

INDEX

OPINION ..... 1  
 NEWS ..... 2  
 POLICY, ADVOCACY AND  
 LAW REFORM ..... 4  
 CASEWORK ..... 6  
 SEMINARS AND EVENTS ..... 7  
 EDUCATION AND TRAINING 7

HUMAN RIGHTS LAW  
 RESOURCE CENTRE LTD  
 Level 1, 550 Lonsdale Street  
 Melbourne VIC 3001  
 P: + 61 3 9225 6695  
 F: + 61 3 9225 6686  
 E: [hrlrc@vicbar.com.au](mailto:hrlrc@vicbar.com.au)  
 W: [www.pilch.org.au](http://www.pilch.org.au)

The Human Rights Law  
 Resource Centre Ltd is a joint  
 initiative of the Public Interest  
 Law Clearing House (Vic) and  
 Liberty Victoria.

The HRLRC aims to:

1. Contribute to the harmonisation of Australian law and policy with international human rights norms;
2. Support and enhance the capacity of the legal profession, judiciary, government 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

**The Value of the Legislative Entrenchment of Economic, Social and Cultural Rights**

On a recent visit to Australia, the UN Special Rapporteur on the Right to Health, Paul Hunt, reflected on the global trend towards the legislative entrenchment and judicial recognition of economic, social and cultural rights, such as the rights to education, adequate housing and health care. Increasingly, he said, domestic legislatures and courts are recognising that economic, social and cultural rights are as concrete and important as their civil and political cousins. Moreover, he said, the legislative entrenchment and justiciability of economic, social and cultural rights contributes to and reinforces the realisation of civil and political rights, such as the rights to freedom of expression and association.

The Bracks Labor Government and particularly the Attorney-General, Rob Hulls, should be strongly congratulated for becoming the first Australian state to move towards the comprehensive protection of civil and political rights with the imminent enactment of the Victorian Charter of Human Rights and Responsibilities. The exclusion of economic, social and cultural rights from the Charter, however, flows against the broad global trend identified by Professor Hunt. Indeed, if legitimate criticism of the Charter is to be made, it is that it is not too strong but too weak. As one submission by a homeless man to the independent inquiry into the need for a Charter put it, 'a Charter must cover the right to proper housing, the right to proper health services, the right to work and the right to education, or it will just be icing without a cake'.

The Charter is scheduled to enter into force in January 2007. Section 44 of the Charter requires that, by October 2011, the Attorney General commission and table in Parliament a review of the Charter which considers, among other things, whether it should be amended to include rights enshrined in the *International Covenant on Economic, Social and Cultural Rights*.

Over the next four years, the case must be made repeatedly and strongly for the inclusion of economic, social and cultural rights in the Charter. In particular, three points must be made.

First, the exclusion of economic, social and cultural rights is inconsistent with the international human rights framework, and common sense, both of which recognise that civil, political, economic, social and cultural rights are necessarily interdependent and mutually reinforcing. Meaningful exercise of

the right to participate in public affairs, for example, requires access to information and realisation of the right to education. Similarly, the right to privacy is largely illusory for homeless people who are forced to live their private lives in public space contrary to the right to adequate housing. Access to adequate health care, consistent with the right to the highest attainable standard of health, is necessary if a person is to remain able to exercise their rights to freedom of movement and association.

The second point is that the arguments most frequently advanced for excluding economic, social and cultural rights from charters – namely, that they are resource contingent and the business of parliaments rather than courts – do not appertain to the Victorian Charter. The dialectic model adopted in Victoria is, in fact, particularly suited to the inclusion of economic and social rights because, under the Charter, Courts will not have the power to strike down legislation or order remedies with major resource allocation implications. Instead, the Charter provides for the Courts to enter into a dialogue with Parliament, through the issuance of a 'Declaration of Inconsistent Interpretation', about the compatibility of a law, policy or practice with the Charter. Parliament will retain ultimate power to respond to such a Declaration, including by making policy and resource allocation decisions, as it sees fit. The Charter also requires that, so far as possible, courts interpret and apply legislation consistently with human rights. Again, this is suited to the inclusion of economic and social rights. Surely it is more appropriate and preferable, for example, that the Courts interpret and apply the Residential Tenancies Act, so far as possible, consistently with the right to adequate housing than in a manner that is inconsistent with this fundamental human right?

