CONNECT

the Newsletter of the Mornington Peninsula Human Rights Group

Committed to promoting in our municipality and beyond
understanding of and respect for human rights
through programs of community education

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Our speaker at the next meeting is:

Kerin Leonard

Outcomes of the First Four-Year Charter Review and Beyond

Kerin is the Manager of the Legal Unit at the Victorian Equal Opportunity and Human Rights commission, and coordinated the Commission's submission to the four-year review of the Victorian Charter of Human Rights and Responsibilities

2pm on the 4th June, 2012

Mornington Peninsula Shire Council Offices, 90 Besgrove Street, Rosebud

ALL WELCOME

MENTAL ILLNESS AND THE IMPACT OF THE VICTORIAN CHARTER

by Deidre Greig

For many Victorians, the introduction of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) heralded a new era of commitment to the protection of basic civil, political and cultural rights, both in a Government's legislative capacity and in its administrative responsibilities. Others would argue that the *Charter* is political window dressing, since we have already signed international protocols guaranteeing these same rights, and we have an open democratic system with inbuilt checks and balances such that a further layer of bureaucracy and judicial activity might be considered superfluous.

In order to test the strength of these disparate positions, I shall consider the impact the Charter has had on the rights of mentally ill persons in the relatively brief period since its inception. This is a particularly useful exercise because mental health legislation has been in the forefront of identifying patients' rights and establishing mechanisms to respect these. In Victoria the *Mental Health Act* 1986 is explicit that one of its guiding principles is *to respect the rights of people with a mental disorder*, and that the care and treatment provided is to be in accordance with minimal interference with *their rights, privacy, dignity and self-respect* (ss. 4(1)(ac) and 2(b) respectively). One might then expect that a

Charter of Human Rights would have little relevance for actual mental health practice in the case of involuntary patients, but some recent instances indicate that it has indeed been influential in clarifying issues relating to the meaning of treatment and the deprivation of liberty.

There is no doubt that mental health legislation is a sensitive and inherently problematic area of civil law. It invokes an extraordinary power of the state over ordinary citizens deemed to be mentally ill since the consequence may be compulsory commitment and treatment. Both in literature and history incarceration myths have surrounded the locking up of mad persons and the convenience this mode of disposal can afford those seeking some benefit, or wishing to retain power. Arguments of medical necessity could always be summoned up to counter protest, and the forbidding walls of institutions and rudimentary treatments, born out of despair, added to an aura of exclusion. It has only been since the tearing down of these walls in the final decades of last century that legislatures have been forced to adapt to the reality of accommodating most mentally ill persons within the community, whilst establishing the framework by which to provide necessary treatment for the smaller number of those with either florid or entrenched illnesses. At the same time, the protection of the community must remain an underlying goal of mental health law and this requires balancing with the principle of minimal intervention.

A state power that may trigger compulsory detention for a treatment purpose is clearly one that needs to be exercised cautiously and with adequate review mechanisms. In Victoria, the criteria for involuntary treatment are set out in Section 8 of the 1986 *Act* and are open to testing by the Mental Health Review Board at which the mentally ill person may be represented. At this hearing the Board must be satisfied that all the criteria have been met and that detention is therefore in the person's best interests. In general, these criteria include *the appearance of being mentally ill*, plus *the immediate necessity for treatment on the grounds of that person's health or safety or for protection of members of the public,* and *treatment cannot otherwise be obtained in a less restrictive manner* (s.8 (1)(a) to (e) *Mental Health Act 1986* (Vic)). It should be recognised that compulsory treatment not only occurs within the boundaries of a mental health facility but may also be part of a Community Treatment Order (CTO) whereby a person may remain in the community, but have some specific conditions imposed.

