Liberty Victoria

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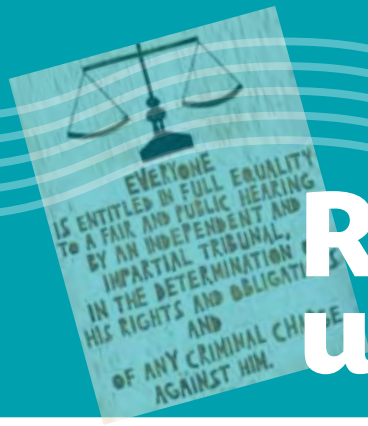

Rights under Review

LAW & ORDER, REVIEW OF THE CHARTER OF RIGHTS

PROF. SPENCER ZIFCAK

Spencer is Professor and Director of the Institute of Legal Studies at Australian Catholic University and President of Liberty.

PRESIDENT'S COLUMN

The last few months has been a time of hectic activity for Liberty. Three matters in particular have dominated the agenda: law and order, the review of the Charter of Rights, and preparations for major events.

The new Baillieu government has been extraordinarily active in promoting its law and order agenda. I have no difficulty with the Government wishing to reduce rates of crime. However, the frenetic pace attached to the implementation of the law and order agenda combined with a lack of appreciation of some of the possible adverse consequences of the measures chosen, has meant that there is much to criticize.

Over the past months, new laws have been introduced or proposed in relation to the abolition of suspended sentences, the imposition of minimum sentences for teenage offenders, on-the-spot fines for swearing in public, a dramatic increase in telephone surveillance by police, and the introduction of new, public safety officers on train stations. This is to say nothing of the crisis that enveloped the senior ranks of the Victoria police.

The thrust of all these policies has been punitive. Any idea of rehabilitation appears to have been comprehensively jettisoned.

To give just two examples of the unintended consequences that may arise from knee-jerk implementation, take public safety officers and the imposition of minimum sentences. 940 public safety officers are to be introduced. They will patrol every railway station in Victoria after 6.00pm. It is the powers with which these officers are conferred that create anxiety. The officers will have only 12 weeks training. Only three of those weeks will be devoted to firearms training.

And yet, these officers are expected to handle what may be very fraught situations. They are to be given powers of arrest, powers to detain people who are drunk and disorderly, powers to search and seize drugs and detain drug users and many others. These are powers of great consequence. They should not be given to people who have an absolute minimum level of training. It is all too easy to see tragedy occurring where inexperience, confrontation and firearms collide.

To some, it may seem sensible to send teenagers to gaol if they commit violent crime. But to mandatorily imprison 16-17 year olds, will have a series of perverse and adverse consequences. Young people will no longer plead to offences, thus resulting in a huge increase in court workloads. The deterrent effect of such sentences is not likely to be significant.

Sending such young people to gaol for lengthy periods will in many cases result in youngsters embarking upon lives of crime. And the reduction of judicial sentencing discretion, means that individual circumstances will no longer be taken into account.

The Parliament's Scrutiny of Acts and Regulations Committee (SARC) has issued its report on the review of the Victorian Charter of Rights. SARC has made a wide ranging series of recommendations almost all of which will reduce the existing legal protection of rights and freedoms in Victoria.

The report is disappointing and derelict. It is disappointing because its recommendations stand in contradiction to the substantial majority of submissions that the Committee received. It is derelict because instead of seeking to strengthen the protection of human rights in Victoria, it has taken every opportunity to weaken them.

Three of the Committee's recommendations are particularly damaging:

The Committee has recommended that the Charter's requirement that all laws should be interpreted and applied in a manner that is consistent with human rights should be radically restricted.

The Committee has recommended that it should no longer be unlawful for government agencies to infringe people's human rights.

The Government majority on the Committee has recommended that individual Victorians should not be able to seek a remedy in the Courts when their human rights have been violated.

If implemented, these changes would render the Charter of Rights meaningless. It would become nothing more than a vacuous statement of empty principle.

The Charter has provided legal protections for some of the most vulnerable people in our community – those with mental illness, disabilities, the young, the old, those in ethnic minorities and religious communities, those who are homeless, displaced and disadvantaged. The Committee has failed entirely to appreciate this fact and has sought instead to strip away the fundamental human rights to which every member of the Victorian community should be equally entitled.

Finally, two significant events have been organised. The Liberty Voltaire Award was presented at our annual dinner on August 6. The award has gone this year to Wikileaks and Julian Assange. Michael Pearce QC was able to deliver the award in person to Julian in the UK early in July. Julian recorded a special DVD to be played at the dinner. We were also enormously fortunate to have Professor Stuart Rees, the Director of the Sydney Peace Foundation at the University of Sydney to address the dinner this year on the subject of 'Wikileaks and Freedom: Manning and Assange'.

This year's annual Alan Missen Oration was presented by the very fine novelist, Richard Flanagan, on the closing evening of the Melbourne Writers Festival on the evening of September 4. Richard's oration examined love and freedom from the perspectives of philosophy, politics and literature.

It was an engaging and insightful lecture, for which I thank Richard on behalf of Liberty Victoria.

Rolling Back the Charter

THE CHARTER GIVES PROTECTION TO THE RIGHTS WE ALL SHARE

PROF. SPENCER ZIFCAK

Spencer is Professor and Director of the Institute of Legal Studies at Australian Catholic University and President of Liberty.

The Victorian government's review of the state's Charter of Rights and Responsibilities, could dramatically change how the charter operates and its ability to protect vulnerable Victorians.

The Coalition's historic opposition to the charter has given rise to suspicions that the government's intention is to water down the charter, or go so far as to abandon it.

So here are five reasons why the charter should be retained and five reasons why the arguments of charter opponents are misdirected.

The charter provides legal protection for the fundamental human rights shared in common by all Victorians. These rights include such things as freedom of speech, association and assembly; freedom of conscience, religion and belief; freedom from cruel and degrading treatment; the right to be free from arbitrary detention; and the right to fair trial. It is frequently thought that these rights already exist in Australian law. In fact, it's only in Victoria and the ACT that they are underpinned by statute.

Australia is a signatory to every major international human rights treaty. This means that all Australian governments are obliged to meet their international human rights obligations. Unlike the Commonwealth and every other state, Victoria is the only state in which these treaty rights have been made real.

The charter has led to better policy-making in government. Victorian departments and agencies are now required to take charter rights into account whenever new policies are worked up. For example, the Department of Health reported recently that the incorporation of human rights considerations in policy development has had a beneficial effect in defining more precisely when interventions restrictive of people's liberty should be undertaken.

