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3. Empower people that are disadvantaged or living in poverty by operating within a human rights framework.

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OPINION

The War on Human Rights in the War on Terror

On 18 August 2006, the Victorian Court of Appeal quashed convictions against Jack Thomas for receiving funds from a terrorist organisation and possessing a falsified Australian passport. Mr Thomas had previously been found guilty of these offences on the basis of self-inculpatory admissions made during an interview conducted by Australian Federal Police ('AFP') in Pakistan on 8 March 2003. The Court of Appeal quashed the convictions because these admissions constituted the only evidence to incriminate Mr Thomas. They ruled that the circumstances in which the interview was conducted were such that the admissions could not be said to have been made voluntarily. They also said that to admit such evidence would be unfair and contrary to public policy.

The decision of the Court of Appeal has been repeatedly and misleadingly criticised by conservative commentators – such as Chris Merritt, Andrew Bolt, Piers Akerman and Janet Albrechsten – who claim that the admissions were excluded on the basis of a legal technicality; namely, that the interview was conducted in the absence of legal representation. The same commentators seem to have conveniently overlooked or ignored the broader circumstances in which the interview was conducted; circumstances which were central to the Court of Appeal's decision. They were circumstances which irreparably damaged the probity, reliability and integrity of the evidence and which, moreover, clearly placed our allies in the so-called 'War on Terror' – the US and Pakistan – in violation of the very human rights they purport to protect. Most disturbingly, the circumstances of Mr Thomas' detention, the conduct of the interview, the prosecution of Mr Thomas on the basis of that interview and, most recently, the imposition of a 'control order' on Mr Thomas, clearly signal that Australian authorities are prepared to repudiate fundamental human rights in this 'War on Terror'.

So what exactly were the circumstances in which the interview was conducted? The following facts were accepted by both the Supreme Court and the Court of Appeal. Many of them were not even contested by the prosecution.

Mr Thomas was apprehended in Pakistan in January 2003 and detained by Pakistani authorities for almost six months. He was not charged with any offence and was not allowed access to a lawyer. Prolonged detention without charge, and without any ability to contest the legality of such detention, is a clear violation

of art 9 of the *International Covenant on Civil and Political Rights* ('*ICCPR*'), which prohibits arbitrary detention.

The conditions of Mr Thomas' detention also violate fundamental human rights and should affront good conscience. During the six months of detention, Mr Thomas was held for extended periods in solitary confinement, including being detained in 'dog-kennel' like conditions and deprived of food and water for up to three days. He was hooded, shackled, manacled, and threatened with electrocution and execution. On one occasion he was strangled with the cord of his hood so that he could not breathe. He was threatened with lashings and, on at least one occasion, was lashed by a US official. He was told that his testicles were going to be crushed. He was urged to cooperate fully with Pakistani and US interrogators who told him, 'We're outside the law. No one will hear you scream.' They threatened to rape his wife. The prohibition on torture and other cruel, inhuman or degrading treatment or punishment is enshrined in the *Convention against Torture* ('*CAT*') and art 7 of the *ICCPR*. It is also a non-derogable norm of international human rights law. The prohibition extends to giving effect to acts of cruel, inhuman or degrading treatment, including by admitting evidence obtained in contravention of the norm.

It was in the context of this incarceration in Pakistan, that Mr Thomas was interviewed on at least six occasions by ASIO and AFP officers. Most of these interviews were conducted when Mr Thomas was sleep deprived between 10pm and 3am. Some of his Pakistani interrogators were also present during these interviews. Mr Thomas was threatened and offered inducements during the interviews. The prosecution never sought to tender these interviews to evidence because they knew that to do so would be unfair and contrary to principles of justice.

On 8 March 2003, Mr Thomas was interviewed by AFP officers. Contrary to both Australian law (the *Criminal Code*) and international human rights law (arts 9 and 14 of the *ICCPR*), he was not permitted access to a lawyer during this interview and it was implied that if he did not cooperate he faced the prospect of indefinite detention in Guantanamo Bay, or worse. Mr Thomas made a number of self-inculpatory statements in the course of the interview. He also told his interrogators that he

had 'absolutely no' intention of engaging in any kind of terrorist activity.

Mr Thomas was released from custody in Pakistan, without charge, in June 2003 and returned to Australia. Eighteen months after his return, Mr Thomas was charged with the offences of receiving funds (in the form of a plane ticket) from a terrorist organisation, providing assistance to a terrorist organisation, and falsifying a passport on the basis of the interview of 8 March 2003.

At trial, before the Supreme Court of Victoria, Mr Thomas was convicted of the offences of receiving funds and tampering with a passport. He was acquitted of the charges of assisting or providing support or resources to a terrorist organisation. The jury found that he had no intent of engaging in any terrorist activity, a finding supported by the recent admission from the head of counter-terrorism at the AFP that 'there is no evidence at all that Mr Thomas, at any stage, planned any particular terrorist acts in Australia' (*The Age*, 22 September 2006). This fact is again conveniently overlooked by conservative commentators, who persist in misleadingly labelling Mr Thomas a 'terrorist' or 'alleged terrorist'.

In allowing the appeal and quashing the convictions, the Court of Appeal held that the conditions and impact of detention – conditions that were so torturous as to cause Mr Thomas profound psychiatric harm – combined to mean that Mr Thomas did not make the statements voluntarily and that it would be unfair and against public policy to admit them. This decision is both courageous and compellingly correct.

We are told that the so called 'War on Terror' is a war against fundamentalists and extremists who seek to deny us the rights to liberty and security of person. They do not recognise or respect our common humanity and inherent dignity. They seek to torture and subject to cruel treatment those who resist them. They certainly do not respect rights to freedom from arbitrary detention, to access to legal representation and to a fair trial. As signalled by Australia's ratification of the *ICCPR* and the *CAT*, from which these rights are derived, human rights matter deeply and are worth fighting for. In the aftermath of the last truly global war, World War 2, respect for human rights was recognised as the foundation of peace and justice.

