



INDEX

OPINION ..... 1  
NEWS..... 2  
VICTORIAN CHARTER OF RIGHTS DEVELOPMENTS.... 4  
CASE NOTES ..... 7  
HRLRC POLICY, ADVOCACY AND LAW REFORM ..... 15  
HRLRC CASEWORK..... 17  
SEMINARS AND EVENTS... 18  
EDUCATION, TRAINING AND RESOURCES..... 18  
IF I WERE ATTORNEY-GENERAL.... 20

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The Human Rights Law Resource Centre Ltd aims to:

1. Promote and protect human rights in Australia through litigation, advocacy, research, education and training.
2. Build capacity in the legal and community sectors to use human rights in casework, advocacy and service delivery.
3. Empower people that are disadvantaged or living in poverty by operating within a human rights framework.

Opinion

It's Easy to Give Financial Equality to Same-Sex Couples and their Children

In June this year the Human Rights and Equal Opportunity Commission ('HREOC') published a report called *Same-Sex: Same Entitlements*. We put federal laws under the human rights microscope and we found that 58 of them breach the right to equality before the law and the right to be protected from discrimination on the grounds of sexual orientation.

The discrimination against same-sex couples is there on the statute books in black and white. And the discrimination exists around basic issues of employment entitlements, workers' compensation, tax, social security, veterans' entitlements, health care, superannuation, aged care and migration.

Just one example of the blatant nature of the discrimination is in the federal Comcare legislation. The law provides that if a worker covered by the Comcare scheme dies on the job, his or her 'spouse' can get workers' compensation death benefits. The law also states that one person can only be another person's 'spouse' if he or she is of the opposite sex. And that's the end of the story. With two small words in the definition of 'spouse' – 'opposite sex' – same-sex partners around the country are denied access to Comcare death benefits.

I am still incredulous that there could be such blatant and widespread discrimination against an entire sector of our community in such fundamental areas of life. However, there is one good thing about the blatant nature of the discrimination against same-sex couples – it means that the problem is easily fixed. Since the discrimination is directly attributable to the way the laws define who qualifies as a person's 'partner', 'spouse', 'de facto spouse' and so on, the simple solution is to amend those definitions so that a same-sex partner is included.

Unfortunately, the discrimination doesn't stop at same-sex couples. Of the estimated 20,000 plus same-sex couples in Australia (and the recent Census suggests the figure is actually closer to 50,000 couples), approximately 20% of lesbian couples, and 5% of gay male couples, are raising children.

Federal laws, and some state and territory laws, fail to recognise both same-sex parents as genuine parents. The consequence is that same-sex couples are frequently denied access to entitlements which are intended to help parents financially support their children. And when you deny financial benefits to same-sex parents, you inevitably sacrifice the best interests of the children being raised by that couple.

As one person said to us:

If benefits to couples are designed to promote the interests of children, then how can one possibly justify withholding those benefits from some children for no other reason than that their parents are both of the same gender?

A month ago the Democrats introduced the Same-Sex: Same Entitlements Bill, which appears to have substantially adopted our recommendations as to how to eliminate discrimination against same-sex couples. The Bill includes a definition of 'de facto relationship' and 'de facto partner' which is very similar to the one we recommend. The Bill also implements our suggestion to include the definitions of 'de facto relationship' in each of the laws that we have identified as discriminatory.

The Bill doesn't quite address all the issues facing the children of same-sex couples. That's because removing discrimination against the children of same-sex couples is a little more complicated. It involves amendment of the federal *Family Law Act*, federal financial laws and some state and territory laws. It's still not rocket science, but it does require a bit more cross-jurisdictional co-ordination.

It seems that the Federal Parliament is not quite ready to pass the Same-Sex Same Entitlements Bill, or any other similar legislation. But all political parties have indicated support for the elimination of discrimination against same-sex couples in the area of financial and work-related benefits, and I am hopeful that change will occur after the federal election – no matter which party takes government.

Over the past year I have been incredibly moved by those people in the gay and lesbian community who have made it very clear to me that there is only one thing that they want: to be treated equally; no more and no less than any other Australian. Just equal.

Ultimately, the 58 federal laws which we have identified fail the litmus test which all Australians apply in the schoolyard, the workplace and the sports field – the 'fair go' test. As 71% of Australians agreed in Get Up's recent Galaxy poll, to treat people differently simply because of who they love is just not fair. It is also a breach of human rights.

It is important to address the discrimination against same-sex families comprehensively and quickly. Our *Same-Sex: Same Entitlements* report shows that this is really not very hard to do so – there is no need to rewrite the laws; it is just a matter of changing a few definitions. We have provided Federal Parliament with the information and tools they need, it is now up to them.

*Graeme Innes AM is the Human Rights Commissioner*

## News

### Prisoners Win Right to Vote in Landmark High Court Decision

In a landmark decision, the High Court has upheld the fundamental human right to vote, finding that a blanket ban denying prisoners the vote is unconstitutional.

In 2006, the Howard Government passed legislation which denied all prisoners the right to vote. On 12 and 13 June 2007, the Centre challenged this law in the High Court on behalf of Vickie Roach, an Aboriginal woman who is a prisoner at the Dame Phyllis Frost Centre in Melbourne. In orders pronounced on 30 August, the High Court struck down the blanket prohibition on prisoners voting. The Court upheld the validity, however, of the previous law which provided that prisoners serving a sentence of three years or longer are not entitled to vote.

The decision of the High Court is a victory for representative democracy, accountable government, the rule of law and fundamental human rights. With Aboriginal Australians incarcerated at a rate of almost 13 times that of their fellow Australians, it is also a vindication of Indigenous rights.

The decision of the High Court is a common sense decision. The Howard Government disenfranchised prisoners on the spurious ground that to do so would promote respect for the social contract and the rule of law. Far from achieving this, denial of the fundamental human right to vote can result in social exclusion, isolation, resentment and unrepresentative government. This is particularly undesirable given that most prisoners will eventually be released into the community. As Vickie says:

I believe this serves only to further alienate us from society and ensures that the exiting prisoner feels no connection, commitment, or loyalty to his or her community, and may therefore not feel bound to respect its laws or social mores.

...

If we exclude prisoners from society by taking away their basic right to political communication, and condemn them as undesirables, how many other sections of society could become similarly marginalised? And how many other rights could then be eroded on the same precept?

Vickie is in good company; over the last ten years, the Supreme Court of Canada, the Constitutional Court of South Africa and the European Court of Human Rights have all reached the same conclusion.

The Human Rights Law Resource Centre pays tribute to Vickie for her courage, integrity and commitment in taking her fight to the High Court. In running this case, Vickie stood up not just for the human rights of prisoners and Aboriginal Australians, but the interests of the entire community. Speaking after the decision, Vickie's senior counsel, Ron Merkel QC, said Vickie may prove to be 'the Eddie Mabo of parliamentary democracy. Like Eddie, who lost his land claim but established the principle of native title in Australia, she lost her case in terms of her own right to vote but won the case for her own people and other prisoners.'

The Centre was provided with outstanding legal assistance throughout the case by leading Australian law firm Allens Arthur Robinson, Ron Merkel QC, Michael Pearce SC, and Fiona Forsyth and Kristen Walker of Counsel. The legal team brought significant commitment, expertise, resources and dedication to this matter. They acted to protect human rights and uphold the rule of law and, in so doing, acted in the highest traditions of the profession and the interests of the community as a whole.

The Centre also acknowledges the support of Victoria Legal Aid, which made a grant of funds to partially cover the costs of the matter. Pursuant to its guidelines, VLA may make a grant of aid in a public interest or test case which involves 'a legal issue that affects or is of broad concern to a significant number of disadvantaged people', or 'an untested or unsettled point of law that affects a significant number of disadvantaged people'. Law Aid also provided generous financial assistance to partially offset some of the disbursements associated with the matter.

The High Court will publish reasons on 26 September 2007.

### **UN Adopts Landmark Declaration on the Rights of Indigenous Peoples despite Howard Government Opposition**

The UN General Assembly has adopted a landmark declaration on the human rights of Indigenous peoples. The United Nations Declaration on the Rights of Indigenous Peoples was adopted on 13 September 2007 with an overwhelming majority of 143 states voting in favour, 11 abstaining and only 4 – including Australia – voting against the text.

The Declaration, which was negotiated over more than 20 years, sets out the individual and collective human rights of Indigenous peoples, including the right to self-determination, freedom and protection from discrimination, cultural and customary rights, rights to language and identity, land and resource rights, and development rights. The Declaration enshrines the principle that Indigenous peoples have the right to participate in decision-making processes which affect them and requires that states consult and cooperate in good faith with Indigenous peoples on matters which affect their rights.