Parliamentary debate on legislation has also been improved. When introducing new laws, ministers must now indicate to Parliament if they believe the laws are charter compliant. Parliament's Scrutiny of Acts Committee must also review proposed legislation and report to Parliament on its human rights impact. These initiatives have had the effect of increasing transparency, inviting public discussion and enhancing the quality of parliamentary deliberation.

Since the charter's commencement many people have benefitted from its protection. Local councils, for example, have become more sensitive to the needs of people with physical disabilities. A young man with Asperger's syndrome was able to access disability assistance that had previously been denied. The rights of children in the criminal justice system have been improved. The charter has engendered a comprehensive review of mental health law and policy. There are many similar instances.

Charter critics complain, however, that its effect will be to shift power from the elected legislature to an unelected judiciary. There is little, if any, evidence to support this assertion. The former UK Attorney-General, Lord Goldsmith, affirmed in a recent speech in Melbourne that no such shift had occurred even after 10 years following the introduction of human rights legislation in Britain. It hasn't happened in New Zealand either. Similarly the first four years of the Victorian charter's operation provide no evidence whatever of such a constitutional transfer of power.

Opponents claim that the charter has the effect only of advancing the rights of criminals. It is true that in the early days of the charter a significant number of cases dealt with criminal procedure. Few were successful and, as the examples cited above demonstrate, many more cases have dealt with issues that concern people in genuine need.

An argument put frequently before the charter's adoption was that it would result in a lawyers' picnic. The statistics have proved otherwise. In fact, many fewer cases have come to court than expected. This is partly because lawyers have been slow to get abreast of charter law. It is partly because the charter encourages better policy and legislation so that fewer legal challenges become necessary on human rights grounds.

Some religious groups have argued that the charter may usher in new laws with respect to abortion, gay marriage and euthanasia. This simply has not happened. Victoria did adopt new abortion laws. But the charter legislation plainly prohibits its application to any law with respect to abortion. Instead, abortion law reform followed from a considered report of the Victorian Law Reform Commission.

Critics argue that parliaments are much better at protecting rights than the courts. After all, parliamentarians are elected while judges are appointed for life. This misses the point. The issue is that neither the parliament nor the government can decide impartially whether or not a challenge to a law or to the action of an agency is justified. This is because the parliament has made the law and the government has implemented it. They can't be objective. There has to be an independent umpire when challenges to law or agency behaviour are made and when remedies are considered. This is what the courts are for.

Only two countries have ever repealed human rights laws once set in place. They are Belarus and Zimbabwe. It would be unfortunate if the Baillieu government were to follow their example.

Judicial imperialism argument is hollow

RESPONDING TO OPPONENTS OF VICTORIA'S CHARTER OF RIGHTS

PROF. SPENCER ZIFCAK

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A recent article by James Allen in the Australian provides a welcome opportunity to examine the nature and quality of arguments advanced by opponents of Victoria's Charter of Rights.

The article, in response to one of mine that Allan described as pathetic and simplistic, contains many of the contrary arguments commonly asserted by antagonists but rarely justified.

The primary argument is that a charter is nothing more than a list of vague aspirations. Because of this, human rights legislation is a gift to judges. It provides them with a unique opportunity to engage in judicial imperialism.

They can make free speech mean what they want. They can whip up a new definition of arbitrary detention. They can stretch the boundaries of fair trial beyond recognition, and so on.

This argument completely ignores the fact that courts globally have 60 years of experience in interpreting the constitutional and legislative protection of human rights.

Ever since the introduction of the European Convention on Human Rights in 1950, courts in every Western nation except the US have been working through the meaning and ambit of rights guarantees born in the Universal Declaration of Human Rights in 1948. In every nation with which Australia usually compares itself -- Canada, New Zealand, Britain -- courts have minutely dissected the definition and effect of free speech, religious freedom and fair trial rights among many others. These rights, all of which are founded upon the Universal Declaration and its associated international covenants, have been fully explored and interpreted. The body of relevant precedent is precise, instructive and huge.

Allan's argument therefore may have had some weight if Australia had been the first Western country to embark upon comprehensive constitutional and legislative protection of human rights, and Australian judges upon their interpretation.

In fact we remain the last and the path is well trodden.

I've not noticed Victoria's radical judiciary gleefully grasping the levers of legislative power.

I've not observed a radical shift of constitutional power from the legislature to the judiciary in any other comparable country. The evidence is quite to the contrary. But that is what Allan would have us believe has happened. In the article he gives three examples of Victorian cases to found the imperialism contention. Every one of them is partial and misleading.

He claims that the charter provided the basis on which a female Victorian prisoner obtained the right to receive IVF treatment while imprisoned. That is incorrect. The Victorian Supreme Court determined that the prisoner's pre-existing treatment could be continued following her imprisonment.

But the charter was not the foundation for the decision. It was made pursuant to a provision in the Corrections Act (Vic) which, the court observed, was consistent with and reflected the woman's charter rights.

Allan asserts that the charter led Victorian judges to rule that extended supervision orders to monitor sex offenders were incompatible with human rights.

Judicial imperialism argument is hollow *(cont'd)*

What he neglected to say was that the relevant decision was by a single judge of the Victorian County Court. That court cannot make a declaration of incompatibility. The judge decided correctly that the matter before him should be determined on the basis of the sex offenders law being considered.

Allan complains that the charter led the Victorian Court of Appeal to rule that a reverse onus provision in a drug trial was inconsistent with the presumption of innocence.

It is plainly inconsistent with that presumption. So, the court returned the matter to the Victorian parliament for reconsideration. Parliament's sovereignty was maintained.

How does any one of these examples justify the claim of judicial imperialism? Absence of evidence does not seem to deter Allan, however. He asserts that charter advocates have not come out in favour of Andrew Bolt's freedom of speech. That is wrong. Among others, I gave many interviews saying that in the Bolt case the racial vilification provision in the Racial Discrimination Act goes too far in constraining free speech.

