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HUMAN RIGHTS LAW
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The Human Rights Law
Resource Centre Ltd, a joint
initiative of the Public Interest
Law Clearing House (Vic) and
Liberty Victoria, 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

Judging Economic, Social and Cultural Rights

Rights, without a forum in which to give them expression, are merely rhetorical. This, surely, is one reason that civil and political rights glamorously strut the human rights stage. They appear in our newspapers. People regularly protest their violation. Nations are (sometimes) diplomatically spanked for breaching them. This is possible because they are exposed.

Exposure occurs because the *International Covenant on Civil and Political Rights* is subject to an individual complaints mechanism. If you're tortured, detained arbitrarily or discriminated against by the law, you can litigate. States are forced to argue their case, legal rulings are made, individuals may be compensated and headlines follow. These rights matter.

The relentlessly repeated mantra is that human rights are indivisible, interdependent and interrelated; that they must not be treated as isolated rights but as part of a singular, comprehensive system of rights. If one right matters, all do. But despite this, economic, social and cultural rights have long been consigned to the more ineffectual backwaters of the international human rights system.

In part, this is because they sound less spectacular: the right to health does not capture attention in the way that freedom from torture does. But it is largely because economic, social and cultural rights cannot be given judicial expression. Presently, no individual complaints mechanism exists for people whose economic, social and cultural rights have been violated. States are not called to account in a litigious setting. Judgements are not given, compensation is not paid, and headlines do not follow. These rights are rhetorical.

It's a gaping hole: one which the UN Human Rights Council is attempting to fill. Last month, the members of that Council came together to discuss drafting an *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR)*. The central plank of that *Protocol* would be the introduction of an individual complaints mechanism for violations of *ICESCR*. It would be a crucial step for making economic, social and cultural rights matter. And they should. The right to shelter is no less important than the right to vote.

But it is also a complex step that raises several questions concerning which rights should be covered and what inquiry procedures are most appropriate for such a judicial forum.

A Working Group was established with a mandate to explore these options, but when the Council met, that mandate had come to an end. The question was therefore whether or not the mandate should be extended. In short, is the *Optional Protocol* worth the hassle?

For most, it was a no-brainer. Representatives from Argentina, Brazil, Mexico, Guatemala, Senegal, Azerbaijan, Chile and the Group of Latin American and Caribbean States reiterated specifically the importance of developing a judicial mechanism for the protection of economic, social and cultural rights. Mexico and Morocco went so far as to argue that the distinction between civil and political rights, and economic, social and cultural rights is artificial. It followed that all rights demanded protection on an equal footing. Equality is undermined where one set of rights is justiciable and another is not.

Even those with reservations about the *Protocol*, such as the United Kingdom and the Netherlands, or those with disagreements about the *Protocol's* precise content, were prepared to support further work being done on it. The preparedness stems from the desire to elevate economic, social and cultural rights to an equal level with civil and political rights. In the final analysis, the Working Group's mandate was extended with the hope that the Council would come to some kind of future consensus. To this extent, delegates were in heated agreement.

Except two: those representing the United States and Australia.

Their isolated stance boiled down to one essential argument: that economic, social and cultural rights differ so significantly in their nature from civil and political rights that they are unfit for judicial treatment. The argument runs that determinations of economic, social and cultural rights must necessarily involve wide-ranging considerations of a country's resource allocation decisions and could therefore have significant fiscal implications. This, of course, assumes that there are no fiscal or resource allocation implications in the context of civil and political rights. But a judicial ruling on conditions of detention is potentially every bit as fiscally potent as one on the right to shelter. This has never been a reason not to adjudicate on the civil and political rights of detainees.