While non-binding, the Declaration is not merely an aspirational text but sets out the 'minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world'.

Internationally, the Declaration was hailed by UN High Commissioner for Human Rights, Louise Arbour, as a 'triumph for justice and human dignity' and by UN Secretary-General, Ban Ki-moon, as an 'historic moment when UN Member States and Indigenous peoples have reconciled with their painful histories and resolved to move forward together on the path of human rights, justice and development for all.'

Domestically, Aboriginal leaders and the Federal Opposition described Australia's decision to vote against the Declaration as 'contemptuous' of Aboriginal rights. Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, said, 'the Declaration's text has been 20 years in the making and has the support of the world's Indigenous peoples. The Declaration...complies with international law and...can only benefit the ability of Indigenous peoples to enjoy their distinct human rights'.

Northern Territory Labor Senator Trish Crossin said, 'Coming at a sensitive time as the government introduces its sweeping changes ... it epitomises their heavy handed, top down approach to Indigenous

affairs'. 'The principles [in the Declaration] would ensure that Indigenous people are partners in change, not merely the subject of a government's latest policy shift,' she said.

Justifying the Howard Government's opposition to the Declaration, Indigenous Affairs Minister, Mal Brough, said it would provide 'one group with the power to veto Government decisions'. Lawyers and academics refuted this, however, with the Director of the University of New South Wales Indigenous Law Centre, Megan Davis, saying, 'it is absolutely incorrect to say that the Declaration will override sovereign law'. Earlier, a group of more than 25 Indigenous organisations from around the world protested outside Australia's UN mission in New York, calling on the Government to end its opposition to the Declaration.

The Declaration is available at <http://www.un.org/esa/socdev/unpfii/index.html>.

## Victorian Charter of Rights Developments

### UN Human Rights Committee Adopts General Comment on the Right to a Fair Hearing with Significant Relevance to the Victorian Charter

The UN Human Rights Committee has recently adopted General Comment No 32 on the right to a fair trial and equality before courts and tribunals pursuant to art 14 of the *ICCPR*. General Comment No 32 will be an important source of guidance on the interpretation and application of s 24 of the Victorian *Charter of Human Rights*, which enshrines the right to a fair hearing, and s 25, which guarantees various rights in criminal proceedings.

Art 14 of the *ICCPR* provides, among other things, that:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

A General Comment is an authoritative summary of the views of a human rights treaty body on the normative content and application of the treaty over which it has jurisdiction. It is an accepted principle of domestic law that it is appropriate to consider the opinions and decisions of treaty bodies (see, eg, *Commonwealth v Bradley* (1999) 95 FCR 218; *Commonwealth v Hamilton* (2000) 108 FCR 378) and, accordingly, the judicial authority of the Human Rights Committee and its General Comments has been recognised by domestic courts (see, eg, *Cornwell v The Queen* [2007] HCA 12; *Tavita v Minister of Immigration* [1994] 2 NZLR 257) and legislatures (see, eg, the Explanatory Memorandum to the Victorian *Charter*). This is an aspect of the broader principle that it is desirable, as far as possible, that expressions used in international agreements be construed in a uniform and consistent manner by both municipal and international courts and panels (see, eg, *Rocklea Spinning Mills Pty Ltd v Anti Dumping Authority* (1995) 56 FCR 406; *Povey v Qantas Airways Ltd* (2005) 216 ALR 427).

General Comment No 32 is likely to have particular significance to the interpretation and application of the following provisions of the *Charter*:

- s 24, which enshrines the right to a fair hearing and is stated in the Explanatory Memorandum to be modeled on art 14(1) of the *ICCPR*;
- s 25, which provides for various rights in criminal proceedings and is modeled on arts 14(2) to (5) of the *ICCPR*; and
- s 26 which establishes the right not to be tried or punished more than once for an offence for which that person has already been finally convicted or acquitted in accordance with law. This clause is modeled on article 14(7) of the *ICCPR*.

Key features of General Comment No 32 applicable in both civil and criminal proceedings provide that:

- Access to justice is a human right *sui generis* and a critical element of the promotion, protection and fulfilment of other human rights.
- The right to a fair hearing is a fundamental human right. Any limitations on the right must be strictly necessary and the minimal impairment possible. General limitations on the right to a fair hearing are incompatible with the *ICCPR*.

- The right to a fair hearing and equality before courts encompasses and subsumes a right of access to courts and tribunals. Appropriate steps and measures must be taken to facilitate such access so as not to undermine the very essence of the right.
- The availability of legal assistance often determines whether or not an individual can access and participate in judicial proceedings in a meaningful way. Having regard to this, states are encouraged to provide legal aid for indigent individuals in civil proceedings and, in some cases, may be positively obliged to do so. Legal assistance may be required for an individual to vindicate their rights under the *ICCPR*. Art 14(3)(d) of the *ICCPR* addresses the guarantee of legal assistance in criminal proceedings.
- The imposition of fees on parties to judicial proceedings may *de facto* prevent access to justice contrary to the right to a fair hearing. In particular, courts and the state should consider the implications of a rigid rule to award costs to a winning party.
- The right to equality before courts and tribunals requires equality of arms and that all the parties involved in judicial proceedings should be provided with the same procedural rights. The right to a fair trial must ensure that litigants have the opportunity to present their case in conditions without substantial disadvantage compared to the other party. This may, for example, require the free assistance of an interpreter where otherwise an indigent party could not participate in proceedings on equal terms.
- Expeditionness is an important aspect of the fairness of a hearing. Delays in proceedings that cannot be justified by the complexity of the case or the behaviour of the parties are not compatible with the principle of a fair hearing. States must allocate sufficient budgetary resources to ensure the effective administration of justice.
- The notion of a fair trial includes the guarantee of a fair and public hearing. The publicity of hearings ensures the transparency of proceedings and provides an important safeguard for the interests of the individual and of society at large. While the right to a public hearing is one that belongs to the parties in the litigation, it also belongs to the general public in a democratic society. Limitations on an open and public hearing are only permissible in exceptional circumstances, such as national security, the protection of children, or the privacy of individuals.

General Comment No 32 also addresses a range of guarantees in respect of criminal proceedings:

- Every person shall be entitled to a presumption of innocence, which is a non-derogable principle of human rights.
- Public authorities and the media must abstain from making statements which suggest the guilt of the accused.
- Defendants should not be shackled during trials or otherwise presented in a manner indicating that they may be dangerous criminals.
- Accused persons must have adequate time and facilities for the preparation of their defence and to communicate promptly and confidentially with counsel of their choosing.
- Defendants must be tried without undue delay.
- Statements obtained under torture or other inhuman, cruel or degrading treatment are not admissible as evidence except as evidence that torture or other prohibited treatment has occurred.
- Criminal procedures in respect of juveniles must take account of their age, provide special protection, and promote rehabilitation.

Finally, General Comment No 32 discusses the relationship of art 14 with other provisions of the *ICCPR*, recognising that the right to a fair hearing 'plays an important role in the implementation of the more substantive guarantees of the Covenant'.

General Comments of the UN Human Rights Committee are available at

<http://www.ohchr.org/english/bodies/hrc/comments.htm>, with General Comment No 32 available at <http://www.ohchr.org/english/bodies/hrc/docs/gcart14.doc>.

*Philip Lynch is Director of the Human Rights Law Resource Centre*

## Statements of Compatibility under the Victorian *Charter*

Section 28 of the *Charter of Human Rights and Responsibilities* requires a Statement of Compatibility to be issued for every Bill that is introduced into a House of Parliament.

### **Justice and Road Legislation Amendment (Law Enforcement) Bill 2007**

The Justice and Road Legislation Amendment (Law Enforcement) Bill 2007 seeks to strengthen law enforcement and police accountability by:

- strengthening the offence of unlawfully dealing with information obtained by police personnel;
- allowing the Chief Commissioner of Police to give authorised media organisations access to photographs of convicted persons, within six months of their conviction;
- making it an offence to continue driving after receiving a direction to stop by a member of the police force; and
- amending the *Sex Offenders Registration Act 2004* to require more information to be provided by registrable offenders, to allow disclosure of information in certain circumstances, to include volunteer work in the definition of child-related employment, and to require any change of name application to be approved.

The Bill potentially engages a number of rights contained in the *Charter of Human Rights and Responsibilities*, including the right to life (s 9), freedom of movement (s 12), privacy (s 13(a)), freedom of expression (s15(2)), protection of families and children (s 17), and property rights (s 20). The Statement of Compatibility considers each of these rights in turn, particularly focusing on the right to privacy.