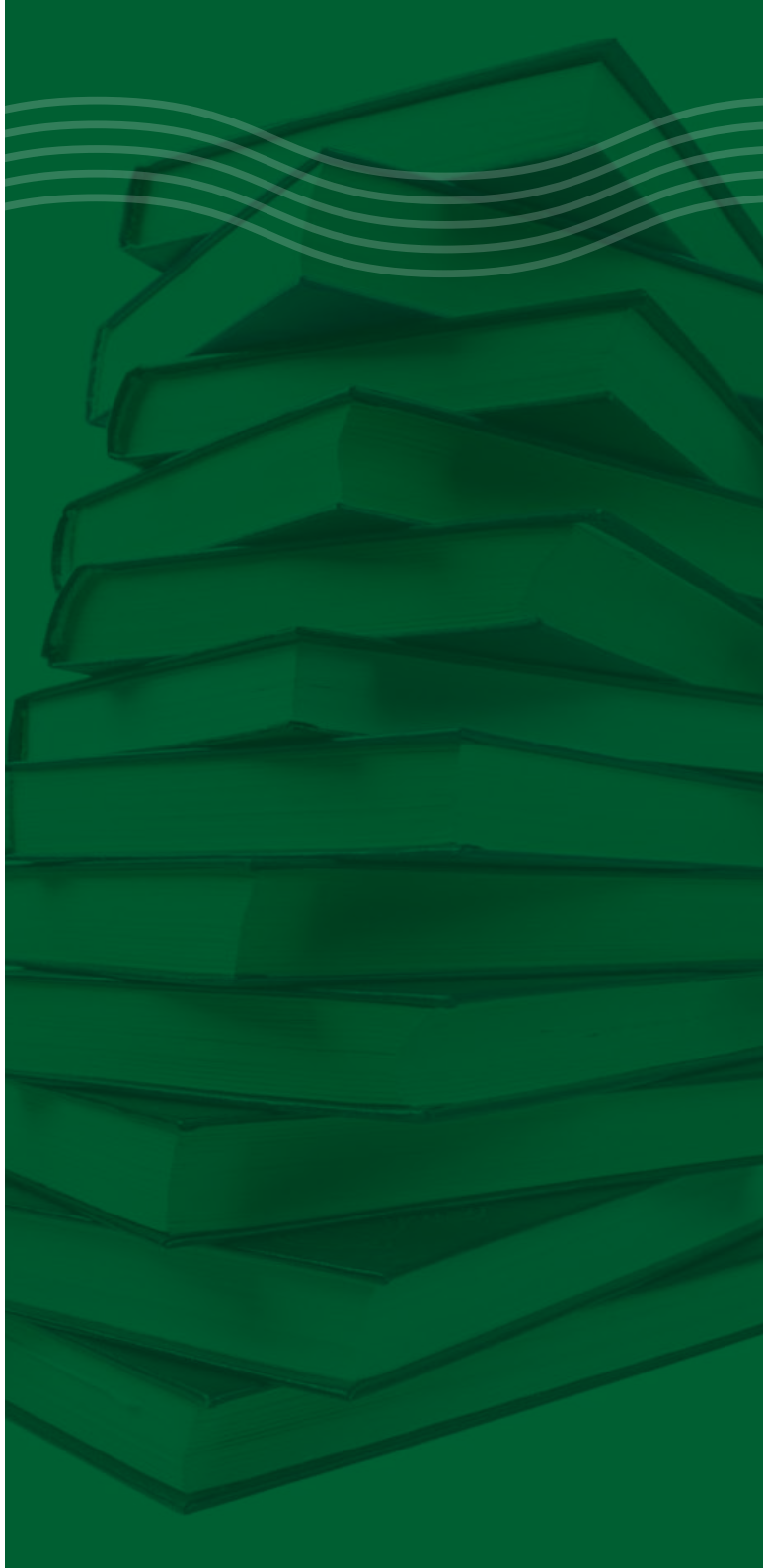
He blames the charter for prompting the Victorian Human Rights Commissioner to make a statement in favour of David Hicks. I am unaware of the statement, but, even if it was made, the Victorian charter and Hicks have absolutely no relevance to one another.

Allan points out that the charter has had no impact upon the increasing number of suppression orders issued by Victorian judges. That is true. But there hasn't yet been a challenge, so how could it have impacted?

This is an unimpressive catalogue of argument. An unattractive facet of Allan's argumentation is the degree of hostility he brings to his consideration of the judiciary. Parliament is the paragon of human rights protection. Judges seemingly are the enemies of democracy. Too often this barely disguised hostility leads him into a rambling world of hyperbole.

For example, in a recent law journal article, he comments on an exemplary decision of the Chief Justice of Victoria in a human rights case: "Alas, all the Chief Justice provides are gaseous platitudes, vague genuflections in the direction of multiple acceptable approaches (hence, perhaps, a bizarre sort of worship at the alter of diversity), seemingly contradictory assurances, a nod towards using international law, talk of a first step of ascertaining ordinary meaning but no clear analysis of what follows thereafter . . ."

The article is the most disrespectful attack on the decision of a senior Australian judge that I can remember. I back Allan's freedom of expression. But if he is to persuade anyone of anything, his arguments will have to be more cogently formulated, his analysis less partial and his prejudices much more firmly set aside.



More harm than protection

REVIEWING PROPOSED SENTENCING REFORMS

MICHAEL STANTON

Michael Stanton is a barrister and a member of Liberty's Policy Committee.

In June 2011, the Sentencing Advisory Council called for submissions on "Statutory Minimum Sentences for Gross Violence," noting that:[1]

> *"The government has committed to introduce a statutory minimum sentence for the offences of intentionally or recklessly causing serious injury when committed with gross violence, in the following terms:*
>
> - *A four-year minimum sentence (i.e. non-parole period) will apply to adult offenders, and a two-year minimum detention sentence will apply to juvenile offenders aged 16 or 17.*
> - *The minimum sentence is to apply save in tightly defined exceptional circumstances, such that the circumstances of the case are so unusual that the court is entitled to assume that parliament could not have intended those circumstances to be covered.*
> - *The minimum sentence is to apply where the offence involves gross violence, such as where the offender:*
>   - *o plans in advance to engage in an attack intending to cause serious injury*
>   - *o engages in a violent attack as part of a gang of three or more persons*
>   - *o plans in advance to carry and use a weapon in an attack and then deliberately or recklessly uses the weapon to inflict serious injury or*
>   - *o continues to violently attack the victim after the victim is incapacitated."*

There can be little doubt that the offences of intentionally and recklessly causing serious injury, when accompanied by "gross violence", demand condign punishment in almost all cases. Indeed, the Court of Appeal has already made that clear in the leading judgment of *DPP v Terrick & Ors* (2009) 24 VR 457. It would be exceptional, as it stands, for an offender in such circumstances to receive a non-immediate custodial sentence. That immediately begs the question as to whether the proposed reforms are necessary. The Government has not made its case as to why such a significant reform is required.

