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The Human Rights Law Resource Centre Ltd aims to:

1. Contribute to the harmonisation of Australian law and policy with international human rights norms.
2. Build 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.

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

Opinion

**Safeguarding the Crown Jewels: The Need for Effective UN Human Rights Experts**

Torture, the sale of children, arbitrary detention, unlawful killings, extreme poverty and attacks against human rights defenders are all abuses that are investigated and often prevented by independent United Nations human rights experts. However, the UN Human Rights Council ('Council') is considering measures to eliminate or weaken the role of these effective human rights champions.

More than 12,000 individuals from 147 countries signed a petition that was delivered on 9 May to the Council. The petition calls on the Council to retain a strong independent system of human rights experts. It is sponsored by 17 international and regional human rights organisations.

A year ago, then UN Secretary-General Kofi Annan criticised the UN's main human rights body in stark terms, stating that its 'declining credibility has cast a shadow on the reputation of the United Nations system.' A much-needed reform process is still underway. But whatever the outcome of the reform process, one thing is clear to those who support a positive role for the UN in the promotion and protection of human rights: it would be a grave mistake to weaken the system of the UN human rights experts (collectively referred to as 'Special Procedures'). While much else in the system has been criticised, they have been described as the 'crown jewels' of the UN human rights system and as giving 'a voice to the voiceless victims of abuses.'

It is the success of the UN human rights experts that makes them a target for the repressive governments that are now seeking to undermine them. Turning the reform process on its head, these governments want to strip the human rights experts of their independence and powers in a bid to prevent scrutiny of their own human rights violations. Without effective UN human rights experts it will be easier for governments to continue committing all manner of human rights crimes, including mass murder.

As part of the reform process, the Council is currently undertaking a formal review of the experts. It is considering imposing a euphemistically named 'code of conduct' on them, which could limit their independence, restrict their ability to use the media and limit their ability to criticise governments implicated in violations. The Council is also considering changing the way the investigators are selected, which would mean that objective experts are less likely to be chosen. Finally, some of the mandates, or subjects, covered by the experts could be abolished altogether. The review is due to be completed by 18 June 2007.

Instead of weakening a part of the UN human rights system that works, the Council should be looking at ways to strengthen it. The experts are important for at least six reasons. First, unlike many international mechanisms, they are flexible and able to respond to urgent situations rapidly. Second, they have a global reach and can respond to violations occurring anywhere in the world. Third, they are independent, objective and impartial. Fourth, as experts in their field, they can provide practical advice to governments and can contribute to the development of human rights law. Fifth, they bring human rights violations, including emerging crises, to the attention of the international community thereby helping to prevent even more severe human rights crises. Sixth, they provide support and protection for local human rights defenders who often work at considerable risk.

Human Rights First is co-sponsoring the petition and works closely with threatened human rights activists around the world. They tell us that the experts are essential to their work. Usman Hamid, an Indonesian human rights activist seeking justice for the 2004 poisoning of renowned Indonesian human rights defender Munir explains that, 'Special Procedures are the most responsive and flexible channel for victims' appeals.'

Ruth del Valle, a prominent Guatemalan activist, whose office was recently ransacked, told us that one such expert, the Special Representative on Human Rights Defenders, 'is a vital mechanism to support our work and protect our lives. It not only provides us with solidarity and protection but also elicits action from our government that we could not obtain alone'.

Such testimonies should be a reminder to governments that the negotiations taking place in Geneva will have a very direct bearing on the enjoyment of human rights by large numbers of people across the world. Governments must make sure that the review maintains the integrity of these vital mechanisms. Citizens around the world have until 18 June to make their voices heard on this topic by signing the petition at <http://www.actforspecialprocedures.org>.

*Andrew Hudson is Arthur Helton Fellow in the Human Rights Defenders Program at Human Rights First*

## News

### UN Moves Closer to Development of Optional Protocol to the *International Covenant on Economic, Social and Cultural Rights*

The UN Human Rights Council has moved a significant step closer to the adoption of an Optional Protocol to the *International Covenant on Economic, Social and Cultural Rights* ('OP-ICESCR'), with the development of a draft text (see <http://www.ohchr.org/english/issues/escr/intro.htm>). An Optional Protocol would enable the UN Committee on Economic, Social and Cultural Rights ('CESCR') to receive and consider complaints regarding violations of any of the rights contained in the ICESCR.

Discussions regarding an OP-ICESCR have been taking place within and between various UN bodies and NGOs since at least 1990. In June 2006, the UN Human Rights Council mandated a Working Group to begin negotiating a text for the OP-ICESCR. A draft of this text, prepared by the Chairperson of the Working Group, has now been prepared and will be discussed in detail at the Working Group's next session from 16-27 July 2007.

