

# 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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at 2.00 pm on Monday 7 November 2011 in the  
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## **A SEMINAR**

led by

**Dr Carol Morse**

on

### **Community Visitors: Supporting the Rights of People with Disabilities**

**Carol is a Community Visitor and  
Independent Third Person Advocate  
with Victoria's Office of the Public Advocate.**

**She is also a member of our Human Rights Group.**

*What is the Office of the Public Advocate and what does it do?  
Come and find out.*

**Carol will address our next meeting and answer questions on her role  
at 2.00 pm on Monday 7 November in the Rosebud Shire Offices**

## **Mental Illness and Human Rights**

by Margaret Grummet

*Margaret is a foundation member of our Human Rights Group. She has a nursing background. Severe mental illness has affected her family for many years. She has been a long-standing member of a psychiatric ethics committee and worked as a volunteer with families of the severely mentally ill for twelve years.*

During September *The Age* newspaper published a series of articles on the plight of some members of our community who suffer from severe mental illness such as Schizophrenia or Bi-Polar disorder. An unacceptable number of deaths occurred while sufferers were in state-run facilities. Were their human rights violated?

Our family members have been involved with severe mental illness for over three decades. We have come to realise that anyone - sufferer, family member, care professional or member of the general public - involved with mental illness, has an extraordinarily difficult task in sorting out an individual's human rights.

As the Chief Psychiatrist of Victoria, Dr Ruth Vine, states in an article entitled "Working on a Better Mental Health System":

*The expectations of the family and the community need to be balanced with the choices made by the people experiencing symptoms of mental illness. Developing and retaining a skilled workforce remains a critical issue.*

*The Age, Monday 5 September 2011*

As our family, and many others I have worked with realise, severe mental illness can remove those suffering, from the realms of reality. Who, therefore, is going to attend to their human right for obtaining high quality care? Who is going to decide what is the definition of high quality care in any given, often bizarre and very fraught, situation?

Quality care may have to involve decisions made without the sufferer's consent, such as involuntary admission to hospital and certain treatments. This could be seen as a violation of human rights.

It could be argued that withholding involuntary treatment could be a violation of human rights! Checks and balances should be in place to try to minimise harm and maximise well-being. These situations require outstanding professional judgement and ability. However, quality on-going care is sometimes difficult to obtain.

Staff members of the Mental Health Service are often under intense pressure and retention of staff is poor. Staff need on-going training, physical and moral support, and appropriate remuneration for difficult work done well.

What of the human rights of the family members? They should, except in rare circumstances, be kept informed of treatment for their loved one and given warning of changed conditions such as restraint and isolation and deterioration in a sufferer's condition. Communication lines to professionals should be kept open so that vital, accurate information from family and friends can help create a full picture of a sufferer's condition.

The human rights of the general public should also be protected. These could include protection from violent behaviour when a sufferer is psychotic. Police sometimes have to intervene, a very difficult situation for all concerned.

Co-operation and collaboration between sufferers, their families and all mental health professionals involved should set the scene for the best possible outcome for the sufferer. These consultations are already happening in a number of places. Mistakes in diagnosis and treatment, unnecessary prolonging of community treatment orders (involving involuntary treatment), slip-ups in fair hearings for sufferers, may then be kept to a minimum. Compassionate, respectful interaction should occur at all times, with the acknowledgment of a person's wish for privacy.

Greg Oke, an advocate for the rights of the mentally ill, states:

*Victoria needs to establish legislation consistent with the Victorian Charter of Human Rights that at the very least entitles these people [those on community treatment orders] the right to a fair hearing.*

*The Age*, Tuesday 6 September 2011

Congratulations to *The Age* for bringing the subject of mental illness to the fore and highlighting the difficulties involved in giving some of our most vulnerable people a chance for better treatment and more transparency for their treatment. Some public debate has been stimulated and the State Government has ordered a wide ranging enquiry into patient deaths while in the Victorian Mental Health Service.

Our present system is not perfect, far from it, but working towards a truly accountable and transparent Mental Health Service can be a big step towards gaining human rights for all concerned.

# **Report of Meeting with Ed O'Donohue**

**From notes taken by Maureen McPhate,  
Maureen is Records Secretary of our Human Rights Group**

Thirty people attended the normal monthly meeting of our Human Rights Group on Monday 3 October to hear Ed O'Donohue MLC. Ed is chair of the Victorian Parliament's Scrutiny of Acts and Regulations Committee (SARC). It fell to this Committee to carry out the review of the *Charter of Human Rights and Responsibilities Act 2006*, that is required by the Act itself after four and after eight years of operation. The SARC, which has seven members - 3 Liberals, 1 National and 3 Labor, submitted its report to Parliament on 15 September last. Given the adverse comments about the Charter by both Attorney-General Robert Clark and Ed O'Donohue while they were in opposition, our members were keen to hear from Ed directly.