The law's foray into encapsulating the meaning of mental illness and the social responsibilities that attach to it are at once admirably simple, and also take account of ordinary, everyday perceptions of behaviours that might seem to suggest madness. Thus, there are further caveats in the definition that focus on it *being a mental condition characterised by a significant disturbance of thought, mood, perception or memory*; however behaviour related to belief or lifestyle that may impact on the appearance of being mentally ill according to the perception of any observers are excluded. The legislation makes it clear that mental illness is a medical rather than a social condition, and this must remain paramount in any delineation for the purpose of compulsory treatment. It is against this backdrop that the rights of the mentally ill from arbitrary detention and treatment are guaranteed, although inevitably there are some problematic areas, such as those exhibiting behaviour affected by alcohol or drug taking (s.8(2)(k)), or as a consequence of having an antisocial personality ((s.8(2)(l)). The 'appearance' of mental illness, as required by the Act, does not always slot easily and neatly into the diagnostic categories of psychiatry.

In a recent article in the journal *Psychiatry, Psychology and Law* Owen Bradfield explores the links between Victorian mental health law reform and its *Charter of Human Rights and Responsibilities Act 2006* (Vic) and I am indebted to his succinct overview ("Navigating the 'Unchartered' Waters of Victorian Mental Health Law Reform" 18:4, November 2011, 486-97). In Sections 8-27 the Charter enumerates fundamental rights as drawn from the *International Covenant on Civil and Political Rights* to which Australia is a signatory and, although these are broadly based, it is evident that many pertain quite directly, but within 'reasonable limits' (s.7(2)) to the situation of those receiving compulsory treatment by virtue of their mental state. Despite some resistance from critics on the grounds that the *Charter* is furthering judicial power at the expense of Parliament and creating an additional layer of bureaucracy, Bradfield maintains that it has had a significant impact in enhancing the rights of the mentally ill by ensuring that there is full adherence to procedures and that review processes explore the ramifications of enforced treatment. In the past few years there have been a number of influential cases

that have prompted the Victorian Government to review its mental health legislation in terms of consistency with human rights' principles. Three, in particular, have raised arguments of compatibility.

In a 2009 case, a young man on a CTO with a diagnosis of paranoid schizophrenia (*Re: Appeal of 09-085* [2009] VMHRB) argued that the severe osteoporosis and resultant loss of bone density arising from the continued use of treatment with Depo Provera injections amounted to "cruel, inhuman or degrading treatment" (Section 10(b) of the Charter). The relevance of the Charter was tested in this case and the meaning of "public authority" in Sections 3 and 4 was considered to include mental health services along with the powers and functions of psychiatrists. As in a raft of both English and Australian decisions, the meaning of 'treatment' in the mental health sense was examined together with its therapeutic necessity. In the case concerned, the severe side effects the appellant suffered were to be balanced with societal risks and it was decided that the treatment plan had to be regularly reassessed from this standpoint. It must be emphasised that the courts neither can, nor should, override medical autonomy, although they may seek further explanation of decision-making in certain circumstances in line with the requirements imposed on them under the Act.

The second case also involved the obligations of the Mental Health Review Board to review at set intervals those persons receiving involuntary treatment on a CTO. In his role as President of VCAT, Bell J analysed the Mental Health Act in the light of various relevant sections of the Charter. He argued in the Kracke case that timely reviews had not been carried out (*Kracke v Mental Health Review Board (Vic)* [2009] VCAT 646), yet these were an integral part of safeguarding specific rights enumerated in the Charter. In fact, despite his medication compliance with his Community Treatment Order, Mr Kracke had been reported as being 'AWOL' on the Board's listing due to an administrative oversight. As Justice Bell pointed out, this denied Mr Kracke a fair and impartial hearing, which should also by implication be expeditious. In this instance, he concluded that the fact that the Board did not carry out timely reviews failed to protect the "right to personal autonomy, integrity and liberty" of the person concerned (Bradfield, p. 289). The benefit here of using the Charter to reinforce the practices of the Review Board in relation to clients on CTOs has led to a change of procedures to ensure that others are not overlooked in the system. This case also signalled a role for tribunals and courts in holding administrative authorities to account, and ensuring that the Charter is more than an aspirational document of little practical consequence.

