DownUnderAllOver
Developments around the country

FEDERAL

Australia moves to ratify international human rights treaties on torture and disability

The Attorney-General, Rob McClelland, and the Minister for Foreign Affairs, Stephen Smith, have announced that the Rudd government is taking steps to ratify the UN Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention against Torture.

The Convention on the Rights of Persons with Disabilities entered into force on 3 May 2008 and enshrines the civil, political, economic, social and cultural rights that are necessary to ensure that people with disabilities have the capacity and opportunity to fully participate in and contribute to our community. It sets out a detailed code for the implementation of human rights for persons with disabilities.

The Optional Protocol to the Convention against Torture provides for the establishment of a system of regular visits to places of detention, including prisons and immigration detention centres, to be carried out by independent international and national bodies. There is substantial evidence that independent and regular monitoring of places of detention can substantially reduce the incidence of ill treatment.

In the case of the Disabilities Convention, the Rudd government has stated that it 'is committed to becoming a party to it as quickly as possible. A National Interest Analysis will be tabled in the Parliament in the coming months.' The government will also soon begin consulting the states and territories on the Optional Protocol to the Convention, which provides a mechanism by which individuals and groups may submit a complaint to the Committee on the Rights of Persons with Disabilities that a State has breached its obligations under the Convention, provided the complainant has first exhausted domestic remedies.

In the case of the Optional Protocol to the Convention against Torture, the federal Attorney-General is consulting State and Territory Attorneys on Australia's acceding to the instrument — 'a necessary step towards Australia becoming a party to this important instrument,' according to Mr McClelland.

The Human Rights Law Resource Centre's submission on the importance of ratifying the Disabilities Convention is available at <www.hrlrc.org.au> under Policy Work>Domestic Submissions>Disability Rights: Australia Urged to Ratify UN Convention (Feb 2008).

PHILIP LYNCH is Director of the Human Rights Law Resource Centre

Federal government to legislate to address same-sex discrimination

The federal government has announced that it will introduce legislation to remove discrimination from a wide range of Commonwealth laws during the winter sittings of Parliament.

The legislation will give effect to many of the recommendations contained in HREOC's landmark report, *Same-Sex: Same Entitlements*, which focused on financial and work-related entitlements, together with the findings of a government commissioned audit of Commonwealth laws, which identified other areas of discrimination. According to the federal Attorney-General, 'The changes will provide for equality of treatment under a wide range of Commonwealth laws between same-sex and opposite-sex de facto couples. Importantly the reforms will also ensure children are not disadvantaged because of the structure of their family.'

The Human Rights Law Resource Centre's submission to the HREOC inquiry is available at <www.hrlrc.org.au> under Policy Work>Domestic Submissions>Discrimination against Same-Sex Couples (June 2006).

PHILIP LYNCH is Director of the Human Rights Law Resource Centre

Senate to review Sex Discrimination Act

The Senate Legal and Constitutional Affairs Committee has announced that it will review the Sex Discrimination Act. Terms of reference are at <www.aph.gov.au/senate/committee/legcon_ctte/sex_discrim/info.htm>, and submissions are due by 1 August 2008.

ACT EDITORIAL COMMITTEE

Freedom, Respect, Equality, Dignity: Action! — Report to UN on economic, social and cultural rights in Australia

In April 2008, a major NGO Report was submitted to the UN Committee on Economic Social and Cultural Rights regarding Australia's implementation of the *International Covenant on Economic, Social and Cultural Rights*.

The Report, entitled *Freedom, Respect, Equality, Dignity: Action* was jointly prepared by the Human Rights Law Resource Centre, the National Association of Community Legal Centres and Kingsford Legal Centre. A further 30 NGOs with specific human rights and subject matter expertise made substantial contributions to the Report. The Report is supported, in whole or in part, by over 100 NGOs.

The Report was intended to assist the Committee to prepare a List of Issues for Australia during the Pre-Sessional Working

Group meeting from 19 to 23 May 2008. It is also intended to ensure that the Committee is equipped to engage in a rigorous and constructive dialogue with Australia when it is reviewed by the Committee in 2009.

