INSIDE

Libertynews

ISSUE 6 NOVEMBER–DECEMBER 2009

LIBERTY VICTORIA VICTORIAN COUNCIL FOR CIVIL LIBERTIES INC

FEATURE

The truth of the refugee crisis

Jessie Taylor and Larry Stillman on the government's asylum seeker policy — 4–7

ISSUE 6
NOVEMBER–DECEMBER 2009

CONTENTS

GPO Box 3161
Melbourne VIC 3001
t 03 9670 6422

info@libertyvictoria.org.au
www.libertyvictoria.org.au

PRESIDENT'S COLUMN

Advancing Liberty

2010 promises to be another big year for Liberty Victoria, writes Michael Pearce SC.

This is my first President's column in my second term as President. I was re-elected unopposed at our Annual General Meeting held on Monday 23 November 2009. Also elected to the executive were: Jamie Gardiner, Vice-President; Anne O'Rourke, Vice-President; Tim Warner, Treasurer; Jessie Taylor, Secretary; and Aggy Kapataniak, Assistant Secretary.

The following were elected to the committee: Rachel Ball, Julian Burnside AO QC, Hugh Crosthwaite, Dr Di Sisley, Marian Steele, Dr Larry Stillman, Evelyn Tadros, Brian Walters SC, Jonathan Wilkinson, Georgia King-Siem, Prof Spencer Zifcak.

At a committee meeting held immediately after the AGM, Judy Magassy was co-opted to the committee and the committee appointed Prof Spencer Zifcak and Georgia King-Siem as additional Vice-Presidents.

The role of the additional Vice-Presidents was raised in a question at the AGM. The official public spokespeople for Liberty are the President and the Vice-Presidents. Two Vice-Presidents are elected each year and, by amendment to the constitution introduced a couple of years ago, the committee has power to appoint an additional two.

This amendment was introduced because of increasing demand from the media for comment from Liberty. With up to four Vice-Presidents there is a wider spread of expertise in the public spokespeople as well as increased availability.

In addition to the power to appoint two further Vice-Presidents, the committee also has power to co-opt members to the committee. This power has also been regularly exercised in recent years as the committee identifies needs for expertise in particular areas.

Currently the committee sees a need to enhance its expertise in submission writing on criminal law. Any members with the requisite skills and the time and commitment to contribute to submission writing are invited to contact the Liberty office.

Before leaving the subject of the new executive and committee, it is appropriate to mark the retirement from office of Yue Yanlo as Treasurer and Ian Dunn, Lucie O'Brien and Peta Murphy as committee members. They have all made a significant contribution to Liberty and we thank them for that.

The AGM was held in conjunction with the 2009 Alan Missen Oration, delivered by Rev. Tim Costello on the subject of human rights and the churches. It promised a lot and delivered even more. After withstanding months of unrelenting anti-human rights propaganda from the Christian churches, it was both refreshing and a relief to hear a pro-human rights message soundly based in Christian doctrine and belief.

The message was also particularly timely as the decision on whether we will have a federal Human Rights Act is imminent. There are strong indications that the decision will be made largely by the Prime Minister, who wears his Christian faith on his sleeve.

There is naturally a real concern that the message from the anti-human rights forces within the churches will be accorded more respect than it deserves. The Prime Minister might do well to contemplate what Dietrich Bonhoeffer would say on this subject.

Thanks are due to the Alan Missen Foundation for supporting the Oration and to the chairman of its trustees, Justice Alan Goldberg, who also spoke and introduced the guest speaker.

I would also like to record Liberty's gratitude to the volunteer consultants who have assisted it through this year in a strategic review of the organisation. Vicki Davidson, of Quest Consulting, Michael Cohn, Bill Haebisch and Angela Tidmarsh have all generously donated their time to this project.

They have now delivered their report to the Liberty members of the working group who are currently considering its recommendations. Without wishing to pre-empt the outcome of that consideration, 2010 is likely to see some organisational revamp of Liberty to enable it to do what it already does better, and to do more of it. Watch this space.