The draft OP-ICESCR provides that the CESCR may receive and consider complaints in relation to violations of economic, social and cultural rights as regards States party to the OP-ICESCR. Complaints may be submitted by or on behalf of individuals. The draft also provides that collective complaints may be submitted by accredited NGOs.

As with other complaints mechanisms (including the Optional Protocol to the *International Covenant on Civil and Political Rights* to which Australia is a party) the OP-ICESCR provides that complaints will be inadmissible unless the victim has exhausted all available domestic remedies. The OP-ICESCR also provides that, prior to any determination of the admissibility or merits of a complaint, the CESCR may request that the State concerned take such urgent measures as may be necessary to avoid any possible irreparable damage to the alleged victim.

Where a complaint is admissible it will be considered by the CESCR in light of all information made available by both the complainant and the respondent State. In particular, the CESCR will consider the 'reasonableness' of steps taken by the State to realise the right or rights in question. In a separate

explanatory statement (see [http://www.ohchr.org/english/bodies/cescr/docs/e\\_c\\_12\\_2007\\_1.pdf](http://www.ohchr.org/english/bodies/cescr/docs/e_c_12_2007_1.pdf)), the CESCR has suggested that this may involve considering, among other things:

- the extent to which measures taken to realise the right were deliberate, concrete and targeted;
- whether the State acted in a non-discriminatory and non-arbitrary manner;
- whether the State adopted the least restrictive approach;
- the time frame in which the steps were taken; and
- whether the steps were adequately directed towards the situations of people or groups that are marginalised, disadvantaged or at risk.

CESCR's statement also suggests that where a State has failed to take steps or has adopted retrogressive measures, the burden of proof will rest with the State to demonstrate that this was based on a careful consideration of the rights at issue and the total availability of resources. The range of recommendations that CESCR would consider if a violation of the OP-ICESCR was found to have occurred include:

- recommending remedial action, such as the payment of compensation;
- calling upon the State to remedy the circumstances leading to the violation, including suggesting goals and measures to assist the State to identify appropriate measures;
- suggesting a range of measures to assist the State to implement the recommendations; and
- recommending a follow-up mechanism to ensure ongoing monitoring by and accountability of the State.

In addition to the establishment of an individual and collective complaint procedure, the draft OP-ICESCR includes an 'inquiry procedure' to enable the CESCR to investigate any alleged grave or systematic violations by a State. It also proposes the establishment of a special fund to assist States to implement effective remedies in line with the CESCR's recommendations.

The development of an OP-ICESCR would be a significant step towards truly recognising the interdependence and interrelatedness of civil, political, economic, social and cultural rights. For example: meaningful exercise of the right to participate in public affairs requires access to information and realisation of the right to education; 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; and 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 campaign for the development of an OP-ICESCR is being coordinated by an International NGO Coalition, of which the HRLRC is a member. For further information about how to support and contribute to this campaign, see <http://www.opicescr-coalition.org/>.

### **Centre Receives Significant Support from Major Commercial Law Firms**

The Human Rights Law Resource Centre has recently received a major financial boost with significant donations from Allens Arthur Robinson, Blake Dawson Waldron and Mallesons Stephen Jaques.

The Centre is also the beneficiary of a full-time human rights lawyer on secondment from DLA Phillips Fox. These contributions are in addition to the substantial pro bono contributions of these firms to the Centre's human rights seminar series, education program, casework, litigation, policy and advocacy work.

### **Victorian Charter of Rights Developments**

#### **Supreme Court Judge Highly Critical of Incarceration of Mentally Ill in Prison**

*R v White* [2007] VSC 142 (7 May 2007)

The incarceration in prison of a person with a severe psychiatric illness may amount to a violation of the Victorian *Charter of Human Rights*, according to Bongiorno J of the Supreme Court of Victoria.

Peter White was charged with murder but found not guilty on the grounds of mental impairment on 5 March 2007. Following Mr White's trial it was intended that he be treated in a secure facility, the Thomas Embling Hospital, but he was instead remanded in prison due to a lack of available beds.

According to Bongiorno J,

Unfortunately that means that Mr White will continue to be confined in a prison where he ought not to be. It is not appropriate for people who have been found not guilty on the ground of mental impairment to be imprisoned. He has no moral or legal culpability in respect of Mr Hatton's death. He is ill and should be treated as such. It is not insignificant that his continued incarceration in a prison would appear to be contrary to the spirit, if not the letter of the *Charter of Human Rights and Responsibilities*.

Justice Bongiorno stated that, 'this state of affairs is unsatisfactory and ought to be looked to by the executive as a matter of some urgency. It is not the first time this situation has arisen and it ought to be remedied as soon as possible'.

Given the lack of beds, Bongiorno J stated that he had 'no alternative but to continue Mr White's incarceration in a prison until a bed becomes available at Thomas Embling'. His Honour went on to say, however, that if this did not occur within a 'reasonable time the matter will be listed again when consideration can be given to what remedy is available to Mr White to relieve him of his present unfortunate situation'.

