

INDEX

OPINION 1
NEWS..... 3
POLICY, ADVOCACY AND
LAW REFORM..... 4
CASEWORK 5
SEMINARS AND EVENTS 6
EDUCATION AND TRAINING 6

HUMAN RIGHTS LAW
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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 Need for a Human Rights Law Resource Centre

The Australian 'reluctance about rights' and the gap between international human rights law and Australian domestic law, policy and practice are well documented. Despite ratifying all of the major international human rights treaties, Australia has not fully implemented or incorporated their provisions into domestic law. Australia remains the only Western democracy without a legislatively or constitutionally enshrined charter of human rights. While Australia relies on a range of mechanisms to implement human rights – including the doctrines of 'responsible government', the enactment of anti-discrimination and privacy legislation at both state and federal levels, and the operation of federal and state equal opportunity commissions and tribunals – it has recently, and rightly, been said in a submission to the Victorian Human Rights Consultation Committee that:

The fabric of human rights in Australia resembles more of a patchwork quilt, frayed at the edges, than a secure and comprehensive regime of rights and freedoms.

Unsurprisingly, the lack of legal protection of human rights in Australia is felt most regularly and acutely by marginalised and disadvantaged individuals and groups. A recent Victorian report on human rights, which was informed by over 2500 written submissions, found that people with disabilities, older people, young people, prisoners, Indigenous people, women, homeless people, ethnic and religious minorities, and gay, lesbian, bisexual, transgender and intersex communities are particularly vulnerable to human rights violations. In the international sphere, a number of United Nations treaty monitoring bodies have, over the last decade, expressed concerns about the human rights of children and young people, women, Indigenous people, gay and lesbian people, refugees and asylum-seekers, and prisoners, among others. The lack of domestic legal protection of human rights across Australia is compounded by the relatively limited use made of international human rights law in domestic forums by advocates and judges. While international human rights norms and principles may be referred to or relied upon in the context of the review of administrative decisions, the development of the common law, the exercise of judicial discretions, the interpretation of statutes, and arguably the application of the Australian Constitution, the receptiveness of courts and tribunals to international human rights law submissions is highly variable. Moreover, the capacity and expertise of advocates with respect to

making such submissions is limited. As one commentator has written, 'from a detailed consideration of the existing case law, it is clear that the potential significance of international human rights law ... is yet to be fully realised in Australia'. Justice Maxwell, President of the Victorian Court of Appeal has similarly recently described 'the development of an Australian jurisprudence drawing on international human rights law' as being 'in its early stages'.

The relatively limited capacity and expertise of lawyers with respect to the use of international human rights law in domestic litigation and advocacy is a significant deficiency in Australia's framework of human rights protection. The availability of information, advice, assistance and advocacy about human rights must be an integral component of the implementation and realisation of such rights. This is because the right to equality before the law and the administration of justice is both a human right of itself and an important aspect of the promotion, protection, fulfilment and enforcement of other human rights. It is particularly important that human rights advocacy and legal services be available to marginalised and disadvantaged individuals and groups, many of whom are vulnerable to human rights violations and for whom ordinary legal services are not accessible. According to the UN Office of the High Commissioner for Human Rights, the availability and accessibility of human rights legal services and the justiciability of human rights are among 'most important tools' to prevent or seek redress for rights violations. The UN Basic Principles on the Role of Lawyers recognise this, referring in the Preamble to the fact that:

Adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession.

Article 14 of the Basic Principles goes on to oblige lawyers, 'in protecting the rights of their clients and in promoting the cause of justice' to 'uphold human rights and fundamental freedoms recognized by national and international law'.

Recognising the need to enhance the capacity of the legal profession and judiciary to develop

Australian law and policy consistently with international human rights standards, the Human Rights Law Resource Centre Ltd ('HRLRC') was established in January 2006 to promote human rights in Victoria and Australia, particularly the human rights of people that are disadvantaged or living in poverty, through the practice of law.

The HRLRC will seek to achieve this aim by providing pro bono expert advice, assistance, resources and support to community legal centres, human rights organisations, non-profit organisations and marginalised or disadvantaged groups to pursue human rights litigation, policy analysis and advocacy, education, monitoring and reporting.