Australia specifically argued that economic, social and cultural rights were not best protected via a judicial mechanism. But such fears have not materialised in the Council of Europe, whose judicial mechanism for protecting these rights has resulted in a finding against Portugal for failing to combat child labour. Nor have the Americas collapsed as a result of the work of the Inter-American Commission on Human Rights. Meanwhile in Africa, the African Commission on Human and Peoples' Rights has found breaches of the right to health and a safe environment where the extraction of oil reserves had contaminated the environment damaging the health of local communities.

The trend is catching. Norway, South Africa, Finland, India and the United Kingdom have all begun incorporating economic, social and cultural rights into domestic law. It is true that the jurisprudence surrounding economic, social and cultural rights is shallow and underdeveloped in comparison with that concerning civil and political rights. But this is one of the best arguments for an individual complaints mechanism to begin. Indeed, the above developments have already begun generating important jurisprudence in the area. If, as the United States and Australia claim, these rights are inherently not justiciable, someone forgot to tell the rest of the world.

Ultimately then, American and Australian objections are not convincingly jurisprudential in nature. They are political. It is difficult to believe they emanate from a concern for the integrity and importance of economic, social and cultural rights. It is more likely they reflect a gradual philosophical retreat from the demands of international human rights law. Little wonder economic, social and cultural rights are merely rhetorical. Australia's commitment to human rights is too.

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

NEWS

Victoria Enacts *Charter of Human Rights and Responsibilities*

On 20 July 2006, the Victorian Parliament took the historic step of passing the *Charter of Human Rights and Responsibilities Act 2006*.

The Charter entrenches a range of civil and political rights derived from the *ICCPR*, including: the right to equality before the law;

the right to life; the right to protection from torture and cruel, inhuman or degrading treatment or punishment; freedom from forced work; freedom of movement; the right to privacy and protection of reputation; freedom of thought, conscience religion and belief; freedom of assembly; the right to peaceful assembly and freedom of association; the right to take part in public life; the right to liberty and security of person; the right to humane treatment when deprived of liberty; and the right to a fair hearing.

The Charter establishes a 'dialogue model' which seeks to ensure that human rights are taken into account when developing, interpreting and applying Victorian law and policy without displacing current constitutional arrangements.

The dialogue between the various arms of government — namely, the legislature, the executive (which includes 'public authorities') and the courts — is facilitated through the following mechanisms:

- Prior to introduction to parliament, bills must be assessed for the purpose of consistency with the human rights contained within the Charter, and a Statement of Compatibility tabled with the Bill when it is introduced to Parliament;
- All legislation, including subordinate legislation, introduced to Parliament, must be considered by the Scrutiny of Acts and Regulations Committee for the purpose of reporting as to whether the legislation is incompatible with human rights;
- Public authorities must act compatibly with human rights and also give proper consideration to human rights in any decision-making process;
- So far as possible, courts and tribunals must interpret and apply legislation consistently with human rights;
- The Supreme Court has the power to declare that a law cannot be interpreted and applied consistently with human rights and to issue a Declaration of Inconsistent Interpretation;
- The Government must respond to a Declaration of Inconsistent Interpretation within six months; and
- The Victorian Equal Opportunity and Human Rights Commission has responsibility for monitoring and reporting

on the implementation and operation of the Charter.

The Charter is scheduled to enter into force on 1 January 2007, although the obligation of public authorities to consider and act consistently with human rights and the powers of the courts to interpret and apply legislation in accordance with the Charter and to issue Declarations of Inconsistent Interpretation where this is not possible do not become effective until 1 January 2008.

Over the coming months, the HRLRC proposes to develop materials and deliver legal professional and community education regarding the Charter.

HRLRC Launches Website @ www.hrlrc.org.au

The HRLRC has recently launched a new website, www.hrlrc.org.au.

The website contains information about the HRLRC's casework and litigation, policy and advocacy work, seminar series, and educational and training activities.

The site also includes a virtual 'Human Rights Library' with full access to:

- the HRLRC's human rights induction training materials;
- legal briefs and memoranda of advice prepared by and for the HRLRC; and
- links to helpful human rights resources and research material.