Yet these are the very rights that Mr Thomas' captors and interrogators themselves violated and denied. Had the Victorian Court of Appeal admitted evidence obtained in breach of these fundamental rights and freedoms, it would have given effect to the human rights violations. This would have been repugnant to justice and humanity and in violation of Australia's human rights obligations.

By allowing the appeal and quashing the convictions, the Court of Appeal has signalled that the 'War on Terror' does not permit a 'War on Human Rights'. We must not succumb to the invidious temptation and hypocrisy of exporting human rights and democracy, and of demanding compliance with human rights by others, while not respecting human rights at home.

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NEWS

Review of ACT Human Rights Act: ACT Should Continue to Lead the Way on Human Rights

In 2004, the ACT Stanhope Government took the lead in protecting human rights when it introduced Australia's first bill of rights, the ACT *Human Rights Act*. Recently, Victoria has followed the ACT's example by adopting a *Charter of Human Rights and Responsibilities*, and other states are considering similar legislation.

In August 2006, ACT Attorney-General Simon Corbell released the Report of the first review of the ACT *Human Rights Act*. Although the Report received little fanfare, it highlights some important changes needed to ensure that the ACT remains at the forefront of human rights protection.

While the Report finds that the ACT *Human Rights Act* has been successful in improving consideration of human rights within the executive and the legislature, it concedes that the Act has not been used often in the courts, and that there is still much work to be done to develop a culture of human rights in the ACT community.

The ACT *Human Rights Act* represented a significant step forward in the protection of human rights in Australia, overcoming the fears and misconceptions that had long surrounded bills of rights. Following lengthy community

consultation, the government chose to enact a bill of rights based on a 'dialogue' model, to encourage an exchange of views on human rights between the courts, the parliament and the executive.

The Act requires the government to certify whether new laws are consistent with human rights, and allows the Supreme Court to issue a declaration of incompatibility where legislation cannot be read to comply with human rights, but does not give it the power to invalidate the law. Unlike an American-style bill of rights, the ACT *Human Rights Act* explicitly preserves the right of the legislature to have the final say.

However, the current *Human Rights Act* is more limited than the model which was recommended by the Consultative Committee.

One of the limitations of *the Human Rights Act* is that it does not impose any direct obligation on public officials to comply with human rights in making decisions and carrying out public functions. This has meant that the main impact of the Act has been in the creation of new legislation, rather than changing existing policy and practice.

Further, the ACT *Human Rights Act* does not provide people with a direct right of access to the courts if their human rights have been breached, which goes some way to explaining why the Act has been largely ignored by the public and by the legal community.

The Victorian Government, perhaps learning from the ACT experience, has addressed these problems in its *Charter of Human Rights and Responsibilities*, which imposes a direct duty on public authorities to comply with human rights, and a right to bring an action to court where this duty is breached, although not to claim financial compensation. These provisions will be phased in after the commencement of the *Charter* in January next year.

The ACT Report recommends that the government consider amending the ACT *Human Rights Act* to include similar provisions. In our view, these amendments are a key step in giving meaning to human rights for people in the community, as decision makers at the coal-face will need to respect human rights in their dealings with the public. A further advantage of updating the *Human Rights Act* to be consistent with the Victorian Charter is that the ACT Government would be able to learn from the cases that will be generated in that much

larger jurisdiction, and to improve compliance with human rights without having to wait for issues to be tested in the ACT.

Another reform canvassed in the review was whether to include social, cultural and economic rights that are currently excluded from the *Human Rights Act*. In introducing the Act in 2004, the ACT Government noted that it was a starting point, and hinted that further rights might be included over time. Although the majority of submissions to the Review supported the inclusion of social, cultural and economic rights, the Report stops short of recommending the addition of any new rights at this stage, but suggests that this issue be revisited when the Act is again reviewed after it has been in place five years.

Critics have suggested that social, cultural and economic rights would be dangerous additions to the *Human Rights Act* because their protection could require unlimited financial resources. This fear is misplaced in the context of legislation that does not allow monetary compensation for breach of human rights. Moreover, decisions on social and economic rights in the South African courts show that the duty on a government in this context is simply to act reasonably to provide access to these rights. The existence of these rights does not impose a requirement to go beyond a government's available resources.

We hope that the ACT Stanhope Government continues to show leadership in the protection of human rights by amending the *Human Rights Act* to include these fundamental rights, such as the right to education, the right to health and the right to housing, which are necessary for the exercise of all other human rights.

Hilary Charlesworth is a Professor of International Law at the ANU and chaired the Consultative Committee which recommended a Human Rights Act for the ACT. Gabrielle McKinnon is the director of the ACT Human Rights Act Research Project at the ANU.

The Human Rights Act Five Years On: Lessons from the UK

Introduction

The *Human Rights Act 1998* ('HRA') came into force in the UK in October 2000. The HRA gives effect to the rights contained in the *European Convention on Human Rights*. It:

- prohibits public authorities from breaching *Convention* rights unless obliged to by an Act of Parliament;
- allows cases concerning *Convention* rights to be dealt with in UK courts (instead of at the European Court of Human Rights in Strasbourg); and
- requires that UK legislation be compatible with *Convention* rights. If a Court determines that this is not the case, then parliament decides whether to amend the Act or not.

The UK Department for Constitutional Affairs issued its *Review of the Implementation of the Human Rights Act* in July 2006 ('the Review'). The Review is available at <http://www.dca.gov.uk/peoples-rights/human-rights/publications.htm>. The Review is the result of a five-year retrospective evaluation of the HRA commissioned by the English Prime Minister and led by the Lord Chancellor.

The mandate of the Review was to look at problems with the implementation of the HRA, focusing on:

- the need for cross-government guidance for officials making decisions with human rights implications;
- whether primary legislation is required either to amend the HRA or other legislation; and
- how to improve public confidence in the HRA.

In part, the Review was commissioned as a result of the findings of the HM Chief Inspector of Probation's Inquiry Report into the release of Anthony Rice. Mr Rice was convicted of killing Naomi Bryant while on parole. The Inquiry Report suggested that human rights arguments and the HRA were contributory factors leading to Rice's release and Bryant's death. This case exemplifies the concerns held by many in the UK about the impact of the HRA on UK law and society.