Given the need to think structurally and strategically about the application of limited resources to have the greatest impact, the HRLRC has identified the following thematic priorities to target its work over the first two years of operation:

- the treatment and conditions of detained persons, including asylum-seekers, prisoners and involuntary patients;
- the content, implementation, operation and review of the proposed Victorian Charter of Human Rights and Responsibilities;
- economic, social and cultural rights, particularly the rights to health, housing and social security; and
- equality rights, particularly the right to non-discrimination on the grounds of race, religion, ethnicity and poverty.

The HRLRC has also identified people with a disability, people with a mental illness, Indigenous people, people living in poverty, children and young people, and people subject to discrimination on the grounds of race, religion and ethnicity as priority target groups for action. This prioritisation recognises the particular vulnerability of members of these groups to human rights violations.

The HRLRC is the first specialist human rights law resource centre in Australia. It will also be the first centre to pilot an innovative service delivery model that draws on the litigation capacity of pro bono lawyers and legal professional associations, the human rights law expertise of university law schools, and the grass root connections of community legal centres and human rights organisations.

The HRLRC proposal was developed over a two year period by the Public Interest Law Clearing House (Vic) and Liberty Victoria, with significant input from diverse stakeholders, including legal professional associations, community legal centres, legal aid, the private legal profession and human rights and community organisations.

The HRLRC was formally launched on 14 March 2006 by Justice Chris Maxwell and Geoffrey Roberston QC. It will operate for a two year pilot period thanks to generous financial and in-kind contributions from PILCH, the National Australia Bank, the Victoria Law Foundation, Allens Arthur Robinson, Mallesons Stephen Jaques, the Law Institute of Victoria, the Helen Macpherson Smith Trust and the R E Ross Trust. Recurrent funding is currently being sought from the Victorian Government as a component and outcome of the Government's Human Rights Consultation Project, with the Committee's Report recognising and recommending that human rights advocacy services form a part of the human rights protective framework in Victoria.

As the UN Human Rights Committee stated in its General Comment 3, human rights-focused legal services play a crucial role in the institutional framework necessary for the promotion, protection and realisation of human rights. The establishment and operation of the HRLRC represents an important and exciting development in the implementation and enforcement of human rights in Victoria and Australia. The HRLRC will significantly enhance sectoral capacity to undertake human rights litigation and advocacy and has the potential to progressively develop a domestic human rights jurisprudence that leads to a much needed rapprochement with international human rights law.

NEWS

Victorian Court of Appeal Considers Relationship between Domestic Law and International Human Rights Law

The Court of Appeal has recently had occasion to consider and comment on the relationship between domestic law and international human rights law, including the use and relevance of international human rights in domestic proceedings.

The case of *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85 (20 April 2006)

<<http://www.austlii.edu.au/au/cases/vic/VSCA/2006/85.html>> concerned the issue of 'public interest immunity' and, in particular, whether it attached to a patient's medical records. In the course of proceedings, the Court requested that parties make submissions on the relevance, if any, of international human rights law to the questions before the Court.

Commenting on the submissions subsequently made to the Court on this matter, the judgment of the President of the Court, Justice Maxwell, makes the following critical points.

First, the Court places significant value on international human rights law. Having regard to this:

1. The Court will encourage practitioners to develop human rights-based arguments where relevant to a question in the proceeding. [69]
2. Practitioners should be alert to the availability of such arguments and should advance them where relevant. [69]
3. Since the development of an Australian jurisprudence drawing on international human rights law is in its early stages, further progress will involve judges and practitioners working together to develop a common expertise. [69]

Second, there are at least three important ways in which international human rights law and jurisprudence may be relevant to the resolution of disputes under domestic law:

1. Statutes should be interpreted and applied, as far as language permits, in conformity with international human rights treaties. [73]
2. International human rights law may be used as a legitimate guide to the development of the common law. [74]
3. The provisions of an international human rights treaty to which Australia is a party may serve as an indicator of contemporary values and the public interest. [75]

Third, having regard to the above, Australian courts have appropriately considered the use of international human rights in:

1. exercising a sentencing discretion;
2. considering whether special circumstances exist to justify the granting of bail;

3. considering whether a restraint of trade is reasonable; and
4. exercising a discretion to exclude confessional evidence. [70]

The decision of Justice Charles, while not dealing with the relationship between international law and domestic law in the same detail, does consider a number of treaty provisions as potentially relevant to the exercise of a discretion as to whether to disclose medical records. In particular, Charles J refers to art 17 of the *International Covenant on Civil and Political Rights* (right to privacy), art 12 of the *International Covenant on Economic, Social and Cultural Rights* (right to health) and art 12 of the *Convention on the Elimination of All Forms of Discrimination Against Women* (right to non-discrimination in access to healthcare). The fact that Charles J considers and comments on these treaties in some detail is, arguably, a strong implicit recognition of their importance and relevance to domestic proceedings.

