

No 11 March 2007

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The Human Rights Law
Resource Centre Ltd aims to:

1. Contribute to the harmonisation of Australian law and policy with international human rights norms;
2. Build the capacity of the legal profession, judiciary and community sector to develop Australian law and policy consistently with international human rights standards; and
3. Empower people that are disadvantaged or living in poverty by operating within a human rights framework.

The HRLRC achieves these aims by conducting and supporting human rights legal services, litigation, education, training, research, policy analysis and advocacy.

OPINION

'Activism' is not a Dirty Word

'Activism' has been copping a bit of flack recently.

Back in October 2005, The Australian columnist Janet Albrechtsen had a go at civil liberties groups, calling them 'a small band of activist lawyers' who use the phrase 'civil libertarian' as a 'smokescreen intended to hide political and personal agendas cunningly camouflaged as community welfare'.

In the Spring 2006 edition of the Liberal Party Magazine, the Federal Attorney General, advocating for community legal centre reform, said 'some centres devote valuable resources to running political campaigns and the promotion of ideological causes rather than providing legal advice and assistance to Australians in need'. He argued that 'centres must focus on serving clients, not running private political agendas'. The Federal Government then commenced a review of community legal centre funding which is currently underway.

Last month, the Federal Treasurer wrote in the Herald Sun that police at the G20 protests were being 'attacked again, this time by activist lawyers who contrived to send a human rights observer team...so they could intimidate and harass police officers performing their duty'. He also backed the Federal review of the 'taxpayer funded lawyers involved'.

In this context, the recent release of the joint Federal and NSW Government review into the NSW Community Legal Centres Funding Program is timely.

The review found that the program in NSW is 'an effective use of public funds and should continue to be supported by government'. It noted that a 'key strength' of community legal centres is their 'flexibility to design and develop their service delivery strategically on the basis of their knowledge and experience of target communities and their relationships with other legal, welfare and community service providers'.

The review concluded that centres should 'continue to determine the mix of services they offer to deal with unmet legal needs in their communities'. It stated that their 'involvement in law reform...represents an effective use of resources, delivering benefits to far more clients than through information, advice and casework services alone'.

It's good to see the review make these findings. But they are nothing new. Centres have been providing a strategic mix of services for 35 years precisely because it is an incredibly effective

means of using limited resources to address legal need and respond to injustice.

Law reform work is a key component of our service mix. We do this work because, often, the client groups we serve cannot effectively represent their own needs and interests to government. We advocate on behalf of our clients for a better and fairer legal system that addresses their legal needs. We have a duty to go beyond advising individual clients about legal problems to argue for systemic change that addresses injustice.

The outcomes delivered by law reform work are far-reaching. It results in important improvements to laws, policies and practices. It allows governments to hear the views of the disadvantaged, minorities and the voiceless. It contributes their perspective to the shaping of our legal system. It promotes debate and democracy. It develops jurisprudence and allows governments to better target resources to address areas of need.

This work is about better serving our clients. It is recognised in our funding agreements and we are specifically funded by government to do it. As the NSW review found, this funding is effective.

So if activism means advocating for changes to laws and practices which create injustice, then we are proudly activist lawyers.

Community legal centres in Victoria receive around \$12 million in State and Federal funds under the Community Legal Service Program. This is supplemented by additional government, philanthropic and other funding. This funding is a fraction of that received by legal aid commissions and other legal institutions around the country. It is less than 10 per cent of the amount spent each year by the Federal Government alone on obtaining its own legal advice.

In return, Victorian centres provide over 100,000 advice, information and casework services to a wide range of members of the public, most of whom have nowhere else to go for help. We conduct over 300 community legal education sessions and we deliver more than a hundred law reform and legal policy projects. Community legal centres are a value for money investment.

Community legal centres are bound by strict accountability requirements. It is entirely appropriate that centres properly account to our funders on how we spend our money and what

it achieves. This includes our community education and law reform work. We look forward to working with the Federal and State governments to develop ways we can better provide access to justice and improve our legal system.

Hugh de Kretser is Executive Officer of the Federation of Community Legal Centres (Vic) Inc

NEWS

DLA Phillips Fox Seconds Human Rights Lawyer to Centre

DLA Phillips Fox, one of Australasia's largest legal firms, has recently employed a Human Rights Lawyer, Ben Schokman, to be seconded to the HRLRC on a full-time basis for 12 months. The secondment is an exciting addition to the firm's Community Care Program, which has a strategic focus on 'human rights', and will contribute significantly to the HRLRC's capacity and output.

Ben previously worked as a solicitor with Allens Arthur Robinson, including as a pro bono lawyer with the Homeless Persons' Legal Clinic and a member of the firm's Charity Committee. He also has experience working with the UN High Commissioner for Refugees and the Starlight Children's Foundation.