The next case to be described again involved a judicial authority, for it afforded the Supreme Court an opportunity to test "deprivation of liberty" in both its common law meaning and that of the Charter. Section 12 of the latter states that every person *has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live*; and Section 21(1) holds that *everyone has the right to liberty and security*. These are similar to Articles 9 and 12(1) of the *International Covenant on Civil and Political* Rights and the lawyers for Ms Autonovic relied on these instruments to test the central tenet of their position, for loss of liberty is at the heart of mental health law. This case did not centre on residential care, but on care restrictions pertaining to a CTO, as an authorised psychiatrist *may* specify where a patient on such an Order is to live. There was no disputation that Ms Autonovic had considerable freedom of movement during the day, but she was constrained to return to her Community Care Unit at night despite her wish to reside with her mother. Justice Bell also heard this case in his capacity as a Supreme Court Judge (*Autonovic v Dawson & Ors* [2010] VSC 377). In an unusual move a writ for habeas corpus had been issued, and thus the case hinged on the legal and medical justification for the deprivation of liberty even though it was not of a fully residential nature. In this context the Judge, having accepted that she was still subject to some deprivation of liberty, analysed both treatment needs and risk factors that might be considered to have some association with this. Ultimately, he found that the necessity for continued residence in the CCU was not established and ordered that Ms Autonovic be immediately released from the necessity of residential community care.

It is important to point out that in none of these instances had *the Mental Health Act 1986* (Vic) been deemed incapable of protecting the rights of patients, but the very existence of the Charter assisted in closer interpretation of its obligations, and some of these changes are reflected in the draft Mental Health Bill currently under discussion Whilst it is not pertinent here to go through the finer details of this Bill that is intended to improve transparency and accountability in dealing with mentally ill persons in a coercive environment, they do include a requirement that the benefits and risks of treatment for

involuntary patients are to be evaluated, thus reflecting the importance of Section 10(b) of the Charter. Changes are also afoot for a review of the *Guardianship and Administrative Act 1986* (Vic) in order to increase the autonomy and participation of those coming within its ambit. Once again, proposed changes owe much to the specificity of the Charter in terms of the meaning of human rights obligations. Although its future is currently uncertain, there is little doubt that it has wielded enormous influence in the minutiae of decision- making by public authorities in terms of the rights of those, who by virtue of their impaired mental state, attract the stringent control powers that a state exercises under its protective mandate.

A CHRISTIAN PERSPECTIVE ON THE CONTEMPORARY HUMAN RIGHTS MOVEMENT

by John Howells

1. Despite their tarnished record, Christians believe in the inherent dignity of the human person.

Christian churches do not have the greatest record when it comes to human rights, despite their stated belief in human dignity. A few allowed the use of torture, some supported slavery, many the death penalty. Even today there are Christian voices calling for discrimination against women and people of other races and faiths. Since the earliest days of the Church there have been those who actively promote religious intolerance, and persecute those who fail to accept the moral values and customs espoused by a particular church. Many of those values and customs are rejected today as contrary to basic moral decency and human dignity and rights. The medieval Crusades, persecution under Torquemada and the Holy Office of the Inquisition, the burning at the stake of opponents by both sides during the Reformation, and "established" churches using their power to oppress minorities quickly come to mind. The attitudes of some Christian groups and churches today toward Islam and homosexual people indicate that such intolerance still has significant Christian support.

And yet the modern movement to recognise and protect the inherent rights of all people has its roots in the Judeo-Christian tradition. Some of these roots are small and are easily overlooked. Deuteronomy, for instance, includes a law (20: 19-20) banning the cutting down of fruit trees when besieging a city, and the Book of Ruth is a gentle protest against the xenophobia of post-exilic Israel. Other roots are stronger and are easily recognised: the Ten Commandments (Exodus 20: 1-17) which prohibit murder, adultery, theft, bearing false witness and coveting one's neighbour's possessions; the various forms of the Golden Rule (Leviticus 19: 18) to do unto others as you would be done by; and the powerfully evocative notion that all human beings, not just the children of Abraham, are made in the image of God (Genesis 1: 27).

