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LibertyNEWS

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LIBERTY VICTORIA VICTORIAN COUNCIL FOR CIVIL LIBERTIES INC

ASYLUM FEATURE

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AUTUMN 2010

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Strengthening Liberty

MICHAEL PEARCE SC

AUTUMN 2010 - No 7

PRESIDENT'S COLUMN

I must begin my first President's column for 2010 with an apology – that this is the first column in the first newsletter for this year.

Unfortunately we lost our newsletter coordinator, Tim Wright, at the end of last year and it has taken a while to replace him. Tim has gone to work in New York on nuclear disarmament, and as much as we thought of trying to persuade him to put our newsletter ahead of nuclear disarmament, we refrained and instead gave him our best wishes and thanks for doing such a professional job.

We are pleased now to welcome new committee member Michael Griffith to the job. He is being assisted on the newsletter by Simon Kosmer of *RiverToMyPeople.com*, who is providing his services pro bono. Thanks to both of them. The newsletter should appear quarterly from now on.

It has in any event been a hectic start to the year for us. We kicked off with an inspiring talk from South African human rights lawyer, George Bizos SC, in March (see elsewhere in this edition). Since then we have been reeling from two major policy back-flips by the Rudd Government. The first concerned asylum seekers and the decisions to suspend processing claims from Sri Lanka and Afghanistan and to re-open the Curtin Detention Centre. The second was the decision not to proceed with a Human Rights Act.

Both these issues are dealt with in detail elsewhere in this newsletter. I mention them here for what they portend about the Federal Government and our relationship with it. Readers will recall that we welcomed the election of the new Government in November 2007 and supported many of its early initiatives. We thought there was more to be gained by engaging constructively with the Government, rather than confronting it. However, I warned at the time that the thawing in the human rights climate would not be permanent and that we should prepare for it to freeze over again one day. I thought there would be a gradual cooling which would gather pace in the second and third terms of the Government.

Experience teaches that the longer governments stay in power the less tolerant they become of human rights and civil liberties. There are a number of explanations for this: new governments sometimes replace a long term government which lost support because of human rights abuses; a new government can afford the early electoral unpopularity of some human rights policies; they are usually more sensitive to issues of process and less determined to ram through policies; they are also usually more independent of the public service which is notoriously hostile to civil liberties. So it usually takes two or three terms for a government to abandon a human rights agenda altogether.

The Rudd Government's abandonment of that agenda before the end of its first term has frankly shocked me. It betrays a wider malaise in the Government about what it stands for. Whatever that may be, it does not include human rights and we must adjust our thinking, and our action, to this reality.

We also face an increasingly hostile human rights environment at the State level, where both major parties in an election year seek to outdo each other in being tough on crime. In the last newsletter of 2009 I warned about the prospect of a law and order auction in State politics and regrettably it seems to be coming. The sensible restraint shown in the past on both sides of politics seems to be evaporating. It is ironic that the State that has been blighted for many years by law and order auctions (NSW) is turning its back on them just as we in Victoria appear to be embracing them.

...

To prepare us better the meet these and other challenges of the future, which are bearing down fast upon us now, Liberty has been undergoing an internal strategic review with the assistance of outside consultants. They provided us last year with a detailed five year action plan and at the end of the year we prepared a 12 month plan, which included recommendations for major organisational reform. The two reports have been uploaded to our website under "About Us". The 12 month plan recommendations were accepted at our annual planning day meeting in February and so we are proceeding with constitutional amendments to implement them.

Essentially, the proposed reforms are intended to enable us better to perform our core function of making submissions to parliamentary and other inquiries on legislation and other human rights issues. We therefore propose to "spin off" from the current committee the policy deliberation and formulation function into a new and expanded "Policy Committee". The old executive will be replaced by a new "Management Committee" which will be beefed up with new positions covering website & communications, membership, fundraising and events. It is proposed the new Management Committee will be solely responsible for organisational matters, leaving the Policy Committee to deal with policy matters. This should overcome the blurring of functions between the current committee and executive.

These changes require approval by the membership and we hope to schedule a Special General Meeting before our annual dinner on 17 July (see details on this page). Any members with questions about these matters should feel free to contact me.