Ben's work at the HRLRC will include conducting legal education and training regarding the Victorian Charter of Human Rights, assisting with the preparation of Shadow Reports under the ICCPR and the ICESCR, and working on human rights-focused litigation and law reform.

For further information about the DLA Phillips Fox Community Care program, see http://www.dlaphillipsfox.com/about_pf/CommunityCare.asp

UN Publishes Report on Australian Human Rights Compliance While Countering Terrorism

Introduction

The UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, has published a human rights based evaluation of Australia's counter-terrorism legislation and practice. The report is based on the premise that states'

duties to take measures to protect against and prevent international terrorism must be implemented in accordance with international human rights law.

The report contains seven chapters:

- Australia's counter-terrorism framework;
- The classification of 'terrorism', terrorist entities and organisations;
- Incitement and sedition;
- Investigative and intelligence-gathering powers;
- Powers of detention and control;
- Immigration and refugee status; and
- Conclusions and recommendations.

Key concerns raised in the report include that Australia should clearly distinguish between criminal law and counter-terrorism and associated powers, ensure that measures to protect against terrorism maintain adherence to due process and the rule of law, and that protections against the transboundary movement of terrorists do not undermine the international rights of asylum-seekers.

Australia's Counter-Terrorism Framework

Australia is party to numerous international terrorism-related conventions, most of which have been implemented into municipal law. This international framework has been supplemented by domestic legislative amendments, including those relating to law enforcement, aspects of border security, and the jurisdiction and powers of ASIO. Key issues associated with these legislative developments are canvassed below.

Definitions of Terrorism

It is the view of the Special Rapporteur that the *Criminal Code Act 1995* defines 'terrorist act' too broadly and goes beyond the international characterization of terrorism. He considers that those aspects of Australia's definition which incorporate criminal activity, such as interference with an information system with an intent to create a serious risk to the safety of the public, should not be brought into the counter-terrorism framework. This is because the more stringent application of police and law enforcement powers to ordinary crimes can have consequences for human rights in Australia. He therefore urges Australia to reconsider the definition to clearly demarcate between criminal and terrorist acts.

Investigative and Intelligence Gathering Powers

The Special Rapporteur is concerned that information gathered at ASIO hearings is not restricted to intelligence usage. He suggests either that police officers should be restricted from attending ASIO hearings or that 'derivative use' immunity should apply.

In addition, a person detained by ASIO for questioning has no right to seek judicial review of the validity or terms of an issuing authority's warrant and no right to be brought before any judicial body other than a prescribed authority. This, in the opinion of the Special Rapporteur, offends the right to a fair hearing and the right to have the legality of one's detention determined by an independent and competent authority.

Powers of Detention and Control

Section 15AA of the *Crimes Act 1914* now prevents a bail authority from granting bail to a person charged with, or convicted of, certain terrorism offences, unless exceptional circumstances exist. The Special Rapporteur is concerned that this reverses the burden of establishing the need for detention, whereas article 9(3) of the ICCPR requires states to affirmatively establish the need for detention. Furthermore, persons charged with terrorism offences are often remanded in maximum-security prisons. Pursuant to art 10(2)(a) of the ICCPR and paras 8(b) and 85(1) of the UN Standard Minimum Rules for the Treatment of Prisoners, the Special Rapporteur expects the segregation of accused persons from convicted persons.

Australia has been commended for adoption within a control order regime of measures capable of protecting the public while avoiding the detention of suspected terrorists. However, the Special Rapporteur also urges vigilance in ensuring that such controls do not cumulate so as to amount to detention (ie, house arrest) or so as to violate the rule that a person should not be tried or punished twice for the same offence.

The Special Rapporteur also expresses concern over the potential use of secret information in the making of preventive-detention orders. He reiterates his comments in the context of control orders about the use of such information being potentially contrary to the right to a fair trial.

Immigration and Refugee Status

The Special Rapporteur notes that while Australia has an obligation to prevent the movement of terrorists through effective border controls and measures to secure the integrity of identity papers and travel documents, such measures must be implemented in conformity with human rights law, including international refugee law. He cautions Australia to ensure that pre-boarding authorization and airport security measures do not deny the ability of persons to exercise their right to leave any country in accordance with art 12(2) of the ICCPR.

Conclusion

The Special Rapporteur concludes that, overall, Australia has developed a robust multilayered approach to protection against and prevention of international terrorism. However, the Special Rapporteur recommends that Australia take steps to bring such measures and protections into conformity with international human rights. In particular, the Special Rapporteur notes the speed with which recent counter-terrorism legislation has been passed in Australia and expresses concern at the absence of any federal human rights legislation capable of guarding against undue limits being placed upon the rights and freedoms of individuals.