Impact on law and policy

The Lord Chancellor summed up the impact of the HRA on the substantive development of UK law as 'significantly less, and significantly less negative' than had been expected (at 3).

The principal positive impact of the HRA is that it has been widely used across a range of civil and criminal litigation, generating 'a substantial body of case law' (at 10) and encouraging a

positive dialogue between UK judges and the European Court of Human Rights. In the House of Lords, the HRA was substantively considered in one third of the 354 cases brought over the review period, though it affected the outcome in only one tenth of those cases. It featured most predominantly in public law cases, dealing with issues such as euthanasia, mental health, same-sex discrimination, and the right of schools to prohibit students wearing the jilbab. The Review found that the impact on private litigation has, by contrast, been very small.

The Review also found that the HRA has had a positive effect on policy formation by providing a formalised and compulsory process of ensuring compatibility with *Convention* rights. One example the Review provides is a shift away from blanket policies to a more flexible approach which provides greater recognition of diversity and difference within the community.

Areas of conflict

The most significant problem the Review identified has been the actual or perceived conflict between the HRA's protection of rights, and legislative and executive agendas of national security, criminal justice and immigration control. This arose in cases challenging, among other things, detention without trial of foreign nationals, fixing of tariffs for life prisoners, searching of prisoners' privileged correspondence, and stop and search counter-terror legislation.

Several mechanisms have evolved to limit the effect of the HRA in these key areas, leading to the Review's finding that there has been no significant impact on the criminal law and a reduced impact on national security and immigration. The most significant has been recognition by the courts of an 'area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the legislature or the executive' (at 12). This deference, now more commonly referred to as 'discretionary area of judgment', has led to the courts refusing to substitute their own views for policy decisions made on issues of national security, criminal justice and economic policy.

Misconceptions

A substantial section of the Review was devoted to the HRA's impact on culture and civil society in the UK. Widespread and

detrimental misconceptions about the scope of the HRA and the nature of claims that may be brought under it were identified, including the belief that the HRA gives the undeserving a means of 'jumping the queue and getting their interests placed ahead of those of decent hardworking folk' (at 29). The Review shows these myths to have arisen as a result of widely-publicised frivolous claims.

The Review found these myths to be 'extremely damaging', as they 'corrode public confidence in the importance of human rights' (at 30), and contribute to the mistakes in the interpretation and application of the Act by public officials. Such mistakes have been found to be a significant concern. It was this issue that was played out in the Anthony Rice case, mentioned above. The Review's findings in this area prompted its call for better education for public officials as well as the public generally.

Implications for the Victorian Charter

Victoria can learn from the UK's experience with the HRA. The widespread use of rights legislation, the increased dialogue between domestic courts and international jurisprudence, and the mainstreaming of human rights in government processes are to be encouraged. The pitfalls, in particular the misunderstanding and misapplication of the HRA, must equally be anticipated and addressed, including through extensive judicial, legal and community human rights education and awareness.

Before its introduction, it was predicted by some that the HRA would become 'a field day for crackpots, a pain in the neck for judges and legislators and a goldmine for lawyers'. Five years on this has proved not to be the case. We can look to the experience of the UK to ensure that Victorian Charter similarly avoids that fate.

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'A Life with Dignity for All': UN Adopts Text for *International Convention on the Rights of Persons with Disabilities*

After five years of negotiation, the UN has finalized the text of a *Convention on the Rights of Persons with Disabilities* ('Convention'), the adoption of which is currently being considered

by the UN General Assembly at its 61st session. If the Assembly adopts the *Convention* it will become the first new human rights treaty of the 21st century and has the potential to significantly and positively impact on the lives of an estimated 650 million people with a disability worldwide.

The *Convention* was first discussed at the UN in 2001 and arose out of the failure of other international human rights instruments to specifically address disability issues. While the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* all enshrine the right to equality, they do not enumerate 'disability' as a ground on which discrimination is prohibited. In addition, although people with disabilities are the largest minority group in the world, they are not included in the UN's concept of 'minority'.

There was much early debate on whether creating a new *Convention* was the most appropriate method for promoting disability rights. The Australian Government, in particular, strongly advocated for the annexure of a disability-specific protocol to an existing international treaty to avoid excessive cost, the duplication of rights and the creation of a new treaty monitoring body.

This approach was widely rejected by disability organisations on the basis that it would de-prioritise disability rights; however, they recognized the concerns regarding duplication and efficiency. As a result, the *Convention* does not seek to create new rights, as such, but rather to elaborate on existing ones. It is also intended to provide direction for governments to develop and implement legislation, programs and education to ensure that human rights are made real and practical for people with a disability.

The *Convention* contains a number of innovative and important provisions, including an obligation to promote awareness and combat stereotypes (art 8) and an obligation to facilitate independent living, participation and social inclusion (art 19). The *Convention* also enshrines a range of well-established rights, including equal recognition before the law (art 12), liberty and security of person (art 14) and protection from torture or other cruel, inhuman or degrading treatment or punishment (art 15). In respect of all of these provisions, the *Convention* requires the adoption of measures

to fully implement rights, the enactment of laws prohibiting discrimination on the basis of disability, the elimination of existing discriminatory laws and practices, and the taking into account of the rights of persons with disabilities in all policies and programs (art 4). States parties are also required to fight stereotypes and prejudices, promote awareness of the capabilities of people with disabilities, and to ensure the development and availability of technologies and aids (such as communication and mobility aids) to enable full participation.

Literally hundreds of government delegates and representatives from disability organisations were involved in the drafting process and, as a result, consensus was not easily reached on all issues. International monitoring and the definition of disability were issues of ongoing discussion. Extensive debate over a specific monitoring body for the *Convention* led to suggestions that the issue of disability could be covered by the existing treaty bodies, and that a new body would lead to overlapping, duplication and the unnecessary expenditure of resources. Most countries, however, argued for a specific treaty monitoring body, with the delegate from Lichtenstein stating that, without it, 'the perception will be that this *Convention* is seen as less important by the international community'. The International Disability Caucus, which represents more than 70 regional and international disability organisations, also commented that existing human rights bodies were not addressing relevant issues as they do not have the expertise, therefore a new body is crucial to the successful implementation of the *Convention*.