The third point is that legislative recognition of the interdependence of human rights has substantial benefits so far as decision-making and policy design processes are concerned. By seeking to identify the various civil, political, social, economic and cultural factors that contribute to policy 'problems', the framework promotes a more sophisticated analysis of social issues in a way that captures their multidimensional and interrelated elements. Further, by focusing on the conditions and capabilities that people need to meaningfully

participate in society, the framework promotes an integrated and holistic response to the problems identified. To use the language of government, recognition of the interdependence of civil, political, economic, social and cultural rights encourages 'joined up solutions to joined up problems'.

The commencement of the Charter in 2007 will go some way towards discharging Victoria's human rights obligations and enhancing governmental, legislative and judicial decision-making processes. It is critically important that when the Charter is reviewed in 2011, it is amended to include the economic, social and cultural rights which are necessary for people to live with human dignity and to fully participate in and contribute to the Victorian community

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

## **NEWS**

### **Rev Tim Costello Calls for a Human Rights Approach to Human Development**

Economic, social and cultural rights are, at best, the poor cousins of civil and political rights, stated the Reverend Tim Costello, speaking at the Human Rights Dinner hosted by the Human Rights Law Resource Centre at the Essoign Club on Saturday 29 April. Addressing the 160 members of the Melbourne legal community in attendance, Costello noted that the term 'human rights' continues to be short hand for civil and political rights. For this reason, Costello – CEO of World Vision Australia – stated that it was unusual for the head of a development agency to be asked to speak on human rights issues.

For decades, the disjunction between civil and political rights and economic, social and cultural rights has meant that the development and human rights communities have had little or nothing to do with one another, stated Costello. He stressed the inconsistency of this division and highlighted the effect it has had on attitudes toward human rights abuses. Citing Scott Leckie, the Director of the Centre on Housing Rights and Evictions (COHRE), Costello stated that when a person's right to speak freely is restricted, observers almost unconsciously hold the state responsible. However, when a person dies of hunger or thirst, the world still tend to blame nameless economic or 'developmental forces'.

Costello began his address with an engaging narrative about his first experience as a lawyer in St Kilda, relating how he found himself confronted with the realities of the cycle of poverty subsisting within the Melbourne community. He then turned his audience's attention to the main focus of his discussion – issues of global poverty and inequality and the need to reconceptualise these matters within a human rights framework.

Amongst the statistics cited by Costello was the World Food Programme's estimate that 852 million people go to bed hungry every night despite the fact that the world produces enough food to feed itself. The problem is access rather than availability, noted Costello. He also stated that 6,000 children die every day from diseases associated with lack of access to safe drinking water, inadequate sanitation and poor hygiene – the equivalent to 20 jumbo jets crashing every day.

Part of the challenge of addressing these gross inequities – and the unrest and upheaval that they precipitate – is to take economic, social and cultural rights seriously as legal rights, argued Costello. In Australia this involves extending the boundaries of 'fairness' beyond national borders and includes conceptualising international aid as a legal obligation. Costello noted that amongst OECD countries, Australians have the second highest per capita private aid contribution rate, yet we have one of the lowest rates of governmental aid. He questioned whether the government's current aid budget of 0.28 per cent of the GDP qualifies as meeting Australia's commitment to allocate the 'maximum available resources' to realising global economic, social and cultural rights, as required by article 2 of the *International Covenant on Economic, Social and Cultural Rights*.

During his engaging address Costello expressed the view that lawyers, community workers, development practitioners and members of the press need to engage in a process of renaming poverty and inequality as violations of human rights rather than as inevitable tragedies. Through his persistent placement of global economic, social and cultural inequality within the framework of international human rights, Costello himself has made a valuable contribution to this process.

*Elsbeth Martini is an Administrator with the Public Interest Law Clearing House (Vic) Inc*

### **UN Human Rights Committee Rules that Australian Prison Conditions Violate Human Rights of Indigenous Prisoner**

***Brough v Australia*** (Communication No 1184/2003)

In March this year, the UN Human Rights Committee ('HRC') published a landmark finding concerning alleged breaches of articles 2(3) (right to an effective remedy), 7 (right to freedom from cruel, inhuman or degrading treatment or punishment), 10 (rights of persons deprived of their liberty) and 24 (right to adequate protection for children) of the *International Covenant on Civil and Political Rights* ('ICCPR') in a New South Wales prison.

The prisoner was an Aboriginal man who suffered from a mild mental disability, with significant impairments in his adaptive behaviour, communication skills and his cognitive functioning. He was sentenced to 8 months' imprisonment at age 16. In the first month of his incarceration, he was referred to an adult correctional facility after his involvement of a riot. He was segregated from other inmates on the ground that association with them would constitute a threat to the personal safety of inmates and to the security of the Correctional Centre.