Michael Pearce SC
President
Liberty Victoria

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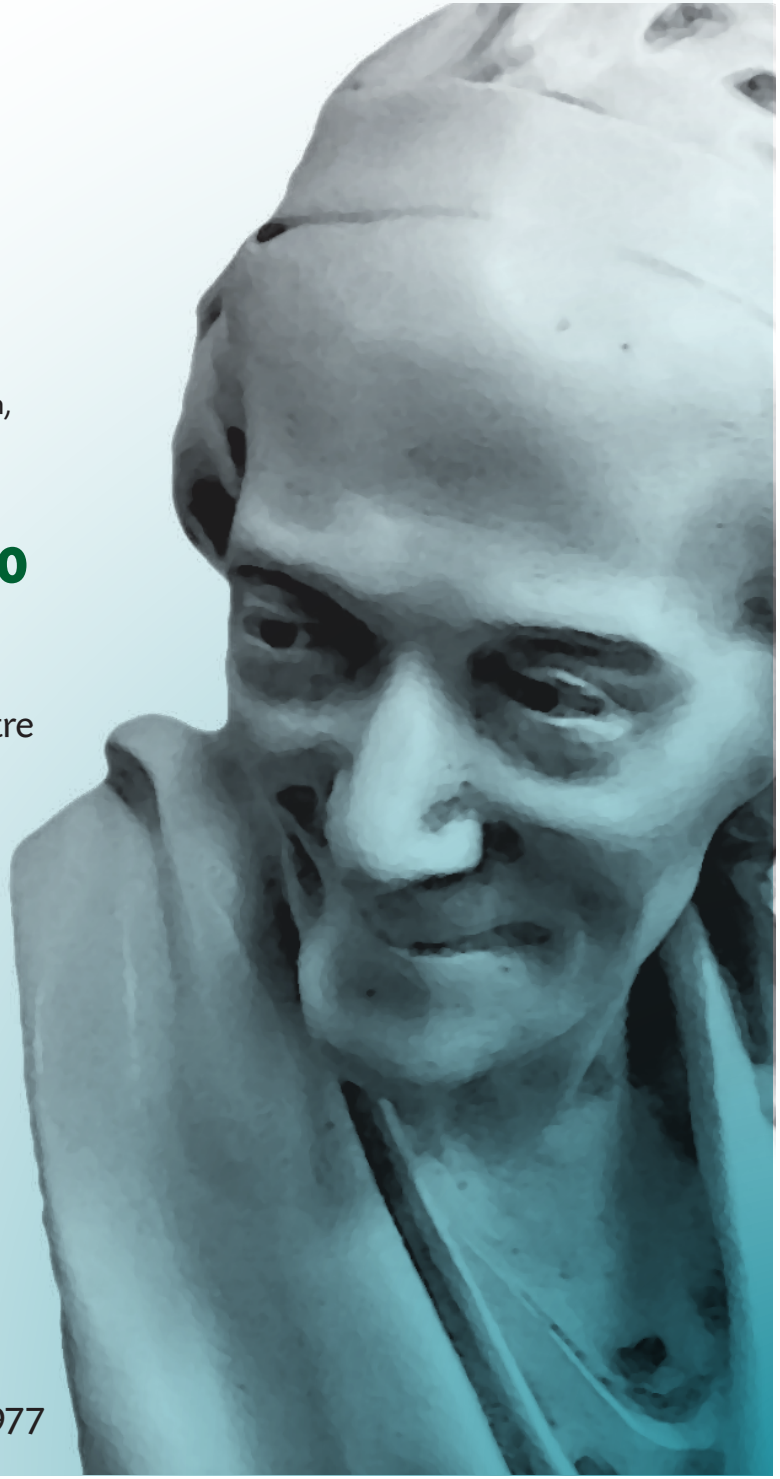

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Yet another backflip | RUDD HAS RETREATED FROM HUMAN RIGHTS

PROFESSOR SPENCER ZIFCAK

Professor and Director of the Institute of Legal Studies at Australian Catholic University and a Vice-President of Liberty Victoria

Last year, the Rudd Government established the National Consultation on Human Rights, chaired by Professor Frank Brennan. The Consultation Panel then embarked on a comprehensive examination of Australia's human rights record, combined with an extensive and wide-ranging review of Australians' attitudes to human rights and the means by which they might best be protected.

The Panel received some 35,000 submissions. This was by far the largest number of submissions ever received by a federal inquiry. In addition, some 6000 people attended 57 public meetings held by the Panel in every part of the country. Of the 35,000 people who sent submissions of some kind, 33,356 expressed a view for or against a Human Rights Act. Of these, 87% of those who addressed the issue were in support of comprehensive human rights legislation to protect the rights and freedoms of Australians. Similarly, the overwhelming majority of those attending the community meetings favoured such a law.

The Panel did not leave it at that. It commissioned independent opinion polling on the question. A random sample of Australians were polled on the question. Of these, 57% were in support, 14% were opposed and 30% were undecided. The Consultation Panel could hardly ignore the message. Consequently, faithfully reflecting the outcome of its deliberations, the Panel recommended that the Government enact an Australian Human Rights Act. The Act would be similar to those enacted over the past decade in New Zealand, the United Kingdom, the ACT and Victoria. The idea was hardly radical or untried.

Certainly there was concerted opposition. This came principally from two sources. Conservative churches argued that a Human Rights Act may require legislation permitting abortion, euthanasia and gay marriage. This concern was misplaced since no such legislation had been necessitated in New Zealand or the UK because of the introduction of human rights legislation in these jurisdictions. The second source of opposition emanated from the pages of The Australian and other tabloid newspapers, principally in the Murdoch group. Here the argument was that an Act would unbalance the present constitutional relationship between the government, the parliament and the judiciary. This concern was also misplaced. The first major inquiry into the operation of the UK Human Rights Act found to the contrary that no significant alteration to that constitutional and administrative balance had been discerned. This did not stop the Murdoch press from continuing to propagate the view, contrary to any sensible analysis of the comparative evidence.

Liberty provided the Consultation Panel with a wide-ranging submission, which can be read on our website. We were strongly in favour of the enactment of comprehensive legislative protection of human rights in Australia. As is noted frequently, a human right cannot be characterised as such unless there is a remedy for its infringement. In the absence of firm legal protection of human rights, any such entitlement has little practical value. Without legal backing, a government may profess to observe and protect human rights but their practical worth is chimerical.

In the face of such strong support, comparative evidence, in-principle desirability and unmeritorious opposition, one might have expected a progressive government to embrace the recommendation that an Act should be adopted. What did the Rudd Government do? It rejected the Panel's recommendation, inserting in its place a series of weak measures packaged grandiosely as a new 'National Human Rights Framework'. Its 'courage' in this respect mirrored that exhibited at the same time in relation to the refusal to process asylum seekers from Afghanistan and Sri Lanka and its extended deferral of any concerted action to combat climate change. Its leadership credentials in relation to civil liberties and human rights have been shredded at a stroke.