The purported justifications for such reform appears to be, first, that the public is calling for harsher sentencing of offenders who have caused serious injuries through violence; and secondly, that such reforms will result in greater protection of the community. The first justification is inconsistent with empirical evidence that, when informed of facts relevant to sentencing, most members of the public do not consider sentences imposed upon offenders by judicial officers to be too lenient.[2] The second justification is inconsistent with the pivotal role of rehabilitation in protecting the community, especially with regard to younger offenders. The Government has not cited any empirical evidence that supports the proposition that mandatory sentencing achieves a greater level of community protection. As French CJ noted in the recent judgment of *Hogan v Hinch*:[3]

> *"[r]ehabilitation, if it can be achieved, is likely to be the most durable guarantor of community protection and is clearly in the public interest."*

The introduction of mandatory minimum sentences for a certain types of offences would mark a further erosion of the sentencing discretion of judicial officers in the State of Victoria. Over the previous year, the Victorian Parliament has already limited sentencing options for those persons who have been found to have committed what are deemed to be "serious" and "significant" offences.[4]

Proposed sentencing reforms: more harm than protection *(cont'd)*

In comparative jurisdictions, mandatory sentencing regimes have been found to disproportionately affect indigenous and other marginalised groups.[5] Such regimes have been found by the United Nations Human Rights Committee to violate Australia's international human rights obligations.[6] In 2001, the Law Council of Australia considered mandatory sentencing regimes and concluded, inter alia:

i) The mandatory sentencing laws in Western Australia and the Northern Territory impose unacceptable restrictions on judicial discretion;

ii) The laws are ill-conceived as a means of addressing the crime rate;

iii) The laws tend to target Indigenous persons;

iv) The laws have resulted in unjust sentences; and

v) The laws contravene Australia's international obligations under at least two treaties.

As identified by the Law Council of Australia, the problem with limiting judicial discretion in sentencing is that it prevents judicial officers from imposing proportionate punishment in appropriate cases. This necessarily results in injustice. Such concerns have been echoed by the Law Institute of Victoria's comprehensive submission on the proposed reforms dated 30 June 2011, which also notes inter alia:

"The overwhelming evidence from Australia and overseas... demonstrates that mandatory sentencing does not reduce crime through deterrence nor incapacitation, and may lead to increased crime rates in the long run, as imprisonment has been shown to have a criminogenic effect."

This article cannot consider all the potential problems and pitfalls that would be caused by the proposed reforms. However, from the outset it should be noted that it is unclear why Parliament has deemed the offences of intentionally and recklessly causing serious injury to fall into a special category necessitating mandatory sentencing, whereas other serious offences such as aggravated burglary, armed robbery, manslaughter and murder do not.

The proposed reforms appear to draw no distinction between the offences of intentionally causing serious injury and recklessly causing serious injury. This is strange, as Parliament has provided for different maximum penalties for the two offences,[7] and the former offence may extend to conduct akin to torture and has been described as the most serious non-homicidal offence against the person.[8]

The proposed Victorian reforms, and in particular the concept of "gross violence," raise many difficult questions of interpretation, including:

i) What is meant by planning "in advance"? Will it extend to retaliation during the one incident provided there was some, albeit very limited, opportunity for planning? Will it extend to cases where there is serious provocation and where the accused person was acting disproportionately in defence of another?

ii) What is meant by the expression "gang"? Does that encompass a subjective or an objective test of identification? Do the other persons need to actively participate in the attack in order to meet the criterion, or is mere presence sufficient? How will the provisions operate in circumstances of complicity?

iii) What are "exceptional circumstances, such that the circumstances of the case are so unusual that the court is entitled to assume that parliament could not have intended those circumstances to be covered"? Such a concept is extremely narrow.[9] Presumably it could not be said that, prima facie, accused persons suffering from serious mental health issues or intellectual disability at the time of the alleged offending[10] meet such a test. If that is so, then how will persons be sentenced in circumstances where their moral culpability is found to be significantly reduced?

The above issues, amongst others, will need to be tested in the Courts, at considerable public expense. In the interim, accused persons will be treated differently depending on the interpretation of the proposed provisions by different judicial officers. Given the length of the proposed mandatory minimum terms, such divergence in interpretation and application is of the greatest significance to accused persons, their families and the community at large.

In addition, when faced with a mandatory minimum period of imprisonment, accused persons are much less likely to plead guilty to such offences when there is ambiguity as to the elements of the offence and with regard to whether circumstances of aggravation have been established. Accordingly, the proposed reforms would almost certainly see an increase in contested committals and trials and would place further pressure on a Court system that is already strained and suffering from serious delays.

Proposed sentencing reforms: more harm than protection *(cont'd)*

With regard to the offence of recklessly causing serious injury, at law "recklessness" requires subjective foresight of serious injury as a probable consequence of the accused person's actions.[11] That is a high threshold that is often difficult to prove. Recklessness does not encompass mere accident and negligence. Further, there is a wide divergence as to what is regarded as a "serious injury" under the Crimes Act 1958. That Act defines "serious injury" as including "a combination of injuries,"[12] and the Courts have traditionally regarded such a matter as a question of fact for the jury, and have resisted providing any further definition.[13]

At present, often accused persons are willing, for the sake of an early plea and perhaps after a favourable sentencing indication, to plead guilty to recklessly causing serious injury even when elements of the offence would be very difficult to establish. That is very unlikely to occur if mandatory minimum sentences are introduced.

The combined effect of the above is that it leaves a significant margin for disagreement and error. It will take significant time and expense for the legal profession to receive guidance from superior courts as to the meaning of critical expressions. In the interim, those without the means to challenge and test such matters may be sentenced to mandatory minimum terms of imprisonment under divergent applications of the law by judicial officers.

Further, it will fall upon prosecutors and informants to determine whether to proceed on charges of intentionally or recklessly causing serious injury in circumstances where the offences will be likely to attract a mandatory minimum term. The proposed reforms transfer the burden of key decision making from judicial officers and juries to the executive, where there is less transparency and greater room for arbitrary and inconsistent decision-making without recourse to judicial review or consideration by an appellate court. As outlined above, concepts of "gross violence" and "serious injury" are necessarily abstract. Reasonable minds will differ about whether they apply in a given case.

By requiring judicial officers to impose disproportionate sentences in some cases, mandatory sentencing arguably causes accused persons to be subject to arbitrary detention. This is in breach of international law as protected by Article 9 of the *International Covenant on Civil and Political Rights 1966*, and reflected in s.21(2) of the *Charter of Human Rights and Responsibilities Act 2006* ("the Charter"). It appears likely that, depending on possible legislative amendment, the Charter would affect the proposed reforms. At present, the Charter could be argued to affect the interpretation of the provisions.[14] It would arguably apply to Courts with regard to the function of judicial officers to ensure that accused persons receive a fair trial and are not subject to arbitrary punishment.[15] Further, it would apply with regard to the obligation on public authorities to act compatibly with the Charter.[16] In addition, the Parliament, when making a statement of compatibility with any legislative reform, will be required to determine whether it acknowledges that such reforms constitute a disproportionate limitation to the human rights of Victorians.[17]

Further, if the proposed reforms are introduced, it is almost certain that the Supreme Court of Victoria will be called upon to consider whether to make a declaration of inconsistent interpretation.[18]

The proposed reforms are even more concerning in so far as they would apply to children. The criminal law recognises that in most cases young persons should be treated differently to older offenders. This includes youthful offenders who are adults.[19] The proposed regime is particularly concerning in that it would seek to sentence children, who are subject to a completely separate sentencing regime that gives primacy to rehabilitation,[20] to mandatory detention.