The prisoner was placed in a 'safe cell', a facility designed for inmates at risk of self-harm. The prisoner's condition deteriorated in the cell and he threatened suicide. He was subsequently removed to a 'dry cell', which is used for the short-term containment of inmates, usually where inmates are unable to provide a urine sample or are suspected of concealing smuggled goods in their bodies. He was confined there for 48 hours.

About a week later, the prisoner was observed obscuring a surveillance camera. Officers came to remove all items that could be used for this purpose, including his clothes except his underwear. The same happened about a week later when the prisoner refused to return to his cell after being allowed out for exercise. Later, he was observed trying to hang himself with a noose made out of his underwear. Officers removed the noose.

The prisoner was also administered with anti-psychotic medication without his consent until he could be examined by a psychiatrist. The treatment continued after that examination.

The prisoner complained that the officers' attempts to secure him involved excessive use

of force in violation of articles 7 and 10, and that continuous camera surveillance was incompatible with these provisions. The HRC however agreed with the State that the prisoner had failed to substantiate this with evidence, and that these complaints were therefore inadmissible.

The State's primary objection to the prisoner's complaint was that the prisoner had not exhausted all available domestic remedies before petitioning the HRC as required by article 5.2(b) of the First Optional Protocol to the *ICCPR*. The HRC dismissed this argument. It acknowledged that, in theory, the prisoner could have pursued certain administrative and judicial remedies, but found that the prisoner could not reasonably have been expected to have used them. The prisoner was barely able to read or write at the time of his segregation, and in all the circumstances, it would have been futile for him to commence court proceedings.

Regarding the merits of the case, the HRC found that the prisoner's treatment constituted breaches of articles 10 and 24 of the *ICCPR*. In reaching this conclusion, the HRC noted that the purpose of the safe cell was to provide a less stressful, more supervised environment for the inmate, but found that this was negated by the fact that the prisoner's psychological development only worsened. Moreover, the HRC found that the prisoner's confinement, even if to protect him from further self-harm, was incompatible with the requirements of article 10. The HRC found:

*'In the circumstances, the author's extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal. As a consequence, the hardship of the imprisonment was manifestly incompatible with his condition, as demonstrated by his inclination to inflict self-harm and his suicide attempt.'*

The administration of anti-psychotic medication, however, did not constitute a breach of article 7 or any

other provision of the *ICCPR*. It was intended to control the prisoner's self-destructive behaviour, was prescribed by a general practitioner and only continued once the prisoner was examined by a psychiatrist. The HRC found that the medication was therefore not administered contrary to the prisoner's human rights.

Having regard to its findings, the HRC considered that, in accordance with article 2(3) of the *ICCPR*, the prisoner was entitled to an 'effective remedy', including adequate compensation. The HRC also stated that the State is under an obligation to ensure that similar violations do not occur in the future. Finally, the HRC called for information from the State about the measures taken to give effect to the HRC's views in this matter within 90 days, and requested that the State publish the HRC's views.

A full copy of the decision is available at [http://193.194.138.190/tbs/doc.nsf/\(Symbol\)/8aeb1fcbc458419ac125716200520f4b?Opendocument](http://193.194.138.190/tbs/doc.nsf/(Symbol)/8aeb1fcbc458419ac125716200520f4b?Opendocument).

*Waleed Aly is a Secondee Solicitor with the Human Rights Law Resource Centre Ltd*

## **POLICY, ADVOCACY AND LAW REFORM**

### **Mocking our Democracy – Prisoners and the Human Right to Vote**

Electoral law is easy to ignore. It has all the excitement of a sedated accountant. But as a matter of democratic influence, it has teeth. By definition, it concerns democracy's essence: the mechanism of popular election. A democracy with iniquitous electoral laws doesn't deserve the name.

That is why a Bill presently in the midst of debate in Federal Parliament proposing several amendments to our electoral laws, is so important. It has received little exposure, but most debate so far surrounds a plan to allow political donations of up to \$10,000 (rather than the current \$1,500) to remain secret. Yet, a largely ignored, but perhaps more philosophically significant amendment proposes to strip prisoners of the right to vote.

It's a perfectly hideous idea; one that will have a disproportionate impact upon the poor and especially the Indigenous who make up 20 per cent of the prison population. It will further

disenfranchise an already isolated group of people; a fact likely to impede, or even counteract their rehabilitation, and in turn, increase recidivism.