The Bill contains a number of clauses which may limit a person's right to privacy. The Statement considers whether these limitations are unlawful or arbitrary.

For example, the disclosure of personal information, such as a photograph, to the media, is likely to impinge upon a convicted person's right to privacy. However, the Statement contends that the public interest in the release of a photograph outweighs the restriction on the individual's right, particularly given that the decision to release a photograph will be made on a case-by-case basis according to the specific circumstances involved.

A further example is the extended power to collect personal information under the *Sex Offenders Registration Act 2004*. This power engages the right to privacy of registrable offenders. However, only particular additional information is allowed to be collected, and provisions restricting the disclosure of personal information have also been introduced. Therefore, according to the Statement, the power is not unlawful or arbitrary, and so does not unreasonably limit the right to privacy.

The Statement concludes that the Bill is compatible with the human rights protected by the *Charter*. The limitation on rights can be reasonably justified given the harm sought to be prevented and the lack of alternative means to achieve the same outcomes. As well as limiting some rights, the Statement refers to the fact that the Bill also enhances other rights, such as the right to life, the right to freedom of expression and the protection of families and children.

*Katie Hamilton, Articled Clerk, Human Rights Law Group, Mallesons Stephen Jaques*

### **Confiscation Amendment Bill 2007**

The *Confiscation Amendment Bill 2007* makes various amendments to the *Confiscation Act 1997* to:

clarify the operation and scope of provisions relating to exclusion orders and related appeal provisions and to make miscellaneous amendments relating to interests in property which may be subject to orders.

Under the Act, property is forfeited if it belongs to persons convicted of certain offences, if it is retained on suspicion that it is tainted property, or if it constitutes the proceeds of a crime. Exclusion orders exist to exclude certain property from forfeiture.

The Statement of Compatibility submitted in accordance with the *Charter* identified three sections of the Charter which are engaged by the Bill.

The Bill engages s 20 of the *Charter*, which provides that 'a person must not be deprived of his or her property other than in accordance with law', through a number of proposed amendments. First, the Bill

seeks to clarify that exclusion orders relate only to the applicant's interest in property rather than the whole of the particular property. According to the Scrutiny of Acts and Regulations Committee Report on the Bill, this amendment 'does not affect any applicant adversely.'

Second, the type of property to which an exclusion order can apply has been limited by the addition of 'derived property' to 'tainted property' in certain provisions. Therefore, an applicant for an exclusion order must demonstrate that the subject of the application is not property derived from unlawful conduct (derived property), regardless of whether the property 'is the object of the immediate charge or not.' According to the Statement, the Bill strikes an effective balance between the interests of the State in discouraging criminal activity with the property rights of individuals, and accords with European Court of Human Rights jurisprudence.

Finally, the Bill makes amendments which will allow the court to confiscate property that has been transferred for less than full value (eg, as a gift to a criminal's spouse). This amendment engages s 20 of the *Charter*, as well as s 13 (the right to privacy and reputation) and s 17 (protection of families and children). Although the Statement recognises potential negative consequences for families or the family home, it emphasises the need to prevent criminals from subverting the confiscation regime. The Statement also refers to the fact that other sections of the Act sufficiently deal with the 'court's discretion to take into account circumstances which may give rise to hardship', and to ameliorate any significant impact.

*Carla Cummings, Articled Clerk, Human Rights Law Group, Mallesons Stephen Jaques*

## Case Notes

### Excessive Court Fees Incompatible with the Right to a Fair Hearing

*Kijewska v Poland* [2007] ECHR Application No 73002/01 (6 September 2007)

The European Court of Human Rights has held that the right to a fair hearing subsumes a right of access to a court and that a requirement to pay substantial court fees to file or proceed with a claim may constitute a violation of that right.

#### Facts

The applicant, Bozena Kijewska, lodged a civil claim regarding a property dispute in the Polish local courts. She applied on a number of occasions between 1999 and 2001 to be exempted from court filing and processing fees amounting to approximately 10,000 Polish zlotys (about A\$4000). The applicant received on average around 2,500 Polish zlotys (about A\$1000) from a disability pension and part-time work as a lawyer. The Polish courts refused her applications for exemption from the court fees and dismissed her claim accordingly. In 2004, the applicant again filed her claim and paid the associated court fees. This claim was determined on the merits and dismissed in 2005.

The applicant then lodged a complaint with the European Court of Human Rights alleging that the excessive court fees required to proceed with her claim constituted a breach of her right of access to a court for the determination of her civil rights under art 6 of the *European Convention*. Art 6 relevantly provides that, 'In the determination of civil rights and obligations ..., everyone is entitled to a ... hearing ... by [a] ... tribunal established by law. ...'

#### Decision

The Court held that, pursuant to its judgment in *Kreuz v Poland* (Application No 28249/95, 19 June 2001), a requirement to pay substantial fees to civil courts can be regarded as a restriction on the right of access to a court. The Court stated that the amount of the fees assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them, and the phase of the proceedings at which that restriction has been imposed, are factors which are material in determining whether or not a person enjoyed a right of access and had 'a ... hearing by [a] tribunal'.

In the present case, the Court considered that the amount of the court fees were substantial, particularly having regard to the applicant's monthly income, stating that 'it does not seem reasonable to demand that she spend it on the payment of court fees rather than on her basic living needs.' The Court also

observed that, even if the fees were not waived in their entirety, the Polish courts could and should have considered partial exemption.

In respect of the claim filed and applications made between 1999 and 2001, the Court concluded that, 'having regard to the importance of the right to a court in a democratic society...the judicial authorities failed to secure a proper balance between the interest of the state in collecting court fees on the one hand, and the interest of the applicant in pursuing her civil claim on the other'. The Court further concluded that 'the refusal to reduce the fee for lodging the applicant's claim constituted a disproportionate restriction on her right to access to a court' in breach of art 6 of the *European Convention*. The Court ordered the payment of EUR 6,000 in damages for the applicant's 'frustration and feeling of injustice'.

In respect of the claim filed and substantively dismissed in 2005 after the applicant had paid the fees, the Court held that the applicant had obtained a determination on the merits by domestic courts and, therefore, notwithstanding that the court fees were very high, they could not be found on the facts to have constituted 'an unjustified restriction on her access to a court'.

### **Implications for the Victorian Charter**

This decision may be relevant to the interpretation and application of s 24 of the *Charter*, which provides that 'a person charged with a criminal offence or a party to a civil proceeding has the right...to a fair hearing'.

As discussed in Edition 17 of the Bulletin, on a narrow view, the term 'party to a civil proceeding' used in the *Charter* is more limited in its application than a term such as a person seeking 'determination of rights and obligations in a suit at law' used in art 6 of the *European Convention* and art 14 of the *ICCPR*, and will not subsume a right of access to the courts; the right to a fair hearing is only a right belonging to a person who is already before the court.

The broader and better view, however, is that 'party to a civil proceeding' under s 24 of the *Charter* should be interpreted to include a *potential* party to a proceeding in circumstances where the denial of access to a court would amount to the denial of a fair hearing itself. Both the European Court and the UN Human Rights Committee have consistently stated that human rights must be interpreted and applied in a manner which renders them 'practical and effective, not theoretical and illusory' (see, eg, *Goodwin v United Kingdom* (2002) 35 EHRR 447, [73]-[74]; *Airey v Ireland* (1979) 2 EHRR 305, 314; *Currie v Jamaica*, UN Doc CCPR/C/50/D/377/1989). Accordingly, the right to a fair hearing has been consistently held, at the very least, to include the minimum basic elements of:

- equal access to, and equality before, the courts;
- the right to legal advice and representation;
- the right to procedural fairness;
- the right to an expeditious trial or hearing without undue delay;
- the right to a competent, independent and impartial tribunal established by law;
- the right to a public hearing; and
- the right to have the free assistance of an interpreter where necessary.

In respect of access to a court, both the Human Rights Committee and the European Court have held that the fair conduct of a civil proceeding is meaningless if one does not have the right to bring the proceeding in the first place. The right to a fair hearing presupposes the right of access to the courts just as it presupposes the existence of the courts themselves (see, eg, *Golder v United Kingdom*, 4451/70 [1975] ECHR 1). Both bodies have further held that fulfilment of the right to a fair hearing may require positive action by the state to ensure effective access to the courts, such as waiver of court fees and the provision of legal aid (see, eg, *Airey v Ireland* (1979) 2 EHRR 305).