Finally, on behalf of the new committee and executive, I should say thanks to our many members for their support, financial and other. One thing which has emerged from our strategic review is that we do tend to take our members for granted and fail to engage them sufficiently in activities.

To some extent this reflects our lack of resources but it is clearly something we need to work on. I am hopeful the strategic review will also yield positive results in this area as well. So watch this space too.

Meanwhile, all the best over the holiday period and into the New Year.

Myth and reality

Stephanie Batsakis questions whether Australia is really a land of the 'fair go'.

Australia prides itself on being the land of the 'fair go' and yet from an international perspective, this reputation has been tarnished by our recent human rights record. Persistent human rights violations across both Howard and Rudd governments demonstrate that a federal Human Rights Act is the only way to bring us into line with international human rights standards.

While Australia is signatory to all five international treaties of the international bill of human rights, it is no secret that Australia's domestic policies have increasingly disregarded these obligations since the Howard government assumed leadership in 1996. According to the United Nations Association of Australia, by 2006 'Australia slipped further behind the rest of its class' and was criticised for 'continuing to legislate and operate in breach of human rights commitments'.

The UN Human Rights Committee has heard 52 complaints against Australia since 1993, 21 of which have found Australia to be guilty of violating rights contained in the International Covenant on Civil and Political Rights. While complaints before 1996 were met with federal action, every complaint since 1996 has been rejected by the Australian government. Fundamental human rights such as the right to humane treatment, children's rights, the right to non-discrimination and the right to liberty were found to be violated by Australia and were not acted upon.

Recent action by the Rudd government on human rights has caused the international community to commend our change in direction. For example, Amnesty International's 2009 Report praised the apology to members of the Stolen Generations, the establishment of a National Council to Reduce Violence Against Women and their Children, the abolishment of temporary protection visas and legislation to remove discrimination against same-sex couples and their children.

Even during 2009, however, continued violations of human rights have caused the international community to regard our positive developments with wariness. When Amnesty International's secretary general visited a remote indigenous community this year, she commented that 'for a country which by human development standards is the third most developed in the world … such a level of poverty is inexcusable, unexpected and unacceptable'. In March, the UN Human Rights Committee

condemned Australia's persistent policies on the Northern Territory intervention, mandatory immigration detention, and the excessive use of police force. A key issue, raised repeatedly, was that Australia remains the only liberal democracy without human rights enshrined in law.

A significant outcome of this blemished reputation is a reduced bargaining position in diplomatic relations. In February a Northern Territory Aboriginal group put in a request for urgent intervention to the Committee on the Elimination of Racial Discrimination, due to the devastating impact of the intervention on their lives. Shortly after, when Australia tried to criticise China's human rights record at universal periodic review hearings in 2009, China raised this recent request as evidence of our hypocritical poor rights performance. It is imperative that Australia practises what it preaches in order to effectively promote the benefits of human rights to developing states.

More than anything, this recent history of human rights abuse demonstrates that our current human rights protection is far from adequate. As noted repeatedly by other western states and several branches of the UN, Australia urgently needs a federal Human Rights Act.

Without one, Australian courts remain severely constrained as to the extent to which they can apply human rights standards, especially compared to courts in the United States, New Zealand and Europe. A Human Rights Act will provide a much needed parameter for government behaviour, it will bring the issue of human rights to the forefront of public discussion, and importantly it will be a major step in reinstating our reputation as a land of the 'fair go'.

Stephanie Batsakis is a Liberty Victoria volunteer.

Playing politics with lives

The asylum seeker policy game continues under the Rudd Government, writes Jessie Taylor.

Since Liberty's last newsletter, there has been a significant escalation in the game of asylum seeker policy. Perhaps it all started with a phone call from Prime Minister Kevin Rudd to his Indonesian counterpart, asking that Indonesian authorities intervene to prevent a boatload of Sri Lankan Tamils from approaching Australian waters.

In November, Indonesian coastguard, in a state-of-the-art Australian boat, opened fire on a boatload of asylum seekers, shooting two, including a 17-year-old boy who has been in solitary confinement at Kupang jail since he fell under suspicion of talking to the media. The rules of this game have changed.