And in case we still care, it violates a raft of international human rights, including most obviously the right to vote under the *International Covenant on Civil and Political Rights*. According to the UN Office for the High Commissioner for Human Rights, that right may only be restricted legitimately to the extent 'necessary in a democratic society' for a public purpose. Nothing about this proposal is necessary. Superior courts in Canada and South Africa have said as much when confronted with similar legislation. So has the European Court of Human Rights.

But then, Senator Eric Abetz, who originally championed the Bill, emphatically doesn't care. 'The reliance on international treaties is usually the last resort of those that can't argue their case domestically,' he says. So let's get domestic: the proposal risks violating our own constitutional requirement that the government is elected by 'the people'. True, once upon a time 'the people' did not include women, or Aborigines, but constitutional lawyers have long accepted that the concept would evolve with community standards. Are we prepared to concede those standards hold that prisoners are not people?

But in a nation where the idea of democracy is a rhetorical hook, but lamentably, human rights are not, perhaps the greatest concern is that this Bill grotesquely subverts our notions of democracy. To see this, we need look no further than the justifications the Government has put forth in its defence.

For Senator Abetz, the proposition is simple: 'If you're not fit to walk the streets as deemed by the judicial system in this country, then chances are you're not a fit and proper person to cast a vote in relation to the future of your country.' Democratic pearls should not be cast before civil swine, apparently. Prisoners don't deserve democracy.

There's a paradigm shift here. Suddenly, to vote is not a right of the people from which government derives its legitimacy; it is a privilege to be conferred at Canberra's discretion. That is the very opposite of democracy. When you take the philosophical step of tying voting rights to worthiness, it implies a governmental prerogative to make this judgment. The logical extension of this is

to restrict the power to appoint the government to a governmentally-authorized elite.

This fact is not avoided by the argument, put forward in recent parliamentary debates by Liberal backbencher Michael Johnson, that 'people who commit serious offences against society, against the community, should forfeit their right to vote.' Their transgressions may entitle the State to incarcerate them (though not arbitrarily), but they do not render such people devoid of rights.

From here, further arguments become deeply absurd. In the past, some have argued that such an amendment would deter the commission of crime, as though it will work where the threat of imprisonment has failed. And on this occasion, the Festival of Light appeared before a Senate Committee to argue the Bill was necessary to prevent prisoners acting as a lobby group. The government-dominated Committee adopted that reasoning, too, despite the fact that every other submission vehemently opposed the Bill, with one exception – the Liberal Party's own submission.

There is, of course, no evidence to demonstrate any of these rationalisations.

In the arena of political argument, democracy is a rhetorical colossus. It permits those who have it a certain smugness at their comparative political enlightenment in the world. It confers moral authority in international affairs. Apparently, it even justifies ill-conceived military invasions. That only increases the imperative for us to be vigilant about its quality. In that regard, this Bill should sound the alarm. It seems democracy is more a good for export, than for domestic consumption.

*Waleed Aly is a Seconded Solicitor with the Human Rights Law Resource Centre Ltd*

### **Submission to Senate Inquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006**

The HRLRC has recently made a submission to the Senate Legal and Constitutional Legislation Committee Inquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006. The HRLRC submission expresses profound concern that, in contravention of international human rights law, the Bill provides for offshore detention of those deemed to be designated unauthorised arrivals, and an alternative method of

processing such asylum seekers which does not provide them access to legal assistance, allow for merits review, or allow for judicial review.

The submission examines the Bill in light of the *International Covenant on Civil and Political Rights* ('ICCPR'), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT'), the *Convention on the Rights of the Child* ('CRC'), and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'). Australia has ratified all of these conventions. Accordingly, the terms of the conventions are binding on the Australian government.

Part 2 of the submission provides an overview of the civil and political rights contained in the ICCPR, as well as the CAT and the CRC, and the extent to which the present Bill meets Australia's international obligations in respect of these rights. The rights considered in this Part are the rights to life, freedom from torture and inhumane treatment, freedom from arbitrary detention, a fair trial, and non-discrimination.

Part 3 of the submission examines and discusses the proposed Bill's compatibility with Australia's human rights obligations in respect of economic, social and cultural rights under the ICESCR and the CRC. Specifically, this Part considers the human rights to health and education.

Although some of the human rights conferred upon children under the CRC are considered in Parts 2 and 3, Part 4 of the submission considers the Bill in light of other rights which are specific to children under the CRC. These are, namely, the rights conferred upon refugee children, the right to an adequate standard of living, and the right to leisure.