The Report is a comprehensive and constructive analysis of the state of ESC rights in Australia and makes a range of targeted recommendations to address disadvantage and poverty. The Report documents a number of areas in which Australia is falling short of its obligations under the *International Covenant on Economic, Social and Cultural Rights*.

It focuses on areas that have been the subject of extensive NGO activity and research in Australia. Subjects detailed in the Report include:

- lack of legal recognition and protection of economic, social and cultural rights;
- nature and extent of poverty in Australia and the need for a comprehensive national poverty reduction strategy;
- Indigenous self-determination and disadvantage;
- current housing crisis and the significant problem of homelessness;
- groups within society that remain vulnerable to discrimination, such as Indigenous peoples, women and children, people with disability, asylum seekers and gay and lesbian couples;
- violence against women;
- inadequacy of income and social security supports;
- regression of workers' rights under Work Choices;
- crisis in mental health in Australia and the inadequacy of mental health care;
- chronic under-funding of both public health care and education; and
- deleterious impacts of Australia's immigration law and policy on families and children.

The Report includes recommendations as to concrete steps that Australian authorities should take to bring Australia more fully into compliance with its obligations under the *International Covenant on Economic, Social and Cultural Rights*: an Australia in which all persons can live with freedom, respect, equality and dignity.

The Report is available at <www.hrlrc.org.au> under Policy Work>International Submissions> FREDA: NGO Report to UN Committee on Economic, Social and Cultural Rights (April 2008).

PHILIP LYNCH is Director of the Human Rights Law Resource Centre

Security for costs in public interest cases: precedent set

Earlier this year, Lawyers for Forests Inc (LFF) lodged an application under the Environment Protection and Biodiversity Conservation Act in the Federal Court challenging the decision of the federal Minister for the Environment to approve the Gunns pulp mill in the Tamar Valley in northern Tasmania. Gunns, through its lawyers Freehills, applied for security for costs.

An application for security for costs is commonly made when, as here, a respondent in proceedings is concerned that the applicant would be unable to pay a costs order if the applicant failed. LFF agreed that it has very limited funds, and said that security for costs order would effectively prevent it from litigating. Gunns submitted that members of LFF would be able to fund the continuing litigation, so that security for costs order should not be seen as stifling the case.

The Court rejected that submission and said that:

> there is a relevant difference between members of a non-profit voluntary association formed for some public policy purpose and shareholders of a company. Members of LFF do not stand to gain any financial benefit from the proceeding. The proceeding is one in which LFF sues for its own benefit to advance a purpose or purposes for which it was formed.

Gunns also submitted that LFF is not authorised to bring the proceeding because LFF's objects and purposes are about protecting and conserving Australia's native forests which are in conflict with the grounds in the application. The grounds in the application include reference to the impact that the toxic effluent to be discharged from the pulp mill will have on the marine environment. The effluent will contain dioxins and furans which are among the most toxic chemicals known to science. The Court found Gunns' submission to be without merit because:

> LFF's purposes include the stimulation and encouragement of public interest in the value and importance of native forests and related environmental issues. Opposition to the operation of a pulp mill, which may lead to adverse environmental effects and use wood sourced from native forests, fits well within the purposes of LFF.

In rejecting the application for security for costs, the Court found that:

> as the only factor of any substance raised in support of the proposed order is LFF's impecuniosity, Gunns has not satisfied its onus of demonstrating that a security for costs order should be made. To hold otherwise would stifle the litigation and prevent an applicant with standing to bring the application from agitating a matter which it considers to involve questions of public importance and which seems, on the material currently before the Court, to be made bona fide and raises arguable questions of law.

Gunns was ordered to pay LFF's costs of the failed application. The proceeding went to trial on 18 June 2008 for two days. The Court's ruling on the security for costs issue can be read at <www.austlii.edu.au/au/cases/cth/federal_ct/2008/588.html>.