Regardless of your politics, there is no denying that in recent weeks the Rudd government has edged dangerously close to reinstating the Howard-era policy of 'deter and deny', the architecture of which it had worked so hard to dismantle earlier on in its term. There are some who think that Howard had it right, and there are some who think he had it wrong. There are very few people who would consider that the Rudd government has handled this issue well in recent times. It has been a catastrophe. My own determination to give this government the benefit of the doubt is dwindling fast.

Many of the Sri Lankan Tamils on the *Oceanic Viking* and at Merak port were in possession of UNHCR refugee certificates. Many had been in Indonesia for months or years before appearing on our televisions. They were waiting and waiting, and — like so many others — they took their lives into their own hands and took proactive steps to force a result for themselves and their families.

This may be imperfect behaviour. We can all see the moral flaw in it. Perhaps they should wait in the magical queue that so many people enjoy talking about! But before getting too judgmental, let's have a closer look at that queue. *(Continued next page.)*

> A 14-year-old boy whose entire family has been killed for converting to Christianity. A young man who watched his father's body take 16 bullets from a Taliban AK-47. These stories are devastatingly commonplace.

Around October 27 this year, some Department of Immigration and Citizenship figures emerged that I'm betting the government would have preferred to keep quiet. Australian resettlement from Indonesia was 35 people in 2008–09, 89 people in 2007–08 and 32 people in 2006–07. Total resettlement from 2001 to 2009 was 460 people — an average of 50 per year. If there are 2000 asylum seekers in Indonesia, the 'queue' that our morality dictates that they should stand in is, on current figures, 40 years long.

Perhaps this would be bearable if the opportunity existed to work, or to send their children to school. To move freely in the country without fear of arrest and detention. But Indonesia is not, and never has been, a signatory to the Refugees Convention. It has no obligations to asylum seekers, and it behaves accordingly.

I often get the impression that when Australian people talk about refugees, we tend to start upside-down. We start with border protection, security control and managed migration flows. All of these are fundamentally important issues, and must be considered at the highest level. But if we talk about them in the context of a faceless, nameless, godless horde of boat people, devoid of humanity, then we dismiss the fundamental point of what it is to be a refugee.

Many of you will be familiar with the plight of the Hazara people, and how difficult it is to make a life when you are the Taliban's public enemy number one. In Indonesia I met a nine-year-old girl who described to me the Taliban's practice of hammering nails into the skulls of Shi'a people, and her disgust at three of her teachers, all women, being killed as punishment for educating girls. A 14-year-old boy whose entire family has been killed for converting to Christianity. A young man who watched his father's body take 16 bullets from a Taliban AK-47.

These stories are devastatingly commonplace, and it is understanding of this experience of loss, grief and trauma that must colour our nation's treatment of asylum seekers. The other night I sat up late with two of my housemates, both young Hazara men, and we had a talk. The newest of the 10 young Afghan refugees to live in our house this year came from Christmas Island last month.

Last night he reeled off the inevitable list that I always dread hearing: the inventory of family members wounded, killed or just disappeared. This particular list included the boy's father, a sister, and his brother's two baby children. So ordinary, so matter of fact was his telling of it. So devastating that many of our countrymen would react with hostility and suspicion rather than sorrow and condolence to a young man who has lost so much.

We need our government to provide leadership, to explain to the nation our collective obligations to asylum seekers, and to set the tone of debate, rather than scurrying along behind it in damage control mode. After the events of recent months, nobody in their right mind would suggest that Mr Rudd will lose the next election. So now, with political capital so far in the black, it is time for the government to spend some: to make some tough decisions, perhaps unpopular decisions, but strong, visionary and right decisions to uphold the moral and legal obligations that we hold to asylum seekers.

We must bolster the capacity and transparency of the UNHCR in the region, ensure proper processing under the banner of the rule of law and natural justice, and see that UNHCR's operations are in line with international best practice.

