

# New Human Rights Commissioner gives the Castan Centre Annual Lecture

By Anthony Hallal



Australian Human Rights Commissioner Edward Santow

The Castan Centre's Annual Lecture lived up to its billing, hosting the newly minted Australian Human Rights Commissioner, Edward Santow, in one of his first public speeches. The lecture, held in partnership with law firm King & Wood Mallesons, is always a prestigious and eagerly awaited event on our annual calendar. We were lucky to host Ed as he laid out his vision for his time as Commissioner in a speech entitled peering through human rights-tinted glasses.

Mr Santow commenced by noting that most modern social issues cannot easily be resolved through a clear and globally accepted application of human rights law. It is difficult, he suggested, to develop an approach to human rights law that can be predictably and consistently applied while remaining flexible enough to allow for a creative and nuanced response to novel circumstances. This difficulty prevents human rights law from producing clear answers to every social question.

While attempting to achieve this balance can cause difficulties, Mr Santow noted that there are at least three reasons why doing so is necessary. First, human rights law does not provide a single correct answer to every problem: it is often the case that competing rights can only be reconciled through careful and nuanced consideration of the people affected. Second, social issues are subject to human variables that cannot be readily predicted, and so any human rights approach to dealing with these issues must be flexible enough to accommodate these variables. Finally, suggested Mr Santow, human rights law constitutes a body of legal and philosophical principles that ultimately aim to protect the dignity of *all* individuals. Accordingly, taking human rights seriously requires a compromise to be made by the affected parties.

Mr Santow then discussed these tensions in the context of the issues surrounding marriage equality. He commented that the Australian Human Rights Commission (AHRC) considers marriage equality to be partly an issue relating to Article 26 of the ICCPR: the right to equality before the law. However, given that many religions' beliefs are opposed to marriage between any two people other than a 'man' and a 'woman', it is arguable that marriage equality impinges on freedom of religion. To resolve this tension, Mr Santow

laid out arguably the most human rights compliant solution: same-sex marriage should be permitted, but religious organisations should also be able to object to solemnising same-sex marriages. This compromise preserves the maximum possible dignity of those affected on all sides of the controversy. However, Mr Santow also recognised the difficulty of defining *religious organisation* in an appropriate way, and supported the use of a broad definition.

After condemning the forced sterilisation of young intersex people, Mr Santow considered the Optional Protocol to the Convention Against Torture (OPCAT). He noted that, while Australia is a party to the Convention, it has not ratified OPCAT nor incorporated it into domestic law. He predicted that setting up an OPCAT-mandated monitoring body for places of detention would stimulate consideration of issues such as the use of spit-hoods in prisons. These conversations would also require nuanced consideration of all affected people and would ultimately entail a compromise between competing rights.

Mr Santow then concluded that the AHRC does indeed peer through human rights tinted glasses. First, its work and expertise is grounded in human rights law. Second, it recognises that reconciling competing rights and interests requires compromise so that all individuals' dignity can be preserved. Finally, he commented, looking through human rights-tinted glasses requires acknowledgement of the fact that implementing human rights is a *human* endeavour.

When asked how we might encourage politicians to peer through human rights-tinted glasses when addressing social questions, Mr Santow suggested that it is important that discourse is couched in terms of human rights, rather than framing the dialogue in other terms, for example, border security. He also emphasized the importance of collaboration so as to avoid the harms of segregation.

Mr Santow's lecture provided an insight into the role of the AHRC, and of human rights law generally, when we are faced with difficult social questions. The Castan Centre is grateful to have had the opportunity to host such a thought-provoking event.