The HRLRC considers that Mr White's continued detention in a prison raises serious issues under the Victorian Charter, including in relation to the right to freedom from cruel treatment (s 10), the right to liberty and security and freedom from arbitrary detention (s 21) and the right to humane treatment when deprived of liberty (s 22).

There is a clear body of jurisprudence to the effect that lack of access to adequate health care in detention may violate these rights and that a government will not be excused from what are otherwise breaches in the prison context 'simply by pointing to a lack of resources that are provided by other arms of government'. This body of jurisprudence includes decisions of the UN Human Rights Committee (see, eg, *Mukong v Cameroon*, UN Doc CCPR/C/35/D/265/1987), the European Court of Human Rights (see, eg, *Keenan v United Kingdom* (2001) 33 EHRR 913; *Price v United Kingdom* (2001) 34 EHRR 1285; *McGlinchey v United Kingdom* (2003) 37 EHRR 821) and the UK courts under the *Human Rights Act 1998* (see, eg, *(Noorkoiv) v Secretary of State for the Home Department* [2002] EWCA Civ 770).

The full text of *R v White* is available at <http://www.austlii.edu.au/au/cases/vic/VSC/2007/142.html>.

### **UK Parliament Considers Bill to Clarify Meaning of 'Public Authority' under the *Human Rights Act 1998***

A Bill to clarify the meaning of 'public authority' under the *Human Rights Act 1998* has been tabled in the UK Parliament. The Human Rights Act 1998 (Meaning of Public Authority) Bill is intended to implement the key recommendation of the recent report of the Joint Standing Committee on Human Rights ('JSCHR') on the meaning of 'public authority'. As discussed in Edition 13 of the Bulletin, that Report was highly critical of the restrictive approach that the UK courts have taken to the meaning of 'public authority', stating:

In a series of cases our domestic courts have adopted a more restrictive interpretation of the meaning of public authority, potentially depriving numerous, often vulnerable people...from the human rights protection afforded by the Act. We consider that this is a problem of great importance, which is seriously at odds with the express intention that the Act would help to establish a widespread and deeply rooted culture of human rights in the UK.

The sponsor of the Bill, Andrew Dismore MP, said:

Under the *Human Rights Act*, public authorities – such as central and local government – must act in ways which protect and promote the human rights of the people who deal with them. But many services – such as care homes – are now contracted out to the private sector. It is not clear in law whether the *Human Rights Act* applies to these services. We think that it should: human rights should be protected whether the service is provided by the public or private sector. My Bill would clarify the law and ensure vulnerable people – for example, in care homes – get the protection they deserve from the *Human Rights Act*.

The Bill seeks to do this by providing that a function of a public nature includes a function performed pursuant to a contract or other arrangement with a public authority which is under a duty to perform the function.

The Second Reading debate on the Bill, which has the bipartisan support of the JSCHR, is due on 15 June 2007. The Bill is available at <http://www.parliament.the-stationery-office.co.uk/pa/cm200607/cmbills/043/2007043.pdf>.

### Register of Statements of Compatibility

Section 28 of the Victorian Charter requires that a Statement of Compatibility must be prepared and tabled in respect of any proposed legislation. The Statement must specify, in the member's opinion, whether and how the Bill is compatible with human rights and, if any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.

As part of its functions under s 41 of the Charter, the Victorian Equal Opportunity and Human Rights Commission is monitoring all Statements of Compatibility, including by compiling a Register of Statements. The Register also includes responses to such Statements prepared by the Scrutiny of Acts and Regulations Committee pursuant to s 30 of the Charter.

This Register is available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under 'Victorian Charter of Human Rights and Responsibilities'.

### Casenotes

#### UK High Court Considers Scope of Duty to Investigate and Provide Legal Representation in Response to Unnatural Death

*Main(R) v Minister for Legal Aid* [2007] EWHC 742 (2 April 2007)

The UK High Court of Justice has quashed a decision by the Minister for Legal Aid to refuse the family of two people killed in a train crash funding to be legally represented at the coroner's inquest. Central to the decision was the finding that funding was necessary to carry out an effective investigation into the accident pursuant to art 2 of the *European Convention on Human Rights* ('ECHR').

#### Facts

The claimant's mother and sister died in a train collision, when they were thrown through the unlaminated carriage windows. The victims' deaths were to be investigated at a coroner's inquest. One of the reasons for the inquest was the fact that the right to life under art 2 of the ECHR imposes on the State an obligation to carry out an investigation into unnatural deaths.