Most fundamentally, we must increase our resettlement of asylum seekers from Indonesia. With increasing systematic ejection of Afghans from Iran, and the descent into chaos of the traditional city of refuge — Quetta, Pakistan — we will see more asylum seekers heading our way. Not because we are 'soft' or because they are destination shopping, but because between Pakistan and Australia, the only Refugees Convention signatory country is Cambodia. Indonesia is the doorstep to the first country where Iraqis and Afghan Hazaras can hope to have their claims processed according to law. Currently, we are letting them down spectacularly.

Jessie Taylor is the secretary of Liberty Victoria.

The reality of the global refugee crisis

Australia's asylum seekers debate needs to be put into perspective, writes Dr Larry Stillman.

Public perception of refugees causes razor sharp public anxiety with every boat arrival. Yet after rigorous scrutiny by the UN High Commissioner for Refugees or Australia's Immigration Department, the vast majority of asylum seekers can in fact be classified as genuine refugees. Australia's situation must be also seen from a global perspective. The five or ten thousand people who come to Australia in this way are just a drop in the ocean of global population movements. These movements are an international reality from which Australia, one of the world's most affluent countries, cannot be isolated.

I am starting to experience the reality of the international refugee crisis. In South Africa there are at least one million refugees, who have fled countries such as Zimbabwe. In total there are at least 17 million refugees in Africa, similar to Australia's entire population. Many of the refugees in South Africa live in tin-shack shantytowns, some of the most squalid and heart-rending conditions imaginable.

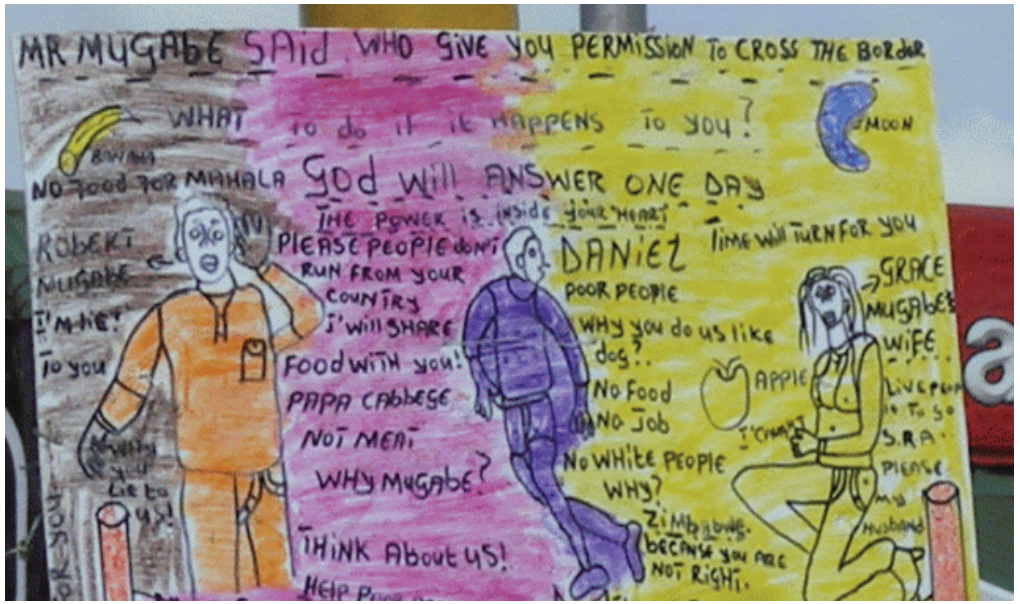
Just down the road from Monash University's South Africa campus is the Zandspruit 'informal settlement'. It wouldn't surprise me if the film *District 9* had been made there. At least 50,000 people live here cheek by jowl, inhabiting hovels the size of garden sheds, without running water, electricity or proper sewerage. There are piles of garbage. Fleas and lice are endemic and then there are the rats. There are only a couple of health clinics here, each with huge queues of mothers and babies desperate for basic health care. If someone is seriously ill, ambulances cannot get into the camp because roads are almost non-existent and the laneways are tiny. Instead, people must be piled into wheelbarrows and brought out. The chances of dying en route are high. It is bad enough when it rains, but when there is a downpour — like tonight, when I drove home to middle-class comfort — Zandspruit becomes a sea of filth and mud. Because of the struggle to survive, Zandspruit is very violent and there have even been killings.