Delegates also reached consensus on the establishment of an *Optional Protocol* to the *Convention* which, if approved by the General Assembly, will allow individuals and groups to submit communications and complaints on alleged violations of their rights to the expert monitoring body. This provision effectively gives an individual a voice to be heard before the international community and reminds governments of their significant obligations under the *Convention*.

The definition of 'disability' was one of the most controversial issues arising out of the drafting process. Delegates argued that the group to whom the *Convention* applies must be clearly ascertainable for complaint procedures; the

International Disability Caucus argued that the definition needed to reflect a 'social model' of disability (which focuses on the social environment rather than the individual), and others argued that the definition needed to be 'modern' and inclusive in nature. Ultimately, a definition of 'disability' was not included in the text, with the compromise being the preambular recognition that 'disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'. Although the practical effects of this decision will not be known for some years, this approach leaves the definition of disability up to judicial and treaty body interpretation, so as not to exclude any potential parties from the jurisdiction of the *Convention*.

The drafting was not without political influence, through which several proposals became highly contested issues. Sudan's proposal for a paragraph relating to protection of rights of people with a disability during armed conflict and foreign occupation caused uproar among some delegates and was eventually approved by vote. Australia was one of only five delegates to reject the proposal, as they claimed, along with Canada, Israel, the USA and Japan that it was an attempt to 'politicize' the Convention (with reference to Israel and Lebanon). Another politicised issue was the provision requiring governments to provide persons with a disability equal sexual and reproductive health services to other groups. Unlike Sudan's proposal, this provision was dropped without a vote due to strong opposition from anti-abortion delegates. This suggests a weakness in the drafting process and serves as a reminder of the powerful influence of politics and religion on the development of human rights.

The prospective approval of this *Convention* is an exciting development in international human rights law and the process by which it has come into existence is commendable, particularly the willingness of states and civil society to reach consensus on fundamental human rights issues, despite religious, political and other differences. Most interestingly, we will finally see whether a new, more modern and practical approach to the drafting of this treaty will pay off, and whether people with disabilities will truly benefit from a more direct

and specific document guiding the way that governments provide and ensure access to rights for people with disabilities.

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CASENOTES

High Court Considers Relevance of International Human Rights to Constitutional Interpretation

Forge v Australian Securities and Investments Commission [2006] HCA 44 (5 September 2006)

The High Court of Australia has recently had occasion to consider the relevance of international human rights law instruments and jurisprudence to Australian domestic law, in *Forge v Australian Securities and Investments Commission*.

The case concerned the constitutionality and validity of the appointment of Michael Leader Foster to act as a temporary Judge of the Supreme Court of New South Wales and the capacity of his Honour to act in this case. The appointment was made pursuant to s 37 of the *Supreme Court Act 1970* (NSW) which provides for appointments to act as a judge for a period not exceeding 12 months. The appointment was also enabled by Chapter III of the Constitution of Australia.

Both parties to the case, as well as the numerous state and territory Attorneys General who intervened in the matter, provided detailed submissions regarding the relevance of international human rights law to the issues in question.

In particular, the Court was asked to consider the essential requirements for the constitution of a court and the definition of an independent and impartial tribunal. In considering these elements, the Court looked at various international, regional and national human rights instruments such as the *ICCPR*, the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, the *Canadian Charter of Rights and Freedoms* and the South African *Bill of Rights*. The Court also considered the impact of these instruments in jurisdictions such as the United Kingdom. However, with the exception of Kirby J's decision, the majority of the discussion in the various judgments concerned the fact that

although Australia is a signatory to the *ICCPR*, it does not form part of Australian municipal law.

In his judgment, Gleeson CJ briefly examined the recent decision of the Privy Council in *Kearney v HM Advocate* (2006) SC PC, in which the Privy Council applied the legal norm set out in art 6(1) of the *European Convention on Human Rights* to the Scottish system of appointing practising advocates as temporary judges. His Honour acknowledged that legal standards such as the *European Convention* have been applied by courts on many occasions in the past. However, while Gleeson CJ stated these cases contained 'valuable analyses', he did not further consider the application of international human rights law to the case.

In their majority judgment, Gummow, Hayne and Crennan JJ looked at various international sources. However, despite acknowledging the international consensus with respect to the elements of a fair and impartial judicial officer, their Honours concluded that, 'overseas analogies provide little sure guidance to the resolution of the issues that must now be considered'. Their Honours stated that international human rights law jurisprudence had limited utility, cautioned that international analogies 'may be apt to mislead' and tend to obscure the vital, 'historical and governmental setting in which the issues... must be decided'. As a result, international standards were not considered relevant to the Australian context.

Justice Heydon was even more dismissive of the application of international human rights law, arguing that no assistance can be obtained from the international law instruments and jurisprudence because they post-date Chapter III of the Constitution.

Unsurprisingly, Kirby J (in dissent) provided the most thorough and positive consideration of international human rights law. His Honour recognised the importance and increasing relevance of the international context to contemporary legal practice in Australia, describing it a 'natural and inevitable development in the law'.

Justice Kirby placed great emphasis on art 14 of the *ICCPR* and art 6 of the *European Convention*, both of which enshrine the right to a fair trial by an independent and impartial tribunal. His Honour also referred to the decision of Lord Justice-Clerk Cullen in *Starrs* (2000) JC 208, which includes conclusions of

the then UN Special Rapporteur on the Independence of the Judiciary. These instruments and jurisprudence were used to flesh out the requisite criteria for the constitution of a court under Australian law.

Finally, Kirby J turned to the issue of the relationship of international human rights law instruments, such as the *ICCPR*, with Australian municipal law. Although his Honour acknowledged that the *ICCPR* does not, as such, form part of Australian law, Kirby J reconfirmed his view that international human rights law has a role in 'elaborating the requirements of our own Constitution' and interpreting the ambiguities of statutes, as well as in the development of the common law in Australia.