The full report is available at <http://www.ohchr.org/english/issues/terrorism/rappporteur/reports.htm>.

Chantal Encavey is an Articled Clerk with Arnold Bloch Leibler

Young Peoples' Advocate wins NAB Human Rights Law Scholarship

For the second year, the National Australia Bank ('NAB') has generously provided funding to the Human Rights Law Resource Centre to confer a scholarship to an individual to enable him or her to undertake an approved unit of postgraduate study in human rights law.

The 2007 NAB Human Rights Law Scholarship has been awarded to Tiffany Overall. Tiffany is an Advocacy and Human Rights Officer with Youthlaw, a specialist legal service for young people. She has previously worked as a solicitor with Darebin Community Legal Centre and has extensive experience in refugee and asylum seeker advocacy, including with the Northern Migrant Resource Centre, the Al Amel

TPV Holders Association and the Asylum Seeker Resource Centre.

Tiffany proposes to use the NAB Scholarship to study 'Comparative Bills of Rights' as part of a Masters of Human Rights Law at Monash University. Congratulations Tiffany!

CASENOTES

Supreme Court of Victoria Considers Right to Legal Counsel under Charter of Human Rights

R v Carl Williams

[2007] VSC 2 (15 January 2007)

The Supreme Court of Victoria has substantively considered the Victorian *Charter of Human Rights and Responsibilities 2006* (Vic) for the first time.

Background

This case related to an application by the accused, Carl Williams, to adjourn his trial until July 2007, when the barrister of his choice, Peter Faris QC, would have been available to represent him.

The accused was charged on 14 December 2004 and committed to stand trial in the Supreme Court on 10 March 2005. Presentments were filed in December 2005 and the trial was originally listed for February 2006. Subsequent to a number of adjournments, the trial was listed to commence on 29 January 2007.

Counsel for Williams relied on Part 2 of the Charter, particularly s 24, which enshrines the right to a fair hearing, and s 25, which contains a range of procedural guarantees for persons charged with a criminal offence, including a right to choose their legal representation at s 25(2)(d).

The Crown submitted, that under the Charter's transitional provisions, the Charter was not relevant to the proceeding. They relied on s 49(2) which provides that the Charter does not effect any proceedings commenced or concluded before the commencement of Part 2 (which contains the rights that are protected under the Charter). Pursuant to s 2, the Charter (except for Divisions 3 and 4 of Part 3) comes into operation on 1 January 2007. Divisions 3 and 4 of Part 3, which pertain to the 'Interpretation of Laws' and the 'Obligations of Public Authorities', commence on 1 January 2008. The defence contended that s 49(2) did

not apply as the hearing of the trial (and therefore the 'proceeding' within the meaning of s 49(2)) had not yet commenced.

The central issues for the Court, therefore, were whether the proceeding had commenced prior to the commencement of the Charter and, by extension, the Charter's applicability to Mr Williams' application for adjournment.

The other issues in dispute were, in summary:

1. Whether a judge is acting in 'an administrative capacity' when listing trials such as to be a 'Public Authority' within the meaning of s 4. Pursuant to s 38 of the Charter, public authorities must give proper consideration to, and act compatibly with, human rights;
2. The date at which parliament intended for the courts to become 'actively involved in the interpretation of the Charter and human rights'; and
3. Whether the rights contained at ss 24 and 25 are 'absolute' or may be subject to limitation.

The common law position on providing counsel of choice to a defendant in order to ensure a fair trial was also considered.

Summary of Judgment

As discussed above, s 49(2) provides that the Charter does not affect any proceeding commenced or concluded before the commencement of Part 2 on 1 January 2007. Justice King held that a criminal proceeding is commenced either by way of arrest and information or by summons served upon the person. As Mr Williams was charged on 14 December 2004, her Honour concluded that the Charter had no effect on, and could not be relied on in relation to, Mr Williams' application for an adjournment. In so holding, she dismissed the application.

In relation to some of the other issues in dispute, King J considered, in summary that:

1. A judge is acting in a judicial capacity rather than 'an administrative capacity' when he or she is hearing an application for adjournment of a trial which has already been listed by the listings section of the court and does not fall within the definition of 'Public Authority' in the Charter; and
2. The 'intention of the parliament was for the courts to become actively involved in the interpretation of the Charter and human

rights after 1 January 2008'. However, King J acknowledged that it is also arguable that, in so far as the Courts exercise functions or perform duties that are relevant to human rights contained in Part 2 (such as the right to a fair hearing and rights in criminal proceedings), they are bound to take account of such rights and that such rights are justiciable from 1 January 2007. Justice King did not consider it necessary to determine this issue in the current case.

