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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 the capacity of the legal profession, judiciary 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

Killing the Mockingbird

Mr Ruddock Attacks Pro Bono Lawyers

Atticus Finch was a character created by the journalist Harper Lee in her Pulitzer Prize winning novel *To Kill a Mockingbird*. When the book was made into a film, Gregory Peck won an Academy Award for his portrayal of Atticus. It was his finest performance.

Like Harper Lee's own father, Atticus Finch was a small town lawyer in the southern United States. When Atticus agrees to take on, *pro bono*, the case of a black man charged with raping a white woman, he knows he is entering troubled waters in the racist south. At one stage he sits outside the local jail, armed with a shotgun, in order to protect his client from a racist lynch mob.

Atticus Finch not only defended his client, but took on the whole town's racism – the only way to properly do his job. His character is an inspiration.

The Federal Attorney-General, Philip Ruddock MP, held up the example of Atticus Finch in a recent article in the *Australian* in which he attacked pro bono lawyers, saying that, 'an increasing shade of moral vanity colours pro bono work'. In particular, Mr Ruddock attacked lawyers for attempting to effect 'broader social and political change'.

But Atticus Finch defended his client – not just in court, but against the deep seated racism that allowed his client to be charged. Protecting his client from a lynch mob, and confronting the locals with their own racism, was indeed attempting to effect broader social and political change.

Mr Ruddock thinks that lawyers should stay out of the 'political fray'. He complains:

Of 28 media releases issued by the Law Council of Australia this year, 24 entered the political fray. Eight were devoted to David Hicks. Not one was related to the push to create a national legal profession.

Mr Ruddock is right to be sensitive about lawyers speaking out over the treatment of David Hicks. Mr Ruddock has publicly supported the inhumane treatment of David Hicks in Guantanamo Bay. Not just Germany and Britain, but Saudi Arabia and even Afghanistan, have objected to the military tribunals set up by the United States for Guantanamo Bay detainees. The US never subjected its citizens to this process. Only Australia – the relevant minister being Mr Ruddock – has supported the subjection of its

citizen to such a travesty of real legal protection, falling far short of the norms of justice understood by every civilized country.

Mr Ruddock recently suggested that if David Hicks wanted a speedy trial, he should plead guilty; thus providing us with the spectacle of the first law officer of the Commonwealth trashing the presumption of innocence.

Mr Ruddock also attacked Julian Burnside QC, saying:

Some lawyers assume they are gifted with unique insights into the appropriate moral content of the law. Consider this address by Julian Burnside: 'Plainly, the Government understood (border protection) would be electorally popular among the large number of Australians who had responded positively to far-Right racist political programs. The struggle for justice fell on to the shoulders of a few lawyers.'

Julian Burnside was speaking about the Tampa case. In the Tampa case, Mr Ruddock was the relevant Minister when Australian troops were used to prevent asylum seekers – at gunpoint – from approaching the courts to vindicate their rights. As the Full Federal Court held, the lawyers spoke in court for those who were perforce voiceless, and in so doing acted in the highest traditions of the law.

By contrast, Mr Ruddock has:

- attacked the judiciary, having been required to explain himself to the Full Federal Court in May 2000;
- undermined and reduced funding to legal aid and community legal centres; and
- introduced legislation, such as the *National Security Information Act*, which is calculated to prevent the courts properly deciding whether government power has been exercised lawfully.

Doing pro bono work is part of the tradition of the law. It is a fundamental professional and ethical obligation. It is often very hard work.

We have a choice as a nation. We can be governed by powerful people whose decisions and actions are not subject to any limits – the rule of the despot – or we can have a society where precise laws apply to powerful and weak alike – the rule of law. It is, in essence, the choice between tyranny and democracy.

Mr Ruddock may not like having his actions scrutinized by the courts, but that is precisely what the rule of law is all about.

Despite Mr Ruddock's complaints, we need pro bono work more than ever – because the actions of leaders like Mr Ruddock have undermined the core value that all lawyers understand – the rule of law. And it is up to citizens – including lawyers – to keep governments accountable.

Mr Ruddock, in statements to overseas journalists, has blamed our Indigenous people for their own level of disadvantage in Australia. He has said that prior to European colonization Aborigines had no knowledge of the wheel and no experience of a more advanced civilization. He claimed that this low level of development may explain why the Indigenous population is still disadvantaged today.

Perhaps, after all, Mr Ruddock has more in common with the racist lynch mob than he does with Atticus Finch.