Unfortunately, the Court's treatment of international human rights law in the case of *Forge* does not indicate any substantial departure from its established position. The majority of the Court appears to view international law and jurisprudence as largely uncertain and inappropriately applied to the domestic context. Justice Kirby alone, and correctly in my view, supports an expanded view of its role in the interpretation of Australian law. Despite the Court's continued reticence to adopt Kirby J's broader approach, it is hoped that as parties to litigation increasingly make submissions based on international human rights law principles, the Court will come to view these principles and their analysis as a 'natural and inevitable development in the law'.

The decision is available at

http://www.austlii.edu.au/au/cases/cth/high_ct/2006/44.html

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UN Human Rights Committee Finds Australia in Breach of Right to Freedom of Expression; Comments on Obligations of States and Territories

***Coleman v Australia*, HRC, Communication No 1157/2003, UN Doc CCPR/C/87/D/1157/2003 (10 August 2006)**

In a decision with important ramifications for the human rights obligations of federal, state and local governments and officials, the UN Human Rights Committee ('Committee') has concluded that the application of a Queensland

law and a Townsville bylaw impermissibly restricted the complainant's right to freedom of expression, placing Australia in breach of its obligations under the *ICCPR*.

The complainant, Patrick Coleman, was charged, convicted and fined under *Townsville City Council Local Law No 39* for 'taking part in a public address in a pedestrian mall without a permit' and s 120(1) of the *Police Powers and Responsibilities Act 1997* (Qld) for obstructing police. The charges related to two public addresses delivered by Mr Coleman in 1998 and 1999 in a pedestrian mall on issues such as bills of rights, land rights and freedom of speech. The content and delivery of the addresses was not threatening or unduly disruptive. Mr Coleman did not, however, obtain a permit for either address and refused to voluntarily accompany police when he was charged with this offence. Mr Coleman was initially convicted in the Magistrates' Court and this conviction was subsequently upheld by the Supreme Court of Queensland and the Queensland Court of Appeal. Leave to appeal to the High Court was denied. In late 1999, Mr Coleman was imprisoned for five days for non-payment of the fine.

Mr Coleman's complaint to the Committee contended, among other things, that the arresting police officer, Townsville City Council and the State of Queensland had violated the following *ICCPR* rights:

- his right to freedom of expression under art 19;
- his right to freedom of assembly under art 21; and
- his right to freedom from arbitrary detention under art 9.

In response, the Australian Government submitted that the complaint was inadmissible on a number of grounds, including that it was directed against persons and entities that are not States parties to the *ICCPR*. The Committee rejected this submission, stating that pursuant to 'ordinary rules of State responsibility' and 'in light of art 50' of the *ICCPR* (which provides that 'the Covenant extends to all parts of federal states without limitations or exceptions'), the 'acts and omissions of constituent political units and their officers are imputable to Australia'. This jurisprudence is consistent with art 27 of the *Vienna Convention on the Law of Treaties* and the Committee's own General Comment 31,

which provide, in effect, that all branches of government (legislative, executive and judicial) and other public or governmental authorities, at whatever level (national, state or local) must act to respect, protect and fulfill human rights.

On the merits, the Australian Government contended that:

- in respect of art 19, the restrictions on freedom of speech imposed by the requirement for a permit were reasonable, proportionate and necessary for public order and amenity;
- in respect of art 21, an 'assembly' requires more than one person and the complainant was not thereby protected; and
- in respect of art 9, the detention of Mr Coleman was the result of a court order and was not unreasonable, disproportionate or capricious.

After considering all the material and submissions, the Committee made the following conclusions.

First, the right to freedom of assembly under art 21 extends only to gatherings of people, and does not afford protection to a person 'acting alone'. Mr Coleman's claim on this ground was therefore dismissed.

Second, Mr Coleman's arrest, conviction, sentence and detention for delivering a public address amounted to a clear violation of his right to freedom of expression under art 19. This having been established, the onus then shifted to Australia to demonstrate that the violation was necessary for a permissible purpose under art 19(3), including protecting the rights or reputations of others or maintaining public order. The Committee found that while a permit system such as that which was operating is not, *prima facie*, impermissible, it must strike an appropriate balance between the individual's freedom of speech and the general interest in public order. In the present case, there was no evidence that Mr Coleman's speech or conduct was threatening, unduly disruptive or in any way detrimental to public order. In this context, the fine and imprisonment was disproportionate, not a permissible limitation under art 19(3), and therefore a violation of the right to freedom of expression.

Having found a violation of art 19, the Committee did not consider it necessary to address the merits of Mr Coleman's claim in respect of arbitrary detention pursuant to art 9.

The Committee concluded that, consistent with the obligation to provide an effective remedy for human rights violations under art 2(3) of the *ICCPR*, Australia is obliged to quash the convictions against Mr Coleman, reimburse the fine and any court costs, and pay compensation for the detention associated with the violation.

The Australian Government is required to advise the Committee, within 90 days, of the measures taken to give effect to the Committee's views.

The decision is available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/bb31fe728f09bc5dc12571cd0048757c?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bb31fe728f09bc5dc12571cd0048757c?Opendocument)

Bail and the Right to Liberty and Security of Person under the ACT Human Rights Act

***R v Rao* (Unreported, Supreme Court of Australian Capital Territory, 11 August 2006, Gray J)**

This case is the first in which a court has specifically considered the application of the ACT *Human Rights Act* to provisions of the *Bail Act 1992* (ACT) which impose a presumption against bail for certain types of criminal offences.

Under s 9C of the *Bail Act*, a court must not grant bail to a person charged with murder or specified drug offences unless satisfied that special or exceptional circumstances exist favouring the grant of bail.

By contrast, s 18(5) of the *Human Rights Act* provides that:

Anyone who is awaiting trial must not be detained in custody as a general rule, but his or her release may be subject to guarantees to appear for trial, at any other stage of the judicial proceeding, and, if appropriate, for execution of judgment.