There are some non-government organisations involved in supporting the community. The people who work for the NGOs are extraordinary, and the local white councillor, who at first sight seems like a relic of the apartheid regime, is an ANC member and a tireless advocate on their behalf. Monash University gives homework assistance to 200 children and runs fun activities every Saturday morning, and I am involved in an IT project. Amazingly, some of these kids are even making it to university despite their struggles. And you know how many refugees live in the camp? Fifty thousand. That's probably five times the total number of 'illegals' who come to Australia each year by boat.

I have gone into such detail because it is easy to forget how horrible life can be for people whose displacement is no fault of their own, just as it is easy to fall into cold governmental language that dehumanises 'unjustified' refugees. Just as the Nazis found good use for bureaucratic language to rationalise their hatred, Australians have a penchant for a similar characterisation of supposed enemies, aided by politicians and enthusiastic bureaucrats who play the worst sort of dog-whistle politics.

The number of people who get to Australian 'illegally' is tiny compared with what happens in the rest of the world, and we can afford not only to treat them better, but also to massively invest in civil reconstruction and development abroad so that they needn't flee in the first place.

Dr Larry Stillman is a Liberty committee member and Monash University academic. These views are his own, not those of the university.



Voices of victims

The International Criminal Court is giving victims the opportunity to tell their version of events, reports Natalie Simpson.

Legal representation for victims in international criminal trials is an interesting and emerging field of international criminal law currently being developed through the International Criminal Court in The Hague. Governed by Article 68 of the Rome Statute, legal representation of victims is the practice of allowing victims of crime to have counsel represent them throughout proceedings, sometimes being actively involved in the questioning of witnesses and presentation of arguments.

The precise role of victims in proceedings is essentially left up to the discretion of the presiding judges who have ultimate power over deciding the manner in which the victims' legal representatives can participate in the proceedings.

The concept of victim participation at the pre-trial and trial phase of a hearing is novel in international criminal law and while it has its basis in protecting the rights of victims to a crime, it also has significant flaws. One of the main arguments against the system of having victims legally represented by counsel is that it upsets the balance of justice in the court.

This practical concern stems from the idea that having a prosecutor and a representative for victims effectively allows the prosecution more power, therefore undermining the strength of the defence from the outset and undermining the presumption of innocence afforded to the accused.

The Rome Statute attempts to correct this imbalance by stating in Article 68(3) that such intervention can only be allowed if it 'is not prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial'. However, one questions how effective such a provision will be in reality when the mere existence of such representatives arguably undermines this fundamental right.

The highly problematic role of the legal representatives for victims needs to be dealt with carefully in these early years of the International Criminal Court in order to maintain the integrity of the Court's proceedings. The first case to openly question the role of legal representatives of victims is *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*. In this case, the defence team for Mr Katanga recently voiced its concerns to the Court that the representatives are effectively acting as a substitute or ancillary prosecutor by picking up the slack in the prosecutor's questioning. The counter-argument to this particular objection from the representatives was that if curtailed, the legal representatives risk becoming glorified spectators to the proceedings with no practical function.

The Court has yet to decide on the exact role the legal representatives will play in this particular case, and given the youth of the ICC there is very little instruction as to how the role of the legal representatives will develop, but it will be interesting to see how this field emerges and how the Court manages to balance the fundamental rights of the victims with those of the accused.

Natalie Simpson is a Liberty Victoria volunteer.

Expanding the franchise

Kate Mallinson comments on the review of the federal electoral act.

The second Electoral Reform Green Paper was released for comment on September 23. Since 1918 the Commonwealth Electoral Act has only been rewritten once, in 1984, and consequently much of language contained in the Electoral Act is outdated, complex and in need of reform. The Green Paper sought to address this, and opened for comment a broad range of discussion issues relating to Australia's electoral structure and processes. The paper invited comment on issues including the possible methods to maximise voter participation, the use of new media in enrolment and election processes, coordination of State and Federal electoral laws, the distribution of electoral boundaries and the structure and functions of the Australian Electoral Commission. Most importantly for Liberty, the paper welcomed discussion around the voting franchise.