Part 5 of the submission concludes that a number of the Bill's provisions are inconsistent with international human rights principles and standards and Australia's obligations in respect of those norms. The submission therefore recommends that the Bill not be passed in its current form.

The submission is available at [www.aph.gov.au/senate/committee/legcon\\_ctte/migration\\_unauthorised\\_arrivals/submissions/sub73.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/migration_unauthorised_arrivals/submissions/sub73.pdf).

## CASEWORK

### HRLRC to Seek Leave to Intervene in Jack Thomas Appeal against Conviction and Sentence

Blake Dawson Waldron, Brian Walters SC and Michael Kingston of Counsel have agreed to act on a pro bono basis to assist the HRLRC to seek leave to intervene as amicus in Jack Thomas's appeal against conviction and sentence to the Victorian Court of Appeal.

Jack Thomas was convicted of receiving funds from a terrorist organisation contrary to s 102.6(1) of the *Commonwealth Criminal Code* and falsifying an Australian passport which is an offence against s 9A(1)(e) of the *Passports Act 1938* (Cth). He received five years' imprisonment with a two year non-parole period. The primary basis for the conviction was the content of an interview conducted by ASIO in Pakistan on 8 March 2003. By that time, Thomas had been detained in Pakistan for almost six months without charge and allegedly subject to cruel and degrading treatment, including strangulation and being chained to a wall for extended periods.

Thomas now experiences post-traumatic stress disorder and depression.

If the HRLRC is granted leave, it is likely to make submissions on the question of conviction regarding:

- the relevance of the to be free from cruel, inhuman or degrading treatment or punishment pursuant to the CAT and art 7 of the ICCPR to whether the record of interview of 8 March 2003 should have been admitted or excluded;
- the relevance of the right to a fair trial, and particularly the right to counsel, pursuant to art 14 of the ICCPR to whether the record of interview of 8 March 2003 should have been admitted or excluded;
- the relevance of the right to a fair trial pursuant to art 14 of the ICCPR to whether Mr Thomas could have received a fair trial in the context of the extensive and sometimes hysterical media coverage of the matter, including referring to Mr Thomas as 'Jihad Jack'; and
- the relevance of the right to freedom of association pursuant to art 22 of the ICCPR to the interpretation and application of s 102.6(1) of the *Commonwealth Criminal Code* and also to the appropriate

penalty for a transgression of that provision.

On the questions on sentence, the HRLRC will seek to make submissions regarding the relevance of the following norms to the exercise of the sentencing discretion:

- the right to life in art 6(1) of the *ICCPR*;
- the right to be free from cruel, inhuman or degrading treatment or punishment pursuant to art 7 of the *ICCPR*;
- the right of persons deprived of their liberty to be treated humanely and with dignity and respect pursuant to art 10 of the *ICCPR*; and
- the right to health in art 12 of the *ICESCR*.

There are a number of cases in which courts have considered international human rights standards to be relevant to the severity, type and length of punishment: see, eg, *Walsh v Department of Social Security* (1996) 67 SASR 143; *Bates v Police* (1997) 70 SASR 66; *R v Hollingshed* (1993) 112 FLR 109.

## **SEMINARS AND EVENTS**

### **The Right of Indigenous Peoples to Self-Determination and the Need for a Treaty in Australia**

On 1 August 2006, the HRLRC will present a seminar on 'The Right of Indigenous Peoples to Self-Determination and the Need for a Treaty in Australia'.

The keynote speaker will be Professor Larissa Behrendt, Professor of Law and Director of the Jumbunna Indigenous House of Learning at the University of Technology Sydney.

Further details will be posted closer to the date at [www.pilch.org.au](http://www.pilch.org.au) in 'What's New'.

## **EDUCATION AND TRAINING**

### **Human Rights Induction Training**

On 29 March, 5 April and 12 April 2006, the HRLRC ran a human rights induction training program, entitled 'Human Rights Litigation, Advocacy and Campaigning Training'.

The training was intended for workers, volunteers and pro bono legal practitioners at community legal centres, law firms, community organisations and human rights organisations with an interest in using international human

rights law in litigation, advocacy and campaigning.

The training ran over three half-days and covered:

- Overview of International Human Rights Law;
- Implementation of Human Rights in Domestic Law and Advocacy; and
- Using International Human Rights Complaints and Monitoring Mechanisms.

Copies of all of the training materials are available at [www.pilch.org.au](http://www.pilch.org.au) in the 'What's New' box.