Facts

The defendant, Mr Rao was initially charged with assault occasioning grievous bodily harm in relation to the stabbing of a man outside the Cube nightclub in Canberra. Mr Rao, the owner of Cube, was granted bail on this charge, but was subsequently refused bail in the Magistrates' Court after the victim died in hospital from his injuries and the charge was elevated to one of murder.

The defendant applied to the Supreme Court to review his case for bail, arguing that there were special or exceptional circumstances in this case; namely, that he had been previously granted bail on a serious charge despite the extent of the injuries to the victim and the probability that the victim would die, and that he had continued to meet his bail conditions after he was notified that he would be charged with murder, following the death of the victim.

The defendant also relied on newly released CCTV footage of the moments before the stabbing, which apparently showed the victim and others attempting to violently force their way into the nightclub, and strengthened a possible defence of self-defence.

Decision

In hearing the application, Gray J noted a concern in relation to the consistency of section 9C of the *Bail Act* with s 18(5) of the *Human Rights Act*, stating that:

There must be a serious question as to whether or not, by making a provision in the case of certain offences, a presumption against bail governed by special or exceptional circumstances, that that transgresses the requirement that a person waiting for trial must not be detained as a general rule. Because of itself it creates a general rule, namely that persons will be detained in custody unless there are special or exceptional circumstances. [Transcript, 16]

The prosecutor submitted that if there was such an inconsistency, his Honour had limited powers under the *Human Rights Act*, and could only refer the matter back to the Legislative Assembly, presumably through a declaration of incompatibility, which would not invalidate the law, and therefore would not affect the outcome in this case.

However, Gray J noted that the *Human Rights Act* could be used in the interpretation of s 9C, stating that:

I was suggesting that that might have some effect on what was meant by special or exceptional circumstances and that may or may not be of significance. The *Human Rights Act* enables me to have regard when interpreting a provision of an Act to its provisions and effect. It may be that if special or exceptional circumstances is considered in the light of the provisions of

s 18(5) [of the *Human Rights Act*] that that may colour what could be said to be special or exceptional rather than defining special and exceptional in some more restrictive way, that's all. [Transcript, 18-19]

His Honour made reference to the recent House of Lords decision in *O(FC) v the Crown Court Harrow* [2006] UKHL 42, which dealt with a similar legislative provision, and its consistency with the UK *Human Rights Act 1998*. He stated that:

There is a view expressed in that case that reads down exceptional circumstances to, in effect, make it more of a presumption in relation to – against the grant of – bail and the necessity to establish something extraordinary as being such circumstance as would mitigate against [the presumption against] the grant of bail. To the extent where it is also said that if the court were left unsure as to whether or not there were special circumstances then in that situation bail would still have to be granted. That indeed was the view of Mr Hooper J in the original case, but was given the specific endorsement of Lord Brown in the House of Lords decision. [Transcript, 29]

However, in this case, Gray J considered that he did not have to go to that extent to determine the matter, as he was satisfied that the circumstances of this case, including the previous grant of bail to the defendant on a serious charge, and the subsequent laying of the murder charge, did amount to special or exceptional circumstances. Thus bail was granted on strict conditions.

Comment

Although not a reported decision, this case is significant for the level of detail in which Gray J considers the application of s 18(5) of the *Human Rights Act* to the interpretation of special or exceptional circumstances under s 9C of the *Bail Act*, and for the use of comparative jurisprudence from the United Kingdom.

It is notable that s 9C of the *Bail Act* was introduced in the *Bail Act Amendment Bill 2003*, prior to the passing of the *Human Rights Act*, and the government was thus not required to certify whether this provision was compatible with human rights.

In the Explanatory Memorandum to the Bill, the government noted that:

Section 9C(2) evokes the common law position on murder, which attracted a presumption against bail unless exceptional circumstances existed.
[Citations omitted]

Nevertheless the Scrutiny Committee did raise concerns over this provision, based on international human rights commentary and case law, and noted a potential conflict with the right to liberty in the Human Rights Bill which at that stage was also before the Legislative Assembly. The Attorney-General, Jon Stanhope, responded briefly to the concerns of the Committee, welcoming the debate on human rights terms, but stating that:

I do not agree with the argument that the right not to be detained arbitrarily inherently means a statutory presumption for bail. The issue for governments and parliaments should not be a matter of counterposing human rights against bail law, but making a judgment to enact law that accounts for all policy imperatives, including human rights.

However, the human rights jurisprudence which has developed in relation to the right to liberty now appears to have diverged from the common law regarding bail for murder, and may in fact require a presumption in favour of granting bail, at least where the court cannot determine whether special or exceptional circumstances exist.

Justice Connolly, commenting extra-judicially, foreshadowed the approach taken in *R v Rao*, noting that although these provisions of the *Bail Act* are equivalent to the NSW legislation:

[I]t seems to me that, while prior to the enactment of the *Human Rights Act* an ACT judicial officer would be minded to follow the views of the NSW Court of Criminal Appeal on what is meant by 'special or exceptional circumstances' on an equivalent provision in the bail laws, the requirement to give an ACT law the interpretation that best accords with a right conferred by the *Human Rights Act*, namely the right that a person should not generally be detained before trial, may require reconsideration of that provision. [Justice Terry Connolly, 'Golden Thread or Tattered Fabric: Bail and the Presumption of Innocence', Paper presented to the

National Access to Justice and Pro Bono Conference, Melbourne, 11-12 August 2006]

It does appear that the approach taken by Gray J in *R v Rao* may have given a slightly broader interpretation to the concept of special or exceptional circumstances than might have been the case prior to the *Human Rights Act*. The NSW and Victorian cases have generally set the bar very high, requiring the applicant to establish grounds such as the weakness of the prosecution case, unusual delay in the case being brought to trial, or serious medical problems, to satisfy the exceptional circumstances test: see, eg, *Memery v R* [2000] VSC 495 and *R v Hantis* [2004] NSWSC 153.

Nevertheless, although Gray J apparently approved of the comments of Lord Brown in *O(FC) v Crown Court Harrow* that bail should be granted where the court was unsure whether special or exceptional circumstances existed, he was not required to decide this issue in *Rao*. His Honour was also not required to go so far as suggested by the Law Commission Report on Bail and the UK *Human Rights Act* which recommended that an exceptional circumstances provision

should be construed as meaning that where the defendant would not, if released on bail, pose a real risk of committing a serious offence, this constitutes an exceptional circumstance so that bail may be granted.