Turning to the New Testament, the picture of Jesus that emerges from the Gospels is of one who is on the side of the little ones - the poor, the sick, the powerless and the outcasts. His words and works affirm the intrinsic value of each person. Think, for instance, of his answer to the question "Who is my neighbour?" in the parable of the Good Samaritan (Luke 10: 29-37); or of his injunction to love one's enemies in the Sermon on the Mount (Matthew 5: 44); or of his healing of the daughter of the Syrophoenician woman, a Gentile with whom Jews should have no dealings (Mark 7: 24-30); or of his identification with the hungry, the thirsty, the strangers, the naked, the sick and the prisoners in the parable of the Great Judgement (Matthew 25: 31-46), to name but a few of the many examples one could list. I do not want to suggest that Jesus was some sort of first century human rights activist. Clearly his mission was much wider. It was nothing less than the redemption of the world beginning with calling the lost sheep of Israel to return to God. The early followers of the Risen Jesus shared a vision of an inclusive faith. Salvation in Christ was for all. Paul taught that it transcended even the deepest divisions of the ancient world. In Christ there was neither Jew or Greek, slave or free, male and female (Galatians 3: 28), because "through him God was pleased to reconcile to himself all things, whether on earth or in heaven, by making peace through the blood of his cross" (Colossians 1: 20).

Today there is widespread Christian support for the concept of human rights and the need to advocate for the rights of individual people. This support flows from certain fundamental Christian beliefs:

a) ***A belief in the transcendent reality of God***
God is the ultimate reality and the source of truth, goodness and love. For Christians, therefore, human rights do not flow simply from nature, but from God. The dignity of each human being is a gift bestowed by God, not just a human idea that can be subject to changing fashions.

b) ***A belief that God's truth is to be discerned both by reason and by revelation***
Under the guidance of the Holy Spirit, reason helps in determining specific rights, such as what is necessary to sustain human life. Revelation provides the values that enable the Christian to affirm that humanity was created with universal and indelible dignity.

c) ***A belief that human dignity is met both in God's creation and in God's Son, Jesus Christ***
For Christians, human rights derive from their understanding of humankind's special place in creation as made in the image of God, and from their understanding of Jesus as our brother who is one with God and in whom we find redemption.

2. Some Christians are uneasy with the contemporary human rights movement.

If then Christian beliefs lead to an affirmation of the inherent dignity of all people and urge that Christians work for the protection of the rights of all human beings, why are some Christians nervous about supporting the contemporary human rights movement? There are various reasons:

- Some Christians fear that human rights principles, such as non-discrimination on the grounds of gender or sexual orientation, could be used against them. This is a concern of Cardinal George Pell and of those who wish to be free to discriminate against women and homosexuals.

- Some Christians see the contemporary human rights movement as essentially a secular humanist campaign and are reluctant to be associated with its, sometimes strident, anti-religious rhetoric. This is a concern of Jim Wallace of the Australian Christian Lobby and of those who still see Australia as being a Christian nation.

- Some Christians are apprehensive of too close a relationship with the world lest it blunt their commitment to share with people of all faiths and of none the Gospel of Jesus Christ as the only saviour. This is a concern of Archbishop Peter Jensen and of those who see evangelism as a one-way process.

I would suggest that the context for these fears is cultural globalisation. The world has become smaller and we are all live alongside people whose faith and customs differ greatly from our own. How do we cooperate with them? Can we find common cause with them? The ecumenical movement of the twentieth century taught us much in this regard, and maybe the inter-faith movement of today has good things in store for us as we face this challenge. But if we are fearful and seek only to hold on to that which used to be, we run the risk of losing our true life. Jesus warned "those who want to save their life will lose it" (Matthew 16: 25).

This is not to deny that there are genuine concerns about the human rights movement that must be taken seriously. One is the claim that a focus on rights at the expense of duties is damaging to society. The right to adequate food, for instance, implies that those who have sufficient have a duty to share with those that haven't. The Victorian legislation is very properly called the *Charter of Human Rights and Responsibilities.* Further, there is a fear that criminals and some aggressive people will use human rights legislation to demand special concessions. A school-teacher friend of mine has had to contend with the parents of a child with a disability in her class who insist that my friend is discriminating against their child by having a physical education program in which their child cannot participate even though an alternative program has been arranged for the child. We do not allow the problem of professional beggars to stop us ministering to the poor. Nor should we allow professional complainants to stop us addressing the human rights of all.

3. The contribution of ecumenical Christianity to the United Nations' Universal Declaration of Human Rights tends to be forgotten.

