

# UK to enact Bill of Rights

Simon McGregor, APLA Policy Manager

*In a radical move that now leaves Australia alone in the common law world without declared rights for its citizens, the UK is set to pass the Human Rights Bill drawn by Lord Lester of Herne Hill QC.*

The Bill has been read for the second time, will have passed the Committee stage in the House of Commons by the time this article goes to print, and will become law this year. This major reversal of the UK's traditional reliance on an unwritten constitution comes as a result of a European Union entry condition which requires all members to incorporate the European Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR] into member's constitutions. This means citizens can enforce rights in their domestic courts and avoid the expense of an action in an international court where there are also numerous enforcement problems.

The Bill is the successful culmination of a decade long campaign started by a Private Member's Bill introduced by Sir Edward Gardner QC in 1987. Whilst introducing the Bill, Sir Edward recognised that fundamental rights once taken for granted now needed constitutional protection: "*It is language which echoes right down the corridors of history. It goes deep into our history and as far back as the Magna Carta.*" (Hansard, 6 February 1987, col.1224). The Bill was defeated, but Lord Lester continued the campaign, introducing further Bills to the House of Lords in 1994, 1996 and the ultimately successful 1997 Bill.

In brief, the Bill will change statutory interpretation in the UK, in that

*"[cl.3(1)] 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."*

Clause 6(1) is a corollary of this clause, declaring "*It is unlawful for a public authority to act in any way which is incom-*

*patible with one or more of the convention rights.*" The term 'public authority' is not defined in the Bill, and one key issue will be whether this covers government work sub-contracted to private enterprises.

The Bill then adopts most of the ECHR Articles, namely (A2) the right to life, (A3) freedom from torture or inhuman or degrading treatment or punishment, (A4) freedom from slavery and torture, (A5) liberty and security of person, (A6) the right to a fair civil or criminal trial, (A7) no retrospective criminal laws, (A8) respect for private and family life, home and correspondence, (A10) freedom of expression, (A11) freedom of peaceable assembly and freedom of association, including the right to join a trade union, (A12) the right to marry and to found a family, and (A14) freedom from discrimination in the enjoyment of these rights and freedoms.

The Bill also adopts the first three Articles of the First Protocol to the Convention, which adds the right to (A1) peaceful enjoyment of possessions, (A2) the right to education, and (A3) the right to free elections.

All these rights are qualified by ECHR (A16) which allows governments to restrict the political activity of aliens and (A17 & 18) a prohibition against using rights under the ECHR to perform any activity contrary to the rights given to others therein.

Notably, the Bill has not adopted the enforcement provision, ECHR (A13), which states the member nation shall every person affected by a violation with an effective remedy before a national authority. Instead, the Bill provides that all the usual UK civil remedies will lie against an offending person.

In relation to any legislation in question, the courts have not been given a power to declare legislation invalid. If the courts cannot find an interpretation of an Act which is consistent with the

aforementioned articles, then they can make a 'Declaration of Incompatibility', which empowers the responsible Minister to amend the offending Act by Order. The Order must be approved by both Houses if they are sitting, or will be effective for a maximum period of forty days if the matter is urgent and Parliament is not sitting. The offending remains effective unless amended, so responsibility for the resolution of the incompatibility will rest squarely with the legislature in the political sphere.

Subordinate legislation can, however, be struck down by the court unless the terms of the primary legislation make this impossible.

Also of interest is the Bill's requirement that responsible Ministers scrutinise all Acts and declare that they comply with the rights protected under the Bill, and of course to suffer the political consequences when an Act does not. It is envisaged this will encourage the executive to support the spirit of the rights, rather than to see what they can get past the courts. Emphasising compliant drafting, rather than remedial litigation, is a sound proactive policy.

The Bill is concisely drawn, and has been received by the legal and political minds of the UK as a document which is not perfect, but on balance useful. Whilst here is no equivalent regional convention to the ECHR in Australia, we could draw on the International Covenant on Civil and Political Rights [ICCPR] as a similar anchor for our own Bill should our politicians have the courage to guarantee our fundamental freedoms.

The ICCPR was published by the UN 1966, although Australia only agreed to be bound by it in 1981. It is administered by the UN's Human Rights Committee, to whom each participating country submits a report on its human rights situation every five years. The problem is that many countries are late in submitting this report,

and indeed, Australia has not submitted a report since 1988. Individuals can make a complaint in writing to the Human Rights Committee under the Optional Protocol to ICCPR, which Australia consented to in 1991, and the Committee can investigate.