The Electoral Act currently contains exclusions around the right to vote for prisoners serving a sentence of three years or more. This has been a particularly contentious issue, and was addressed in the High Court case of *Roach v. Electoral Commissioner* ([2007] 233 CLR 162) when the Court struck down an attempt by the Howard Government to impose a blanket ban on all prisoner voting. Liberty's submission to the Green Paper suggested that the loss of prisoners' voting rights constitutes extra-judicial punishment, which only serves to further isolate and stigmatise incarcerated persons from the community.

The Green Paper invited suggestions on the issue of how best to engage members of the community that tend to be isolated from the electoral process, specifically, young voters, persons experiencing homelessness and Indigenous voters. In order to address research findings that Australians aged between 15 and 35 have limited knowledge of Australia's political system, Liberty's submission suggested the establishment of civics education in secondary schools. Liberty also suggested amendments to the Commonwealth Electoral Act in order to remove barriers in the legislation that currently prevent homeless persons from exercising their vote, for example, by making the Electoral Act more flexible around the provision of mobile polling booths and electoral information.

The Green Paper also invited discussion on the current 'close-of-rolls' period. Australia's Federal Elections have no fixed date, which means the closing date of the electoral roll is a critical issue. Reforms to the Electoral Act in 2006 shortened the amount of time available to enrol or vary enrolments. This effectively disenfranchised a large number of eligible voters. The Australian Electoral Commission estimates that in the 2004 election, when there were seven days from the issue of the writs in which to enrol, 423, 975 people used the close of rolls week to change their details. Liberty suggested in our submission that the close of rolls period be extended to seven days from the issue of the writs. The current close of rolls period disenfranchises voters and runs contrary to the key principles suggested in the Green Paper.

Liberty trusts the Federal Government will take advantage of the opportunity to reform the electoral laws in order to ensure the franchise is available to all eligible members of the Australian community.

Kate Mallinson is a Liberty Victoria volunteer.

IS E-HEALTH HEALTHY?

Tim Warner warns that Australia's e-Health Initiative provides the structure for a national ID scheme.

Should you visit a Medicare health practitioner in the second half of 2010, you will be asked to identify yourself from a list of persons who have similar names and birth dates. This will be the start of a new medical records system called the e-Health Initiative, designed to allow the smooth electronic referral of patients, patient records and the orderly transfer of pathology results.

This unique identification system will rely on a number that will be generated when you appear for an appointment after July 2010, and will not be stored on your Medicare Card — it will be kept in a separate computer system which will be the hub of the doctors, pathologists and so on. The new number is required because many Medicare cards cover a number of individuals in families or households, and this new system is designed for clinical use and will therefore have to be patient-specific.

All of the above is happening and many of the planned direct outcomes in improving patient records and reducing clinical errors can be welcomed, but the mechanisms chosen to deliver these outcomes, the method chosen to administer the scheme and possibly the actual outcomes have serious downsides.

The second pilot scheme for the referral and management of patient records has been running in the Hunter Health public health service of NSW. This follows a very troubled first pilot in Tasmania where many practical failings of e-records became apparent. Two large problems were the lack of consistency in recording illness between doctors: what one sees as a cold, the other will write up as a minor upper respiratory tract infection.

In the delicate issue of social diseases some doctors either use personal codes or misdiagnose an illness with a similar pharmacological treatment. The second major issue was that many people have multiple Medicare identities many for reasons of personal safety and legal invisibility. How to handle this became a significant issue.

(Continued next page.)

> “The e-Health Initiative is a very worrying piece of public policy. It is in effect the structure of a national identification scheme.”

The second trial at Hunter Health has been under way for more than a year. It is slated to have a public release of an interim report in March to April 2010. Here we reach the first major problem in process. The federal and state governments are scheduled to pass the enabling legislation for e-Health in February to March 2010 — before we see the results of the final practical trial.

Without information from the Hunter Health trial and with some key issues not even included in the limited trial, we are setting forth on a national and expensive scheme, without knowing if it will deliver the key outcomes. Will it reduce patient misidentification or wrongful diagnosis due to lack of or wrong prior history by significant amounts?