But what of the 'National Framework'? This consists of measures such as the following:

- A grant to the Australian Human Rights Commission to engage in community education about human rights
- A further grant to non-governmental organizations to educate their members and the community about human rights
- A further grant to educate the public service about its human rights responsibilities
- A requirement that Ministers introducing legislation into parliament provide a statement that the legislation is compatible with human rights
- A new parliamentary joint-committee to examine the consistency of legislation with human rights.

No one can quibble with the allocation of funds to educate the community about human rights and responsibilities. But this does nothing to redress existing injustices suffered by many minority groups in the Australian community. We learn that such injustices should not occur but are left without any ready remedy for their amelioration.

Ministers are asked to furnish a statement of human rights compatibility to the parliament. But the human rights with which legislation should be compatible is, seemingly, left open, perhaps with some vague reference to Australia's international treaty obligations. The parliamentary committee runs into the same definitional difficulty. And, in any case, being an all-party committee, it can be expected for the most part to make recommendations by majority in the interests of the governing party. Asked whether the Joint Parliamentary Committee on Human Rights in the UK House of Commons could have done its path-breaking work without the backing of a legal instrument, its Secretary made it clear in an address to Australian lawyers that plainly it could not.

The new human rights framework is in essence nothing more than window-dressing. The decision to reject the recommendation for a Human Rights Act is nothing less than pusillanimous. Perhaps the only positive is that the Attorney-General has announced that the framework will be reviewed – in 2014. The campaign for effective human rights protection will then no doubt resume. In the interim Australia still remains the only nation in the Western World without either a constitutional or legislative rights charter. The Government should be ashamed.

Asylum policy backsteps

JESSIE TAYLOR

Secretary of Liberty Victoria

The autumn issue of the Liberty Victoria newsletter cannot report good news for refugees. Once again we are seeing headlines shrieking about numbers, floods, hordes and invasions. Talkback callers and shock jocks are building a battle against asylum seekers, in the guises of banning the burqa, punishing people smugglers and - thank you, David Oldfield - barbecuing refugees on the electric fences surrounding the Christmas Island detention facility.

April 2010 brought the extraordinary announcement of the suspension of processing of asylum claims from Afghan and Sri Lankan nationals arriving in Australia by boat. This announcement was met with slack-jawed disbelief by the refugee sector; not since the dark old days of the Howard government have we seen such bizarre, cynical and discriminatory measures taken against asylum seekers. The Human Rights Law Resource Centre - a friend of Liberty Victoria - quickly took action to brief three respected barristers to provide advice on the legal implications of the decision by the Federal Government to suspend processing of asylum claims made by Sri Lankan and Afghan nationals.

Debbie Mortimer SC, Chris Horan and Kathleen Foley provided their joint opinion as this newsletter was written.

Counsel's view was that the policy involves discrimination on the basis of nationality and country of origin, breaching the non-discrimination principle enshrined in Article 3 of the UN Convention on the Status of Refugees, as well as Article 26 of the International Covenant on Civil and Political Rights (ICCPR) and Article 2 of the Convention on Elimination of Racial Discrimination (CERD).

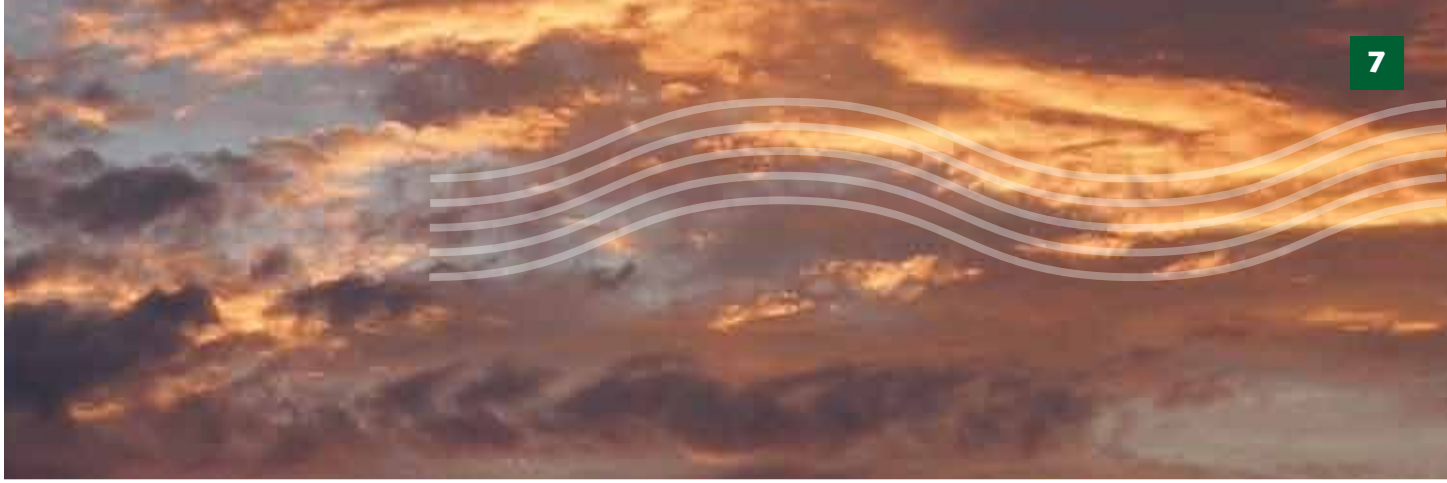
Counsel also advised that the prolonged detention of people during the so-called suspension of their claims amounts to arbitrary detention, in breach of Article 9(1) of the ICCPR. In the domestic law, this practice could be seen as outside the power of the Migration Act 1958 (Cth), defeasible by an ordinary challenge under orthodox administrative law or through other legal proceedings.