ATTI CUSFINCH is a Melbourne lawyer

Workplace Relations

The Howard government's fourth term amendments to the *Workplace Relations Act* 1996 included the creation of a six-month qualifying period before employees are eligible for unfair dismissal protection. Subsection 643 (7) of the *Act* provides that the qualifying period can be waived or changed only 'by written agreement between the employee and employer before the commencement of the employment'. But what happens when a new employment relationship is created by a business getting a new owner rather than a new employee?

Making the qualifying period start over would create a particularly harsh result for employees who have proven themselves through a long period of employment. Many of these continuing employees would have little choice as to whether to stay and minimal power to influence the conditions under which they will continue to be employed.

However in *Stanfield v Childcare Services Pty Ltd* [2008] AIRC 127 ('*Stanfield*') this is precisely what happened. An employee of 17 years (including five months with the new owner) was found by the Australian Industrial Relations Commission not to qualify for unfair dismissal protection. The Commission interpreted subsection 643 (7) of the *Workplace Relations*

Act strictly, finding a written agreement was needed in this situation. This was despite verbal assurances from the new owners to staff members that, in relation their jobs, 'everything stays exactly the same' and when pressed, 'What more can I tell you? Nothing will change.' There was also reference in the contract of sale that continuing employees be employed on conditions that were 'no less favourable'.

At paragraph [52] of the decision in *Stanfield*, Commissioner Cargill stated:

> I am not satisfied that any verbal representations made by or on behalf of the respondent can displace the specific requirement of the statute that any agreement to alter or remove the qualifying period must be in writing.

This indicates an expectation that employees should be aware that they need to gain written agreement to displace the qualifying period provision. Many employees are unlikely to have any knowledge of the Act, let alone this particular provision.

The interpretation of this provision places a high burden on continuing employees to know and bargain for their rights. While the federal government is amending workplace laws, its proposed changes to the unfair dismissal provisions will maintain a qualifying period for unfair dismissal. As explained in Labor's *Forward with Fairness* plan from April 2007, this will comprise six months for workplaces with 15 or more employees and 12 months for those with fewer than 15, to balance:

> ...the right of employees to protection from unfair dismissal with the need for employers to have an adequate opportunity to determine whether or not an employee is suited to their job and the employer's business.

Explicit attention in any proposed reforms should be given to the interests of continuing employees in determining this 'balance'.

CADIE MINSHALL, Student Law Clerk, Kingsford Legal Centre, UNSW

AUSTRALIAN CAPITAL TERRITORY

On 19 May 2008, the ACT's new *Civil Partnership Act* came into force. While this is a great step forward for the local gay and lesbian community, the political fiasco leading up to the law's being passed raises serious questions about both federalism and the Rudd government's commitment to human rights.

The ACT originally proposed a Civil Union Bill in 2006. The Howard government objected to the Bill for a number of reasons. These included that the Bill allowed young people under 18 to form a civil union, recognised overseas gay and lesbian marriages, and wasn't restricted to ACT residents. Most importantly, however, the Howard government objected to the fact that the ACT's Bill 'mimicked marriage'. This was because the original Bill included a ceremonial aspect, whereby a civil celebrant would officiate while the couple exchanged vows. Despite negotiations between the Howard and ACT governments, neither government would back down. The ACT passed an amended form of its law which was disallowed by the Governor-General, on Howard's advice, under the *Australian Capital Territory (Self Government) Act*, in June 2006.

The election of the Rudd government in December 2007 brought new hope that the ACT would be able to enact its laws. Shortly after Rudd's election, the ACT government announced it would re-introduce its law and at the same time the new PM explicitly stated this was a matter for the states and territories.

Unfortunately, the new PM could not be taken at his word. The Rudd government made exactly the same objections to the ACT's proposal as had the Howard government. After months of negotiations that went nowhere, the ACT was again forced to back down under threats from federal Attorney-General McClelland that the ACT law would again be disallowed. The ACT government was forced to remove any ceremonial aspect. It was also forced to restrict its law to people over 18 who are ACT residents.

It seems the new federal government doesn't believe in federalism, or lesbian and gay rights, any more than Howard did.