The Human Rights Library will also host the forthcoming Human Rights Law Resource Manual. The Manual, which is expected to be launched in September 2006, will be a comprehensive but accessible resource, with chapters on:

- Introduction to Human Rights Law;
- Human Rights Implementation;
- Use of International Human Rights in Domestic Courts and Tribunals;
- The Victorian Charter of Human Rights and Responsibilities;
- International Human Rights Complaints, Monitoring and Reporting Mechanisms; and
- Running a Human Rights Campaign.

POLICY, ADVOCACY AND LAW REFORM

HRLRC Contributes to Development of Content of the Right to Social Security under International Human Rights Law

In June, the UN Committee on Economic, Social and Cultural Rights ('CESCR') invited the HRLRC to make observations on its Draft General Comment on the right to social security. That right is contained in article 9 of the *International Covenant on Economic, Social and Cultural Rights*.

The HRLRC took the opportunity to express its overall support for the Draft Comment, and made the following additional observations in response:

- The right to social security is inextricably linked to the human right of freedom from poverty, which is the right to live in dignity and free from want. As poverty and social exclusion usually co-exist, fulfilment of the right to social security also enhances social inclusion and cohesion and enables people to participate in the life of their communities.
- The Comment's emphasis on individuals and groups who have traditionally faced difficulties in exercising their rights was crucial, especially concerning women, unemployed people, marginalised workers, injured groups, people with disabilities, the elderly, children and dependents, minority groups, asylum seekers, internally displaced persons, non-nationals, prisoners and detainees.
- What constitutes the adequate provision of social security may differ between groups, and what is adequate for persons within the territory or control of a particular State may not be adequate for citizens of another State. For example, as the Committee stated in *General Comment No 5: Persons with Disabilities* at [28]-[29], social security benefits for persons with disabilities 'should reflect the special needs for assistance and other expenses often associated with disability'. Similarly, significantly larger efforts may be required on the part of certain States to maintain social security benefits at an adequate level. While the different levels of adequacy must be acknowledged through flexibility and discretion in implementation, the core obligations of ensuring access to the minimum essential levels of social security must be stressed.
- There should be no discrimination, direct or indirect, in the availability and adequacy of social security. All segments of society should be entitled and able to access social security, regardless of their race, colour, language, gender, sexual orientation, religion, political or other opinion, national or social origin, birth, nationality or socio economic status. Positive steps should be taken to ensure that social security and related social services are particularly targeted at, available and accessible to, and adequate for, people who are disadvantaged or marginalised.
- While social security has traditionally been considered as a right of citizenship, there should be no discrimination on the basis that an individual is a non-citizen within a State. Given the existence of several treaties in the area of protection of refugees and other non-citizens concerning the area of social security, it is appropriate that non-citizens, particularly refugees and asylum-seekers, are entitled to claim the right to social security.
- Where the availability of social security is made conditional on, for example, a 'mutual obligation' regime, the conditions should be reasonable, proportionate, non-discriminatory and consistent with other civil, political, economic, social and cultural human rights. Under no circumstances should benefits be terminated or reduced below the level necessary to ensure that a person can access the minimum essential levels of food, water, health care, housing and education. This emphasises the need for clearly delineated limits to conditionality of access to the right to social security, taking into account various factors in order to maintain consistency with other human rights. The Comment should therefore be drafted in strict terms to ensure that States cannot take any such retrogressive measures in relation to the right.

The Draft General Comment is available at <http://www.ohchr.org/english/bodies/cescr/discussion.htm>.

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

It is likely that a revised General Comment will be adopted by CESCR when it next meets in Geneva from 6-24 November 2006.

The HRLRC is very grateful for the assistance of Clayton Utz in the preparation of its submission.

CASEWORK

Amicus Application:

Joseph Thomas v The Queen

On 3 July, the HRLRC filed an affidavit and submissions in support of an application for leave to appear as amicus curiae in the Victorian Court of Appeal in the case of *Joseph Thomas v The Queen*.