There is not sufficient space in this article to detail the numerous problems

with any enforcement of findings by the Human Rights Committee. Suffice to say that on a practical level, the findings rely more on "media shame" than legal enforceability. But this is all the more reason why Australia, as it steps out of the colonial shadow, should enshrine the rights of its citizens in a constitutional document. The

description and protection of our fundamental rights should be definitively stated and approved via our sovereign political process. ■

**Simon McGregor** is APLA's Policy Officer.

**Phone** 03 9601 6439 or **email** smcgregor@apla.com

## APLA Exchange

### Australian Vaccination Network seeks lawyer

The Australian Vaccination Network Inc (AVN) seeks a lawyer to take action on behalf of their members against the Federal Government for false and misleading conduct and for being in breach of the Trade Practices Act, s52 in respect to vaccination. They are also seeking someone to mount a constitutional challenge on the basis that legislation introduced by the government linking vaccination compliance with government entitlements in unconstitutional and contravenes s51 of the Constitution.

The AVN are looking for a solicitor willing to work on a pro-bono basis. The AVN are an organisation composed of parents, health professionals and others concerned about freedom of choice for all health issues.

Phone **Meryl Dorey**, President, AVN, on **phone** 02 6687 1699 or **fax** 02 6687 2032 or **email** meryl@avn.com.au

### Arachnoiditis

We are acting for a woman who has been diagnosed with having Arachnoiditis, a chronic pain syndrome which may have been caused or aggravated by lumbar surgery and two myelogram procedures. The chemicals inserted into the spine during these myelograms may have aggravated the condition. We are particularly interested in hearing from anyone who has knowledge of the condition or of the risks involved with the myelogram procedure.

We would be pleased if you would contact **Sara Loughnan**, Bill Cooper & Associates, PO Box 472, Mackay, 4740, **phone** 07 4951 3422 or **Fax** 07 4951 3022.

### Land Contamination

I would be pleased if any member could advise me of a plaintiffs/ objective expert to link poisonous toxins (DDT, DDE, arsenic, organochlorates, organophosphates) with illness and disease, either existing or potential, occasioned to residents of houses, the land of which contains cattle-tick dip sites.

Please contact **Robert Walker**, Barrister, Ground Floor, Wentworth Chambers, 180 Phillip Street, Sydney, **phone** 02 9233 3011 or **fax** 02 9232 8435.

### Cerebral Palsy

Any practitioners who can assist with information or expert referrals regarding the causation of cerebral palsy, particularly due to oxygen deprivation during delivery or due to respiratory distress following birth, are asked to please contact:

**Julie Wrathmall** at Biggs & Biggs, GPO Box 1388, Brisbane 4000

**Phone** 07 3331 1950, **Fax** 07 3221 0329 or **email** biggs@gil.com.au

### Whooping Cough

We have been instructed by our client to pursue a claim for medical negligence on behalf of his son. His son was born in 1987. As a result of recommendations by his doctors, the son was immunised against whooping cough. The immunisation occurred on three occasions. (Possibly as a result of the immunisation) their son developed uncontrollable epilepsy.

Subsequent treatment of the epilepsy has been incorrect and as a result their son is severely disabled. Evidence suggests that our client's did not give informed consent to the vaccination. In addition the Doctor administering the vaccination was advised on the second and third occasion their son had had adverse reactions to the vaccination. He proceeded to administer the third vaccination in any event and immediately following that vaccination their son had his first fit and was subsequently diagnosed with uncontrollable epilepsy.

If anyone has any information or knows of similar instances please contact

**Kyle Kimball** at Kimball Wood, PO Box 923, Mooloolaba Qld 4557, **phone** 07 5477 7222 or **fax** 07 5477 7090.

### Enforcement procedures in the UK

We act for a woman who was injured whilst on a cruise ship. We have a judgement for \$25,000 plus costs against Charter Travel Co Ltd. Unfortunately that company ceased operating in Australia a few weeks before judgment and although represented by insurers, the insurance company's solicitors (Norton Smith & Co) have now withdrawn. We are unable to enforce the judgment. The defendant company we understand is still operating in London and we are seeking someone who may be able to assist with enforcement procedures in London on a conditional basis.

Members who have encountered similar claims or may be able to assist please contact

**Bert Adams** of S Barton Adams & Co, Solicitors, Level 5, 104 Bathurst Street, Sydney. **Phone** 02 9264 8153 or **Fax** 02 9264 8228.

**APLA Exchange** gives APLA members a chance to share information on special issues or products relevant to their litigation. If you would like to submit a request to **APLA Exchange**, contact **Jane Staley** at APLA on **phone** 02 9415 4233.