Such a proposal would appear to be in breach of Australia's obligations as a signatory to the *United Nations Convention on the Rights of the Child 1989*, including Article 40(4) of the *Convention* which provides:

> *"A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."*

The human rights of the child are expressly protected by the Victorian Charter.[21]

Proposed sentencing reforms: more harm than protection *(cont'd)*

Young persons and children are particularly vulnerable in custody, both to abuse and to the deleterious influence of others. In DPP v Tokava [2006] VSCA 156 (27 July 2006), Maxwell P cited with approval[22] the following remarks of Fox J in R v Dixon (1975) 22 ACTR 13:

> *"In general, but by no means always, persons convicted of serious crime are the maladjusted people of the community, and some will have developed serious behavioural problems. ... Unfortunately, gaol may well make their anti-social tendencies worse. This is not always the case; sometimes the experience of gaol effects a real improvement. Nevertheless, I think it is well accepted that it is so in most cases; at least where the sentences are at all long. The reasons are obvious enough: the prisoners are kept in unnatural, isolated conditions, their every activity is so strictly regulated and supervised that they have no opportunity to develop a sense of individual responsibility, they are deprived of any real opportunity to learn to live as members of society, their only companions are other criminals, some of whom are bound to be quite vicious, their sex life must be unnatural, scope for psychiatric treatment is very limited, if not non-existent, and employment is limited and stereotyped. To many this must seem one of the most absurd aspects of the whole matter. They may well ask why the system has to be so anti-social in operation, why it cannot be improved so that people for whom there is a prospect of reformation, and who are not so dangerous that they have to be kept in strict confinement, are given a real opportunity for self-improvement. The irony is that prison authorities are among the strongest advocates of reform.*
>
> ...
>
> *When, therefore, a court has to consider whether to send a young person to gaol for the first time, it has to take into account the likely adverse effects of a gaol sentence. A distinct possibility, particularly if the sentence is a long one, is that the person sent to gaol will come out more vicious, and distinctly more anti-social in thoughts and deed than when he went in. His own personality may well be permanently impaired in a serious degree. If he could be kept in gaol for the rest of his life, it might be possible to ignore the consequences to society, but he will re-enter society and often while still quite young. His new-found propensities then have to be reckoned with. A substantial minority of persons who serve medium or long gaol sentences soon offend again."*

There is no merit to the argument that any limitation to the human rights of children and young persons would be proportionate because Parliament had legislated for mandatory detention. Issues of proportionality will need to be considered in light of the facts of each case.

In essence, the proposed reforms would seek to remove the capacity of Courts to determine and apply proportionate punishment. The central problem caused by mandatory sentences was eloquently described by Mildren J in *Trenerry v Bradley* (1997) 6 NTLR 175 at 187:

> *"Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a Court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case."*[23]

The Victorian Parliament has not made its case as to why such reform is needed. The proposed reforms directly challenge proportionality as a foundational pillar of the criminal law.24 The reforms may well raise issues as to the constitutionality of fettering judicial power in such a manner, and open the way for Federal Parliament to override such laws due to Australia's international obligations.

The proposed reforms have been almost uniformly decried by the legal profession. The reforms are not supported by empirical data and ignore a wealth of experience from comparative jurisdictions. Such reforms would arguably see Victoria in breach of Australia's obligations at international law and acting inconsistently with its own Charter. Most seriously of all, such reforms would actively endanger, rather than protect, the public by sacrificing rehabilitation on an altar of political expediency.

Postscript

In October 2011, the Sentencing Advisory Counsel published its report on Statutory Minimum Sentences for Gross Violence. That report made three key recommendations:

(1) The creation of two new offences of intentionally and recklessly causing severe injury, with a mandatory minimum non-parole period of 4 years imprisonment for those aged 18 years or older at the time of offending, and a minimum sentence of 2 years imprisonment in a Youth Justice Centre for those 16 or 17 years old at the time of offending. "Severe injury" is defined as long-term serious impairment or loss of a

body function, long-term serious disfigurement, or loss of a foetus. The offences would be made out in circumstances where an offender:

(i) plans in advance to engage in an attack intending to cause severe injury;

(ii) causes severe injury while in company with two or more persons, where both the offender and at least two other persons cause severe injury or act in concert with one another to cause severe injury;

(iii) plans in advance to carry and use a weapon in an attack and intentionally or recklessly uses the weapon to inflict severe injury; or

(iv) continues to attack the victim, or cause injury to the victim, after the victim is incapacitated.

(2) The offences be excluded from jurisdiction of the Children's Court; and

(3) There be an exception to mandatory sentencing for "special reasons", including intellectual disability. mental illness, particular psychosocial immaturity or vulnerability in custody, and assistance by the accused to the Police or the Crown.

While the recommended broadening of the "exceptional circumstances" test is to be welcomed, the other recommendations made by the Sentencing Advisory Council do not address many of the definitional issues concerning the elements of the offences as identified above. Such matters will still need to be tested through litigation and will provide a disincentive to an early resolution of criminal proceedings.

Moreover, creating a third-tier of injury offences, with the same maximum penalties as the offences of intentionally and recklessly causing serious injury, will still transfer the burden of key decision-making to the executive. It may well lead to a form of "bracket creep", with "serious injury" offences being placed in the mid-range of injury offences, resulting in such offences being charged and proven at a lower threshold than at present. This would result in accused persons being exposed to longer terms of imprisonment and serious ancillary orders (such as the application of the serious offender provisions of the Sentencing Act 1991). Further, it may well result in a greater workload for the County Court of Victoria as matters fall outside of the jurisdiction of the Magistrates' Court of Victoria, given that the offence of intentionally causing serious injury cannot be dealt with summarily.

In addition, the recommended removal of the jurisdiction of the Children's Court of Victoria for the "severe" injury offences, and the applicability of the mandatory sentencing provisions to children, fails to pay due regard to the special position of children in the criminal justice system and arguably fails to comply with Australia's international obligations, and in particular Article 40(4) of the *United Nations Convention on the Rights of the Child* 1989.

1 Sentencing Advisory Council, ""Statutory Minimum Sentences For Gross Violence," http://www.sentencingcouncil.vic.gov.au/page/our-work/projects/gross-violence, at 14 November 2011.

2 Austin Lovegrove, 'Public Opinion, Sentencing and Lenience; an Empirical Study involving Judges Consulting the Community' (2007) Criminal Law Review 769. See R v WCB [2010] VSCA 230 (10 September 2010), [23] per Warren CJ and Redlich JA.