The claimant sought 'exceptional funding' under the *Access to Justice Act 1999* (UK) to appear at the coroner's inquest. The UK Minister for Legal Aid ('Minister') has a discretion to grant such funding on the recommendation of the Legal Services Commission ('LSC') on the basis that:

- (a) there is a significant wider public interest in the claimant being legally represented at the inquest; or
- (b) funded representation for the family is likely to be necessary to enable the coroner to carry out an effective investigation into the death as required by art 2 of the ECHR.

The LSC recommended that the Minister grant funding to the claimant. However, the Minister rejected the application, instead authorising limited funding for preparatory legal work, excluding advocacy at the inquest.

The claimant applied for judicial review, contending that there was a significant wider public interest in him being represented at the inquest, and that his legal representation was necessary for a proper investigation into his family's deaths, in accordance with art 2 of the ECHR.

#### Findings

##### Significant Wider Public Interest

The High Court found that the Minister had acted unreasonably in failing to take account of the conclusions reached by the LSC concerning the significant wider public interest. The claimant was the

only one able to represent the general public interest in promoting passenger safety on public trains. On this basis, the Court quashed the Minister's decision refusing funding.

#### Article 2 ECHR

In relation to the issue of art 2 of the ECHR, the High Court disagreed with the Minister's finding that funding for the claimant was not necessary for the coroner to properly investigate the facts. The Court emphasised that the relevant question was not whether such funding was necessary, but rather whether it was *likely* to be necessary.

The High Court also stated that in this case, an art 2 investigation 'must ensure so far as possible that dangerous practices and procedures are identified and rectified, and risk of future likely deaths minimised.'

The Court held that the Minister should have taken into account the fact that 'it is only through representation of the family that the wider public interest will be represented'. Further, the legitimate interests of the claimant could not be safeguarded by the limited offer of funding, which extended only to preparing representations and excluded advocacy during the inquest. On this basis, funded legal representation was likely to be necessary for an effective art 2 investigation.

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

The decision in *Main(R) v Minister for Legal Aid* may influence the interpretation of the right to life and the right to a fair hearing contained in the Victorian Charter. Notably, s 32(2) of the Charter specifically provides that 'the judgments of domestic foreign and international courts...relevant to a human right may be considered in interpreting a statutory provision.'

This UK decision may be used to interpret public authorities' duties in respect of the right to life in s 9 of the Charter. Although s 9 does not expressly include a duty to investigate unnatural deaths, such a duty may be read into the Charter on the basis of substantial jurisprudence from the UK and the European Court of Human Rights. Accordingly, this UK judgment may assist in shaping the scope of any duty to investigate and the related issue of granting publicly funded legal representation to parties to the investigation.

Further, in determining the meaning of a 'fair' hearing under s 24 of the Charter, Victorian courts may be influenced by the finding of the UK High Court that the claimant's legitimate interests could only be properly safeguarded by publicly funded legal representation. Although the decision was not directly based on the right to a fair hearing, it may nevertheless assist in arguments for broader categories of publicly funded legal representation in not only criminal, but civil proceedings.

The decision is available at <http://www.bailii.org/ew/cases/EWHC/Admin/2007/742.html>

*Eugenia Levine, Human Rights Law Group, Mallesons Stephen Jaques*

#### **European Court of Human Rights Considers the Right to a Fair Hearing in Civil Proceedings**

*Case of Vilho Eskelinen & Ors v Finland* ([GC] No 63235/00, 19 April 2007)

In a judgment handed down on 19 April 2007, the European Court of Human Rights ('ECtHR') considered the scope of the right to a fair hearing in the context of civil proceedings, with particular reference to the acceptable length of proceedings and the necessity of an oral hearing.

#### **Facts**

The applicants were Finnish public servants, including five police officers and one administrative assistant. In 1990, after their district was merged with another, the applicants lost individual wage supplements. The applicants alleged that the Provincial Police Command promised in 1990 that their losses would be compensated, but never were.

The applicants sought compensation from the Juopio County Administrative Board in 1993. Four years later, in 1997, the Administrative Board rejected the application. The applicants appealed to the Kuopio County Administrative Court later in 1997, requesting an oral hearing to establish relevant facts. The Administrative Court dismissed the application in 1998, stating that it was 'not necessary' to receive oral testimony from the applicants. The applicants appealed in 1998 to the Supreme Administrative Court,

again seeking an oral hearing. This court dismissed the application in 2000, again stating that an oral hearing was not necessary.

### **Issue**

The applicants lodged an application against Finland with the ECtHR alleging that the denial of an oral hearing and the excessive length of proceedings breached art 6 of the of the ECHR, which provides that '[i]n the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time'.