The significant role that Christian leaders played in the development both of the *Charter of the United Nations* and of its *Universal Declaration of Human Rights* has been largely forgotten. The general view today is that these documents are secular manifestoes - fruits of the anti-clerical wing of the Enlightenment. Indeed, there is a slanderous view in circulation[1] that all human rights abuses are attributable to the Christian religion. Thanks to the painstaking scholarly research of Canon John Nurser, the history of the period from 1939 to 1948 has been carefully documented and recorded in his book, *For All Peoples and All Nations*[2]. He shows that during the Second World War, ecumenical Protestant church leaders in America, with such contacts as were possible with those in Britain and Europe, planned and worked to build a lasting and durable peace after the War.

Nurser describes how America's Federal Council of Churches during the War set up two high-powered committees: the Joint Committee on Religious Liberty and the Commission to Study the Bases of a Just and Durable Peace. He tells in great detail how these bodies and the men who created them and worked through them persuaded the American Delegation to the 1945 San Francisco International Conference on International Organisation to press for a human rights commission. After the War, one of the first acts of the newly created World Council of Churches was to establish the Commission of the Churches on International Affairs. Then when the United Nations was founded in 1945 and American advocacy led to the creation of its Commission on Human Rights with Eleanor Roosevelt elected as its chair, these same ecumenical leaders worked tirelessly networking among diplomats and helped to shape and define the themes to be included, especially those concerning religious freedom.

Nurser's account includes a full description of the men who played a leading role in the long process. If one person stands out it is Otto Frederick Nolde (1899-1972), professor of Christian Education and Dean of the Graduate School at the Lutheran Theological Seminary at Philadelphia. He became a major player on the world's diplomatic stage during the 1940s and wrote the sections on freedom of religion in the *Universal Declaration of Human Rights.*

The conscience of the world had been profoundly stirred by the horrors of the Second World War. There was a widespread longing to safeguard the world from being visited by such horrors again, and there was political will to do something. So, on 10 December 1948 the *Universal Declaration of Human Rights* was adopted by the General Assembly of the United Nations without one dissenting vote. In the over sixty years since it was adopted, great effort has been put into creating a legal framework to make this great declaration effective in the day to day life of the world. Human rights has become the touchstone of political legitimacy in the world today. It is often described as the "soul" of the United Nations.

4. Can the contemporary human rights system survive without its Judeo-Christian grounding?

My final section concerns the question of whether the contemporary human rights system can survive without its Judeo-Christian grounding.

A distinction needs to be made between human rights and civil rights. Civil rights are rights determined and conferred by society through laws enacted by legitimate government. They can be changed or

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[1] There is an unidentified website at http://www.heretication.info/ which lists the thirty articles of the *Universal Declaration of Human Rights* and purports to show that the Christian Church is responsible for their violation.

[2] John Nurser, *For All Peoples and All Nations: the Ecumenical Church and Human Rights.* Geneva: WCC Publications, 2005.

abolished as society deems fit. The civil right to drive a motor car on a public road is conferred by society after one passes certain tests of knowledge and skill. Human rights are of a different order. The first clause of the Preamble to the *Universal Declaration of Human Rights* speaks "of the inherent dignity and of the equal and inalienable rights of all members of the human family". The United Nations does not confer human rights. Its role is to recognise them and declare them. The source of these rights transcends human society. Christians identify God as the source. Those without a religious faith develop some sort of meta-narrative such as it is in the nature of things or simply go along with it being the stage human life has reached.

Herein lies the danger. As the American theologian, Max Stackhouse, has said:

> *Today, the threat to human rights is deeper than their sometimes violation; it is a profound intellectual and spiritual problem, for many today doubt that we can have or defend any trans-empirical principles to judge empirical life.*[3]

Unless one believes that human rights are not of our making but inherent in each human person, what is to stop us discarding or weakening them. During the cold war, the Soviet bloc, which saw the Declaration as a Western bourgeois construct, tried to do that. More recently certain Islamic groups have been critical. However, the real threat today comes from within its secularist supporters. If it is seen purely as a human creation without any ultimate and absolute legitimation, then it can be modified by human agreement. The great Declaration was won by men and women from within the Judeo-Christian tradition, or in some cases as that tradition was filtered through the Enlightenment; it has since been affirmed by men and women from widely diverse religious and cultural traditions. I suspect we have a continuing battle ahead to maintain belief in universal moral principles that we do not construct and cannot de-construct.