The decision of the Court, particularly that of Maxwell P, represents an increased receptiveness in Victoria's supreme appellate court to submissions based on international human rights law. The HRLRC considers this to be very heartening for the development of an international human rights law jurisprudence in Victoria and Australia.

POLICY, ADVOCACY AND LAW REFORM

Prisoners and the Human Right to Vote

A Federal Government proposal to deny the right to vote to all prisoners will, if enacted, violate numerous of Australia's obligations under international human rights law.

The Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005, which is currently before Federal Parliament, seeks to amend the *Commonwealth Electoral Act 1918* (Cth) to remove the franchise from any person serving a custodial sentence. The policy rationale for this proposed amendment is unclear but seems to be based on two Coalition propositions, namely:

- denial of the right to vote to prisoners is educative in that, according to Senator Eric Abetz, it 'ensures that people realise the importance of the democratic system and

the role it plays within our societal structures'; and

- denial of the right to vote to prisoners is a deterrent or disincentive to the commission of crime.

The practical impact of this amendment will be the disenfranchisement of at least 20,000 prisoners around Australia. The amendment is likely to impact disproportionately on Indigenous people, who are 16 times more likely to be imprisoned than non-Indigenous people and who comprise approximately 20 per cent of the prisoner population compared with roughly 2 per cent of the general population.

The proposed disenfranchisement of prisoners is manifestly inconsistent with a range of international human rights norms and principles.

Most obviously, the proposal is inconsistent with art 25 of the *International Covenant on Civil and Political Rights*, which enshrines the right to vote for all citizens and only permits restrictions on that right in so far as they are objective, reasonable, proportionate and necessary. It is notable that no evidence has been advanced (nor exists) to support the propositions that the proposal will have either educative or deterrent impacts. In fact, all of the available evidence demonstrates that policies which promote social inclusion, rehabilitation, civic engagement and participation can reduce and resolve marginalisation, disadvantage and poverty, all of which are significant causal factors and risk indicators of criminal activity. On the other hand, policies and practices which are discriminatory or result in social exclusion are closely linked with increased crime rates and recidivism.

The inconsistency between the human right to vote and the disenfranchisement of prisoners has been recognised by a number of courts over recent years, including the Supreme Court of Canada, the European Court of Human Rights and the South African Constitutional Court. The proposal to deny prisoners the right to vote has not in any way been demonstrated by the government to be objective, reasonable, necessary or proportionate and, as such, violates art 25 of the *ICCPR*.

In addition to being manifestly inconsistent with the right to vote, the proposal to deny the franchise to prisoners is also inconsistent with a number of instruments and norms pertaining

to the rights and treatment of prisoners, including:

- Art 5 of the *UN Basic Principles for the Treatment of Prisoners*, which provides that 'all prisoners shall retain their human rights and fundamental freedoms' except to the extent that a limitation is 'demonstrably justified by the fact of incarceration';
- Art 10 of the *UN Basic Principles for the Treatment of Prisoners*, which provides that prisoners should be subject to conditions 'for the re-integration of the ex-prisoner into society';
- Art 60(1) of the *UN Standard Minimum Rules for the Treatment of Prisoners*, which states that correctional services should 'seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings'; and
- Art 10 of the *ICCPR*, which provides that prisoners must be accorded all of their civil and political rights, including the right to vote, subject to the restrictions that are 'unavoidable in a closed environment'.

Finally, the move to disenfranchise prisoners is likely to constitute a violation of art 5(c) of the *Convention on the Elimination of All Forms of Racial Discrimination*, which, read in conjunction with arts 1 and 2, provides that the right to vote must be equally accorded to all citizens without distinction on the grounds of race and that any restriction to this right must have neither the purpose nor effect of discriminating on the grounds of race. As discussed above, it is clear that a blanket disenfranchisement of prisoners will have a significantly disproportionate and therefore discriminatory impact on Indigenous people contrary to the Convention.