The broader interpretation of s 24 of the *Charter* is consistent with the requirement pursuant to s 32(1) of the *Charter* that all statutory provisions must be interpreted compatibly with human rights (this interpretative principle relevantly applying to s 24 of the *Charter* itself) and s 32(2) which encourages Victorian courts to consider international and comparative human rights jurisprudence. It is also consistent with the fact that the right to a fair hearing under international law is considered by the

Human Rights Committee to be fundamental and, in certain respects, non-derogable (see, eg, HRC, *General Comment 29: States of Emergency (Article 4)*, UN Doc CCPR/C/21/Rev.1/Add.11 (2001) [11]).

The decision is available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database>.

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## Complaints of Ill-Treatment in Custody Must be Promptly Investigated and Plausibly Explained

*Yilmaz v Turkey* [2007] ECHR Application No 17721/02 (5 June 2007)

The European Court of Human Rights has held that serious allegations of torture or other cruel, inhuman or degrading treatment or punishment must be the subject of expeditious, effective and independent investigation. It has further held that evidence of ill-treatment, particularly of persons in custody, will give rise to a rebuttable presumption that the ill-treatment occurred and shift the burden to the state to provide a 'plausible explanation' as to the injuries.

### Facts

The applicant, Mr Hürriyet Yilmaz, was arrested by police in September 1996. He alleged that, at the time of his arrest, he was severely beaten on his neck and back. He further alleged that, during interrogation in custody, he was stripped, punched, beaten with a truncheon and had his testicles squeezed.

The Turkish Government maintained that Mr Yilmaz's interrogation occurred in the presence of his lawyer and that the report of a medical examination conducted on his last day in custody concluded that there were no signs of ill-treatment. However, subsequent medical investigations indicated that the applicant had suffered injuries consistent with the allegation that his neck was beaten at the time of his arrest. His first allegation was also corroborated by the testimony of his two children, who witnessed the arrest. The authorities provided no explanation for the applicant's injuries.

In response to complaints by Mr Yilmaz, the public prosecutor began investigating the allegations in late 1996. The process was subject to lengthy delays. In September 2000, the İstanbul Assize Court acquitted the police officers, on the grounds that there was insufficient evidence.

### Decision

The applicant argued that the Turkish Government breached its obligations under art 3 of the *European Convention*, which provides that '[n]o-one shall be subject to torture or to inhuman or degrading treatment or punishment.' He contended that the alleged ill-treatment constituted a substantive violation of art 3, and that the domestic authorities' failure to effectively investigate those allegations amounted to a procedural violation.

The Court dismissed the allegation as to ill-treatment in custody on the basis of Mr Yilmaz's failure to raise the allegation before domestic authorities, and the lack of supporting evidence.

The Court then turned to the applicant's allegation as to ill-treatment at the time of arrest. The Court held that the applicant needed to prove his allegations beyond reasonable doubt, but noted that 'proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact'. In the case of a person injured while in police custody, 'any such injury will give rise to a strong presumption that the person was subjected to ill-treatment'. The onus was on the Turkish Government to provide a 'plausible explanation' for Mr Yilmaz's injuries, which they failed to do. On the facts, the Court found that there had been a substantive violation of art 3.

The Court also found that there had been a procedural violation of that provision, arising from the Turkish Government's failure to expeditiously investigate the applicant's allegations. The Court held that a state's obligations under art 3, read together with the general duty under art 1 (to 'secure to everyone within their jurisdiction the rights and freedoms defined in... [the] Convention') gives rise to an implied requirement 'that there should be an effective official investigation.' The investigation should be 'capable of leading to the identification and punishment of those responsible' and 'must be independent, impartial and subject to public scrutiny'. In addition, 'the competent authorities must act with exemplary

diligence and promptness'. In this case, the Turkish authorities' investigations did not meet the Court's standards because of lengthy delays.

### **Implications for the Victorian Charter**

Pursuant to s 32(2) of the Victorian *Charter*, Victorian Courts are permitted to consider the judgments of foreign or international courts when interpreting statutory provisions. The European Court's judgment may be relevant in the application of s 10 of the *Charter* (which provides for protection from torture and cruel, inhuman or degrading treatment) as well as s 22 (humane treatment when deprived of liberty).

Victorian courts may look to *Yilmaz v Turkey* (and related cases) for guidance about the standard and burden of proof in cases concerning allegations of torture and cruel, inhuman or degrading treatment. In particular, courts may adopt the principle that, if a person sustains injuries pursuant to arrest or while in detention or custody, this gives rise to a refutable presumption that he or she was subjected to ill-treatment.

With regard to procedural rights, it is desirable that, as has occurred in the UK under the *Human Rights Act 1998*, the courts will imply an obligation to conduct an effective, expeditious, independent and impartial investigation in respect of allegations of torture and ill-treatment.

*Jess Moir is a member of the Corporate Responsibility Group at Allens Arthur Robinson*

### **Access to Medical Treatment in Detention**

*Paladi v Moldova* [2007] ECHR Application No 39806/05 (10 July 2007)

The European Court of Human Rights has held that the medical treatment of a prisoner within a remand centre and prison hospital was inadequate and that failure to treat him as an inpatient at a hospital where he could receive the necessary neurological and hyperbaric oxygen treatment amounted to a violation of the prohibition on torture and other cruel, inhuman or degrading treatment.

#### **Facts**

The applicant, Mr Paladi, was Deputy Mayor of Chişinău. He was arrested in September 2004 and charged with corruption and abuse of his position. He was detained initially in a remand centre and subsequently in a prison.

The applicant suffered a range of serious illnesses, including diabetes, hepatitis, hypertension, chronic pancreatitis and cardiac and neurological problems. A number of medical practitioners recommended that the applicant be treated as an inpatient in an appropriately equipped hospital and concluded that he required constant medical supervision without which he faced major health risks. Despite this, the applicant was only visited sporadically by doctors and received urgent medical assistance, including hyperbaric oxygen treatment, in emergencies. He made a number of unsuccessful habeas corpus applications to domestic courts and continued to be held on remand until December 2005.

Before the European Court, the applicant alleged, among other things, that his inadequate medical treatment in custody amounted to cruel, inhuman or degrading treatment contrary to art 3 of the *European Convention*. The government responded that the applicant had received appropriate medical treatment, both in the remand centre and prison and prison hospital.

#### **Decision**

The Court reiterated the principles established in *Sarban v Moldova* that 'ill-treatment must attain a minimum level of severity if it is to fall within the scope of art 3'. In *Sarban*, the Court stated that:

The assessment of this minimum level is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. Although the purpose of such treatment is a factor to be taken into account, in particular whether it was intended to humiliate or debase the victim, the absence of any such purpose does not inevitably lead to a finding that there has been no violation of art 3.

The Court then examined the relevance of art 3 to the medical treatment of persons in detention, concluding that:

Although art 3 of the Convention cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance.

The Court affirmed the principle set down in *Sarban* that 'the right of all prisoners to conditions of detention which are compatible with human dignity', requires that they are not subject 'to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention'.

In the present case, the Court considered that the lack of proper medical assistance at the remand centre and in prison, the incomplete treatment of the applicant in the prison hospital and the failure to continue the recommended hyperbaric oxygen treatment 'unnecessarily exposed the applicant to a risk to his health and must have resulted in stress and anxiety' which was 'in excess of the level inherent in any deprivation of liberty'. The Court concluded that this amounted to a violation of art 3 and awarded the applicant 21,080 euros in damages.

### **Implications for the Victorian Charter**

A number of influential courts and bodies – including the European Court of Human Rights under the *European Convention*, the UK Court of Appeal under the *Human Rights Act 1998*, and the UN Human Rights Committee under the *ICCPR* – have consistently held that the state has a particular duty and responsibility for the health and well-being of those in its custody.

In recent cases, the European Court has stated that the quality of healthcare to those imprisoned by the state is not to be relative. While an individual in society may have no right to healthcare as such, where they are in the state's custody the state must ensure that they receive the medical care required (see, eg, *Holomiov v Moldova* ([2007] ECHR 30649/05); *Istratii and others v Moldova* ([2007] ECHR 8721/05)). Both the European Court and UK courts have stated that scarce resources or logistical difficulty will not be legitimate excuses for inadequate medical treatment to prisoners. In *Mamedova v Russia* ([2007] ECHR 7064/05), for example, the European Court stated that it is 'incumbent on the...Government to organise its penitentiary system in such a way that ensures respect for the dignity of detainees, regardless of financial or logistical difficulties' (see also *Frolov v Russia* [2007] ECHR 205/02). Similarly, the UK Court of Appeal stated in *R (Noorkoiv) v Secretary of State for the Home Department* ([2002] EWCA Civ 770, [31]) that the government could not be excused from what were otherwise breaches of the right to liberty and freedom from cruel treatment in the prison context 'simply by pointing to a lack of resources that are provided by other arms of government'. Where authorities decide to place and maintain a seriously ill person in detention, they must demonstrate special care to provide conditions of detention to accommodate the disability (see, eg, *Testa v Croatia* ([2007] ECHR 20877/04)).