Brian Walters SC is the immediate past president of Liberty Victoria

NEWS

States and International Community have a Duty to Fight Poverty, says UN High Commissioner for Human Rights

The following statement was delivered by the UN High Commissioner for Human Rights, Louise Arbour, on Human Rights Day, 10 December 2006:

The awareness of the stranglehold of poverty on billions of men, women and children around the world, and of how this state of deprivation and misery compromises our common future, has never been higher. Yet, despite an increasingly sophisticated understanding of the complex makeup of poverty, ranging from exclusion and discrimination to a skewed international trade system, approaches to poverty reduction are still often tinged with appeals to charity or altruism.

On this Human Rights Day, we reaffirm that freedom from want is a right, not merely a matter of compassion. Fighting poverty is a duty that binds those who govern as surely as their obligation to ensure that all people are able to speak freely, choose their leaders and worship as their conscience guides them.

All countries, independent of national wealth, can take immediate measures to fight poverty based on human rights. Ending discrimination, for example, will in many cases remove barriers to decent work and give women and minorities access to essential services. Better distribution of collective resources and good governance, exemplified by tackling corruption and ensuring the rule of law, are within the reach of every state.

But as much as States bear the primary responsibility for their own development, the international community must also meet the commitments it has made to support the efforts of developing countries. Many rich countries have yet to meet development assistance targets they have accepted, yet they continue to spend ten times more on military budgets. They also spend nearly four times their development assistance budget – an amount almost equal to the total gross national product of African countries – to subsidise their own domestic agricultural producers. Indifference and a narrow calculus of national interests by wealthy countries hamper human rights and development just as damagingly as discrimination at the local level.

At the 2005 World Summit, global leaders recognized that development, peace and security and human rights are mutually reinforcing. In a world where one in every seven people continues to live in chronic hunger, and where inequalities between and within countries are growing, our ability to reach the goals the Summit reaffirmed in order to 'make poverty history' will remain in serious doubt if we do not tackle poverty as a matter of justice and human rights.

Inquiry into the Indonesia Security Treaty

The Federal Parliament's Joint Standing Committee on Treaties is inquiring into the recently signed security treaty with Indonesia.

The Agreement between Australia and Indonesia on the Framework for Security Cooperation, also known as the Lombok Treaty or the Indonesia Security Treaty, was tabled on 6 December 2006 in Federal Parliament. The treaty was referred to the Treaties Committee for inquiry and the Committee is currently accepting submissions.

The Agreement contains provisions on defence, law enforcement, counter-terrorism,

intelligence, maritime security, aviation safety and security, proliferation of weapons of mass destruction, emergency cooperation and cooperation in international organisations on security-related issues.

According to Michael Walton of the NSW Council for Civil Liberties, the security treaty is the first of its kind entered into by Australia with a regional government and is being hailed as a template for similar treaties in the future.

Mr Walton said that:

There are significant implications for Australia in this treaty. ICJ Australia has already raised concerns about freedom of speech in Australia for advocates of West Papuan independence. There are also implications for information sharing between Australian and Indonesian police in the context of the death penalty (as occurred in the 'Bali Nine' case).

The Government has stated in its national interest analysis that 'the Agreement will be Australia's first security treaty with a regional country to cover comprehensively traditional and non-traditional security threats. It should set the benchmark for others in the region and will contribute to the stability and prosperity of both countries and the broader Asia-Pacific region.' Regrettably, the Agreement does not contain any reference or commitment to human rights.

Submissions can be made until 23 February 2007. The Committee will begin public hearings in February and is due to report to Parliament by 12 June 2007. More information on the Committee's inquiry, including the treaty text and national interest analysis, is available on the Committee's website at <http://www.aph.gov.au/house/committee/jsct/6december2006/index.htm>.

UN Adopts Landmark Convention on the Rights of Persons with Disabilities

The campaign for the international recognition of the rights of persons with disabilities is not new. The UN declared 1981 as the International Year of the Disabled and included persons with disabilities in the 1993 Vienna Declaration for Human Rights. In 2001, the rights of persons with disabilities burst back into the UN arena when the General Assembly established the Ad Hoc Committee on a

Comprehensive and Integral International Convention on the Protection of the Rights of Persons with Disabilities. As a result of the work of the Committee – together with sustained pressure from NGOs, persons with disabilities and civil society groups – on 13 December 2006, the UN General Assembly adopted the *Convention on the Rights of Persons with Disabilities*. The Convention will be formally opened for signature on 30 March 2007, at which time governments can begin their respective ratification procedures. The UN Secretary-General, Kofi Annan, welcomed the convention as an 'historic achievement for the 650 million people with disabilities around the world.'