### **Findings**

#### Length of Proceedings

After dealing with a threshold issue over the applicability of art 6, the ECtHR went on to consider the scope and content of the art 6 right to a fair trial. It considered first the relevance of the right to the length of domestic proceedings, noting that reasonableness will be assessed 'in the light of the particular circumstances of the case, in particular the complexity of the case and the conduct of the applicant and relevant authorities' (at [67]). It found on this point that the case was neither complex nor exceptional. It also stated that 'in civil matters the reasonable time may begin to run, in some circumstances, even before the issue of the writ commencing proceedings before the court to which the plaintiff submits the dispute' (at [65]).

Considering the length of the actual proceedings in this case, the ECtHR found that the four years taken by the Administrative Board to examine the case had 'no sufficient explanation'. It did not find any issue with the length of time taken in the Administrative Court or Supreme Administrative Court proceedings. However, the delay in the Administrative Board proceedings was held to be in violation of the Convention.

The ECHR awarded each applicant €2500 for distress and frustration resulting from the length of the proceedings.

#### Oral Hearing

The ECtHR then went on to consider the role of an oral hearing in the provision of a fair trial. The ECtHR first indicated that the relevant principals were expressed in its earlier judgment in *Jussila v Finland* ([GC] No 73053/01, §§40-45). It noted that the applicants' purpose in requesting a hearing was to provide testimony that the provincial officials had promised that the individual salary losses would be compensated, while the Finnish government had argued that an oral hearing was unnecessary as the relevant information could be conveyed in written submissions. The Court agreed with Finland's submission that the relevant issues could be decided on the basis of written submissions (at [73]). It further noted that while it was for the courts to decide whether an oral hearing was necessary, the applicants were able to request such a hearing and the administrative courts gave the request consideration and reasons. Given that the applicants were given 'ample opportunity to put forward their case in writing and to comment on the submissions of the other party', the ECtHR held that the right to a fair hearing was not violated notwithstanding that no oral hearing was afforded.

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

Section 32(2) of the Charter states that '[i]nternational law and the judgments of domestic, foreign and international courts and tribunals relevant to a human rights maybe considered' when interpreting a provision of the Charter.

Accordingly, it is likely that the ECtHR's decision in *Vilho Eskelinen* will be of relevance for Victorian courts called upon to consider s 24(1) of the Charter, which provides that persons charged with criminal offences or, relevantly, parties to a civil proceeding, have 'the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing'. The most salient finding will likely be that an oral hearing is not necessarily a requisite element of a fair hearing in all circumstances, particularly where the facts sought to be proven may be presented equally well in written form. The ability of the applicant to apply for an oral hearing, and be provided with reasons for any denial, may also be a factor that suggests the right has been fulfilled notwithstanding no hearing being granted.

The ECtHR's finding in relation to lengthiness of proceedings may also be of relevance in considering the Charter right to a fair hearing, although it is notable that s 24(1) of the Charter right does not guarantee a fair hearing within 'a reasonable time', as is the case for the ECHR right.

The decision is available at

<http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=61926&sessionId=9799508&skin=hudoc-en&attachment=true>

*Tamara Vu, Human Rights Law Group, Mallesons Stephen Jaques*

### **Requirement that Patient comply with Mental Health Treatment does not Necessarily Interfere with Right to Privacy and Respect for Family Life**

*R (on the application of H) v Mental Health Review Tribunal* [2007] All ER (D) 29 (Apr)

The claimant was the subject of hospital and restriction orders under the *Mental Health Act 1983* (UK). The Mental Health Review Tribunal reviewed the claimant's position and subsequently ordered the claimant's discharge under s 73 of the Act on the condition that, amongst other things, the claimant 'shall comply' with medication prescribed by a specified doctor. The claimant applied for revocation of this and other conditions and sought an order for *absolute* discharge. The claimant wanted to show a willingness to take the medication, free from the requirement to do so.

The claimant argued that the condition should be revoked because conditions are subject to the principle of legality and that *requiring* the claimant to comply with the condition:

- interfered with his common law right of 'absolute choice' in relation to medical treatment; and
- interfered with his right under art 8 of the *European Convention on Human Rights* which provides that '[e]veryone has the right to respect for his private and family life, his home and his correspondence'.

The Queen's Bench Division (Administrative Court) decided that the principle of legality did apply. They also held, however, that the Mental Health Review Tribunal would have meant for the condition to be read as being subject to the real consent of the claimant, because it was trite law that an adult of full capacity has the right of 'absolute choice' in relation to medical treatment and that a doctor had to be satisfied that they received real consent from their patient. Therefore, the Court held that the condition that the claimant 'shall comply' with medication prescribed by a specified doctor does not require the claimant to *take* the prescribed medication, but rather to *consider* the consequences of not taking the medication in deciding whether or not to consent.

Accordingly, the Court held that the condition did not interfere with the claimant's common law right of 'absolute choice' in relation to medical treatment or his right under art 8 of the *European Convention* to respect for his private and family life, his home and his correspondence.