Legally, and from a lobbying and advocacy perspective, it is very useful to have this considered advice from three respected barristers on hand. On the ground, however, there has been sinister, swift and merciless application of this new policy, and already Sri Lankan and Afghan families are being refused. The Minister for Immigration's announcement that the "situations in these countries is evolving" is deeply

concerning, as there is no reliable evidence that Sri Lankan Tamils and Afghan Hazaras (in particular) are in any less danger now than they were before. Indeed, evidence keeps pouring in of ethnically motivated executions, roadside bombings, and attacks on innocent civilians (including most recently a poison gas attack on a girls' school in Afghanistan).

On Christmas Island, anecdotal evidence suggests that Immigration Department officials are using seriously questionable evidence as a basis for refusing asylum applications. A prime example of this is the Department's reported reliance on a 'security map' issued by the Afghan government, purporting to identify areas of the country which are safe for the return of Hazaras. Primitive facilities on Christmas Island mean that migration agents and lawyers do not have regular internet access, and cannot conduct the necessary on-the-spot research to rebut and answer sketchy country information when it is put to their clients during interviews. DIAC officers, on the other hand, have more reliable access to the internet. This all means that Afghan and Sri Lankan applicants on Christmas Island are faced with a barrage of adverse country information - much of it not worth the paper it is printed on, from an evidentiary perspective - but they are denied the opportunity to respond meaningfully to it, and, as such, it is allowed to stand as fact. It is on the weight of such evidence that families are now being refused protection.

The suspension announcement, the passage of the Anti People Smuggling and Other Measures Bill, and the re-opening of the detention camp at Curtin Army Base (a place that even Philip Ruddock called "primitive") have given us a horrible shock. The evidentiary and procedural horror stories emerging from Christmas Island are deeply concerning from the perspectives of natural justice and the rule of law. The bottom line is that asylum seekers remain among the most vilified and vulnerable people in Australian society, and are still being used as pawns in a political points-scoring game - almost ten years after the Tampa election. Liberty Victoria encourages you to engage with your local member of parliament and to put pressure on all political parties to ensure that the rights of asylum seekers are not thrown overboard in the run up to Election 2010.



On the ground, however, there has been sinister, swift and merciless application of this new policy

Beware the privacy privateers

CATHERINE DEVENY'S DEMISE IS ANOTHER CAUTIONARY TALE IN THE TWITTER AGE

MICHAEL PEARCE SC

President of Liberty Victoria

Catherine Deveny's demise at The Age is yet another cautionary tale about the shrinking of privacy through new technology. Her comments about the Logies would previously have been confined to her immediate companions. Thanks to Twitter they have been broadcast far and wide. The offence – or, more likely, mirth – they might have provoked in a small group of confidants has been amplified by Twitter throughout the community.

Deveny was, of course, the author of her own demise as she chose to tweet her controversial thoughts. But the availability and immediacy of the technology intrude upon the normal choices and judgments which people make. Had Deveny only confined her comments to her companions, it is unlikely they would have been publicly repeated. They might have been repeated in private and to others who would have instinctively understood the private nature of the communication and the confidence attaching to it. Twitter cuts right across that and brings into the public realm many things that would previously have remained private.

We are at a kind of evolutionary disjunct between our old notions of the public and private spheres and the means of communication now widely available. When letters were the primary means of written communication we had the "24 hour rule" to save us from ourselves. That rule suited the technology because it would normally take some time after the letter was written before it might be committed to the post. In that time we could calm down, talk things over with someone, and rethink.

With modern communication this pause for reflection is lost. Email, SMS and Twitter are all instantaneous and, unlike the phone call, create a permanent record. At the push of a button or the click of a mouse people everywhere and all the time are firing off recorded messages of outrage and disgust which, in days gone by, would never have been sent. Especially in the young, the prospect of regretting the finely crafted insults and barbs they have just assembled is remote. By the time that regret strikes, it is too late. Tensions thus mount and conflicts escalate. Is it any wonder the world is going crazy?

Then there are those who inadvertently reveal their private thoughts, like poor Gordon Brown. Until recently, OB microphones were huge things that looked like busbies and were attached by cable to the recorder. Gordon Brown would have noticed one of those under his nose and it could never have recorded him as he sped off in the car from his fateful encounter. But he was dealing with a tiny thing, easily forgotten while attached to his lapel and which continued to transmit radio waves to the receiver as his car moved off.

Brown's case is thus much more deserving of sympathy than Deveny's. But both measure the contraction of the private sphere in modern life, as well as the role of the media in it. The media tend only to celebrate and feed on the phenomenon of shrinking privacy. They pander to public prurience and curiosity with little regard to the real public interest.

It is valuable to recall the case of US President Franklin Roosevelt from the 1930s and 1940s. As we now all know he suffered from polio and was confined to a wheelchair except for public appearances when he would stand with discrete assistance. This was never publicly disclosed during the term of his presidency. Indeed, on one occasion he fell to the ground in front of the entire Washington press corps. Not one photograph was taken of the stricken President, sprawling helplessly before the throng. The photographers rightly judged it to be private and to be irrelevant to his performance as President.

Fast forward 50 years to the presidency of Bill Clinton when his predilection for fellatio was front page news. How far we have sunk.