Commentary on Limitations on Human Rights

Justice King also considered whether human rights are 'absolute', holding that the rights enshrined in Part 2 of the Charter are not absolute, but are rights which may be limited pursuant to s 7. Section 7 of the Charter provides that rights may be subject to such reasonable limitations as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

Justice King appears to endorse the assertion in the Explanatory Memorandum that 'no right is absolute' and that 'there may be various limitations imposed on any right'. With respect, this view is flawed. While it is arguable that the rights enshrined by ss 24 and 25 may be limited, there are some rights, such as the prohibition on torture, that *are* absolute in that their limitation can never be considered reasonable or justifiable.

Although, unlike many other human rights instruments, the Charter does not, in terms, provide that certain rights are absolute or non-derogable, the preferable view is that, consistently with art 4(2) of the ICCPR, certain human rights are absolute and must not be subject to limitation or derogation. Pursuant to art 4(2) of the ICCPR, these rights include:

- the right to life (art 6);
- the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment (art 7);
- the right to freedom from slavery or forced labour (art 8);
- the right not to be imprisoned for a contractual debt (art 11);
- freedom from retrospective criminal punishment (art 15);
- the right to recognition as a person before the law (art 16); and

- freedom of thought, conscience and religion (art 18).

In *General Comment 29*, the UN Human Rights Committee (which is an independent body of experts with the authority to interpret and expound the meaning of the ICCPR) posited that, in addition to those rights identified in art 4(2) the following further rights may not be lawfully derogated because to do so would be inherently inconsistent with the ICCPR or because they have attained the status of peremptory norms of customary international law:

- the right of persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person (art 10);
- the prohibition against taking of hostages, abductions or unacknowledged detention;
- the prohibition against incitement to discrimination, hostility or violence (art 20); and
- the obligation to provide 'effective remedies' for breaches of human rights (art 2(3)).

Consistently with s 7 of the Charter, international human rights law provides that, in respect of rights that are not absolute, limitations are only permissible in certain circumstances and subject to particular conditions. In *General Comment 31*, the Committee stated that, where limitations or restrictions are made,

States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.

The general principles relating to the justification and extent of limitations have been further developed by the UN Economic and Social Council in the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*. Those principles include that:

- no limitations or grounds for applying them may be inconsistent with the essence of the ICCPR or the particular right concerned;

- all limitation clauses should be interpreted strictly and in favour of the rights at issue;
- any limitation must be provided for by law and be compatible with the objects and purposes of the ICCPR;
- limitations must not be arbitrary or unreasonable;
- limitations must be subject to challenge and review;
- limitations must not discriminate on a prohibited ground;
- any limitation must be 'necessary', which requires that it:
 - is based on one of the grounds which permit limitations (namely, public order, public health, public morals, national security, public safety or the rights and freedoms of others);
 - responds to a pressing need;
 - pursues a legitimate aim; and
 - is proportionate to that aim.

In our view, it is important that s 7 of the Charter is interpreted and applied consistently with both the jurisprudence of the Human Rights Committee and the *Siracusa Principles* (s 32(2) of the Charter providing that such jurisprudence should be considered in interpreting the Charter). Some human rights *are* absolute.

The Right to Counsel of Choice under the Common Law

As a final matter, King J noted that even if the Charter had been operative at the time of the application this would not have changed her decision.

Her Honour stated that at common law an accused in a criminal matter has no right to counsel at the public expense, but the accused does have the right to a fair trial. A trial without representation would most likely be stayed until representation was obtained, but ultimately this is at the discretion of the court.

Justice King considered that if there is no right to counsel then there is certainly no right to counsel of choice, especially in the present case, as to allow the accused counsel of choice would significantly delay the trial. Her Honour referred to the Canadian decision of *R v McCallen* in the Ontario Supreme Court as support for this proposition, namely that 'if the counsel of choice is not available within a reasonable time, then the rights of the accused

must give way to other considerations'. Her Honour also noted that she had given Mr Williams the opportunity to obtain other counsel or legal aid and that none of these opportunities had been taken.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VSC/2007/2.html>.

Katherine Hayes is a volunteer with the Public Interest Law Clearing House

Phil Lynch is the Director of the Human Rights Law Resource Centre

UN High Commissioner for Human Rights Intervenes in Iraq Death Penalty Case

The UN High Commissioner for Human Rights, the Hon Louise Arbour, has sought leave to intervene as amicus curiae in the Iraqi High Tribunal in relation to the sentencing of Taha Yassin Ramadan, a co-accused of Saddam Hussein.

The legal brief filed by the High Commissioner raises a number of significant issues of international human rights law which are also of great relevance to the proposed prosecution of David Hicks before a US Military Commission.