In an Australian context, the Victorian Ombudsman concluded in a July 2006 report entitled *Conditions for Persons in Custody* that 'there are significant deficiencies in the health care provided to prisoners' as a result of factors including 'insufficient resources', 'contractual arrangements with health providers' and 'prison regulations which create obstacles to the provision of effective health care'. Similarly, a July 2007 audit of ACT correctional facilities conducted by the ACT Human Rights Commission concluded that the ACT needs to 'do much more to ensure that people receive adequate...health care and treatment'. The Commission stated that:

Health services to detained persons must be equivalent to those available in the community and should form part of, and be broadly consistent with the wider community health system. When it comes to health, prisoners are patients first.

It is imperative that the Victorian Government review and implement recommendations such as these if Victorian prison conditions and prisoner health care services are to meet the threshold required by s 10 (protection from torture and cruel, inhuman or degrading treatment), s 21 (right to liberty and security of person) and s 22 (humane treatment when deprived of liberty) of the Victorian *Charter*.

*Phillip Lynch is Director of the Human Rights Law Resource Centre*

## The State Must Facilitate and Enable Freedom of Peaceful Assembly

*Bukta v Hungary* [2007] ECHR Application No 25691/04 (17 July 2007)

*Makhmudov v Russia* [2007] ECHR Application No 35082/04 (26 July 2007)

The European Court of Human Rights has considered two cases in which it held that the relevant State party had interfered with the right to freedom of peaceful assembly in art 11 of the *European Convention of Human Rights*. That right is protected by s 16(1) of the *Victorian Charter*. In both cases, domestic law required that the authorities be informed in advance of any planned public assembly.

In *Bukta v Hungary*, the Court held that the requirement to give prior notice of an assembly is not itself necessarily a breach of art 11. However, in situations where it would have been impossible to comply with the notice requirement, to disperse an assembly for the sole reason that such notice was not given amounted to a disproportionate restriction of the right to assembly not warranted in a democratic society.

In *Makhmudov v Russia*, the Court held that where a State withdraws permission for an approved public assembly, it must substantiate its reasons for doing so or explain why those reasons cannot be substantiated. Where a State fails to do so, the interference with the right to peaceful assembly will be considered arbitrary and unjustified.

### General Principles

In both cases, the Court took a two step approach to assessing whether there had been a breach of art 11. First, it asked whether there was an interference with the right to peaceful assembly. Secondly, it considered whether that interference was justified under art 11(2).

Art 11(2) provides that restrictions placed on the right to peaceful assembly must be

prescribed by law and ... necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others...

According to the Court, the right to freedom of peaceful assembly is a fundamental right which is a foundation of a democratic society. Measures which interfere with this right must be:

- required by a democratic society;
- justified by 'convincing and compelling reasons';
- 'proportionate to the legitimate aim pursued' in light of all the facts of the case; and
- imposed by a State 'reasonably, carefully and in good faith.'

### *Bukta v Hungary*

The applicants organized a demonstration outside a government function. They could not comply with the three day notice period, because they only planned the demonstration one day before it was held, when the Prime Minister announced he would attend the function. Approximately 150 people participated in the demonstration, which was then disbanded by police.

The Court considered that the requirement to give notice did pursue a legitimate aim: it allowed the police to prevent disorder and protect the rights of others. However, dispersing the demonstration for the sole reason that prior notice was not given was disproportionate and not justified in this case.

Because the Prime Minister only announced his intention to attend the function the day before the event, the applicants either had to forego their right to peaceful assembly or exercise that right without complying with the notice period. The Court held that requiring them to forego their right altogether did not pursue a legitimate aim.

The Court reiterated that public authorities must 'show a certain degree of tolerance towards peaceful gatherings' which present no danger to public order except for a minor, inevitable level of disturbance.

### *Makhmudov v Russia*

The applicant organised a public assembly and informed the relevant authority. Notice of the assembly was initially accepted but later withdrawn, allegedly to ensure public safety due to an 'unexpected

outbreak of terrorist activities.’ A few dozen residents still assembled, and the police dispersed them by force. The applicant was charged with organizing an unauthorized assembly.

The Court considered that the cancellation of the assembly was arbitrary and without justification for two reasons. First, the Government failed to substantiate its claims of terrorist activity. Where a Government does not provide information to support its reasons for cancelling an assembly, nor provide a satisfactory explanation for failing to do so, it can be inferred that the cancellation was not necessary.

Second, the fact that the Government-organised ‘Day of the City’ celebrations went ahead throughout Moscow during the same period as the public assembly, and were in fact attended by thousands of people, indicated that the alleged concerns of terrorist activity could not have made cancellation of the assembly necessary.

### **Implications for the Victorian *Charter***

The judgment of the Court in these cases will be relevant to future consideration of s 16(1) of the *Charter*, which guarantees the right to peaceful assembly. Section 7(2) of the *Charter* allows restrictions to be placed on Charter rights in similar circumstances to those in art 11(2) of the *European Convention*.

Such limitations must be ‘under law,’ reasonable and ‘demonstrably justified in a free and democratic society ... taking into account all relevant factors’, including whether there are less restrictive means available to achieve the purpose of the limitation.

The principles expressed by the Court will likely influence interpretation of s 16(1) of the *Charter*, such that:

- it would not be considered legitimate to disperse an otherwise permissible assembly for the sole reason that a notice period has not been complied with in circumstances where compliance with the notice period was unreasonable; and
- the Government would likely be required to substantiate its reasons (or provide an explanation for why those reasons cannot be substantiated) for not allowing an assembly to proceed, or overturning an earlier decision to allow an assembly (this principle may also apply to the dispersal of an otherwise permissible assembly).

The European Court’s recognition that measures required to protect the rights of others (such as a 3 days prior notice requirement) can be a legitimate aim of restrictions will also be relevant to s 7(3) of the *Charter*, which states that the rights guaranteed by the Charter are not to detract from the rights of others.

*Jane Tipping, Articled Clerk, Mallesons Stephen Jaques Human Rights Law Group*

### **Supreme Court of Victoria Considers and Applies ICCPR in the Context of the Right to a Fair Trial and the Obligations of a Court to Self-Represented Litigants**

*Tomasevic v Travaglini & Anor* [2007] VSC 337 (13 September 2007)

In a very significant decision, the Supreme Court of Victoria has considered the relevance and application of the human rights to equality before the law, access to justice and the right to a fair hearing under the *ICCPR* to the right to a fair trial under Victorian law and the obligations of the court to self-represented litigants.

#### **Facts**

Mr Tomasevic, a teacher with no legal background, was convicted by a magistrate on a range of criminal offences on 23 May 2003. Unrepresented, he sought leave to proceed with an appeal out of time before a judge of the County Court. The judge did not direct Mr Tomasevic’s ‘attention – as a self-represented litigant - to the salient points of law and procedure and refused the application.

Mr Tomasevic sought judicial review of the County Court decision before Bell J in the Supreme Court. In judgment, Bell J stated that:

This case both requires and deserves an analysis of the law with respect to the duty of a judge to ensure a fair trial by giving due assistance to a self-represented litigant, taking into account the fundamental human rights of equality before the law and access to justice specified in the *International Covenant on Civil and Political Rights*.

## Decision

The Court considered the 'significance of the human rights of equality before the law and access to justice' and stated:

56 The right of every person to a fair criminal or civil trial, and the duty of every judge to ensure it, is deeply ingrained in the law. Expressed in traditional terms, the right is inherent in the rule of law – indeed, 'in every system of law that makes any pretension to civilisation' – and in the judicial process. Expressed in modern human rights terms, the right to a fair trial is important for promoting and respecting equality before the law and access to justice.

57 The numerous human rights specified in the *ICCPR*, including equality before the law and access to justice, form the basis of the human rights set out in Part 2 of the *Charter of Human Rights and Responsibilities Act 2006*, which may be referred to, with a direct simplicity that only serves to emphasise its historic significance, as the *Charter*.

58 The Charter does not affect any proceedings commenced or concluded before the commencement of Part 2, which occurred on 1 January 2007. Like the proceeding brought against the accused in the case before King J in *R v Williams*, Mr Tomasevic's proceeding in the case before me was commenced before that date. Just as the *Charter* did not affect King J's consideration of Mr Williams' application, it does not affect my consideration of Mr Tomasevic's.