It is little better in this country: witness the public revelations of the relationship between Gareth Evans and Cheryl Kernot and the more recent disclosures concerning John della Bosca in New South Wales. The recent "outing" of a New South Wales Minister shows this trend is only likely to continue. The public interest pretexts put forward by the journalists in these cases were as flimsy as they were disingenuous.

Where all this will lead is difficult to gauge. Undoubtedly we must make some adjustments to our notions of privacy and recognise that it ain't what it used to be. But in most of us there will remain a desire for some private space in our lives, where we control who enters and who does not. If you doubt the need for such a space, take a look at the German film The Lives of Others with its grim portrayal of a society where there were no secrets.

The private sphere is under constant attack from new technologies not just in communication but from ubiquitous CCTVs, Google Earth, Google Street Views, airport full body scanners, ID scanners at night clubs and in taxis, Government database matching, ID cards masquerading as health cards, social networking sites that never delete profiles. The list goes on and on and grows continuously.

One modest proposal to help us hold on to a small measure of privacy was put forward in 2008 by the Australian Law Reform Commission. It was for a legislative right of privacy, which would permit people whose privacy has been seriously invaded without any justification to sue for damages. There is currently no such right in Australian law and the privacy laws are piecemeal and inadequate.

The Law Reform Commission's proposal was shouted down by the mainstream media organisations, which also denied space to rival views. They believe in free speech but only up to a point and certainly not when it might threaten their profits.

The Federal Government has simply ignored this recommendation. In characteristic fashion it has spurned good policy for bad politics. Should any of its members be embarrassed by revelations from their private lives, their predicament will more likely resemble Catherine Deveny's than Gordon Brown's.

Courtesy of The Age newspaper.

Equal Opportunity 2010 | REVIEWING VICTORIA'S NEW EQUALITY LAW

RACHEL BALL

Director of Policy and Campaigns at the Human Rights Law Resource Centre (www.hrlrc.org.au) and a committee member of Liberty Victoria

A new equality law was passed by Victorian Parliament on 15 April 2010. The Equal Opportunity Act 2010 heralds a long-awaited revamp of Victorian anti-discrimination law to reflect contemporary understandings of the nature of inequality and the mechanisms necessary to address it.

The new Act recognises that individual complaints procedures are poor weapons against discrimination that is entrenched in our institutions and social structures. The Equal Opportunity Act 1995, like other State and Commonwealth anti-discrimination laws, focused on responding to isolated instances of discrimination. This is an important function of an anti-discrimination regime, but it needs to be supplemented by mechanisms capable of addressing systemic discrimination.

Systemic problems cannot and should not be addressed through individual complaints. Violence against women, barriers to participation in public life for people with disability and Indigenous disadvantage (to name a few) are all mired in discriminatory frameworks, institutions and attitudes. No one expects the new Act to instantly solve these pervasive and persistent problems, but it is vital that our laws recognise and respond to systemic forms of discrimination.

The new Act does this by including an express positive duty to eliminate discrimination, strengthening the Victorian Equal Opportunity and Human Rights Commission's role in issuing guidelines and action plans and providing new powers for the Commission to conduct investigations and public inquiries into serious instances of systemic discrimination.

Disappointingly – and contrary to the recommendations contained in the major review of the Equal Opportunity Act 1995 conducted by Julian Gardner in 2007-2008 – the Act fails to provide protection from discrimination on the basis of homelessness and irrelevant criminal record.

The new Act also retains many of the permanent exceptions in the Equal Opportunity Act 1995, (including those for religious groups and same sex clubs). Future review and reform of the Act should recognise that permanent, blanket exceptions to the operation of equal opportunity laws perpetuate unfair and unreasonable discrimination.

As the Commonwealth Government embarks upon its project to consolidate Commonwealth anti-discrimination laws, it should take note of developments in Victoria. Our new Equal Opportunity Act brings us to a new era of achieving real and meaningful equality for all.

Starting a Dialogue | EXAMINING THE IMPLICATIONS OF R v MOMCILOVIC

MICHAEL STANTON

Barrister and committee member of Liberty Victoria

Since the enactment of the Charter of Human Rights and Responsibilities Act 2006 ("the Charter"), there has been strong disagreement concerning the correct methodology to be employed when interpreting legislation consistently with the Charter's interpretative provision (section 32).

Section 32 provides:

> "So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights."

That disagreement has been largely resolved by the Court of Appeal judgment of R v Momcilovic & Ors [2010] VSCA 50 (17 March 2010) ("Momcilovic"), although the case raises as many questions as it answers for the Victorian Parliament.

THE FACTS

The applicant sought leave to appeal against conviction and sentence after being found guilty of one count of trafficking in a drug of dependence (methylamphetamine) at the County Court of Victoria. The applicant was sentenced to two years and three months' imprisonment, with a non-parole period of 18 months.

At trial the applicant gave evidence and denied all knowledge of the drugs, which were found at various locations in her apartment. The applicant's partner, who lived with the applicant, gave evidence that the drugs were in his possession for the purpose of trafficking, and that to his knowledge the applicant was unaware of the existence of the drugs.

THE REVERSE ONUS

Section 5 of the Drugs, Poisons and Controlled Substances Act 1981 (Vic) ("the Act") provides that when drugs are located at a premises occupied, used, enjoyed or otherwise controlled by a person, that person is deemed to be in possession of the drugs unless he or she "satisfies the court of the contrary." That reverse onus provision has been interpreted by Victorian Courts as requiring that a person must prove, on the balance of probabilities, that the drugs were not in his or her effective possession ("a persuasive onus").