Nevertheless, the ACT now joins Tasmania and Victoria in having civil union laws, although Victoria's law will not become operative until the end of the year. Under all three laws, same-sex or opposite sex couples may register their relationships and immediately access rights and benefits under state and territory law, without having to 'prove' they are in a traditional de facto relationship. This is an important practical law reform; however, the question must still be asked: where is Rudd's commitment to human rights and to federalism??

WAYNE MORGAN teaches law at the ANU College of Law.

NEW SOUTH WALES

Launch of the Older Persons' Legal and Education Program

On 7 April the Attorney-General of NSW launched the Older Persons' Legal and Education Program, a partnership between Legal Aid NSW and The Aged-care Rights Service (TARS) to respond to the legal needs of older people.

The need for legal services to address the special legal needs of older people was first identified in the Law and Justice Foundation of NSW report, *The Legal Needs of Older People in NSW* (2004). In December 2007 the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older people and the law*, also identified the barriers to older people accessing legal services, and the need for initiatives that improved the ability of older people to access effective legal services in a holistic way.

TARS has received funding from Legal Aid NSW for an 18-month pilot of an Older Persons' Legal Service to provide legal advice, assistance and education for older people in NSW in consumer rights, human rights, guardianship and other areas of law where the older person is economically or socially disadvantaged, or vulnerable due to frailty or disability.

Legal Aid NSW has also established an Older Persons' Legal and Education Unit to resource and support Legal Aid in providing effective and appropriate legal services to older people through:

- professional training and skills development in legal and service delivery issues that affect older people
- initiatives to assist disadvantaged older people access legal services
- legal education for older people and community workers
- contributions to public policy development and law reform to improve access to legal services to older people

Contact (02) 9219 5924 for more information about the Program.

Capacity Toolkit

A publication produced by the Attorney-General's Department of NSW, the Capacity Toolkit is a guide to assessing a person's capacity to make legal, financial, medical and personal decisions. It is a much-needed and practical resource and will be helpful to all lawyers and others who may be dealing with someone whose decision-making ability may be in question.

Copies of the Toolkit can be obtained by calling (02) 8688 8460 or at <www.lawlink.nsw.gov.au/diversityservices>

NSW EDITORIAL COMMITTEE

QUEENSLAND

Of prosecutors and prisoners

Leanne Clare resigned from the position of Queensland Director of Public Prosecutions in March 2008, to take up a judicial position on the District Court. Appointed as DPP in 2000, Clare had been the subject of sustained criticism over a number of controversial matters, including those involving politician Pauline Hanson (conviction later overturned), magistrate Di Fingleton (conviction later overturned), swim coach Scott Volkers (decision not to prosecute child sexual abuse claims) and police officer Chris Hurley (decision not to prosecute over the death of Mulrunji Doomadgee while in a police watch house in 2004). In her swearing-in speech in April, Clare highlighted the significant funding shortfalls in the Office of the DPP. An internal report prepared by Clare before her departure, at the request of the state government, has recently been leaked to the public. It confirms chronic under-funding in the ODPP, with Queensland prosecutors handling at least twice the number of matters as their interstate counterparts, while receiving among the lowest salaries.

The state government introduced legislation in early May to make it more difficult for prisoners to pursue claims of discrimination before the Anti-Discrimination Tribunal. The legislation is a direct response to media claims in late-2007 about so-called 'frivolous' actions by prisoners (although the net cast here includes successful actions). The Minister, Judy Spence, recently intensified the rhetoric, suggesting that '[p]risoners need to understand this Government is not running a hotel and an offender's every whim will not be accommodated'. This legislation continues a counter-productive politics of law and order in Queensland (see Butler and Dupuy, (2007), Vol 32(2) AltLJ for an account of recent dramatic changes to prisoners' rights in Queensland to access information about administrative decisions which affect them and their ability to judicially review those decisions).