CASEWORK

Constitutional Challenge to Restrictions on Prisoners' Right to Vote

The HRLRC is currently examining the merits of a possible constitutional challenge to the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005 which, as discussed above, seeks to amend the *Commonwealth Electoral Act 1918*

(Cth) to remove the franchise from any person serving a custodial sentence.

The HRLRC is obtaining pro bono assistance from Allens Arthur Robinson, Fiona Forsyth of Counsel and Michael Pearce SC to consider the merits and prospects of success of a High Court challenge to the Bill on the basis that, by removing the franchise of a significant group, it violates the requirements in sections 7 and 24 of the Constitution that members of the Senate and the House of Representatives, respectively, be 'directly chosen by the people'. AAR and Counsel are also advising the HRLRC as to the relevance, if any, of art 25 of the *ICCPR* (which enshrines the human right to vote), together with any other relevant international human rights law, to the interpretation and application of the term 'directly chosen by the people' and, by extension, the implication of a right to vote in the Constitution.

If Counsel advises that a Constitutional challenge is meritorious, it is likely that the HRLRC will initiate such an action either on behalf of a prisoners' rights organisation or a disenfranchised prisoner through such an organisation.

If Counsel advises that a Constitutional challenge is unlikely to be successful and that there are no other effective domestic remedies available, it is likely that the HRLRC will lodge a complaint with the UN Human Rights Committee ('HRC') under the First Optional Protocol to the *ICCPR* alleging a violation of *ICCPR* arts 25. Although HRC complaint determinations are not directly enforceable under Australian domestic law, they can be politically and publicly persuasive and perform a significant educative function. A similar complaint by Nicholas Toonen in 1991 regarding the criminalisation of homosexuality in Tasmania resulted in the HRC finding a violation of the *ICCPR* and the Federal Government subsequently overriding the Tasmanian legislation.

Court of Appeal Intervention regarding Prisoners and the Right to Health

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 a case before the Victorian Court of Appeal.

The case relates to a man with a severe mental illness who was sentenced to a term of imprisonment for an armed robbery. The man has been granted leave to appeal against sentence and Victoria Legal Aid is acting in this regard. The articulated grounds of appeal include that the sentence is manifestly excessive having regard to the psychiatric condition of the accused and that the trial judge failed to properly apply the sentencing principles, particularly the principle of deterrence, having regard to the mental health of the accused.

The HRLRC proposes to seek leave to make submissions as amicus curiae on the relevance of international human rights instruments and standards to exercise of the sentencing discretion. In particular, the HRLRC will seek to make submissions to the Court that the following norms should be considered as relevant to and inform the exercise of a sentencing discretion in relation to a person with a mental illness:

- Art 12 of the *International Covenant on Economic, Social and Cultural Rights*, which enshrines the right to health;
- Art 6(1) of the *International Covenant on Civil and Political Rights*, which enshrines the right to life;
- Art 10(1) of the *International Covenant on Civil and Political Rights*, which enshrines the right of prisoners to be treated with dignity and respect;
- Art 7 of the *International Covenant on Civil and Political Rights*, which enshrines the right to be free from cruel, inhuman or degrading treatment or punishment;
- The *UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, particularly the provisions relating to conditions of detention and access to medical care and treatment;
- The *UN Standard Minimum Rules for the Treatment of Prisoners*, particularly Rules 22-26 pertaining to access to medical services; and
- The *UN Basic Principles for the Treatment of Prisoners*.

SEMINARS AND EVENTS

Human Rights Activism and Advocacy on 25 May 2006

On 25 May 2006, the HRLRC, in conjunction with PILCH, presents a Law Week seminar entitled 'Human Rights Activism and Advocacy'.

The keynote speakers are Justice Ron Merkel (Judge, Federal Court of Australia), Andrea Durbach (Director, Australian Human Rights Centre) and Cassandra Goldie (Director, Homelessness Legal Rights Project).

Details of the seminar are:

Time: 5.45pm – 7.45pm

Date: Thursday, 25 May 2006

Venue: Allens Arthur Robinson
Level 34, 530 Collins Street
Melbourne

Cost: \$20/\$10 concession

Registration is essential

RSVP: 15 May 2006 using booking form available at 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 in the 'What's New' box.