The Court clarified that, except in emergency situations, failure to comply with a condition does not mean that the order of conditional discharge is automatically revoked. The order can only be revoked, and the person the subject of the order consequently detained, if up to date medical evidence indicates that the criteria for detention are satisfied.

*Leana Papaelia, Human Rights Law Group, Mallesons Stephen Jaques*

## **HRLRC Policy, Advocacy and Law Reform**

### **Western Australia to Develop Human Rights Act**

The Attorney-General for Western Australia, Jim McGinty MLA, has announced that the WA Government proposes to introduce a Human Rights Act. The Act will have the purpose of 'establishing a human rights culture...in which there is greater awareness of, respect for, and observance of, human rights at all levels of government and throughout the community'.

The Government has established an independent consultative committee, chaired by the Hon Fred Chaney (former Minister in the Fraser Government and Director of Reconciliation Australia), to:

- consider and consult with Western Australians about the ways in which greater awareness of, respect for, and observance of, human rights can be achieved at all levels of the Government and throughout the WA community;
- ask the community what it thinks about the Government's preferred model for a WA Human Rights Act;
- identify a human rights framework that will serve the needs of Western Australians; and
- make recommendations to the Government about the matters which should be addressed in a WA Human Rights Act.

In order to focus the consultations, the WA Government has prepared a draft Human Rights Bill (which draws from both the *Charter of Human Rights and Responsibilities 2006* (Vic) and the *Human Rights Act 2004* (ACT)) and eight key questions:

- Should WA have a Human Rights Act?
- What rights should be protected in a WA Human Rights Act?
- What form should a WA Human Rights Act take?
- How should a WA Human Rights Act require human rights to be protected?
- Who should be required to comply with the human rights recognised in a WA Human Rights Act?
- What should happen if a person's human rights are breached?
- If WA introduced a Human Rights Act what wider changes would be needed?
- What else can the Government and the community do to encourage a culture of respect for human rights in WA?

The Committee has called for written submissions by 31 August 2007 and is due to report to Government by 16 November 2007.

The Human Rights Law Resource Centre is in the process of drafting a submission to the consultative committee with the substantial pro bono assistance of Allens Arthur Robinson. The Centre aims to make this submission available to other human rights and community organisations to assist and inform the development of their own submissions by late-July 2007.

For further information, including a discussion paper and the draft Bill, go to [www.humanrights.wa.gov.au](http://www.humanrights.wa.gov.au).

## HRLRC Casework

### Prisoner Voting Case

As reported in Edition 12 of the Bulletin, on 5 March 2007, the Human Rights Law Resource Centre commenced legal action in the High Court to challenge the constitutionality of legislation which removes the right of all sentenced prisoners to vote in federal elections.

The matter has now been listed for hearing by a Full Court of the High Court in Canberra on 12-13 June 2007. The plaintiff in the matter is Vickie Roach, an Aboriginal woman who is currently held at the Dame Phyllis Frost Centre in Deer Park. The defendants are the Commonwealth of Australia and the Australian Electoral Commission.

The case raises issues of significant constitutional importance, including the meaning of representative democracy, parliament's power to limit the franchise and the extent to which voting can be considered an incident of the implied freedoms of political communication and participation. The case is also concerned with the fundamental human right to vote and participate in public affairs, enshrined in art 25 of the *International Covenant on Civil and Political Rights* ('ICCPR').

The Centre is being provided with very substantial pro bono assistance in this case by Allens Arthur Robinson, Ron Merkel QC, Michael Pearce SC, and Fiona Forsyth and Kristen Walker of Counsel.

Further information on the case, including copies of the plaintiff's written submissions, are available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under 'Legal Briefs' in the 'Human Rights Library'.

## **UN Working Group on Arbitrary Detention Considers Conditions of Detention of 'Melbourne 13'**

As reported in Editions 5 and 11 of the Bulletin, the Centre submitted a complaint to a number of Special Procedures of the UN Human Rights Council in relation to the conditions of detention of 13 men charged with various terrorist-related offences.

As reported in Edition 11, the Centre understands that the length, conditions and effects of the detention have now been raised as matters of concern with the Australian Government by the UN Special Rapporteurs on Freedom of Religion and Belief, Human Rights while Countering Terrorism, and the Independence of Lawyers and Judges.

The Centre further understands that the case was also considered by the Working Group on Arbitrary Detention at its 48<sup>th</sup> Session in May 2007. At that session, the Working Group adopted a legal 'Opinion' on the legality of the detention, including whether it constitutes arbitrary detention contrary to art 9 of the ICCPR. The Australian Government has been notified of the substance of the Opinion and the Centre will receive notification within 3 weeks.

The Centre's correspondence in this matter is available at [www.hrlrg.org.au](http://www.hrlrg.org.au) under 'Legal Briefs' in the 'Human Rights Library'.