Background

The defendant was convicted on 5 November 2006, together with six co-defendants, of serious crimes arising from an incident in Dujail, Iraq, in 1992. He was initially sentenced to life imprisonment but, following an appeal to the Appellate Chamber of the Iraqi High Tribunal, is being re-sentenced 'for the purpose of strengthening the penalty and raising it to the appropriate legal limit' (ie, the death penalty).

The UN High Commissioner – who is the UN's senior human rights official and mandated by the General Assembly and Security Council to monitor, assess and report on states' compliance with international human rights law – has sought leave to intervene to make submissions as to the relevance of international human rights norms to the trial, conviction and sentence. In particular, the High Commissioner submits that the conduct of the trial and the possible imposition of the death penalty raise significant issues in relation to arts 6 (right to life), 7 (right to freedom from torture) and 14 (right to a fair trial) of the ICCPR.

Right to a Fair Trial

The High Commissioner submits that the trial did not amount to a 'fair trial' within the meaning of art 14. The High Commissioner draws particular attention to the following issues in this regard:

- 'Over the period of the trial, senior Government and legislative figures, including at the highest level, made comments of unmistakeable clarity as to the guilt of the defendants, the appropriate sentence and the proper function of the courts in this context.' UN Human Rights Committee jurisprudence establishes that such comment by senior officials is incompatible with the right to be presumed innocent protected by art 14(2): see, eg, *Gridin v Russia* (2000).
- It is a fundamental tenet of fairness and a prerequisite to a fair trial that an accused have adequate time and facilities to prepare a defence in conditions which do not place him or her at a substantial disadvantage as regards the prosecution. In particular, a fair trial requires that the accused receive fair notice of all adverse evidence and the opportunity to fully and fairly contest such evidence: see, eg, art 14(3); *Morael v France* (1989); *Fei v Columbia* (1995).
- A fair trial requires that a full appeal, on both fact and law, be available in respect of both conviction and sentence: see, eg, art 14(5).

Prohibition on Torture or other Cruel, Inhuman or Degrading Treatment or Punishment

The prohibition on torture or other cruel, inhuman or degrading treatment or punishment is a non-derogable norm of international law, enshrined in art 7 of the ICCPR. The High Commissioner submits that a sentence, in particular a sentence of death, that is imposed following a trial that does not accord the guarantees of art 14 (ie, that is not a fair trial), may amount to a violation of art 7. This is supported by recent jurisprudence from the European Court of Human Rights: see, eg, *Ocalan v Turkey* (2005).

Right to Life

While the High Commissioner concedes that international human rights law does not currently comprehensively prohibit the death

penalty, she submits that its prohibition and abolition is desirable in all circumstances on the following policy grounds:

- The 'impossibility of avoiding irreversible execution of the innocent';
- The 'absence of proof that the penalty in fact serves as a deterrence to others in respect of future conduct';
- The 'inappropriately vengeful character of the sentence'; and
- The 'capacity of life imprisonment to satisfy all penological purposes of punishment and prevention of future crime'.

The High Commissioner further submits that, where the death penalty is imposed, it will violate art 6 unless the trial has accorded all of the guarantees required by art 14: see, eg, *Reid v Jamaica* (1990).

Comment

In a previous edition of this Bulletin (edition 9), Peter Vickery QC set out the case that, by urging or counselling the trial of David Hicks before the US Military Commissions in Guantanamo Bay, senior Australian officials may be violating the Australian *Criminal Code* and the *Rome Statute of the International Criminal Court*. If the UN High Commissioner's submissions in the Ramadan case are correct, the same conduct is also likely to constitute a violation of Australia's obligations under the ICCPR and customary international law.

The High Commissioner's legal brief is available at http://www.ohchr.org/english/docs/arbour_amicus_curiae_brief_en.pdf.

HRLRC POLICY, ADVOCACY and LAW REFORM

HRLRC Submission to the Inquiry into the Australia- Indonesia Security Treaty

The HRLRC recently made a submission to the inquiry by Federal Parliament's Joint Standing Committee on Treaties into the recently signed security treaty with Indonesia.

Known as the 'Lombok Treaty' and tabled on 6 December 2006, the Treaty provides a framework for security cooperation between Australia and Indonesia, including provisions on defence, law enforcement, counter-terrorism, intelligence, maritime security, aviation safety

and security, proliferation of weapons of mass destruction, emergency cooperation and cooperation in international organisations on security-related issues.

Australia and Indonesia have each ratified key international human rights instruments, including in particular the ICCPR, ICESCR, CEDAW, CERD, CAT and CROC. In May 2006, Indonesia was elected to be a member of the new UN Human Rights Council. Despite these ostensible commitments to human rights and the obvious implications the Treaty has for human rights and freedoms, the Treaty is devoid of reference or commitment to human rights.