3 (2011) 85 ALJR 398, [32].

4 In effect, resulting in suspended sentences of imprisonment and home detention to be unable to be imposed for certain categories of offences, Sentencing Act 1991, ss 27(2b), 26N.

5 Smart Justice, "Mandatory Sentencing", 25 May 2011. See further Law Council of Australia, "The Mandatory Sentencing Debate", September 2001.

6 Ibid.

7 Pursuant to s.16 of the Crimes Act 1991, the maximum penalty for intentionally causing serious injury is 20 years' imprisonment. Pursuant to s.17 of that Act, the maximum penalty for recklessly causing serious injury is 15 years' imprisonment. Section 5(2)(a) of the Sentencing Act 1991 provides that when sentencing an offender, the Court must have regard to the maximum penalty prescribed for the offence.

8 DPP v Nazari [2010] VSCA 293 (3 November 2010), [30].

9 Such a test is narrow than the current test for "exceptional circumstances"; R v Steggall (2005) 157 A Crim R 402, R v Ioannou (2007) 17 VR 563, R v Ienco [2008] VSCA 17 (14 February 2008); R v Markovic (2010) 200 A Crim R 510.

10 Such that their moral culpability is reduced and they are not an appropriate vehicle for general and specific deterrence, but they do not have a complete defence at law; R v Verdins (2007) 16 VR 269.

11 R v Ignatova [2010] VSCA 263 (23 September 2010), [38].

12 Crimes Act 1958, s.15.

13 R v Welsh and Flynn (Unreported, Court of Appeal of the Supreme Court of Victoria, Crockett, King and Tadgell JJ, 16 October 1987). Cited with approval in R v Paton [2011] VSCA 72 (25 March 2011), [17] fn1.

14 Section 32(1); Momcilovic v The Queen (2011) 85 ALJR 957. In comparative jurisdictions, human rights legislation has been used to, in effect, broaden "exceptional circumstance" exceptions to mandatory sentencing regimes so as to protect the right to liberty; R v Offen [2001] 1 WLR 253.

15 Section 6(2)(b).

16 Section 38(1).

17 As the previous Government did with the Control of Weapons Amendment Bill 2010, Victorian Hansard, 27 May 2010, 2000. See s.28(2) of the Charter.

18 Section 36 of the Charter. Although it should be noted that in Momcilovic v The Queen (2011) 85 ALJR 957, the High Court of Australia was divided concerning the constitutionality of making declarations of inconsistent interpretation. While the majority held that s.36 was not unconstitutional, Crennan and Keifel JJ noted that such declarations may not be appropriate in the context of a criminal trial proceeding (at [604]-[605]).

19 R v Mills [1998] 4 VR 235.

20 Children, Youth and Families Act 2005

21 Sections 17 and 23.

22 At [22]-[23].

23 Cited with approval in Olsen v Sims [2010] NTCA 8 (30 November 2010), [77].

24 Veen v R (No 2) 164 CLR 465; Baumer v R (1998) 166 CLR 51.

Vanstone's big step back

A RESPONSE TO THE FORMER IMMIGRATION MINISTER

HUGH CROSTHWAITE

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He is a committee member of Liberty Victoria and the recipient of the 2011 Chief Justice's Prize for Excellence and Service.

Earlier this year, Amanda Vanstone penned an opinion piece for The Age attacking asylum seekers. In it she wandered into rhetoric that has not been the flavour of choice in years. Demonising people smugglers has been the approach of late and it's easy to see why.

It's an easier argument to stomach because unlike asylum seekers, who are generally fleeing some sort of tyranny, people smugglers can be characterised as manipulative and commercially focussed. However, Vanstone prefers the classics and her opinion piece was chock full of classic anti-asylum seeker rhetoric. It was vintage Howard era migration misrepresentation, but we'll deal with all of that shortly. First an introduction.

John is an Australian citizen. He is the director of two successful small businesses. He lives in Dandenong, employs four people, pays a bucket load of tax and proudly refers to Australia as "this great country." To top it off John is a volunteer fire fighter with the CFA. In anyone's eyes he's a model citizen. He is respectful, thoughtful and he has a work ethic that would rival the keenest of seventeenth century puritans. He embraces the Australian traditions of working your way up the ladder and calling a spade a spade. On anyone's estimation John is a fabulous addition to the Australian citizenry but in Vanstone's eyes John is on par with those whom Kevin Rudd referred to as "the scum of the earth." Why? Because John sought freedom on the shores of Australia instead of languishing, warehoused in a camp outside Australian jurisdiction.

John is from rural Afghanistan. Borne the son of a subsistence farmer, he is Hazara which means he is a member of an ethnic minority that has and continues to be the subject of serious oppression. Being a Hazara in Afghanistan, and particularly a young man, means walking around with a cross hair on your forehead. Life in fear of death precipitated John's escape. He had few options. In Afghanistan travel documents are not as easy to come by as one might think. It is not a case of just dropping by the chemist, getting a photo taken and applying for a passport, waiting a few weeks then sorting out your flight on Webjet. Those travel options are closed to people like John. So what to do? Unsurprisingly John decided in favour of self-preservation even though it bore great risk. As he puts it, "it is better to eat donkey meat than die of starvation."

John's voyage to Australia took him to Pakistan and from there to Indonesia where he waited some months before he boarded a boat headed for Australia. Once he arrived on Australian soil he was taken to a detention centre where he waited for months before being given a temporary protection visa. The visa provided some protection but little comfort. John was expected to create a life for himself without any of the usual supports. No permission to work; no Medicare when you get sick; no way of seeing your family if they cannot visit Australia on a holiday, the likelihood of which is not worth consideration. The interpreter made available when John was facing the government was not from his region and did not understand him fully. He knew mistakes would be made. They were: John was denied permanent protection. This decision was an administrative bungle that could have cost John his life. Luckily John is a can-do guy and rejection for want of formality was not an option. Although he faced great odds John began a process of education and self-improvement from the moment he left detention. John worked menial jobs during the day and educated himself at night. He has gained no less than ten qualifications in his relatively short time as an Australian citizen and he did it all from nothing. Who could deny that John carries with him the best characteristics of Australian culture? Vanstone could.

Vanstone's big step back *(cont'd)*

Turning now to Vanstone's depiction of asylum seekers who come to Australia by boat. According to Vanstone, asylum seekers like John are dishonest. That is their principle characteristic. She argues that John used a back door, or the wrong way in. She claims that he used this "back door" so that he didn't have to wait for what she refers to as a "golden credit card." Further, she claims that John did this, not because he wanted to be found a genuine refugee, but for some other reason left to our collective imagination. So here we have Vanstone characterising John, the CFA volunteer, as all the worst parts of our society. It doesn't add up.