59 King J left open the important question of the extent to which, in cases to which the *Charter* applies, the courts are bound to apply the provisions of Part 2. That question does not arise in the present case, for the *Charter* does not affect it. The question that does arise in the present case is whether, apart from the *Charter*, the *ICCPR* is relevant in any event.

60 Apart from the *Charter*, the *ICCPR* does not 'operate as a direct source of individual rights and obligations' because it has not otherwise been incorporated into Australian law. But like other international instruments to which Australia is a party, the *ICCPR* has an independent and ongoing legal significance in Australian and therefore Victorian domestic law, a significance which is not diminished, but can only be enhanced, by the enactment of the *Charter*.

61 What is that significance? Subject to certain limitations and to an evolving extent, the *ICCPR*, and those other instruments, may at least inform the interpretation of statutes (so as to be consistent with and not to abrogate international obligations), the exercise of relevant statutory and judicial powers and discretions, the application and operation of the rules of natural justice, the development of the common law and judicial understanding of the value placed by contemporary society on fundamental human rights. In this regard, I would endorse, with respect, the remarks of Maxwell P in *Royal Women's Hospital v Medical Practitioners Board of Victoria* about the need to consider arguments based on Australia's international legal obligations in appropriate cases.

62 Therefore, even though the *Charter* does not affect my consideration of Mr Tomasevic's application for judicial review, I think the *ICCPR* does. To determine the application, it will be necessary for me to identify what was required for the proper performance of the duty of the trial judge to ensure a fair trial by giving due assistance to Mr Tomasevic as a self-represented litigant. I think this should be done in terms that take into account the importance of that duty in promoting and respecting the fundamental human rights of equality before the law and access to justice which are specified in the *ICCPR*.

63 I could decide this case by reference only to the judge's duty to ensure a fair trial. If that is so, you might ask, why should I also refer to the human rights issues that the case raises?

64 I would answer that Australia may be an island geographically, but in international law terms, we are not. Australia has chosen to become a party to the *ICCPR*, and so has undertaken to promote and respect the human rights of equality before the law and access to justice, which are universal and fundamental. This case concerns the inherent duty of a judge to ensure a fair trial by giving due assistance to a self-represented litigant. It therefore raises issues of direct practical importance to the promotion and respect of those rights. The inherent duty to ensure a fair trial and the human rights of equality before the law and access to justice

may be said to breathe the same air. Without impairing, indeed by asserting, the independence of our own law, judges can, and in my view should, act consistently with the international obligations specified in the *ICCPR* by accepting that, when appropriate, the exercise of relevant judicial powers and discretions, such as the duty to ensure a fair trial, can take into account the human rights specified in the *ICCPR*. That, I think, is the state and rationale of the current law. Of course the inherent duty to ensure a fair trial always remains the source of the binding law, but its nature is better understood, its function in the law is strengthened, its application is more penetrating and its capacity to evolve is enhanced once it is appreciated that its performance has an international dimension.

Justice Bell then went on to consider relevant domestic jurisprudence on the right to a fair trial and the duty of the court to self-represented litigants and concluded:

126 On the basis of this analysis, I think I can summarise the law as it currently stands.

127 Every judge in every trial, both criminal and civil, has an overriding duty to ensure the trial is fair. A fair trial is the only trial a judge can judicially conduct. The duty is inherent in the rule of law and the judicial process. Equality before the law and equal access to justice are fundamental human rights specified in the *ICCPR*. The proper performance of the duty to ensure a fair trial would also ensure those rights are promoted and respected.

128 Most self-represented persons lack two qualities that competent lawyers possess - legal skill and ability, and objectivity. Self-represented litigants therefore usually stand in a position of grave disadvantage in legal proceedings of all kinds. Consequently, a judge has a duty to ensure a fair trial by giving self-represented litigants due assistance. Doing so helps to ensure the litigant is treated equally before the law and has equal access to justice.

129 The matters regarding which the judge must assist a self-represented litigant are not limited, for the judge must give such assistance as is necessary to ensure a fair trial. The proper scope of the assistance depends on the particular litigant and the nature of the case. The touchstones are fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed.

Justice Bell concluded that, by reference to these principles, the County Court had failed to accord Mr Tomasevic a fair trial such as to constitute a breach of natural justice and failure to properly exercise jurisdiction. His Honour ordered that Mr Tomasevic's application for leave to appeal be remitted to the County Court for reconsideration according to law.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VSC/2007/337.html>.

## HRLRC Policy, Advocacy and Law Reform

### Centre Influences Normative Development of the Human Right to a Fair Hearing and Equality before Courts and Tribunals under International Law

As discussed above, on 23 August 2007, the UN Human Rights Committee released General Comment No 32 on the right to equality before courts and tribunals and to a fair trial under art 14 of the *ICCPR*. The Centre is pleased and proud that the General Comment incorporates a number of recommendations made in the Centre's submission on the draft General Comment in January 2007. Specifically, consistently with the Centre's recommendations, General Comment No 32 provides that:

- The right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party. [GC para 9, HRLRC submission paras 11.1-11.4]
- The principle of equality between parties applies also to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party. [GC para 13, HRLRC submission paras 5.1-5.2]
- In exceptional cases, equality between parties might require that the free assistance of an interpreter be provided where otherwise an indigent party could not participate in the proceedings

on equal terms or witnesses produced by it be examined. [GC para 13, HRLRC submission paras 8.1-8.2]

- Where delays in legal proceedings are caused by a lack of resources and chronic under-funding, to the extent possible supplementary budgetary resources should be allocated for the administration of justice. [GC para 27, HRLRC submission para 6.3]

The Centre would like to particularly thank Ben Schokman, the Centre's DLA Phillips Fox Human Rights Lawyer, for his excellent work on this submission.

### Centre Contributes to Normative Development of the Prohibition on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

On 24 August 2007, the Centre made a Submission to the UN Committee against Torture in response to Draft General Comment No 2 on art 2 of the *Convention against Torture*.

Art 2 of the Convention provides that:

- (a) each state party must take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction;
- (b) no exceptional circumstances (eg whether a state is at war; has internal political instability or any other public emergency) can justify an act of torture;
- (c) an order from a superior officer or a public authority may not be invoked as a justification for an act of torture.

The Draft General Comment is of significance to the normative development of human rights law.

Although the prohibition against torture is a non-derogable human right and a peremptory norm of customary international law, it continues to be flagrantly violated around the world. For example, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment reports that during the period from 16 December 2005 to 15 December 2006, he sent 79 letters of allegations of torture to 35 governments and 157 urgent appeals to 60 governments on behalf of persons who might be at risk of torture or other forms of ill-treatment. These statistics highlight the urgent need for state parties to receive practical instruction in respect of the Convention and in particular, art 2, which underpins the absolute prohibition against torture.

The Draft General Comment provides useful guidance on various aspects of art 2 of the Convention. In the Centre's submission, however, it could be strengthened by reference to relevant jurisprudence of the European Court of Human Rights (in particular, art 3 of the *European Convention of Human Rights*) and the General Comments of the United Nations Human Rights Committee, with particular reference to arts 7 and 10 of the *ICCPR*. A consideration of comparative jurisprudence provides a useful framework for the interpretation and application of the Draft General Comment.

The Centre's submission considers and makes recommendations on the following important aspects of the Draft General Comment:

- the definition of 'torture';
- the particular circumstances in which the prohibition against torture may be relevant, including arrest, prison conditions, immigration detention, detention for mental health purposes, non-refoulement and the 'war on terror';
- protection of vulnerable groups;
- the burden and standard of proof relevant to alleged violations of the norm; and
- the nature and scope of the negative, positive and procedural obligations arising out of the norm.

The submission was prepared with very substantial assistance from Lucy Adams, David Boots, Cameron Goodwin, Mele-Ane Havea, Sachi Haga, Udara Jayasinghe, Afroz Kaviani Johnson, Tom Lin, Elsie Loh, Warrick Louey, Jehan Mata, Daniel Matta, Michael McIver, Jarod Sacks, Ann-Maree Ventura, Rebecca Wilcock and Martine Wilson of Clayton Utz.

The submission is available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under Policy Work>HRLRC Submissions>Submission to UN Committee against Torture in response to Draft General Comment No 2.

## HRLRC Casework

### Conditions of Detention of 'Barwon 13' Continue to Raise Major Human Rights Concerns

As reported in previous editions of the Bulletin, on 3 August 2006, the Centre sent a request for urgent action to various UN Special Rapporteurs regarding the conditions of detention of the so-called 'Barwon 13'. The Barwon 13 are unconvicted remand prisoners who were charged with terrorism offences in November 2005 and have been held in prison pending trial since that time.