The second process issue is the lack of continuing information on how the federal and state governments have been reaching each stage. Juanita Fernando of the Australian Privacy Foundation has been demanding the opening of various reports since 2005. The Australian IT section has had many articles, including some leaked papers, that show a culture of secrecy and a lack of accountability.

The methods chosen to deliver the e-Health Initiative contain all the elements of a national identification scheme. Every adult will be identified and their medical details and contact details will be linked. The first stage has all medical practitioners moving to storing their records in a form that is consistent and searchable by the new number.

Later external searches of practitioners’ databases will be possible to ensure up-to-date clinical information at the venue where the patient presents. Many of these details are not confirmed but are inherent in the design proposed. The possibility of function creep, both within the Health and Social Security Department and in ‘whole of government’, is very real. No attempt at placing limits on the information to be gained is included in the design.

The final key process failure is one with massive implications for many of the proposed public policy initiatives, including the changes to hospital and clinical delivery. The driving force behind the e-Health Initiative is not the Federal Government as such, but the Council of Australian Governments. COAG is the formalising of the old Premiers Conference where money and responsibilities for national issues were debated and allocated. It now has grown to have an independent existence and as such is not directly answerable to any of the constituent parliaments.

The e-Health Initiative has been structured as a company owned by COAG, and thus not under Freedom of Information or other responsibility mechanisms of either state or federal jurisdictions. Each request for information or transparency is met with an answer couched in terms of the others agreed to it.

Each criticism of process or inadequate outcome has been met with the other agreed to it. Direct request for information or accountability are met with a reply that they do not have to respond as they are not covered by federal or state FOI.

The e-Health Initiative is a very worrying piece of public policy. It is in effect the structure of a national identification scheme. Future uses and expansion of the system are being designed into the system, whilst those implementing the system claim they have no mandate to discuss wider future uses. The actual efficacy of the scheme is in doubt and laws are to be enacted before proof has been made public. The vehicle chosen to implement the system: a company structure owned by an arm of federal–state consultation, which has no methods of answerability or responsibility to the public. The best that could be said of the e-Health Initiative is that Sir Humphrey would be proud.

Tim Warner is a Liberty Victoria committee member.

Law-and-order auctions

Michael Pearce SC welcomes the NSW Shadow Attorney-General's commitment to put an end to law-and-order auctions before elections.

In a surprise but welcome move, a senior NSW politician has called for an end to the law-and-order auctions which have prevailed in NSW politics since the 1980s. And this was not just any politician but the NSW Shadow Attorney-General Greg Smith SC MLA.

In an article in the current *Bar News* of the NSW Bar Association, Mr Smith traces the history of the law-and-order auction through various state election campaigns back to the 1980s. He demonstrates convincingly the damage done by that debate and concludes: 'I became very uneasy with the law and order auctions, as they tended to make the law — particularly the sentencing laws — more complex and more susceptible to error.'

He refers to the lower imprisonment rates and lower recidivism rates in Victoria and observes: '[Victorian] sentences are lower and rehabilitation more effective. Be assured that I strenuously support protecting the community from dangerous offenders, but most of those imprisoned could not be so described. They are sentenced to less than 12 months' imprisonment and there is a strong case for non-custodial punishment.' He refers also to the failure of the Blair government's law and order agenda in the United Kingdom and its repudiation by the present government following a report by Cherie Booth QC. Mr Smith concludes: 'We have come to a point in time when the theory of "lock them up and throw away the key" just doesn't work.

Governments all over the world have to contend with more pressures on limited resources … The state cannot afford to keep incarcerating more people, and spending will have to shift to reducing incarceration rates.

Non-custodial punishments will inevitably become more prevalent and far more work must be done on rehabilitation before, during and after incarceration.'

This departure from decades of reflexive law-and-order rhetoric in NSW is bold and courageous. It carries special weight because of Mr Smith's intimate knowledge of the justice system and his senior position as a prosecutor.