## **Seminars and Events**

### **Forthcoming HRLRC Seminars**

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

- 8 August – Professor Claudio Grossman, UN Committee Against Torture
- 13 August – Gareth Evans AO QC, President, International Crisis Group
- 15 August – Lord Robert Walker, UK House of Lords

Further details will be available closer to each date.

## **Education, Training and Resources**

### **Human Rights Training Program**

The Human Rights Law Resource Centre's annual human rights training program will be held over three half-days on 6, 14 and 20 June.

Day 1 will provide an 'Overview of Human Rights Law', including:

- sources and principles of human rights;
- implementation of human rights; and
- researching, interpreting and applying human rights.

Day 2 will focus on 'Using Human Rights in Domestic Law and Advocacy', including:

- the Victorian Charter of Human Rights; and
- the use of international human rights in domestic courts and tribunals.

Day 3 will cover 'Using International Human Rights Monitoring and Complaints Mechanisms', including:

- UN treaty bodies;
- Special procedures of the UN Human Rights Council; and
- the role and function of NGOs.

The training is provided free of charge and is aimed at pro bono lawyers and barristers, community lawyers and legal educators, legal aid practitioners, and advocates from human rights and community organisations.

For further information, including booking and venue details, see [www.hrlrc.org.au](http://www.hrlrc.org.au).

### **VGSO Charter of Human Rights Newsletter**

The Victorian Government Solicitor's Office ('VGSO') is producing a monthly newsletter regarding the implementation and operation of the Victorian Charter of Human Rights. The newsletter seeks to 'identify...the most relevant considerations in the implementation of the Charter' and to provide 'simple and informative material' on these issues.

To date, VGSO has published three issues of the newsletter:

- Issue 1 (January 2007) considers the meaning and obligations of 'public authorities';
- Issue 2 (February 2007) considers the relevance of the Charter to criminal and civil proceedings; and
- Issue 3 (March 2007) discusses statements of compatibility and other processes that now need to be followed in preparing legislation and operational and other non-legislative policies to ensure compatibility with the human rights in the Charter.

The newsletters are available at <http://www.vgso.vic.gov.au/>.

### **Monash Offers New 'Comparative Bills of Rights' Masters Subject – 2-8 August 2007**

Monash Law School is offering a new postgraduate subject, 'Comparative Bills of Rights'.

The subject will be taught by Dr Angela Ward and Rabinder Singh QC, both of the London Bar. Julian Burnside QC will be a guest lecturer.

The subject will be taught from 2-8 August 2007 at Monash Law Chambers in the Melbourne CBD and will cover:

- the content and case law of domestic bills of rights in the ACT and Victoria;
- the implementation of bills of rights in Australia compared with those of other countries, including the United Kingdom and New Zealand;
- the 'Europeanisation' of UK human rights law and its relationship with common law protection; and
- relevant principles, laws and precedents, applying them to resolve issues relating to bills of rights.

For more information, go to <http://www.law.monash.edu.au/postgraduate/law-hr.html> or email [graduate@law.monash.edu.au](mailto:graduate@law.monash.edu.au).

## **Human Rights Law Jobs**

### **Amnesty International Australia – Chief Executive Officer**

Amnesty International is a worldwide movement of people campaigning to protect human rights. As part of this global movement, Amnesty International Australia works to protect people facing abuse and to promote a culture in which all people enjoy impartial protection of these rights.

Amnesty International Australia is currently seeking a National Director (CEO), based in Sydney, to assume leadership of Australia's largest human rights organisation.

For further details, visit [http://www.amnesty.org.au/about/current\\_vacancies/national\\_director](http://www.amnesty.org.au/about/current_vacancies/national_director).

## **Foreign Correspondent**

### **Still in Struggle Town: Towards the Fulfilment of Socio-Economic Rights in South Africa**

Last month South Africa celebrated Freedom Day, marking 14 years since the end of apartheid and the holding of the first democratic elections. In one sense progress toward democratisation and the protection of human rights in South African cannot be overstated. Nor can the promise and commitment to genuine equality embodied in the South African Constitution, the cornerstone of which is an indivisibility of rights approach protecting both civil and political and socio-economic rights. But spend any time in the mushrooming informal settlements skirting the periphery of every urban centre in South Africa and the yawning gap between law, policy and implementation becomes painfully apparent.

## **Before and After**

The legacy of apartheid is perhaps no more obvious than in the desperate conditions in which many South Africans still live. A fundamental feature of the apartheid regime was a system of influx control that sought to exclude Africans from urban areas. In spite of the policy, Africans continued to camp on the edge of cities in search of employment. In the absence of formal housing, millions of people created 'informal settlements' that were characterised by abject poverty and frequent forced removals. More than a decade after the dismantling of apartheid and despite the construction of over 1.4 million houses in that time, the number and size of informal settlements has grown and almost half of the population continue to live in housing that is hopelessly inadequate.