Mulrunji's Death in Custody (Pt III)

Regular readers of this column will recall that Senior Sergeant Chris Hurley was acquitted of manslaughter and assault charges in June 2007 over the death in custody on Palm Island of Mulrunji (aka Cameron Doomadgee) in 2004 (see Vol 32 (3) AltLJ). In the riots which followed the release of the autopsy report, police buildings, including the premises on which Hurley resided, were burned down. Queensland's *Courier-Mail* newspaper has recently reported that in February 2005 Hurley was paid in excess of $100,000 in compensation for the loss of unspecified personal possessions. By contrast with the speedy resolution of the compensation claim, the Queensland Police and Crime and Misconduct Commission review of the initial investigation by two Townsville police officers into Mulrunji's death, both allegedly friends of Hurley, drags on into a fourth year.

Reform of Civil and Administrative Tribunals

A new civil and administrative tribunal is to be established in Queensland, expected to be in place by the second half of 2009. The new tribunal will consolidate 26 existing bodies (including the Anti-Discrimination Tribunal, Children Services Tribunal, Mental Health Tribunal, Small Claims Tribunal and Legal Practice Tribunal), with claims that it will streamline applications and make civil and administrative review more accessible. A 'panel of experts' has been appointed to sort out the implementation details, including jurisdiction and structure, and will be drawing on amalgamation experiences in other states.

STEVEN WHITE teaches law at Griffith Law School.

SOUTH AUSTRALIA

Leave your bike in the shed

The latest initiative of the South Australian government in its long running campaign against organized crime by 'bikie' groups, has been to pass the *Serious and Organised Crime (Control) Act 2008* (SA) in April. The Liberal opposition supported the Labor government in passing the legislation. Some minor parties and independents argued strongly against the introduction of the legislation. The Act is, of course, not limited to bikies, but is aimed at any organisation and its members whom the Commissioner of Police and the Attorney-General believe are associating for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity. Nevertheless, the political rhetoric around the passing of the Act is a warning that, when you meet at the cafe, you would be well advised to leave your Harley-Davidson in the shed.

The scheme works like this. The Commissioner of Police makes an application to the Attorney for a declaration which effectively makes an organisation a criminal organisation. The Attorney may have regard to information linking the organisation to criminal activity, criminal convictions of the members (current or past) of the group or associates of the group. The Attorney does not have to be satisfied that all members engage in serious criminal activity or to consider whether they associate for other purposes.

One of the particularly concerning parts of the legislation is the degree of discretion given to the Attorney to declare an organisation, and the apparent lack of scrutiny of the decision to make a declaration. A declaration has to be published in the Government Gazette and a major newspaper, but the Attorney does not have to publish reasons for making the decision. Furthermore, there is no provision for judicial review of the grounds for a declaration.

The Court *must*, on application by the Commissioner, make a control order against a person if the Court is satisfied that the defendant is a member of a declared organisation. Control orders can be issued without notice. In these respects, there is less scrutiny of the Attorney's power than under Commonwealth terrorism laws. Control orders can prevent communication and association, and prevent possession of

various objects. The Court has regard to the defendant's behaviour and history to determine whether the defendant will engage in serious criminal activity and the extent to which a control order will assist in preventing that activity. The standard of proof is the balance of probabilities. A person on whom a control order has been served may lodge a notice of objection with the Court. There is a further right of appeal in the Commissioner or the objector to the Supreme Court against a decision of the Court on a notice of objection.

The declaration of organisations, and the provision for control orders give rise to further potential criminal liability for people on the basis of their associations rather than their conduct. Under s 35 of the Act, a person who associates on six or more occasions with a member of a declared organisation, or a person subject to a control order, or a person with a conviction for crimes prescribed by regulation, is guilty of an offence with a maximum penalty of five years if they know of, or are reckless as to, the fact of the other person's status. Association can be in person or via a phone call, fax, email or text message.

Sandra Kanck of the Australian Democrats, among others, has pointed out some of the implications of criminalising these associations. First, it raises questions as to how information about the requisite number of associations will be gathered. Does the information go onto a police database when a first association takes place? Do the police then use more covert methods of investigation to gather the other five associations required for an offence to be committed? Second, although there is an exemption for immediate family members, the Act would seem to criminalise regular interaction with a person's extended family which may have particular implications for Indigenous communities. Although the legislation is not aimed at these innocent associations, it clearly leaves a person who has been convicted of an offence prescribed by regulation, and the people who regularly associate with them for any reason, in a position where their innocent associations constitute a serious crime. It is left to the police to exercise their powers responsibly. As the Haneef case demonstrated, this is not an adequate protection of the civil liberties of innocent people.

