attorney (nor is there now), but there was little prospect of there being a change in the actual Attorney or, at least, a change in the views coming out of the portfolio.

Suddenly, this 'if I were Attorney-General?' question is not just a wistful game. There really *is* a new Attorney, and all those ideas of how things might be different could now become someone's plan. To speculate right now, on what I would do if I was Attorney-General, seems tantamount to saying to Robert McClelland: 'Here's a few ideas for what you could do'.

Before saying what I'd do, I'll say how I'd do it: through a human rights framework. The starting position for all policy would be its compliance with – and furthering of – human rights standards. To design an anti-terrorism policy within a human rights framework, or an asylum seeker policy, or a legal services policy . . . each would take on a significantly different character when the guiding principle, and not the afterthought or begrudging concession, is human rights compliance. And how much more authority will Australia carry internationally when it practices what it preaches?

Perhaps that is all that needs be said, because so much would follow. But here are some specifics.

When reviewed from a human rights perspective, the anti-terrorism laws must be amended. The Dr Haneef debacle demonstrated how far the balance between state powers and people's rights to liberty and a fair trial has slipped in favour of the state. If the ultimate accountability of the state is through the ballot box, then the recent election result demands that the state winds back its self-serving powers. Relatedly, I would make explicit the government's commitment to respect for legal process, to non-political participation in the process, and to the independence of legal and statutory officers from the political influence of the state. I would resile completely from executive action that persecutes individuals outside the procedural protection of the legal system.

The recent election result is also a message to the state that the balance has moved too far against asylum seekers. Detention must be abandoned – we release alleged criminals on bail, but not exhausted, frightened, impoverished people seeking our help. I would move to establish an intelligent and compassionate system of reporting and monitoring during assessment of an asylum seeker's claim.

I would also move to ratify the *Migrant Worker's Convention* and the *Disability Convention*, together with each of the optional protocols to *CEDAW* and the *Disability Convention*. But Australia's history of ratification has not been matched by its commitment to give effect to its obligations in law; I would audit Australia's domestic compliance with its international obligations – beyond the glib reassurances given to the UN in our infrequent reports under the treaties – and legislate to give comprehensive effect to those obligations.

No audit is necessary to tell us that we have not given domestic effect to either the *ICCPR* or *ICESCR*. It is not enough to say that many of the rights can be found scattered around in state and federal statutes, common law and government policy. The simple fact is that we have not clearly and comprehensively extended to Australians rights that we have agreed are universal, and we have not fulfilled our commitment under those human rights treaties. At the very least I would commit government to be bound by human rights standards in legislation and policy, and I would ensure that government compliance would be justiciable; how otherwise can our commitment to human rights be credible?

Australia's national human rights institution, the Human Rights and Equal Opportunity Commission, must be fully staffed and funded to carry out its statutory mandate. I would rely on it for authoritative advice in developing human rights policy, education and laws. In a related initiative I would reinstate the human rights dialogues that previously provided a unique forum for NGOs and government to exchange news and views, with a commitment to making them accessible (the government might even deign to go to them, rather than summon the NGOs to Canberra), and to the Chatham House Rule.

The one area where Australia has for many years given effect to human rights, in law if not in practice, is anti-discrimination. But the laws – State, Territory and Federal – are variously dated, idiosyncratic, inconsistent, insufficient and ineffective. I would consult with the Australian Law Reform Commission

and regional law reform bodies to establish a national review of anti-discrimination laws, to harmonise and modernise them.

In the area of justice – of people's right to a fair and accessible legal system – I would articulate a national policy for access to legal services, and abandon the small-minded distinction between federal-state matters in legal aid funding agreements. I would clearly delineate and respect the unique and independent role of community legal centres, and stop the relentless push to re-cast them as cheap outreach services for legal aid. I would leave the profession's pro bono contribution to the profession to manage as it sees fit.

There is, of course, so much more that could be done or proposed by the Attorney-General to achieve human rights for people in Australia and the region: fully fund comprehensive Aboriginal and Torres Strait Islander legal services; enable intervenors and amicus in court proceedings; reform class action procedures; open up Freedom of Information laws; re-conceive the process of native title determination; publish guidelines for judicial appointments; fund AustLII; revisit the arcane confines of 'Priestley 11' in legal education; enhance law reform references and consultations, redefine Australia's aid strategies for Asia and the Pacific, and so on. Ah, to dream. Or not: over to you, the real new Attorney-General.

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