It is especially timely for us in Victoria where politicians on both sides of the major divide show signs of being seduced by the lure of a law-and-order auction. For example, there is legislation currently before the Victorian Parliament giving police unprecedented powers to stop and search people, in direct conflict with the Charter of Human Rights and Responsibilities. It has bipartisan support and is modelled on UK legislation, part of that country's failed law-and-order program.

It is time for politicians of all persuasions in Victoria to stop and take stock of where we are headed. They need not look too far: just northwards and over the Murray River. What lies beyond there is not attractive or worthy of emulation. If you doubt that, just ask Mr Smith.

Michael Pearce SC is president of Liberty Victoria.

Rights, what rights?

Dr Alice de Jonge questions whether the Victorian Charter has lived up to expectations.

When the Charter of Human Rights and Responsibilities Act was enacted in 2006 it appeared that a new era had arrived in the relationship between government and citizens in Victoria. The Act was described by Professor George Williams as marking 'a decisive departure, at least in Victoria, from the long-held notion that the best protection for human rights is the good sense of our parliamentary representatives'.

When the Summary Offences and Control of Weapons Acts Amendment (SOCW) Bill was passed during a late-night sitting of the upper house of the Victorian Parliament earlier this month, it became obvious how weak Victoria's proud new Human Rights Charter really is. In particular, it became obvious how ready our elected representatives are to ignore the Charter altogether.

The SOCW Act has now given police in Victoria increased powers to search any person including a child in a designated area, even when there is no reasonable suspicion that the person is carrying a weapon. The government itself, in a statement put together by the minister for the purposes of review by the Scrutiny of Acts and Regulations Committee, admits that this new power is a breach of the Charter of Human Rights.

In the minister's own words, the SOCW Act is 'incompatible with the charter to the extent that it limits rights … in providing powers for police to randomly search persons (including children) and vehicles in public places within designated areas, even if the police have not formed a reasonable suspicion that the person or vehicle is carrying a weapon'. Moreover, there is no exemption for peaceful protests applying to the random search powers. Accordingly, these powers breach the rights of freedom of association and freedom of expression contained in the Charter.

Under the Act, the police may conduct pre-arrest strip searches of any person, including children, in certain circumstances. The government has sought to justify this in the interests of community safety, but this is a grossly insufficient justification for a law that disregards fundamental human rights.

The police also have increased powers to move people on. These new 'move-on' powers are distressingly broad. For example, under the new laws the police have power to give directions to a person to 'move on' whenever an officer believes the person 'is likely to breach the peace' or 'is likely to endanger the safety of other persons'.

As the Federation of Community Legal Centres noted in its letter to the Scrutiny of Acts and Regulations Committee of November 20, such broad move-on powers involve 'granting police powers based on subjective predictions of future behaviour by individual police officers'. Such powers are inevitably 'prone to be applied in a discriminatory and disproportionate way against some of our most vulnerable community members, including people who are homeless, young people, Aboriginal people and people experiencing mental health issues'.

A motion by Greens MLC Sue Pennicuik that would have seen the SOWC Act submitted to a process of public consultation, including a round table with the many social service and social justice organisations that have expressed concern at the new legislation, was voted down by both government and coalition members. In refusing to allow the SOWC to see the light of public consultation, the government has ignored the clear recommendation of the Victorian Privacy Commissioner. In her submission

to the Victorian Parliament's Scrutiny of Acts and Regulations Committee, she said that she was 'concerned with the lack of public consultation, including the lack of consultation with her office, regarding a proposal with such an adverse impact on the rights of Victorians'. Referring to the SOWC Bill, the Privacy Commissioner then went on to recommend 'that the Bill not proceed until such time as proper consultation is undertaken necessary for a proposal of this kind'.

The Government is clearly prepared to pass into effect a new law which is incompatible with the Human Rights Charter. At least the government has been prepared to admit that parts of the new law are not compatible with the Charter. This admission includes an acceptance that limitations on human rights in the SOWC Act are not necessary, reasonable or demonstrably justified. As a Victorian-born citizen, I am no longer proud of our state's new Human Rights Charter.

Dr Alice de Jonge is a Liberty Victoria volunteer.