Hellen Cooke (in the Chair) acknowledged the Boon Wurrong people, the traditional owners of the land on which we were meeting, and welcomed those in attendance. She specially welcomed our guests, Councillor Antonella Celi and Councillor Bill Goodrem of the Mornington Peninsula Shire Council and Jacqui Bell of the Federation of Community Legal Centres.

John Howells was invited to provide some background on the formation of the Mornington Peninsula Human Rights Group and its continuing support for the *Charter of Human Rights and Responsibilities*. He then introduced the speaker.

## **Ed O'Donohue's Address**

Ed explained that the Charter became effective in 2007 and it had to be reviewed by the 1 October 2011. The Government then has six months in which to decide whether, and if so how, it would amend it. The Act remains in its present form until then.

Ed reported that the SARC, a cross-party committee, had operated in a constructive bi-partisan manner. Following statutory review processes, it had called for submissions and had received a large number in writing. It also invited a number of individuals and groups to make presentations at hearings. Ed told us that he had re-read that morning the submission of our Group.

He acknowledged that the Charter had had some beneficial impacts in Victoria but there were difficulties working with it. He said there were a number of uncertainties with the Charter, e.g., what is a public authority? High Court judges had recently reached different positions on what constituted a public authority. The Report has recommended a way of removing this uncertainty.

He noted that our Group had taken part in the 2009 Brennan Consultation on human rights. The Brennan Report, which advocated a National Charter of Human Rights, presented the Gillard Government with some difficulties, and it decided against a Human Rights Act. Instead it strengthened the way the parliament could scrutinise legislation for conformity with human rights.

The Report offers two options: Option 1 (the minority option) seeks to retain the present structure of the Act but with some minor amendments; Option 2 (the majority option) seeks to harmonise the Charter with the Commonwealth by removing the role of judges to declare a provision in an Act incompatible with human rights and by removing the obligation on public authorities to act in conformity with human rights.

Notwithstanding the criticisms the Report has received, Ed believes it is a good report. He encouraged all to read it and made several copies available for those present.

## **Questions and Comments**

**Yaroslav:** What happens now? Does the Report examine all provisions of the Charter?

*Answer: The Charter will continue to function until it is amended or repealed. The Report goes through the various provisions of the Charter. The Government can respond variously and may decide not to accept any or all of the Report's recommendations.*

**Helen:** Various people were invited to attend the hearings. I am concerned at the over-representation of some groups. The list is hardly balanced community representation?

*Answer: The Committee held views about who should be called to the hearing. The objective of public hearings is to hear attitudes that are contentious (e.g., attitudes to abortion), but the attitudes expressed at hearings have no greater weight than the views expressed in submissions.*

**Andrew:** To what extent did you examine the experiences of Canada, the UK and New Zealand in enacting similar legislation?

*Answer: The Committee did examine different Charters, but there are differences of definition in other jurisdictions.*

**Tony:** What is the role of the common law?

*Answer: One submission, calling for the repeal of the Charter, quotes the common law. The High Court upheld the Charter's right to the presumption of innocence until proven guilty in its Momcilovic decision, an interpretation akin to the common law.*

**Jacqui (a Comment):** It is very difficult when mounting a case for a client that involves economic, social and cultural rights without the back-up of legislation.

**Helen:** A primary concern expressed time and time again at the Roundtable consultation we held in 2009 were economic, social and cultural rights - the right to healthcare, to adequate food, clothing and housing, to education for one's children, etc.

*Answer: These concerns are best handled by specific legislation rather than a Charter.*

**Peter:** Could the government still look at economic, social and cultural rights?

*Answer: Economic, social and cultural rights have some standing under common law. The Government could adopt the whole or portion of the Report, which does not recommend adding these rights to the Charter.*

**John:** If a person's human rights were damaged by a public authority, should not that person be able to sue the public authority?

*Answer: This is best dealt with by specific legislation, such as defamation and discrimination laws, rather than the very general claims of a Charter.*

**Jacqui (a Comment):** Equal Opportunity laws were introduced in the 1970s. Prior to that it was very difficult for a client to stand up in court on such an issue. Legislation is needed.