The Act moves extreme measures, that were deemed necessary to deal with terrorism offences after September 2001 into the domestic law enforcement arena, and the Act goes considerably further than the commonwealth or states have previously gone in criminalising associations. Evidence of association is, of course, much easier to gather than evidence of criminal conduct. If the government is ultimately concerned to prevent criminal conduct, there is a serious question about whether criminalising association will assist. The danger is that people who are associating for a criminal purpose do so less visibly, to avoid being caught by the Act.

Premier Mike Rann prides himself on being tough on crime. An unfortunate side effect of creating more crimes, and therefore catching more criminals, is that imprisoning people is expensive, and the state's gaols are already bursting at the seams. The *Serious and Organised Crime Act 2008* will only add to the pressure on the gaols. This does not seem to bother the current government. The Treasurer Kevin Foley recently suggested publicly that he was happy to *"rack 'em, pack 'em and stack 'em"* in gaol, three to a cell if necessary.

ALEX REILLY and **GABRIELLE APPLEBY** teach at the University of Adelaide School of Law.

TASMANIA

Calls for a Tasmanian Independent Commission Against Corruption (ICAC) have grown in recent months with both the Tasmanian Liberals and the Tasmanian Greens calling for an ICAC-type body to be established. A newly formed group calling itself 'Tasmanians for a Healthy Democracy' has also recently attracted huge crowds at public meetings in Launceston and Hobart. The outcry has followed the ignominious resignation, since the last state election in March 2006, of two Deputy Premiers — both in extraordinary circumstances. Community concern has also centered on perceived cronyism and government intimidation in a number of government processes. As Jeremy Rockliff, the acting leader of the state Liberal opposition noted at a public meeting in Launceston in late April:

> Acts of retribution, evasion, destruction of documents and the misleading of Parliament strike at the very heart of our democratic system of parliamentary democracy and the traditional separation of powers between the executive government, the judiciary and the parliament. Tasmanians are entitled to better. Much better.

With community pressure continuing to build, perhaps the final word should be left to New South Wales Premier, Morris Iemma, who was quoted last year as saying

> Any jurisdiction that doesn't have its own ICAC-type body is just crazy. If you don't have one you have either discovered a secret to human nature that has eluded the rest of us, or — as is more likely to be the case — you are just kidding yourselves. Create one. You won't regret it.

BENEDICT BARTL is solicitor at Hobart Community Legal Service

VICTORIA

The right to equality and non-discrimination under Victorian law

The Victorian Government is currently undertaking a broad review of the *Equal Opportunity Act 1995* (Vic) to 'better promote the right to equality and improve protection from discrimination' ('EOA Review'). It is also separately reviewing exceptions and exemptions in the Act with a review to ensuring consistency with the *Charter of Human Rights and Responsibilities Act 2006* ('Exceptions Review').

The EOA Review has now published an Options Paper, which details findings from consultation and research and sets out options for reform. Responses to the Options Paper were due by 12 May 2008.

On 18 April 2008, the Human Rights Law Resource Centre made a submission to the Exceptions Review. The Centre's submission proposes that all of the exceptions and exemptions under the Act be repealed and that, instead, any differential treatment that may constitute discrimination be assessed to ensure compatibility with s 7 of the *Charter*. Section 7 recognises that human rights, including the right to non-discrimination, are not absolute but may only be limited so far as is reasonable, demonstrably justifiable, proportionate and adapted.

The Centre's submissions, together with further information about the Reviews, are available at <www.hrlrc.org.au> at Policy Work>HRLRC Submissions>Submissions to Equal Opportunity Act Reviews.

Further information is also available at <www.justice.vic.gov.au/equalopportunityreview>.

PHILIP LYNCH is Director of the Human Rights Law Resource Centre

Victorian Commission releases human rights report card

On 15 April 2008, the Victorian Equal Opportunity and Human Rights Commission released its first report on the operation of the *Charter of Human Rights and Responsibilities*.