A REPORT ON OUR APRIL SPEAKER: KRISTEN WALKER

by Deidre Greig

At the April meeting of the Mornington Peninsula Human Rights Group we were most appreciative of Kristen Walker, a barrister and a Principal Fellow at the University of Melbourne Law School speaking about her role as the senior of the four Junior Counsel in the recent 'Malaysian Solution' litigation involving the potential deportation of a boatload of Afghan and Sri Lankan asylum seekers, including six unaccompanied children, from Christmas Island. They had arrived on a Thursday and were being processed with a view to removing them at 6 am on the following Monday, when a duty solicitor for Legal Aid in Canberra received a phone call for assistance from one of the refugees on the Saturday morning. As there were no other solicitors available on weekend duty, this request was referred to David Manne, the executive director of the Refugee and Immigration Legal Centre, late that same afternoon and he moved quickly to gather together a group of barristers to make an application for a hearing in the High Court of Australia.

Kristen pointed out that under the *Migration Act* 1958 there is no onus on government authorities to provide legal advice regarding action open to asylum seekers, so this initial phone call was fortuitous for the way in which it set in train a sequence of events leading to the airing of migration issues in the High Court. The speed of the application for hearing was almost unprecedented, as the Government had refused to delay the planned 6 am removal, which was just over a day away.

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[3] Max Stackhouse, *Sources of Basic Human Rights Ideas: a Christian Perspective.* Chicago. 2003. http://www.pewforum.org/Politics-and-Elections/Sources-of-Basic-Human-Rights-Ideas-A-Christian-Perspective.aspx

A High Court judge was contacted for a 6 pm hearing on Sunday and this meant that a statement of claim and submission had to be hastily prepared making out the grounds for delaying any removal by 4 pm. It was in these circumstances that Justice Ken Hayne made an interim order to stay the refugees' removal. As Kristen pointed out "The Commonwealth was relatively unprepared for legal proceedings" that ordinarily take many months in the High Court, so there was considerable pressure on both parties to research and prepare arguments. A further injunction of a week was granted to allow final submissions that then had to be prepared within four days. There were additional arguments in respect of the minors involved, because the Minister for Immigration is their legal guardian and has a duty to act in their best interests. This decision therefore became one of whether this should mean that they were to be held in detention and the argument put forward was that the Court rather than the Minister should decide this matter.

A decision was handed down in two days, although ordinarily a case of this nature might have been expected to take between 6 and 9 months. The reasons were published later. The decision was 6:1 with the High Court ruling that the "declaration" required from the Minister for Immigration by the *Migration Act* that Malaysia was a "safe, third country" was invalid and had not been tabled in Parliament. In addition, a Malaysian lawyer gave evidence to the High Court that this country was not a signatory to the Refugee Convention. The High Court made it clear that Australia is legally bound by both international and domestic law to provide asylum seekers with effective means of having their status assessed, and that it is required to ensure protection until there is a voluntary return to their country of origin or resettlement in another country that meets "human rights standards in providing that protection". The Court's decision was thus based purely upon the criteria which the Minister must apply before he could make a declaration under s. 198A.

The second major decision of the High Court in this case was that unaccompanied asylum seekers under 18 years "may not lawfully be taken from Australia without the Minister's written consent under the *Immigration (Guardianship of Children) Act* 1946". In other words the Minister cannot in future simply expel all unaccompanied minors, but must make a specific decision in each individual case. Justice French made the observation that the Minister had "misunderstood his power", and the minors were consequently released from detention whilst proceedings continued.

There are many implications of this important High Court case for the operation of Australian migration law and the outcome is particularly significant for upholding human rights standards in providing protection for refugees as required within a sub-section of section 198A of the *Migration Act* 1958.

In conclusion, Kristen pointed out that the ebbs and flows in worldwide refugee movement do not correspond with our immigration policy and that, of the more than 20 million refugees in the world, Australia takes only 6,000-8,000 annually.