As a result of that request, the matter was considered in a number of reports tabled before the 4<sup>th</sup> and 5<sup>th</sup> Sessions of the UN Human Rights Council (including the Report of the Special Rapporteur on the independence of judges and lawyers (A/HRC/4/25/Add.1), the Report of the Special Rapporteur on freedom of religion or belief (A/HRC/4/21/Add.1), and the Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/HRC/4/26/Add.1)). At its 48<sup>th</sup> Session in May 2007, the UN Working Group on Arbitrary Detention also adopted an 'Opinion' on the matter (No 7/2007 (Australia)). The Working Group expressed a number of significant concerns in that Opinion, including that:

- the 'conditions of detention, as described by the source and not contested by the Government, are particularly severe, especially taking into account that they have been imposed upon persons who have not yet been declared guilty and who must, accordingly, be presumed innocent'; and
- 'the law appears to make the detention under extraordinarily restrictive conditions the rule for any person charged with a terrorist offence, without sufficient room for consideration of the specific charges against the detainees and their individual circumstances or dangerousness'. The Working Group went on to say that the submissions from both the source and the Government 'suggest that the judges deciding on bail applications might not have sufficient discretion to consider these matters either, at least in the absence of "exceptional circumstances"'.

In light of the continued detention and restrictive conditions imposed on the Barwon 13, the Centre has now written to each of the Special Rapporteurs to provide an update on the matter, summarised below.

On 6 September 2007, Ezzit Raad, who has been in custody since November 2005, applied for bail in the Supreme Court of Victoria. Mr Raad has been charged with number of terrorism offences contrary to the *Commonwealth Criminal Code*. His trial is due to commence on 4 February 2008 and is expected to run for at least 6 months. By that stage, like his 12 co-accused, he will have been on remand for almost 3 years.

The Supreme Court denied bail to Mr Raad on the ground that the *Criminal Code* establishes a presumption against bail for a person charged with a terrorism offence. The onus is on the accused to demonstrate exceptional circumstances justifying bail. Justice Bongiorno did, however, raise a number of significant concerns about the conditions of Mr Raad's detention, stating at [6] that:

With respect to Raad's conditions of detention Mr Barns pointed out that those conditions, which are now well known to the court from other applications in these proceedings, are extremely onerous, involving, as they do, confinement in conditions normally reserved for criminals convicted of the most heinous crimes - convicted contract killers and the like. The court has heard and accepted evidence in other cases that the conditions in the Acacia Unit in Barwon Prison are such as to pose a risk to the psychiatric health of even the most psychologically robust individual. Close confinement, shackling, strip searching and other privations to which the inmates at Acacia Unit are subject all add to the psychological stress of being on remand, particularly as some of them seem to lack any rational justification. This is especially so in the case of remand prisoners who are, of course, innocent of any wrongdoing.

His Honour did not, however, consider that these conditions in and of themselves constitute 'exceptional circumstances' justifying bail.

In the Centre's view, the presumption against bail, the length of pre-trial detention, and the oppressive conditions of detention raise significant human rights issues under arts 7, 9, 10 and 14 of the *ICCPR*, together with various provisions of the *Standard Minimum Rules for the Treatment of Prisoners* and the *Basic Principles for the Treatment of Prisoners*. The Centre will continue to raise these issues before international human rights bodies and tribunals.

The Supreme Court's decision is available at <http://www.austlii.edu.au/au/cases/vic/VSC/2007/330.html>.

## Seminars and Events

### Public Lecture on UN Declaration on the Rights of Indigenous People – 2 October 2007

The University of Melbourne Human Rights Forum is hosting a public lecture by Professor Mick Dodson, Director of the National Centre for Indigenous Studies, on the UN Declaration on the Rights of Indigenous People.

Date: Tuesday, 2 October. 6.00pm drinks, 6.30-7.30 lecture

Venue: Melbourne Law School, 185 Pelham St, Carlton

RSVP: [human-rights@unimelb.edu.au](mailto:human-rights@unimelb.edu.au)

Professor Dodson is a member of the Yawuru peoples, the traditional Aboriginal owners of land and waters in the Broome area of the southern Kimberley region of WA. He is Director of the ANU National Centre for Indigenous Studies. Professor Dodson was Australia's first Aboriginal and Torres Strait Islander Social Justice Commissioner with the Human Rights and Equal Opportunity Commission. For over a decade, he has participated in the drafting of the Declaration on the Rights of Indigenous People.

### 2007 Pro Bono Workshop – 15-16 October 2007

The Victoria Law Foundation's bi-annual pro bono workshop will be held at the Sofitel Mansion in Werribee on 15-16 October 2007. The workshop, themed 'Pro Bono 2020: Fit for the Future' is an opportunity for pro bono coordinators and practitioners to collaborate on and contribute to the development of pro bono practice, programs, projects and initiatives.

For further information, contact Maria McGarvie at the VLF on (03) 9614 8100 or [mmcgarvie@victorialaw.org.au](mailto:mmcgarvie@victorialaw.org.au).

## Education, Training and Resources

### What's New on the HRLRC Website?

The following full-text articles, among others, have been posted to the Centre's website over the last month:

- Dr Julie Debeljak, 'The Human Rights Responsibilities of Public Authorities under the *Charter of Rights*', Paper presented at the LIV Charter of Rights Conference, 18 May 2007
- Gareth Evans AO QC, 'The Responsibility to Protect: Creating and Implementing a New International Norm', Paper presented at Human Rights Law Resource Centre seminar, 13 August 2007
- Priyanga Hettiarachi, '*Some Things Borrowed, Some Things New: An Overview of Judicial Review of Legislation under the Charter of Human Rights and Responsibilities*' (2007) 7(1) *Oxford University Commonwealth Law Journal* 61
- Ron Merkel QC, Memorandum of Advice on the Interpretation and Application of s 39 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

### Selected Decisions of the UN Human Rights Committee under the Optional Protocol to the ICCPR

The UN Human Rights Committee has published a volume of selected decisions between July 2002 and July 2005 under the First Optional Protocol to the *ICCPR*.

For international human rights practitioners, the volume is a very helpful guide to the most important recent jurisprudence of the Committee. It contains 56 key decisions and includes indexes by subject, as well as by article of the *ICCPR* and the First Optional Protocol.

Domestically, the volume is likely to be particularly useful in Victoria, with the substantive human rights contained in the *Charter* being largely drawn from the *ICCPR*, and s 32(2) of the *Charter* providing that

'International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision'. The *Charter's* Explanatory Memorandum specifically cites the importance of jurisprudence of the Human Rights Committee under this sub-section.

The volume is available at <http://www.ohchr.org/english/about/publications/docs/sdecisions-vol8.pdf>.

### ***Free Speech in Fearful Times: After 9/11 in Canada, the US and Europe (2007)***

*Free Speech in Fearful Times* is an eye-opening collection of essays by leading writers from the US, UK, Canada and Australia, which provide an international and historical perspective on freedom of speech and academic freedom in times of irrational fear and hostility, especially amidst the chilling post-September 11 'war on terror'.

A key theme is the critical role of public and academic inquiry, underlining the importance of fairness, reason and open debate, within a culture of fear. This book reveals that we are instead witnessing a 'suspension of democratic critique', reflected in the minimal public debate and lack of critical media consideration of draconian counter-terrorism laws.

The book begins by placing current events in a historical context. The first chapters examine attacks on intellectuals and scholars for their political views and affiliations, when western governments have considered themselves under threat in past times. The striking example of the dismissal from Cambridge University of Bertrand Russell, following his active stance against British involvement in World War I, is characteristic of the harassment faced by anti-war intellectuals and German academics.

Other chapters recount personal experiences of American academics targeted during the McCarthy period, and restrictions on academic civil liberties in Cold War Canada. Each provides an example of freedoms being sacrificed in defence of a vague and ill-defined threat. As one writer warns, history repeats itself. Then, as now, we see the perpetuation of certain 'myths' in countering such threats: that the national interest requires an overwhelming emphasis on state security and intelligence powers, draconian legislation, and secrecy; and that this means rethinking the balance between civil liberties and security.

The book then turns in detail to the current 'war on terror', and the enactment of ill-considered anti-terrorism legislation, in the west. These laws are characterised by imprecise and broad definitions of terrorism, combined with unprecedented state coercive powers, and an erosion of long standing legal protections in these jurisdictions.