It is not clear how such an interpretation would sit with the express provision of 9G of the *Bail Act*, which provides that the general criteria for bail (which would include the risk of committing an offence) cannot of themselves constitute special or exceptional circumstances, and requires the court not to consider these criteria until after it is satisfied that such circumstances exist.

Thus, it appears that the full extent of the impact of s 18(5) of the *Human Rights Act* on section 9C of the *Bail Act* remains to be further explored.

Gabrielle McKinnon is the director of the ACT Human Rights Act Research Project at the ANU. Project website: <http://acthra.anu.edu.au>

HRLRC POLICY, ADVOCACY and LAW REFORM

A Charter of Rights for Tasmania?

Following the enactment of the *Human Rights Act 2004* in the ACT and the *Charter of Human Rights and Responsibilities 2006* in Victoria, the Tasmanian Government has asked the Tasmanian Law Reform Institute to investigate the protection and promotion of human rights in Tasmania and, through a process of consultation with the community and key stakeholders, to 'provide a recommendation to the Tasmanian Government as to an appropriate model to protect and enhance human rights'.

In response to this request, the Tasmanian Law Reform Institute has published an Issues Paper, entitled *A Charter of Rights for Tasmania?*, to facilitate discussion and feedback regarding human rights protections. The Issues Paper canvases questions such as the form of any human rights instrument, the rights that should be protected, the roles and responsibilities of the parliament, the executive and the courts, and appropriate educational and enforcement strategies.

As a national centre, and as a part of its mandate and commitment to advocating for better state and federal legislative protection of human rights, the HRLRC is currently preparing a response to the Issues Paper.

For other interested parties, the Issues Paper is available at

<http://www.law.utas.edu.au/reform/Projects/Human%20Rights.htm>. Submissions are called for by 30 November 2006.

HRLRC CASEWORK

Conditions of Detention of Unconvicted Remand Prisoners in Victoria may Violate Human Rights

As discussed in the September 2006 edition of the *Bulletin*, on 3 August 2006, the HRLRC wrote to various UN Special Rapporteurs in relation to the conditions of detention of 13 men charged with various 'terrorist' offences (collectively, 'the Detainees').

Ten of the Detainees have been held as unconvicted remand prisoners in the maximum security Acacia Unit of Barwon Prison in Victoria since November 2005, while the remaining three have been held since March 2006.

In its letter, the HRLRC expressed concern that the type, length, conditions and effects of the detention amount to serious ongoing human rights violations, including in relation to the *ICCPR*, the *ICESCR* and the *UN Standard Minimum Rules on the Treatment of Prisoners*.

The HRLRC's letter of complaint requested that various UN Special Rapporteurs – including the Rapporteurs with mandates relating to arbitrary detention, torture and cruel treatment, health, freedom of religion, and counter-terrorism – consider and investigate the complaint as a matter of urgency.

Since sending the letter, the UN Office of the High Commissioner for Human Rights ('OHCHR'), on behalf of the Special Rapporteurs, has confirmed that it is investigating the allegations. The HRLRC has also received responses from the Victorian Minister for Corrections, Tim Holding MP, and the Commonwealth Attorney General, Philip Ruddock MP.

The response from Minister Holding denies any allegations or assertions that the Detainees' detention in any way violates human rights under the *ICCPR* or the *ICESCR*. The response also indicates that the restrictive conditions of detention are the consequence of an assessment of issues such as the serious nature of the charges, and the need to ensure the safety and security of the prisoners and the general community. The Minister also invited the HRLRC to discuss further concerns with the Deputy Commissioner for Prisons.

The response from the Commonwealth Attorney General acknowledges Australia's human rights obligations under various international instruments, asserts the compatibility of Australia's counter-terrorism laws with human rights, and rather than engaging the HRLRC's concerns regarding the conditions of detention, contends that the management of prisoners and conditions of incarceration are a matter for the states rather than the Commonwealth. This approach is manifestly inconsistent with the principle under international human rights law that all levels and arms of government should engage the responsibilities of States party to international instruments. As the UN Human Rights Committee has recently held (and as discussed in the casenote on *Coleman v Australia* above), the 'acts and omissions of constituent political units and their officers are imputable to Australia'.

The HRLRC will continue to liaise with the OHCHR and the Special Rapporteurs regarding these issues.

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

SEMINARS and EVENTS

'Remedying Violations of Human Rights'

with

Emeritus Professor Ivan Shearer

Member, UN Human Rights Committee

Associate Professor Dianne Otto

Law School, University of Melbourne

Peter Henley

Senior Associate, Mallesons Stephen Jaques

Details

Date: Wednesday, 4 October 2006

Time: 5.45 for a 6.00pm start

Venue: Clayton Utz

Level 18, 333 Collins Street
Melbourne

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

Registration is essential.

Drinks and finger food will be served.

RSVP by 29 September 2006 using Booking Form available at www.hrlrc.org.au under 'Seminars and Events'.

EDUCATION, RESOURCES and TRAINING

Human Rights Law Resource Manual Now Available Online

The Human Rights Law Resource Manual is now available online at www.hrlrc.org.au in the 'Human Rights Library'.

The Manual provides a practical and accessible overview of the international human rights framework and the use of relevant international and domestic human rights instruments in casework, litigation, advocacy, and policy analysis and design.

The Manual is divided into the following parts:

- Title Page, Table of Contents and Acknowledgements

- Chapter 1 – Overview of the Manual and the Human Rights Law Resource Centre
- Chapter 2 – Introduction to International Human Rights Law
- Chapter 3 – Responsibility for Implementation of Human Rights
- Chapter 4 – Implementation and Uses of International Human Rights in Domestic Law and Courts
- Chapter 5 – The *Victorian Charter of Human Rights and Responsibilities*
- Chapter 6 – International Human Rights Law Monitoring, Reporting and Complaints Mechanisms
- Chapter 7 – Choosing and Running a Human Rights Case (to be added by October 2006)

Each of the Chapters can be downloaded as a pdf file. If you require the Manual in Microsoft Word format, please contact the HRLRC Director on hrlrc@vicbar.com.au.