**Andrew:** Were the costs involved taken into consideration?

*Answer: The Committee did examine costs and benefits, and practice in other parts of the world.*

**Hellen:** Who should be entitled to make submissions?

*Answer: Anyone may make a submission.*

**Trish (a Comment):** The first Charter in Canada came out of one province. Is it not unique that the Charter came from Victoria.

Yaroslav Mamchak on behalf of our Human Rights Group thanked Ed for being with us.

## *Asylum Seekers*

# **PART II: WHERE HAVE WE GOT TO?**

**by John Howells**

*"Asylum Seekers, Part I: Our Attitude to Strangers" was published in the September issue of CONNECT, with an undertaking to look at the Malaysian Solution in the October issue. Because the future of asylum seeker policy in Australia was then highly uncertain, it was decided to hold the promised article until the November issue. Australia's policy is still uncertain but a number of things have now become clear.*

### **The Story So Far**

In late 2007, the newly elected Rudd Labor Government honoured its election promise to dismantle its predecessor's Pacific Solution. There were very few detainees remaining on Nauru or Manus Island so they were closed and Temporary Protection Visas were discontinued. It did, however, keep Christmas Island as a detention centre for processing asylum seekers and it retained the excision of parts of Australia from its migration zone including Christmas Island, the Ashmore Reef and the Cocos Islands. There was a surge in boat arrivals.

The following table shows the number of boats with the number of people arriving in Australian waters seeking asylum during the third wave of boat arrivals between 1999 and the present. The majority came via Indonesia from a third country, generally in the Middle East.

#### **BOAT ARRIVALS: 1999 - 2010**

<b>Year</b>	<b>1999</b>	<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>
<b>Number of boats</b>	86	51	43	1	1	1	4	6	5	7	61	134
<b>Number of people</b>	3,721	2,939	5,516	1	53	15	11	60	148	161	2,849	6,879

The Howard Government, which came to power in 1996, struggled at first to control the flow of boat arrivals, but once it got its Pacific Solution operating after the 2001 Tampa incident the flow ceased dramatically. The initial success of the Pacific Solution flowed from the threat that no boat people would reach or be resettled in Australia. The latter proved to be false. Most of the arrivals were eventually assessed to be genuine refugees and most of them were settled either in Australia or in New Zealand. Whether the Pacific Solution would have proved a permanent solution is therefore open to question. Smugglers could sell their product to desperate people as: "We will get you to Australia or New Zealand after a wait on Nauru for processing". The figures for 2005 to 2007 suggest that this was already beginning to happen.

The Rudd Government began idealistically, but the almost immediate surge in boat arrivals sent it back-tracking. It said the problem required a regional solution. This was obviously correct because the plight of refugees is a regional problem, but the best it could come up with was a revised version of the Pacific Solution, with East Timor replacing Nauru. After some delay, the Government of East Timor rejected the proposal. With boats arriving in increasing numbers and with the Opposition making capital at its expense, the Gillard Government eventually came up with the Malaysian Solution.

The Malaysian Solution involved Australia accepting over four years 4,000 people living in Malaysia who had been assessed by the United Nations High Commissioner for Refugees as genuine refugees. In return Malaysia would accept up to 800 boat people arriving without visas in Australian waters.

They would be taken within 72 hours to Malaysia for processing where they would receive no preferential treatment in processing or in resettlement should their refugee claim be approved.

If the Pacific Solution was open to criticism on the grounds that it was contrary to international refugee law, unjustifiably expensive to implement, and psychologically damaging for detainees, the Malaysian Solution was equally unacceptable if not more so. People trading was regarded with abhorrence by many, and the idea of sending children, including unaccompanied minors, to Malaysia, a country that has not signed the Refugee Convention and has a bad human rights record, elicited widespread condemnation. On both scores the plan must be judged immoral.

The plan, however, did have some positive features. First, 4,000 proven refugees, mainly Burmese people who had fled persecution in their own land, would be settled in Australia without displacing other refugees, because Australia's intake would be increased to accommodate them. This could be seen as the beginnings of a regional solution to the refugee problem, even if a very small one, for Malaysia has 200,000 genuine refugees. Secondly, those sent to Malaysia from Australian waters would be detained for no more than 45 days before being released into the community. The International Organisation for Migration would provide them with a month's accommodation and other assistance, and they would be allowed to work. They would be no worse off than if they had stayed in Indonesia. And thirdly, it would send a very clear message to people smugglers and those who seek their help: "There is no point leaving Indonesia for you will only end up in Malaysia with no chance of resettlement in Australia." It would stop the boats and secure the borders.