Firstly, for someone fleeing tyranny there is no back door into Australia. You will not find a political leader that is bold or foolhardy enough to seriously suggest that people who are escaping oppression have no right to ask for Australia's help and do it standing on Australian soil. To do so would be to reject the international refugee system at its core and make a pariah of Australia. They do and there is nothing illegal about it. Vanstone concedes as much in her article although she refuses to say it expressly. So much for the mythical back door.

"Vanstone would have you believe that applying for refugee status is something extraordinary ... and the reward is something the rest of us can only dream of or work for. In short, gold."

The golden credit card is another wonderfully poisonous image. It's like a prize, usually bestowed on the worthy. But that concept bears no relationship to the reality of our migration program or refugees. Vanstone would have you believe that applying for refugee status is something extraordinary, a circumstance in which many are called, few are chosen and the reward is something the rest of us can only dream of or work for. In short, gold. The truth however is much more pedestrian. There is no trial or process by which people earn the right be a refugee. The difference between someone who is and is not a refugee is not what they've done, but what has been done to them. The true gold for most refugees is the freedom to wander down the street without worrying about if you're going to be killed. Clearly, for someone who has not experienced it, this freedom is extremely valuable.

Vanstone claims that asylum seekers like John have no interest in being found to be refugees. She says that if they did, then they would apply to the UN High Commission for Refugees in Indonesia and wait to be sent to wherever will take them. They don't, therefore ulterior motives must be at play. First, this option does not exist in Afghanistan. Secondly, the product of this argument is an egregious shirking of responsibility. Treating developing nations like Indonesia as refugee warehouses is not the right of developed nations like Australia. On Vanstone's logic Australia and Indonesia could both argue that people like John should stay in Pakistan or any number of countries in between Afghanistan and Australia. This approach would radically undermine the international framework designed to help people who need to escape tyranny, the result would be a failure of humanity, oppression and death.

Vanstone characterises the asylum seekers as being accomplices to people smugglers. She would have you believe that people smuggling is like drug trafficking or people (slave) trafficking. Highly organised, well funded operations run by wealthy Dr Evils who sit on high backed chairs stroking their cats whilst watching their investments slowly move from place to place on a gigantic map of the world. Is it the stuff of James Bond? Not really. The experience of people who have escaped countries with the aid of people smugglers shows that often their final destination is not a matter of planning but circumstance. There is no one-way ticket, on a fast train, running express to whichever country they choose. It's not to say that there's no organisation, there is, but the travel is ad hoc at best. It's less a production line and more a relay without a planned circuit where asylum seekers are the baton and you're never quite sure who the next runner is.

In an important concession Vanstone states that permanent protection should only be afforded to people who are in refugee camps elsewhere or to people for whom Australia is the country of first asylum. This means that if an Afghani boards a plane in Afghanistan with fake papers and arrives in Australia they are more "deserving" of a "place at the front" and the "golden credit card" than someone in an identical situation but-for the aeroplane. The distinction is entirely arbitrary as it is not based on needs; it's based on transportation method alone. Vanstones's argument must fail on this point because it is totally inconsistent with her central premise that people who arrive in Australia without spending years in a refugee camp elsewhere do not deserve permanent protection. According to Vanstone this is a system we should be proud of.

Vanstone's big step back *(cont'd)*

Pride is a dangerous word when it relates to citizenship. National pride can often mask any number of evils. Justified pride is normally associated with some degree of effort or hardship. For instance Australians have pride in the efforts of the ANZACs at Gallipoli not because they won, they didn't, but because they stuck it out against fantastic odds for a very long time. The legitimacy of pride is justified by context. So Vanstone argues we should have pride in our migration system. Why? Are we the poor country, stretched for resources, that's going beyond the call? Are we pulling our weight in the global context? No, we are not. We take fewer refugees than most of our friends in the northern hemisphere even though our economy is currently much stronger and even though we have a shortage of skilled workers. Does that context fill you with pride? It shouldn't.

On the matter of deaths, Vanstone blames government policy for the drowning of asylum seekers. The corollary is that under the Vanstone model, tragedy would be avoided. Under Howard and the policy Vanstone advocates the SIEV-X sank. Over three hundred people died, only nine where men of age. Clearly there is no justification for finger pointing on this point and. Unsurprisingly Vanstone's article made no mention of that particular tragedy.

So what are we left with? Vanstone's model, already shown to fail in the tests she sets, inescapably inconsistent with its own moral foundation, politically elitist within our region and Vanstone's asylum seeker, a faceless terror bearing no resemblance to a real man, the Australian called John described in the opening paragraphs above. I've not met Vanstone's asylum seeker, I doubt anyone has, but I have met John and if his character and values are anything to go by, we should be thankful that he boarded that boat, Australia is a better country for his efforts and determination.

Liberty protests character test changes

OUR SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL COMMITTEE INQUIRY

JESSIE TAYLOR

Jessie Taylor is a barrister and member of Liberty's Policy Committee

Liberty Victoria recently had the opportunity to make a submission to the Senate Legal and Constitutional Committee Inquiry on the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011 ("the Bill").

We took this opportunity with relish, as Liberty Victoria had profound concerns about the amendments outlined in the Bill and explanatory memorandum. Despite the best efforts of many NGOs and interested agencies to defeat this terrible Bill, it was passed by both houses of Parliament.

"Such people are then often deported, including to countries where they have no family, no connections and no knowledge of the local language."

Previously, section 501 of the *Migration Act 1958* (Cth) ("the Act") gives the Minister for Immigration a discretion to cancel a visa or refuse to grant a visa on the grounds of "bad character". Previously, the threshold for failure of the character test was fairly high, including that the person concerned had a "substantial criminal record".

S 501(7) For the purposes of the character test, a person has a substantial criminal record if:

(a) the person has been sentenced to death; or

(b) the person has been sentenced to imprisonment for life; or

(c) the person has been sentenced to a term of imprisonment of 12 months or more; or

(d) the person has been sentenced to 2 or more terms of imprisonment (whether on one or more occasions), where the total of those terms is 2 years or more; or (e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution.

There have often been cases of people arriving in Australia as small children or babies, who neglect to obtain citizenship. If they are convicted of an offence that takes them over the threshold of the "substantial criminal record", their visas may be cancelled, and they are often taken straight into immigration detention on the day they are released from prison. Such people are then often deported, including to countries where they have no family, no connections and no knowledge of the local language.

Liberty Victoria has always been concerned about the operation of section 501, but the passage of this Bill has now made the situation significantly worse.

To read Liberty's submission please go to http://libertyvictoria.org/sites/default/files/Website.%20Migration%20Amendment%20Bill%202011.pdf.