Mr Thomas was convicted of a 'terrorist' offence on the basis of material obtained in an interview conducted by AFP officers in Pakistan in March 2003. The interview was conducted without the assistance of a lawyer and after Mr Thomas had been detained and mistreated by Pakistani and US authorities over a 3 month period (including extended periods of solitary confinement, being hooded and shackled, attempted strangulation, and being threatened with bashings, execution, electrocution and that his wife would be raped).

The HRLRC submissions focused on:

1. the relevance of *ICCPR* arts 7 (freedom from cruel treatment), 9 (freedom from arbitrary detention), 10 (right to dignity in detention) and 14 (right to legal representation) to the admission of confessional evidence obtained while Mr Thomas was in detention in Pakistan; and
2. the relevance of art 10 of the *ICCPR* and art 12 (right to health) of the *ICESCR* to the exercise of a sentencing discretion.

Amnesty International also filed a submission in the case, focusing on arts 7 and 14 of the *ICCPR*.

The appeal was heard on 24 July 2006 and, although leave to appear was denied to both the HRLRC and Amnesty, the Court invited Counsel for Mr Thomas to file supplementary written submissions about the relevance of international human rights to issues in the proceeding. The HRLRC provided its submissions and materials to Defence Counsel to facilitate this.

All of the submissions are available at www.hrlrc.org.au in the 'Human Rights Library' under 'Legal Briefs'.

The HRLRC would like to particularly thank and acknowledge the very significant and impressive work of Brian Walters SC, Michael Kingston of Counsel and Steven Amendola, Beth Midgley and Cecilia Riebl of Blake Dawson Waldron on this amicus intervention.

SEMINARS AND EVENTS

Achieving Social Justice for Indigenous Australians

with

Professor Larissa Behrendt (Professor of Law and Director of Research, Jumbunna Indigenous House of Learning)

Brian Walters SC (President, Liberty Victoria)

Mark Leibler AC (Co-Chair, Reconciliation Australia)

Details

Date: Tuesday, 1 August 2006

Time: 5.45 for a 6.00pm start

Venue: Blake Dawson Waldron
Level 39, 101 Collins Street

Cost: \$20 / \$10 for full-time students,
unemployed and pensioners

Registration is essential.

RSVP by 26 July 2006 using Booking Form available at www.hrlrc.org.au

Human Rights in Domestic Law: Views from Australia and The Hague

with

Justice Kenneth Keith QC KBE (Judge, International Court of Justice)

The Hon Justice John Perry (Judge, Supreme Court of South Australia)

Details

Date: Monday, 7 August 2006

Time: 5.45 for a 6.00pm start

Venue: Mallesons Stephen Jaques
Level 50, 600 Bourke Street

Cost: \$25 / \$15 for full-time students,
unemployed and pensioners

Registration is essential.

RSVP by 31 July 2006 using Booking Form available at www.hrlrc.org.au

EDUCATION AND TRAINING

HRLRC Begins Development of Human Rights Education Strategy for *Charter*

On behalf of the HRLRC, Allens Arthur Robinson has recently prepared a Human Rights Education Strategy Report ('Report').

The Report is an excellent summary of human rights education programs in South Africa, the United Kingdom, the Australian Capital Territory and New Zealand. With recent experience from those jurisdictions demonstrating that education is critical to the effective implementation of human rights instruments, the Report will be of great value to the HRLRC as it develops a legal professional and community education program in relation to the Victorian *Charter of Human Rights and Responsibilities*.

The HRLRC has provided the Report to the Equal Opportunity Commission, the Department of Justice Human Rights Unit, the Victorian Council of Social Service and the Federation of Community Legal Centres to ensure that, collectively, our education strategies and activities are well targeted, well coordinated, efficient and effective.

A copy of the report is available at www.hrlrc.org.au in the 'Human Rights Library'.