The HRLRC acknowledges the very significant contributions made to researching, drafting and editing this Manual by: **Allens Arthur Robynson, Blake Dawson Waldron, Mallesons Stephen Jaques**, Udara Jayasinghe, Eve Lester, Associate Professor Di Otto, Alexandra Richards QC, John Tobin, Waleed Aly and Fergus Green.

The Manual is current as at September 2006 and will be updated annually. During the period September–November 2006, the HRLRC is seeking feedback and input on the content, relevance and accessibility of the Manual. If you have any comments, please contact the HRLRC Director on hrlrc@vicbar.com.au or (03) 9225 6695.

Book Review: Hilary Charlesworth, Madelaine Chiam, Devika Hovell and George Williams, *No Country is an Island: Australia and International Law* (UNSW Press, 2006)

In a globally interdependent world, it is trite to say that international law provides significant opportunities for the management and governance of complex global issues, from trade to climate change to terrorism. Yet, governance via international law also poses immense challenges for states and governments as they must adapt to increasing constraints on their freedom of action, which in

turn undermine traditional notions of sovereign independence. As the title of this book suggests, Australia is not immune from this process. Indeed, as the authors illustrate, international law features prominently in public debates concerning a wide range of contemporary political issues.

The focus of this book is to analyse the way in which the Australian Government — primarily the executive and the Parliament — engages with international law in practice. Through a discussion of recent Australian case studies — including the ratification of the *Rome Statute* establishing the International Criminal Court, the signing of the Australia–US Free Trade Agreement ('AUSFTA'), the Government's response to UN criticism of its human rights record, and the decision to go to war in Iraq — the book critiques both the established governmental structures and the fluid political attitudes which influence this engagement. The picture that emerges from this analysis is a complex and (perhaps unsurprisingly) disturbing one. The authors reveal that the nature and degree of Australia's engagement with international law is ultimately driven by more pragmatic concerns of political expediency, economic advancement and strategic alliances, 'rather than by principled action taken with regard to the long-term implications for the national interest'.

At the structural level, the authors are highly critical of the executive's effective monopoly over Australia's engagement with international law and the resulting 'democratic deficit' in international law-making. Their argument is simple: because Australia's international obligations reach ever deeper into areas of domestic governance, placing further constraints on domestic decision-making, it is no longer appropriate for the executive to have exclusive control over Australia's engagement with international law. The Howard Government reforms in 1996 — which established the Joint Standing Committee on Treaties ('JSCOT') and a number of other mechanisms designed to improve executive–parliament and state–federal consultation over treaty-making — went some way to addressing this deficiency. However, the authors convincingly argue that these changes are little more than 'window-dressing'. JSCOT, in particular, receives severe criticism from the authors, who demonstrate that its weak powers, its amenability to political manipulation,

and the timing of its role in the overall treaty-making process render it largely incapable of influencing that process or of holding the executive to account. These conclusions are borne out most strikingly in the Chapter on the AUSFTA. Given the significant impact of the AUSFTA on sensitive areas of domestic policy, such as the Pharmaceutical Benefits Scheme, local television content rules and intellectual property standards, the authors argue that the executive's negotiating discretion should have been subject to much more rigorous parliamentary oversight than that which was able to be achieved by JSCOT.

At the political level, the authors reveal how governmental attitudes and policies regarding international law tend to be informed by pragmatic and short-term political interests. The authors are critical of the way in which flawed arguments about 'sovereignty' and other misconceptions about the nature of international legal obligations are deployed by politicians in order to bolster their political or ideological positions. This is highlighted on the one hand by the Howard Government's fierce opposition to criticism by UN human rights treaty bodies of Australia's human rights practices, and, on the other hand, by its approach to international free trade law as evinced by its support for the WTO and its acceptance of the AUSFTA. In the former case, the rhetoric of absolute 'Westphalian' sovereignty is unashamedly mobilised to rebuff unwanted criticism of government policy; whereas in the latter case, international regulation is portrayed as beneficial to the national interest, while concerns about sovereignty tend to be conveniently ignored. In other words, sometimes we are portrayed as a legal 'island', and other times not. The authors argue that this selective recourse to, and misleading portrayal of, Australian sovereignty promotes an 'all-or-nothing' approach to international law which obscures debate over more relevant issues, such as the *substance* of international law, the *benefits and drawbacks* of Australia's engagement with particular treaties, and the appropriate *degree* to which we subject areas of domestic governance to international constraints.

The value of the book's contribution lies in its reasoned analysis and critique of the way in which the Parliament and the executive engage with international law. The authors also make substantive proposals for both structural reform

and attitudinal change with regard to Australia's engagement with international law, which it is hoped will provoke further public debate in this increasingly important area.

Despite the quality of the book's arguments, I can't help but feel that its rather narrow focus on the role of government will also undermine its general appeal. Despite much reflection, I remain unable to discern the book's target audience. General readers who seek a broader understanding or 'demystification' of international law and the way in which it impacts on Australia may be disappointed by the book's narrow focus and its notable non-inclusion of important case studies such as the Australia-US position on global warming and the *Kyoto Protocol*. Whilst international law concepts and processes are concisely explained where necessary to aid the general reader, the book is simply not intended to be a 'popular guide' to international law, as is, for example, Philippe Sands' excellent book *Lawless World*. On the other hand, in seeking to appeal to the general reader, the value of the book for those of us who are already familiar with the field is diminished — whilst inveterate international lawyers will no doubt gain important and useful insights from the book, they will find few revelations wading through the many expository sections of the book designed to assist the general reader. Thus, while I would agree that this is, as stated on the blurb, 'a highly readable, timely and important book', it is a pity that its style and narrow focus may not fully engage much of its potential audience.

Fergus Green is a volunteer with the Human Rights Law Resource Centre and an editor of the Melbourne Journal of International Law