The HRLRC submission notes that the potential consequences of the absence of human rights protection are evidenced by the current plight of the so called 'Bali Nine'. All nine members of the Bali Nine were arrested in Bali for alleged involvement in heroin trafficking to Australia. The arrests resulted from action taken by the Indonesian National Police ('INP') in consequence of intelligence information provided to the INP by members of the Australian Federal Police ('AFP'). Presently, six members of the Bali Nine face execution as a result of their respective convictions for drug trafficking offences.

Under intelligence sharing arrangements contemplated by the Lombok Treaty, as with the present arrangements between the AFP and international law enforcement agencies, there are no safeguards to prevent the sharing of intelligence, even if the imposition of the death penalty is a predictable consequence of any charges laid as a result. This is in contrast to related treaties between Australia and Indonesia such as the Mutual Assistance Treaty which includes grounds for refusing a request for mutual assistance where the request relates to the prosecution or punishment of a person for an offence in respect of which the death penalty may be imposed.

The HRLRC submitted that the Treaty's formalisation of intelligence sharing arrangements between Australia and Indonesia may result in breaches of Australia's human rights obligations, particularly in respect of the right to life. This concern is amplified in light of recent comments by Indonesia's Constitutional Court in response to an application by two members of the Bali Nine, which stated that

constitutional rights do not apply to foreign nationals.

The Treaty also contains a worrying emphasis upon principles of sovereignty, territorial integrity, and non-interference in the internal affairs of each country to the apparent detriment of human rights protections. This is particularly evident in Clause 3 of Article 2 of the Treaty which states:

The Parties, consistent with their respective domestic laws and international obligations, shall not in any manner support or participate in activities by any person or entity which constitutes a threat to the stability, sovereignty or territorial integrity of the other Party, including by those who seek to use its territory for encouraging or committing such activities, **including separatism**, in the territory of the other Party. [Emphasis added]

Many interest groups have expressed concern that Clause 3 may be specifically aimed at vulnerable communities within Indonesia which have been subjected to human rights abuses in the past; for example, the pro-West Papuan independence groups. The clause may also be in breach of the freedoms of expression and association enshrined in the ICCPR and domestic Australian legislation, and arguably in breach of the implied freedom of political communication which exists under the Australian Constitution.

The HRLRC's submission made the following four key recommendations to the inquiry:

- the Treaty should include preambular recognition that Australia and Indonesia are signatories to the ICCPR and ICESCR and, consistent with each country's obligations under those covenants and the UN Charter, the Treaty will be interpreted so as to promote universal respect for, and observance of, human rights and freedoms;
- the Treaty should include a fundamental principals that, consistent with the UN Charter, Australia and Indonesia will promote, encourage and respect human rights and fundamental freedoms without distinction as to race, sex, language or religion;
- the Treaty should be amended to include an article that provides for circumstances in which security cooperation may be refused where the human rights of an individual or individuals are threatened; and

- that Clause 3 of Article 2 of the Treaty should be deleted.

The Committee will begin public hearings in February and is due to report to Parliament by 12 June 2007. Copies of submissions and more information on the Committee's inquiry, including the treaty text and national interest analysis, are available on the Committee's website at

www.aph.gov.au/house/committee/jsct/6december2006/index.htm.

The HRLRC submission is available at www.hrlrc.org.au under 'Policy Work'.

Mathew Tinkler is a lawyer on secondment from Minter Ellison to the Public Interest Law Clearing House

Response to Australian Government Reports under the ICCPR and the ICESCR

Australia has recently released its draft common core document ('Draft Core Document') as part of its reporting obligations under the ICCPR and the ICESCR. In accordance with the United Nations *Harmonised Guidelines on Reporting under the International Human Rights Treaties* ('Guidelines'), State parties are encouraged to prepare a core document containing general information to supplement specific reports submitted to the various UN human rights treaty bodies. Australia's Draft Core Document also incorporates Australia's Fourth Report under the ICESCR and Australia's Fifth Report under the ICCPR.

The HRLRC, working with the National Association of Community Legal Centres and Rights Australia, prepared a response to the Draft Core Document, which was presented to the Australian Government on 23 February 2007. The response, which was endorsed by over thirty NGOs, addresses principal concerns with the *process* by which the Australian Government has sought to fulfil its treaty reporting obligations, in particular the failure of the Draft Core Document to engage in any real way with human rights discourse and the extent to which the Draft Core Document contains key omissions from its report and is inconsistent with the Guidelines.

Together with a coalition of NGOs, a more extensive response to the *substantive* human rights issues contained in the Draft Core

Document will be prepared over the coming months and will take the form of a Shadow Report to the Human Rights Committee and the Committee on Economic, Social and Cultural Rights.

The response is available at www.hrlrc.org.au under 'Policy Work'.