The arrangement was to come into effect after the signing of the agreement between Australia and Malaysia on 25 July 2011, but the Refugee and Immigration Legal Centre successfully appealed to the High Court which granted an injunction preventing the transfer of the first group of asylum seekers to Malaysia. The court then decided that the arrangement failed to meet Australia's obligations under international treaties which it had signed.

The Gillard Government sought to amend the law so as to overcome the basis of the High Court's decision. Because the Court's decision also threw doubt on the legality of using Nauru for off-shore processing, which is the Opposition's preferred solution, the Gillard Government hoped that it would support the move. It didn't, and with the Greens opposed to any form of off-shore processing, the minority Gillard Government was unable to enact its proposed legislation.

For the immediate future off-shore processing is impossible. The Government says it will retain mandatory detention, but with overcrowding of detention facilities already a problem, community-based alternatives will be increasingly used.

## **What Lessons Can We Learn from This Sorry Story?**

(1) *Australia needs a bi-partisan immigration policy.*

Australians have a history (see Part I : Our Attitude to Strangers) of being fearful and rejecting of foreigners coming to our shores. However, given appropriate leadership, such as that of Arthur Caldwell, Robert Menzies and Malcolm Fraser, and a bi-partisan climate in which the facts can be presented clearly, Australians can be accepting and welcoming of new-comers. But when politicians play on xenophobic fears for political gain, as we have seen during the last fifteen years, we descend into callous selfishness and hatred towards asylum seekers.

*We will decide who comes to this country and the circumstances in which they come.  
Some boat people have thrown their children overboard in order to gain asylum.  
I certainly don't want people of that type in Australia, I really don't.* (John Howard)

*Stop the boats.* (Tony Abbott)

Labor leaders, Kim Beasley, Kevin Rudd and Julia Gillard, have been too weak to counter the opportunism of their adversaries, and have gone along with the claimed threat to our border security and the demonising of asylum seekers.

How do we get back to having parliaments whose primary concern is the national interest and not the gaining and holding of power whatever it takes? Neither major party comes out well from the recent struggles over refugee policy.

(2) *Ignoring international commitments has consequences for world order and our own interests.*

Article 14 of the *Universal Declaration of Human Rights* states: "Everyone has the right to seek and to enjoy in other countries asylum from persecution." Successive United Nations treaties have enshrined this principle in a body of international laws. Throughout the last ten years Australia has failed to honour these laws in fact and in spirit. If other countries were to follow Australia's example, humanitarian care for asylum seekers would collapse. Our international reputation has been damaged and our image of ourselves as a responsible international citizen has been compromised.

(3) *The boats should be discouraged and there is a proper way to do it.*

The claim that we must stop the boats or be inundated with asylum seekers is false. The numbers are tiny. However, it is certainly desirable that the boats be stopped or, at least considerably reduced. The long journey in a small boat is a perilous undertaking and many lives have been lost attempting it. Remember SEIV X and the 2010 Christmas Island tragedy. The question is how to accomplish it. The answer by the Howard and Gillard Governments has been to make the consequences of the sea trip so fruitless and so unpleasant that even desperate people will be daunted.

There is another way. Patient diplomatic negotiations with Indonesia and other Asian nations has significantly helped reduce the threat of terrorism. Similar diplomacy, as part of the Bali Process which is designed to combat people smuggling and trafficking, is beginning to yield results. Indonesia has recently imposed real sentences on smugglers and this is starting to have an effect. The number of arrivals over the last half year has declined. Now that off-shore processing has been closed to our Government, it is to be hoped that it will put additional effort and resources into this approach.

(4) *The immorality of our treatment of asylum seekers will be on our conscience as a nation.*

On the one hand:

- It is morally wrong to refuse to help people fleeing persecution in their own land when we have the capacity to help them.
- It is morally wrong to ill-treat people who have committed no crime in order to deter others from seeking asylum in Australia.
- It is morally wrong to treat men, women and children in a way that is guaranteed to produce psychological harm in many of them.
- It is morally wrong to detain people including children and unaccompanied minors behind razor wire for long periods.
- It is morally wrong to trade people for our own ends.

On the other:

- It is morally right to treat refugees with love and respect no matter what their race or faith or means of arrival.

A first step in seeking to regain integrity in the way we treat refugees and asylum seekers, would be a return to civility in our national politics. A second step would be a determined and continuing effort to find a regional solution for refugees in our part of the world. We cannot ignore or forget the 200,000 genuine refugees in Malaysia.