People Smugglers exhibition success

COLLECTING AND TELLING REFUGEES' STORIES

GLYN AYRES

Glyn Ayres is a JD student at Melbourne Law School.

Earlier this year, Liberty Victoria presented 'People Smugglers: Friend or Foe?', an exhibition that looked at people smuggling through the eyes of refugees. Held at the Jewish Museum, the exhibition featured interviews with people who came to Australia as asylum seekers. They arrived at different times and came from all over the world. Nevertheless, each story had a common thread: the person telling it, or their family, used people smugglers in their attempt to reach safety.

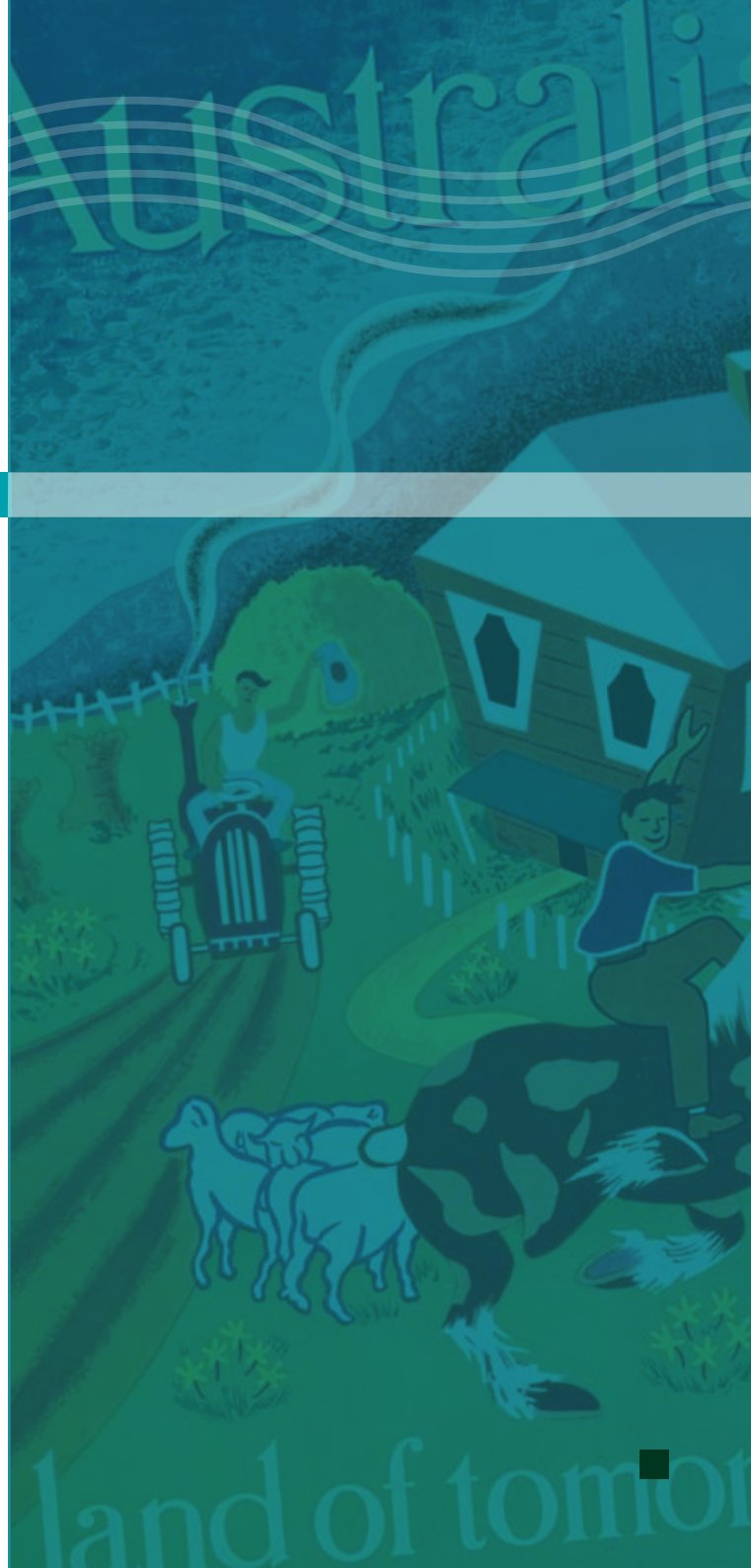
In 2010, the Government introduced heavy mandatory sentences for people smuggling offences. It followed this with its current plan to send boat arrivals to Malaysia, with the much-publicised objective of "breaking the people smugglers' business model". But what exactly is the source of anxiety about people smugglers? Are there genuine concerns about smuggling that justify such extreme measures? Or is the anti-people smuggling rhetoric in the current debate just another way of associating asylum seekers themselves with illegality in an attempt to paint them as illegitimate or dangerous? Liberty hoped to explore the issues surrounding people smuggling in a calm and measured way by talking with refugees themselves about their experiences.

The exhibition was launched by property developer and publisher Morry Schwartz, who shared his own family's experience of being smuggled out of Hungary in the 1950s. Although he described the smuggler who helped reunite his family as "a bit of a shady character", Schwartz acknowledged that without his services they might never have escaped.

Well over a hundred people attended the launch and many more saw the exhibition in the six weeks that followed, including school groups. In addition, Liberty held a panel discussion in which two Afghan interviewees, John Gulzari and Ramat Yousafi, told their stories in greater detail, drawing connections between the persecution suffered by Jewish people in Europe during the Second World War and the persecution suffered by Hazara people in Afghanistan at the hands of the Taliban today. "They call refugees queue jumpers," said Gulzari, who now runs his own real estate business in Dandenong and volunteers as a firefighter. "But where is the queue? I never saw one."

Each of the interviewees was thoughtful and somewhat ambivalent about the moral dimensions of people smuggling. "Is what they do good, or is it bad?" said Eva Rathner, whose uncle used a smuggler to escape anti-Jewish pogroms in Poland. "I don't know. It is both. But they are the reason my family got out."

Liberty Victoria would like to thank Amnesty International, Michael Drapac, Dinos Toumazos and Morry Schwartz for their generous support, and the Jewish Museum of Australia for hosting the exhibition.



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Liberty is one of Australia's leading human rights and civil liberties organizations which can trace its history back to 1936.

Liberty is committed to the defence and extension of human rights and civil liberties. It promotes Australia's compliance with the rights and freedoms recognised by international law.

OUR WORK

Education - Much of our work is directed towards educating the public about the importance of human rights.

Campaigning - Liberty's work involves liaison with police, government, and regulatory authorities to protect existing civil liberties and ensure those liberties are not further eroded. This includes making submissions, meeting members of Parliament and conducting law reform campaigns.

YOUR CONTRIBUTION

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