Essays on Australia and Canada canvass measures such as ministerial listing of 'terrorist' organisations based on secret intelligence information, vastly expanded powers of questioning and preventive arrest, criminalisation of speech through sedition laws, and discriminatory racial or religious profiling. Whereas the Canadian government has been somewhat constrained by the *Charter of Rights and Freedoms*, Australian parliamentary processes have failed to achieve a balance between national security and human rights.

Authors warn that by encompassing conduct ancillary to terrorist acts and 'guilt by association', Australian legislation risks casting the net so widely that innocent people are caught based on their social, intellectual or political connections. Also troubling is the over-use of immigration law, with its procedural shortcuts and lower standards of proof and fairness, as anti-terrorism law. Individuals may also be subject to rendition processes which put them at risk of serious human rights violations. Ascertaining the legitimacy of each of these measures becomes difficult when they are cloaked within secrecy and effectively shielded from public and academic scrutiny.

This book makes a particular contribution in revealing how the terror hysteria spills over into other areas of legislation, allowing government powers to extend into all areas of public, and private, life. Essays relating European experiences identify the intrinsic link between an increasingly coercive state and the decline of the welfare state.

Importantly, the book draws attention to alarming developments taking place under the public radar, involving governments setting up infrastructure for mass registration and surveillance of populations, justified as necessary to combat sophisticated globalised terrorism. When combined with broad terrorism offences and the demonisation of suspect 'terrorist communities', an environment can develop

where people are wrongfully implicated in suspicious activities and in which racial and religious discrimination is endemic.

The greatest danger of creating a 'surveillance society' is the internalisation of social control and self-censorship. The book draws on examples of the way in which the 'war on terror' has influenced the administration of educational institutions, targeted academics and students of Middle Eastern or Muslim background, and curtailed freedom over research activity across disciplines and open debate about contemporary politics.

This book goes beyond mere criticism of anti-terrorism laws. Several authors suggest recommendations to better protect human rights in general, and academic freedom in particular, such as use of 'softer' administrative and environmental controls, rather than coercive policing methods. In the Australian context, Williams suggests that in the short term, proposals for terrorism laws should be subject to reform through democratic scrutiny. The long term, however will require changing the political and legal terrain itself, to ensure that national security and human rights are 'balanced'.

This collection contains some repetitious content, and given the background of the editors, there is a stronger emphasis on Canadian material than that of other countries. Such minor flaws notwithstanding, this valuable anthology leaves a clear message for its readers: in a climate driven by a combination of fear for national and personal security, aggressive political rhetoric, and alarmist media coverage, protecting debate and dissent is of critical concern. Academics and the general public must resist the climate of fear, and actively protect open and critical speech, to preserve our traditions of civil liberties and academic freedoms.

*Tanaya Roy is Associate to Judge Felicity Hampel of the County Court of Victoria*

### **The War on Democracy – Film Releasing on 27 September**

*The War on Democracy* is a documentary about Latin America by Australian writer-filmmaker John Pilger. It explores people's yearning for democracy – government, for, by and of the people – and demonstrates the brutal reality of America's foreign policy of 'spreading democracy'. It also reveals the remarkable rise of true popular democracy and people power among the poorest on earth, the people of Latin America, whose grassroots movements are often ignored in the West.

Pilger conducts an exclusive interview with Venezuelan President Hugo Chavez and films the people of the barrios and the social movements of Venezuela, Bolivia and Chile, and those who suffered under dictatorships tolerated and encouraged by the US and the West. His interviews with ex US government officials and the head of the CIA in Latin America reveal that what happened in Latin America in the 1980s is a metaphor for how the rest of the world is being 'ordered' today, with the Middle East as its epicentre.

Hopscotch Films is offering supporters of the Human Rights Law Resource Centre double passes to see the film. To receive your 2-for-1 pass, email [Rachelb@hopscotchfilms.com.au](mailto:Rachelb@hopscotchfilms.com.au) with the subject line: HRLRC. Please include your name and mailing address in the text of the email.

For a trailer for the film see [www.warondemocracy.net](http://www.warondemocracy.net).

*Emma Saddington works for Hopscotch Films*

### **If I Were Attorney-General...**

#### **Fulfilling Australia's Human Rights Obligations**

If I were Attorney General, it would be an historic moment, as I would be the first female Attorney-General in Australia. Janet Reno served as first female Attorney-General in the US from 1993-2001; Minka Harms was appointed the first female Attorney-General in Germany in 2006; Kim Campbell served as Canada's first female Minister of Justice and Attorney-General from 1990-1993; Margaret Wilson served as the first female Attorney General in New Zealand from 1999-2004; and the UK appointed Dominican-born Baroness Scotland of Asthal QC, the first black female Attorney General in 2007. In Australia, despite three women now having been appointed to the highest court in the land, the office of Attorney-General has never been held by a woman.

Along with Australia being the odd one out for not having had a female Attorney General, Australia is also the only western Democratic nation not to have a Human Rights Act. So as the first female Attorney-General my first action would be to ensure that Australia joins the club of western democracies and enacts a National Human Rights Act that provides comprehensive human rights protection for all peoples in Australia.

Ensuring Australia is fully equipped to meet its international human rights obligations would be my main priority. Having brought in a Human Rights Act, I would move Australia towards signing and ratifying a number of significant international instruments that would demonstrate to the international community and to Australians the seriousness of Australia's commitment to uphold fundamental human rights standards.

I would have Australia sign the UN Declaration on the Rights of Indigenous Peoples. This Declaration has been negotiated by dedicated Indigenous representatives since 1985. The Declaration, which was finally accepted by the UN General Assembly in September 2007, has been welcomed by Indigenous groups around the world as an important recognition of Indigenous rights by the international community. The International Indigenous Women's Forum, has said:

The Declaration on the Rights of Indigenous Peoples will serve as a comprehensive international human rights instrument for Indigenous women, men and youth around the world. The Declaration...would allow Indigenous women to strengthen their advocacy in local, national and international arenas...[and] allow Indigenous women and their families to infuse local human rights struggles with the power of international law and hold their governments accountable to international human rights standards.

Australia was unfortunately one of only four nations who voted against the Declaration. Signing and implementing this Declaration is a step Australia needs to take to ensure the rights of Indigenous Peoples here in Australia.

Secondly, I would also urge the Australian Government to ratify the Optional Protocol to the *Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW) and I would urge the Australia Government to advocate at the international level for an Optional Protocol to the *Covenant on Economic Social and Cultural Rights*. The Optional Protocols provide a significant avenue for review and redress for individuals experiencing human rights violations. Through the Optional Protocol to CEDAW, a woman experiencing domestic violence in Hungary was able to take her case to the CEDAW Committee when the Hungarian government had failed to act to provide her with adequate protection. The Committee found that the government's failure to provide adequate access to safe shelter, the lack of provision for restraining orders in the law, the long delays in her case, and the failure to detain or put the perpetrator in custody, amounted to the government having failed to provide timely or effective protection or remedy, as required to realise the woman's rights under CEDAW. The Committee went on to make several recommendations for the Hungarian government to protect this woman from further violence, but also to ensure such violations, through the failure to take appropriate action, does not occur for other women as well. As can be seen with this example, the international community can play an important role in providing a check on the use of States' authority, to ensure it is consistent with the interests of the people. By committing itself to these optional protocols, the Australian Government would increase its accountability to protect people's human rights at the international level, and allow Australians to access remedies for violations of human rights that are unaddressed at the domestic level.

Next, building on Australia's signing of the *Convention on the Rights of Persons with Disabilities* in March 2007, I would move Australia towards ratifying the Convention and signing the Optional Protocol. As recognised by United Nations Human Rights Commissioner, Louise Arbour, until this Convention came about, the existing standards and mechanisms had failed to provide adequate protection for people with disabilities. Committing to upholding the rights in this convention will mean Australia will be obliged to address and realise the specific rights of people with disabilities in Australia

Having strengthened the legal framework for the recognition and protection of human rights, and the avenues of redress for human rights violations, I would then closely examine the violations of rights of Indigenous Peoples in Australia. One area of immediate concern would be the potential human rights violations under this current Federal Government's *Emergency Response and Development Plan* to protect Aboriginal children in the Northern Territory. The kinds of human rights violations I would be

concerned about include the compulsory acquisition of lands without adequate compensation, the undermining of self-determination of Indigenous Peoples with regards to decision making in their own organizations and affairs, rights to privacy, rights to social security, the right to work, and racial discrimination. I would be looking to revoke the relevant legislation or at least those aspects of it that may lead to human rights violations.

Finally, I would encourage and support government programs to increase Indigenous women's participation at all levels of government. In particular (and perhaps predictably) I would seek to support an Indigenous woman to succeed me as the Attorney General.

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