The Act also contains a provision, s 73(2), which deems that the possession of more than a certain quantity of drugs is prima facie evidence of trafficking. Accordingly, in the circumstances of the applicant, she was deemed not only to be in possession of the drugs, but also her possession was deemed to be for the purpose of trafficking.

The danger of reverse onus provisions, when they require an accused person to satisfy a jury or judicial officer of a fact on the balance of probabilities, is that they create the possibility that a person can be found guilty of an offence even though there is a reasonable doubt in the mind of the fact-finder as to whether the person had a defence at law. Accordingly, reverse onus provisions challenge the golden thread of the criminal law that it is the duty of the prosecution to prove a person's guilt beyond reasonable doubt.

SUBMISSIONS

At the appeal both the Attorney-General for the State of Victoria ("the A-G"), and the Victorian Equal Opportunity and Human Rights Commission ("VEOHRC") intervened. The Human Rights Law Resource Centre ("HRLRC") was granted leave to appear as amicus curiae.

The applicant submitted that s 5 of the Act should, even without the effect of the Charter, be read as imposing only an evidentiary onus upon the accused. That would mean that if there was some evidence that the applicant did not have knowledge of the drugs, then the Crown would be required to prove effective control to the criminal standard of beyond reasonable doubt.

It was submitted by the applicant that, if s 5 could not be interpreted as imposing only an evidentiary onus upon an accused, then s 32(1) of the Charter should be used to re-interpret the provision as imposing such an onus upon the accused, for otherwise it would breach her right to the presumption of innocence as protected by s 25(1) of the Charter, which provides:

> "A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law."

The applicant submitted that s 5 of the Act constituted a disproportionate limitation to her human rights pursuant to s 7(2) of the Charter, which provides:

> "A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom..."

To that end, the applicant relied upon judgments of Courts in comparative jurisdictions with human rights instruments where similar provisions had been read to only impose an evidentiary burden.

In the alternative, it was submitted by the applicant that if the Court could not read s 5 of the Act consistently with the Charter, then the Court should make a declaration of inconsistent interpretation pursuant to s 36(2) of the Charter. Under the "dialogue model" of the Charter, that would not invalidate the legislation, but would require the Legislature to respond to the declaration.

The Crown submitted that s 5 of the Act, in imposing a persuasive onus on an accused, was a proportionate limitation to the right to the presumption of innocence and accordingly there was no need for re-interpretation. In the alternative, the Crown submitted that s 5 could not be re-interpreted by s 32(1) of the Charter to impose only an evidentiary onus on the applicant, and the only option would be for the Court to make a declaration of inconsistent interpretation.

The A-G also submitted that s 5 of the Act imposed a proportionate limitation to the right to the presumption of innocence. However, unlike the Crown, the A-G submitted

in the alternative that s 5 could be read down as imposing only an evidentiary onus upon an accused, and therefore a declaration of inconsistent interpretation should not be made.

Both the VEOHRC and HRLRC submitted that s 5 of the Act should be interpreted through the prism of the Charter as imposing only an evidentiary onus upon an accused.

Importantly, there was significant disagreement between parties concerning the proper methodological approach when considering the operation of the Charter's interpretative provision. Both the A-G and the VEOHC submitted that the proper "stepped" approach, as had previously been applied by Victorian Courts and Tribunals, was to:

> "(1) Ascertain the meaning of the relevant provision by applying ordinary principles of statutory interpretation.
>
> (2) Determine whether the provision thus construed limits a Charter right.
>
> (3) If so, decide whether that limit is a 'reasonable limit [which] can be demonstrably justified', under s 7(2) of the Charter.
>
> (4) If (but only if) the limit on the right is unjustified, apply s 32(1) of the Charter to determine whether it is possible to reinterpret the relevant provision so that it is compatible with the relevant Charter right."

In contrast, the HRLRC submitted that s 32(1) of the Charter should affect the meaning of statutes at the first step: the "ordinary" meaning of a statute was to be read in light of the Charter.

REASONS FOR JUDGMENT

In short, the Court of Appeal (Maxwell P, Ashley and Neave JJA) unanimously held that:

> "(1) Section 32(1) does not create a 'special' rule of interpretation, but rather forms part of the body of interpretive rules to be applied at the outset, in ascertaining the meaning of the provision in question.
>
> (2) Accordingly, when it is contended that a statutory provision infringes a Charter right, the correct methodology is as follows:
>
> Step 1: Ascertain the meaning of the relevant provision by applying s 32(1) of the Charter in conjunction with common law principles of statutory interpretation and the Interpretation of Legislation Act 1984 (Vic).
>
> Step 2: Consider whether, so interpreted, the relevant provision breaches a human right protected by the Charter.
>
> Step 3: If so, apply s 7(2) of the Charter to determine whether the limit imposed on the right is justified."

The Court held that s 32(1) of the Charter affects the interpretation of all statutes at the first step and that a party does not need first to demonstrate that a given human right is disproportionately limited before s 32(1) will apply.

However, in holding that s 32(1) was not a "special" rule of interpretation (and potential re-interpretation), the Court held that it was not possible to interpret s 5 of the Act as imposing only an evidentiary onus upon an accused. For the Court, that would exceed the limits of possible interpretation permitted by the Charter. To that end, the Court contrasted the Charter with human rights instruments in comparative jurisdictions. In particular, the Court held that s 32(1) of the Charter was not as far-reaching as s 3(1) of the Human Rights Act 1998 (UK), which provides:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

The Court noted that, unlike the above provision, s 32(1) of the Charter required that statutory provisions be interpreted "consistently with their purpose." In addition, the Court held that, had Parliament intended for s 32(1) to enable the interpretation of statutes in the manner submitted by the applicant, the A-G, VEOHRC, and the HRLRC, then it would have said so expressly. To that end, the Court placed significance on what was said, and indeed what was not said, in the extrinsic material to the Charter.