Ben Schokman is the DLA Phillips Fox Human Rights Lawyer

Submission on Post-Sentence Supervision and Detention

On 13 February 2007, the HRLRC made a submission to the Victorian Sentencing Advisory Council in response to their Discussion and Options Paper, entitled *High-Risk Offenders: Post-Sentence Supervision and Detention*.

As the Paper identifies, a scheme of post-sentence supervision and detention may be incompatible with or infringe a range of human rights under both international human rights law (particularly the ICCPR) and domestic human rights law (particularly the Victorian Charter of Human Rights and Responsibilities), including:

- The right to liberty and security and freedom from arbitrary detention;
- The right to freedom from cruel, inhuman or degrading treatment or punishment;
- The right to humane treatment when deprived of liberty;
- The right to a fair hearing;
- The right to a presumption of innocence and procedural fairness;
- The right not to be punished more than once; and
- The right to freedom from retrospective criminal laws or penalties.

The HRLRC submission considers the implications of a scheme of post-sentence supervision and detention for the right to freedom from arbitrary detention enshrined by art 9 of the ICCPR and s 21 of the Charter, and the right to humane treatment when deprived of liberty enshrined by art 10 of the ICCPR and s 22 of the Charter. Finally, the submission considers the permissibility of limitations of each of the rights identified in the Paper and above.

The HRLRC submission is available at www.hrlrc.org.au under 'Policy Work'.

HRLRC CASEWORK

UN Working Group on Arbitrary Detention to Consider Case of 'Melbourne 13'

As reported in Edition 5 of the Bulletin, in August 2006, the HRLRC wrote to various UN Special Rapporteurs in relation to the conditions of detention of 13 men charged with various 'terrorist' offences (collectively, 'the Detainees').

Ten of the Detainees have been held as unconvicted remand prisoners in the maximum security Acacia Unit of Barwon Prison in Victoria since November 2005, while the remaining three have been held since March 2006.

The HRLRC understands that the length, conditions and effects of the detention have now been raised as matters of concern with the Australian Government by the UN Working Group on Arbitrary Detention, together with the UN Special Rapporteurs on Freedom of Religion and Belief, Human Rights while Countering Terrorism, and the Independence of Lawyers and Judges. The HRLRC has been instructed that the detention includes:

- extended solitary confinement;
- extremely limited and restrictive visitation rights, including no right to contact visits other than with children;
- the imposition of arbitrary limits set on the time allowed out of their cells;
- very limited contact with other prisoners;
- being strip searched both before and after every contact visit and both before leaving and upon returning to prison to attend court;
- being served non-halal food, including pork;
- being denied the right to religious observance in congregation;
- significant restrictions on the periods for which the Detainees are allowed outside of their cells.

The HRLRC further understands that the case will be considered by the Working Group on Arbitrary Detention at its 48th Session in May 2007. At this session, the Working Group is likely to consider such issues as the conditions of confinement, restrictions on personal visits, respect for religious beliefs (including diet),

effects on physical and mental health, and the period of detention.

The HRLRC's original letter of complaint is available at www.hrlrc.org.au in the 'Human Rights Library' under 'Legal Briefs'.

SEMINARS and EVENTS

Forthcoming HRLRC Seminars

The HRLRC is pleased to announce the following seminars as part of its 2007 Human Rights Seminar Series:

- 24 April – Professor Davison Douglas, William and Mary School of Law
- May (TBC) – Professor Philip Alston, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions
- July (TBC) – Professor Arlene Kanter, Director of Disability Law and Policy Program, Syracuse University
- 8 August – Professor Claudio Grossman, UN Committee Against Torture
- 13 August – Gareth Evans AO QC, President, International Crisis Group

Further details will be available soon.

HRLRC Hosts Sir Nigel Rodley, UN Human Rights Committee

The HRLRC was privileged to host Sir Nigel Rodley, a member of the UN Human Rights Committee and Chair of the Human Rights Centre at the University of Essex, as the inaugural HRLRC Visiting Fellow from 22 – 28 February 2007.

Sir Nigel's engagements included meeting with NGOs, keynote addresses at the 2007 Human Rights Dinner and the Victorian Equal Opportunity and Human Rights Commission Conference, and speaking at seminars for judges, academics, the public sector and community organisations. Sir Nigel's topics included the prohibition of torture, the rights of prisoners, the work of UN treaty bodies and Special Rapporteurs, the death penalty, and the impacts and implications of legislative charters of rights.

Sir Nigel's visit was proudly sponsored by Qantas.

A Briefing Paper prepared for Sir Nigel, which surveys the state of human rights in Australia, is available at www.hrlrc.org.au in the 'Human Rights Library' under 'Legal Briefs'.

EDUCATION, RESOURCES and TRAINING

Charter of Human Rights and Responsibilities Workshops

The Victorian Equal Opportunity and Human Rights Commission is providing a series of free workshops during February – May 2007 to help community organisations to understand and apply the rights and obligations contained in the Charter.