Commission Chairperson, Fiona Smith, said that while the Commission was generally satisfied with the progress on *Human Rights Charter* operation, there was room for improvement.

'Some government departments and local councils have actively embraced the *Charter* and its principles and are changing the way they operate to reflect their new human rights obligations,' Ms Smith said. 'But it is clear that we have a long way to go. This is understandable given that this is a new consideration for public authorities and we do not expect to change the world overnight.'

The report raises some concerns about the apparent lack of action by almost one third of local councils.

'We recognise that local councils have been inadequately resourced to prepare for the implementation of the *Charter* and trust that this will improve.'

At the time of reporting, the Commission had not received any response from the Department of Treasury and Finance regarding its *Charter*-related activities.

The report also highlights a lack of transparency around decisions about the compatibility of new laws with the *Charter*. In 2007, while the Parliamentary Scrutiny of Acts and Regulations Committee raised concerns about the compatibility with the *Charter* for 23 Bills, only one was amended.

'The Commission is monitoring this more closely this year — we want to ensure that human rights compliance is not relegated to a tick and flick exercise,' Ms Smith said.

Under the *Charter*, the Commission has a number of responsibilities including reporting on the operation of the *Charter* every year.

'The *Charter* means government must give equal weight to human rights — alongside economic, social and environmental considerations — in making decisions and delivering services.'

The 2007 *Report on the Operation of the Charter of Human Rights and Responsibilities: First steps forward*, provides an overview of how well state and local government agencies, Parliament and the courts and tribunals have prepared themselves for the *Charter's* introduction, and their responsibility to comply with it.

Copies of the Report and a summary are available at <www.humanrightscommission.vic.gov.au/publications/annual%20reports/>.

MATTHEW CARROLL is manager of the Human Rights Unit at the Victorian Equal Opportunity and Human Rights Commission

WESTERN AUSTRALIA

Disconnecting a society: reversals in the Perth Metropolitan Native Title Claim

When Justice Wilcox delivered judgment in September 2006 in relation to the Single Noongar Claim (*Bennell v Western Australia* [2006] FCA 1243) his Honour found that, leaving aside any question of extinguishment, native title exists over the Perth metropolitan area. The state government, concerned at the precedent although embracing the result, appealed the decision. The Commonwealth government also appealed, with the then Commonwealth Attorney-General, Philip Ruddock, implausibly but predictably citing threats to public access to beaches and parks.

In April this year, the Full Court of the Federal Court overturned Wilcox J's judgment and trenchantly criticised his Honour's general method and particular findings (*Bodney v Bennell* [2008] FCAFC 63). The Full Court found that Wilcox J overstated the claimants' connection to land and that his Honour confused the continued observance of traditional laws and customs since sovereignty with the continuation of the claimant group's social order since sovereignty. Finn, Sundberg and Mansfield JJ said that Wilcox J found native title to exist because the claimants satisfied him that their society had continued, but that Wilcox J had wrongly characterised changes in that society's rules of social descent, traditional rites and identification with the land as evolutions, rather than interruptions.

Since the decision of Olney J in *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [1998] FCA 1606, the accepted wisdom has been that native title claims over major cities or other areas in which land had been intensely developed or brought under cultivation could not satisfy the threshold question of continued connection to land. Justice Olney notably found, in that decision, that the Yorta Yorta people's continued acknowledgment of their traditional laws and customs had been 'washed away by the tides of history' despite their evidence of the still-flowing currents of their culture.

Justice Wilcox's judgment in *Bennell v Western Australia* sought to turn back those tides. However, the Full Court was of the view that Wilcox J's assessment of change in traditional laws had impermissibly downplayed the consequence of those changes as '... the understandable consequence of European settlement'. The Court held that the task is to characterise laws and custom not to find catalysts of change, however devastating, otherwise the Court said '...a great many Aboriginal societies would be entitled to claim native title rights'.

There are few other legal contexts in which one party may succeed because of its past wrongs to its opponent.

HUGO LEITH is a solicitor in Perth, and teaches law at UWA and the University of Notre Dame