The Court held in its "tentative" view that:

"Compliance with the s 32(1) obligation means exploring all 'possible' interpretations of the provision(s) in question, and adopting that interpretation which least infringes Charter rights. What is 'possible' is determined by the existing framework of interpretive rules, including of course the presumption against interference with rights. That is a powerful presumption..."

Nevertheless, the Court held that powerful presumption could not result in s 5 of the Act being read down as imposing only an evidentiary onus upon an accused, as such an interpretation was beyond the realm of "possibility" within the meaning of s 32(1) of the Charter.

The Court further held that s 5 of the Act not only engaged the right to the presumption of innocence as protected by s 25(1) of the Charter, but constituted a disproportionate limitation to that right. To that end, the Court noted that neither the Crown nor the A-G had provided any evidence to establish that the effective prosecution of drug offences relied upon the reverse onus. The Court therefore held that it proposed to make a declaration of inconsistent interpretation pursuant to s 36(2) of the Charter. The Court noted that such declarations were the defining feature of the "dialogue model" of human rights instruments.

The Court also granted leave and allowed the applicant's appeal against sentence due to a specific error concerning the quantity of drugs, and re-sentenced the applicant to 18 months' imprisonment, with as much of that sentence as had not already been served to be suspended for a period of 16 months. To that end, the Court had regard to the fact that the matter had been an important test case on the operation and effect of the Charter.

COMMENT

The judgment of Momcilovic has resulted in the applicant being convicted under a law that the Court of Appeal has necessarily found is not "demonstrably justified in a free and democratic society based on human dignity, equality and freedom." It is a matter for the Victorian Parliament as to whether s 5 of the Act, and similar laws that impose reverse onuses on accused persons, should be amended so that they are compatible with human rights. If the dialogue model is to be taken seriously by Parliament, then such declarations should result in legislative amendment.

It will also be a matter for the Parliament to determine whether the Charter should be amended so that s 32(1) allows for the re-interpretation of statutes in the manner that was submitted was permissible by the A-G in Momcilovic. What is clear from Momcilovic is that the Court of Appeal will not interpret the Charter's interpretative provision as being as far-reaching as its British counterpart without that being clearly provided for by the Legislature.

In a political arena where the debate on law and order and smart justice has seen a dramatic increase in the enactment of wide-ranging legislation that affects the rights of individuals, it is vitally important that the Legislature does not assume that the Courts will read such legislation down to be consistent with human rights norms. The Court of Appeal has made it plain that while it will engage in dialogue through the making of declarations of inconsistent interpretation, the role of law-making is squarely the province of the Legislature.

As such, if the Victorian Government is as committed to human rights as it proclaims to be, then it has a special responsibility to not only amend legislation that has been found to breach human rights, but also not to enact future legislation that does not meet the high standard of being demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

Help! HUMAN RIGHTS FILM MAKERS CALL FOR YOUR SUPPORT

Last year, Jessie Taylor (Secretary of Liberty Victoria) and David Schmidt travelled to Indonesia with a young Afghan interpreter and met 250 refugees in 11 places of detention across the archipelago. Together, they created 'Between the Devil and the Deep Blue Sea' - a film that goes behind the bars of an Indonesian refugee jail, and into the lives of would-be boat-people.

The film is well on its way, but Jessie and David need the help of Liberty Victoria supporters to get the film finished. Can you help?

SYNOPSIS

There is growing concern about the number of asylum seekers coming by boat from Indonesia to Australia. Are these people actually refugees? How do we know if their claims are genuine? What pushes them to leave their own countries? Have Australia's recent policy changes opened the floodgates?

Through hidden camera footage and interviews with asylum seekers, Between the Devil and the Deep Blue Sea examines what it takes to turn a person into a boat person.

Meet Hussein, an Iraqi father who has been waiting in detention in Indonesia for 4 years with his wife and 4 children. He can't work, can't provide for his family, and can't escape the feeling that his life is grinding to a halt. He wants the best for his family but doesn't know how long he must wait before he can provide for them, make plans for them and send his children to school each day. Will he reach Australia by waiting in some unseen 'queue'? Or will he get on a boat?

Between the Devil and the Deep Blue Sea looks at the complexities of the current system and examines the reasons for it being this way. Is the system working? What does the 'Indonesian solution' look like from within? What are the financial and diplomatic costs? What are the human costs? Can we really afford to maintain this system?

At the core of this film is the tension between 'the system' and the longing of a father to start a new life for his children. We see the heartbreaking decision to get on a boat, the full awareness of the possible consequences of it, and all of the living conditions endured during the waiting period. We see this through the eyes of young men, unaccompanied children, families with babies, and widowed mothers with young children. The stories are told in an unsettling manner. Real, raw, unrelenting and emotive.

Will Hussein return to Iraq, defeated? Or will he defy the system and head out into the deep blue sea?

SEE THE TRAILER AT
www.deepblueseafilm.com

HELP FINISH THIS FILM

Between the Devil and the Deep Blue Sea co-creators know that they are sitting on extraordinary, unique and never-before-seen footage. It was obtained by adventure, risk, and somehow - luckily - being in the right place at the right time. This film is begging to be finished.

Through generous contributions from the Amnesty International and a few other donors, the production team is on its way to getting this film onto a screen near you.