An introductory workshop will explore the fundamentals of human rights, the function and operation of the Charter, and how organisations can meet their human rights obligations and achieve best practice.

An advanced workshop will build on the understanding gained from the introductory session by further exploring how community organisations can actively engage in the political process to advocate for policy and legislative change.

For further information, see

<http://www.humanrightscommission.vic.gov.au>.

IF I WERE ATTORNEY-GENERAL...

Human Dignity and Socio-Economic Rights are Indivisible

On 4 May 2006, in the second reading speech for the now adopted Charter of Human Rights and Responsibilities, I declared that the Charter would provide 'a lasting statement of the fundamental values' necessary 'for the freedom and good government of our communities.' I proclaimed that it would enshrine the 'values of decency, respect and human dignity in our law' and would lay 'the foundations for protecting human rights in the daily lives of all Victorians.' I must now concede that my claims were somewhat inflated. The Charter will indeed operate to 'help us become a more tolerant society, one which respects diversity and the basic dignity of all'. But it tells only part of the story. The full dignity of every individual will not be secured by the protection of his or her civil and political rights alone. On the contrary, it is incumbent upon the State of Victoria to respect, protect and fulfil the full range of economic, social and cultural rights which have been recognised under international law. The Federal Government may flout with contempt the nature of the obligations it has assumed with respect to these rights, but I believe it is

incumbent upon myself to advocate for the recognition and full protection of such rights within Victoria.

Economic and social rights were omitted from the Victorian Charter ostensibly because they lacked the 'strong measure of acceptance' enjoyed by civil and political rights within the community. In truth, however the Victorian Government's Statement of Intent on the Proposed Charter indicated that such rights were never to be included because of their perceived resource implications. Moreover the Consultation Committee happily obliged by recommending that they should not be included at this point in time despite 41 per cent of submissions urging their inclusion. Some commentators will no doubt critique and condemn the merits of this approach. The reality, however, is that the Charter requires me to undertake a review of its operation after its first 4 years with a view to considering whether any additional human rights, including economic and social rights, should be included in the Charter. Although mine will not be the sole voice that determines the content of this review, I intend to commit myself to the promotion of such rights with a view to securing their inclusion within the Charter in 4 years time for 3 fundamental reasons.

First, human dignity cannot be secured by the protection of civil and political rights alone. The international community has already recognised the artificial nature of the distinction between such rights and economic and social rights and declared that all rights are interdependent and indivisible. Simply translated, this means that the right to freedom of expression, for example, is of little value if a person is denied a right to an education; while the right to vote is meaningless in the absence of a right to adequate housing and nutrition.

Second, the fears associated with the perceived resource allocations required for the realisation of economic and social rights are misplaced. It assumes that civil and political rights are resource neutral which is entirely inaccurate. The right to life for example does not simply demand that States refrain from taking life but effectively requires the provision of measures to protect life such as an effective police force. The right to a fair trial requires the provision of an independent and impartial judicial system, a competent prosecution body and access to legal aid.

Moreover, the experience of other jurisdictions demonstrates that economic and social rights are capable of constitutional or legislative protection without destroying Government processes. In South Africa, for example, where economic and social rights are justiciable, there has been no avalanche of litigation and no usurpation of the Parliament's role by the courts. On the contrary the Courts have adopted a sophisticated and sensitive role in the adjudication of economic and social rights and expressed a reluctance to question the allocation of resources where such decisions are considered to be reasonable and taken in good faith.

Third, although Victoria is a prosperous State, there remain significant and real pockets of disadvantage and poverty, whether they be homelessness, or a lack of access to education and health care services. Human rights are intended to address such disadvantage and inequality. I concede that this will require the allocation of additional resources. But at the same time, it is important to remember, as the Treasurer proclaimed in his 2006-07 Budget Speech, that 'for the seventh consecutive year, the Government will meet its commitment to deliver an operating surplus in excess of \$100 million' and 'deliver a surplus of \$317 million in 2006-07 and surpluses averaging \$316 million over the following three years'. These are not figures to be proud of when families are struggling to feed and educate their children, the elderly are waiting on hospital lists for years and the homeless remain unable to find a safe place to rest.

As Attorney General, I now accept that the role of the Human Rights Charter is not simply to protect individuals from unjustified interference with their liberty by the State. Rather, the role of Government in a modern democratic State is to create and facilitate the conditions under which the full and fundamental dignity of each individual is secured. The explicit protection of economic and social rights within the Victorian Charter is critical to the realisation of this objective. Until their inclusion is secured, the 'powerful symbolic and educative tool' that the Charter will come to play within Victoria will remain compromised and incomplete.

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