## **Early Promise – Recalling *Grootboom***

For the last 12 days I have been travelling with the UN Special Rapporteur on the Right to Adequate Housing on his official mission to South Africa. One morning we head out on the main arterial from Cape Town to visit a sprawling informal settlement. There are few street signs in the settlement known as Wallacedene but our guide, South African human rights lawyer, Steve Kahanowitz, navigates easily through the dirt streets. As we round a corner, Steve points to a small plaque on the edge of street – *Grootboom*.

It is a name that resonates with human rights lawyers and activists the world over. The case, which came to be known as the *Grootboom* decision, marked a high point in debate over the justiciability of socio-economic rights. Steve Kahanowitz's firm made amicus submissions in the matter. Reflecting on the decision he comments, 'by the fact of their inclusion in the Constitution we knew that socio-economic rights had been deemed justiciable under South African law.' Even so, he says, the Court's decision in *Grootboom* was revelatory. By finding the State in breach of its constitutional obligations under the right to access to adequate housing, content and substance were given to the right.

For several years Irene Grootboom and over 900 others had been living in Wallacedene in appalling shack conditions. Many had been waiting for subsidised low cost housing for over 7 years. Faced with the prospect of remaining in intolerable conditions indefinitely, the group moved out and built new shacks on vacant land. An order for their eviction was obtained and despite having nowhere else to go, Irene Grootboom and 900 others, half of whom were children, were forcibly evicted. Their homes were bulldozed and burnt and their few possessions destroyed. It was, as Justice Yacoob observes in his judgement, 'reminiscent of apartheid-style evictions.' (*Government of the Republic of South Africa v Grootboom and Others* 2000(11) BCLR 1169 (CC)).

On appeal to the Constitutional Court, the Court confirmed the justiciability of the right to access to adequate housing under s 26 of the South African Constitution and held that whether the State had breached its obligations would depend on an examination of whether 'reasonable' laws and policies were in place to protect the right. In this instance, the Court held that failure to develop a 'reasonable' policy for people in urgent need of emergency accommodation amounted to a breach of the State's constitutional obligations.

Subsequent cases have further enunciated these rights and have led to the amending and passing of legislation reflecting the State's obligations. As Kahanowitz notes, 'by protecting those facing eviction the Constitutional Court has granted millions of South Africans still living under insecure tenure increased judicial protection against eviction.'

## **Crisis of Implementation**

The Court was quick to recognise, however, that 'mere legislation is not enough'. Nor are the well-intentioned policies, of which each level of government – national, provincial and municipal – now appears to have in spades. One of the major obstacles facing the fulfilment of socio-economic rights lies now in the implementation of those 'reasonable' laws and policies and the meaningful relief that can be afforded where rights are breached.

It took over four years for the State to develop the emergency housing policy that the Court found lacking in *Grootboom* and over one year for the different levels of government to decide whose responsibility it was. For the Grootboom community it has taken even longer to feel the positive impact of the court's decision.

It is just one example of what appears to be a crisis in implementation in housing and other service delivery. Some say that the problem lies with the huge challenges faced by a relatively inexperienced post-apartheid government. Others point to a fragmented system of government. While laws and policies are developed at a national level, under the Constitution it is the responsibility of the provinces and municipalities to ensure compliance and accountability. In this regard many are failing. Just recently it was revealed that the province of the Western Cape, home to the *Grootboom* residents, failed to spend their allocated housing budget despite the fact that, in 2004, over 1.5 million households had no access to formal shelter.

#### **Further Steps Towards Transformation**

The issue of implementation goes to the very heart of 'transformation' of South African society. To breathe life into the powerful rights embodied in the Constitution requires a constant monitoring of the impact of court judgements, legislative developments and a focus on relief and remedy where breaches occur. One criticism of the *Grootboom* decision was that the Court's order did not actually compel the State to take steps to ensure that the program comply with Constitutional requirements. As a result long periods of inaction followed.

In light of this, many lawyers and advocates are now urging the courts to impose supervisory orders or structural interdicts in the event of a breach. Such orders can shift the onus onto the State to show the Court that where constitutional violations have occurred, timely progress to remedy them is being made.

While supervisory orders and structural interdicts have been imposed in the lower courts, the Constitutional Court is extremely cautious about venturing too closely into parliament's domains of budget prioritising, agenda setting and timelines. But as large scale evictions and displacements continue to occur throughout South Africa, it is clear that the rights contained in the Constitution must be emboldened with strategies, both legal and non-legal to ensure the effective implementation of court judgments.

*Kristen Hilton, the Coordinator of the PILCH Homeless Persons' Legal Clinic, is currently undertaking a Churchill Fellowship to examine international and comparative protection of the right to adequate housing*