However, this film cannot be finished without further donations and support from the public.

CAN YOU donate to the Deep Blue Sea Fund? Payment is accepted by PayPal, direct bank transfer or cheque. Visit the website for further information, and to see what rewards you are eligible for in return for donations of $20, $50, $100, $500, $1000 & $5000+.

This film is being built from the grass roots up - let every dollar you give be a statement of support for asylum seekers, and a statement against the use of refugees as political pawns!

Human rights in South Africa today

A REPORT FROM THE GEORGE BIZOS SC LECTURE

TRISH CAMERON
Office manager for Liberty Victoria

On 5 March 2010 Liberty Victoria, in conjunction with The Castan Centre for Human Rights Law, was proud to present George Bizos SC and his lecture on 'Human Rights in South Africa Today'.

Bizos is widely recognised as one of South Africa's preeminant human rights lawyers. He served as counsel to Nelson Mandela from the mid 1950s onwards, and worked as part of the team that defended African National Congress leaders including Mandela in the Rivonia Trial in 1963-4. He was counsel in numerous political trials including the Biko, Timol, Aggett inquests, the Totivo ja Toiva Trial of the Namibians, the Bram Fischer Trial and the UDF leaders charged with treason in the Delmas Trial. He defended Winnie Mandela in numerous trials from the late 1950s onwards, as well as Albertina Sisulu, Barbara Hogan and other women who defied the carrying of passes from the mid 1950s.

After the end of Apartheid Bizos was appointed by President Mandela to South Africa's Judicial Services Commission and asked to recommend candidates for judicial office and reform of the judicial system. He was reappointed to this position by President Mbeki.

Bizos led the team that defended Morgan Tswangarai in Zimbabwe on charge of treason in 2003-4 . He led the South African Government team in arguing the death penalty was unconstitutional. He represented many families impacted by apartheid when he opposed applications for amnesty at the Truth and Reconciliation Commission. He served as a Judge on Botswana's Court of Appeal between 1985 and 1993. Since 1991 he has acted as Counsel at the Legal Resources Centre's Constitutional Litigation Unit. He has received numerous South African and international awards for his work in promoting democracy and human rights.

Bizos came to South Africa in 1941 as a young World War II refugee and would go on to study at university there in 1948. This is where he met and became friends with Nelson Mandela. In his own words, he 'became radicalised' after seeing firsthand the treatment of black and coloured students. During his lecture Bizos spoke of white attitudes towards other South African cultural groups during apartheid, the parliamentary Acts that were passed to further Apartheid and the day to day reality of living within a rigid class system that separated people depending on the colour of their skin. He spoke of the judicial system, and of how some senior members of the judiciary were responsive but many were not. He spoke of the deep hunger that resided for freedom, and of the increasingly vitriolic propaganda which spread about freedom activists such as Mandela. He spoke of the turning point of the Riviona trial and Mandela's famous statement from the docks: 'This is the struggle of the African people, inspired by their own suffering and experience. It is a struggle for the right to live. I have cherished the ideal of a democratic and free society, in which all persons live together in harmony and with equal opportunity. It is an ideal which I hope to live for and achieve. But, if needs be, my Lord, it is an ideal for which I am prepared to die.'

Bizos then spoke about the telegrams that came in support of the accused, including from the Australian trade union movement, and of Mandela's later determination not to leave jail until all of his fellow activists were free. He reflected on the popularity of the post-apartheid constitution, the changes he witnessed around him, and the growing optimism of the South African people.

Bizos gave insights into the huge number of decisions that needed to be made, such as the creation of a new parliamentary system, and the sometimes humorous problems associated with giving a name to a head of government that did not remind people of the past. He concluded by saying that the time since the end of apartheid was nowhere near enough to undo the injustices that had occurred or to close the chasms between rich and poor. However, South Africans continue to work hard with those goals in mind.

Liberty would like sincerely to thank George Bizos for delivering a powerful lecture on the fortunes of South Africa. Thanks also go to the Castan Centre for co-hosting the event, Laiki Bank for their sponsorship, Dinos Toumazos for his continued support, and all who attended.

A recording of the lecture is available to view on our website www.libertyvictoria.org.au

LIBERTY VICTORIA

Membership FORM

Please fill out the form below and return to address on the bottom right.

This is application is for ☐ **A NEW MEMBER** ☐ **MEMBERSHIP RENEWAL**

If you are renewing please skip to green sections, otherwise if you are a new member please complete the following:

I (NAME),

wish to become a member of the Victorian Council For Civil Liberties Incorporated (LIBERTY VICTORIA).

MY OCCUPATION

In the event of my admission as a member, I agree to be bound by the constitution of the council for the time being in force.

SIGNATURE OF APPLICANT: DATE:

Contact Details

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ADDRESS

POSTCODE

TELEPHONE (BH) (AH)

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Send me correspondence by ☐ **EMAIL** ☐ **POST** ☐ **EMAIL & POST**

MEMBERSHIP/RENEWAL FEES *2009-2010*
☐ **$55 INDIVIDUAL** ☐ **$25 CONCESSION*** ☐ **$150 BUSINESS**
☐ **$90 VOLUNTEER ORGANISATION** ☐ **$90 JOINT MEMBERS (2 ADULTS AT SAME ADDRESS)**

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WHO WE ARE

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

Liberty is an independent organization which does not receive any government funding. It relies solely on membership fees, donations and grants from philanthropic trusts.

Becoming a member – Joining Liberty is a significant contribution which you personally can make to the promotion of the individual freedoms and rights which we all value.

CONTACT US/RETURN

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