The Convention covers a broad range of issues for persons with disabilities including: accessibility; assistive devices; protection for women and children with disabilities; access to education; healthcare; rehabilitation; employment; property; financial services; standards of living; social protection; privacy and freedom to access medical records; and participation in public and cultural life.

Australia's Disability Discrimination Commissioner, Graeme Innes AM, noted that the Convention ensures that persons with 'disabilities throughout the world are entitled to equality in work, education, access and many other areas of public life.'

The Convention is the first international human rights treaty to be adopted in the 21st century and the fastest negotiated human rights treaty in the history of international law. It was also the first time that NGOs and persons with disabilities, rather than exclusively states, have been directly involved in a treaty negotiation process. General Assembly President, Sheikha Haya Rashed Al Khalifa, praised 'the NGOs and civil society groups whose energy, compassion and willingness to work in the spirit of cooperation greatly contributed to the final agreement.'

Lobby groups supporting the Convention have a good reason to celebrate. Only 40 nations world wide prohibit discrimination on the ground of disability. In many countries, the rights of persons with disabilities in areas such as marriage, voting and travel are severely restricted. By ratifying the treaty, nations will, in the words of the preamble, 'reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with

disabilities on an equal basis with others'. With the enactment and enforcement of the Convention largely being a matter of domestic law, disability and human rights organisations will now focus their attention on encouraging national governments to ratify the Convention.

Support for the Convention, although overwhelming, was not unanimous. It remains to be seen whether Australia will sign the treaty. Millions world-wide will be waiting in anticipation for nations to ratify the Convention and enact it into domestic law by adopting laws prohibiting discrimination on the basis of any form of disability and repealing all laws that discriminate against persons with disabilities. Governmental action of this kind will help in the fight against stereotypes and prejudices while promoting awareness of the capabilities of persons with disabilities. It is Secretary-General Annan's message that the first human rights convention of the 21st century may indeed 'usher in an age when all those living with disabilities around the world become fully fledged citizens of their societies'.

Eyal D'vier is a volunteer with the Public Interest Law Clearing House (Vic)

CASENOTES

UN Human Rights Committee Condemns Mandatory Immigration Detention...Again

Danyal Shafiq v Australia

CCPR/C/88/D/1324/2004 (13 November 2006)

Introduction

On 13 November 2006, the UN Human Rights Committee further elaborated on what constitutes arbitrary detention for the purposes of art 9(1) of the *ICCPR*, finding that there must be 'appropriate justification' for continued mandatory detention in light of the circumstances of the particular case. It further re-affirmed its view that, pursuant to art 9(4), the protection against arbitrary arrest or detention provides individuals who have been arrested or detained with the right to take proceedings before a court that is empowered to decide on the lawfulness of the detention and order release if the detention is not lawful.

Background

The author of the communication, Danyal Shafiq, claimed a violation by Australia of art 7

(freedom from cruel, inhuman or degrading treatment or punishment), art 9 (freedom from arbitrary detention) and art 10(1) (right to humane treatment in detention) of the *ICCPR*. Born in Bangladesh in 1979, Mr Shafiq has been detained indefinitely as an unlawful non-citizen since his arrival by boat in 1999. Mr Shafiq argued that such detention contravenes the protections afforded under art 9. Mr Shafiq further claimed that Australia would violate arts 7 and 10 if he was deported to Bangladesh, fearful of being imprisoned in inhuman conditions, tortured and subject to cruel and inhuman treatment.

Mr Shafiq's application for a protection visa (refugee status) was denied, and his application for merits review to the AAT was rejected as there were grounds to consider that he had committed serious non-political crimes prior to his entry into Australia (article 1F(b) *Refugees Convention*). The Federal Court further denied his appeal for legal review, and the Minister for Immigration and Multicultural affairs refused to exercise her discretion to grant a protection visa on humanitarian grounds under s 417 of the *Migration Act*.

Views under Arts 7 and 10

The Committee found that Mr Shafiq's claims under arts 7 and 10 were inadmissible on the grounds that he had not exhausted domestic remedies. This was because, at the time of the decision, Mr Shafiq had applied for a visa under s 501J of the *Migration Act*, which was found to provide an 'in principle' remedy by providing the Minister with power to substitute a decision of a review tribunal in circumstances which include those that bring Australia's obligations as a signatory to the *ICCPR* into consideration. As Mr Shafiq's application remains pending, both related claims under arts 7 and 10 were found to be inadmissible at the time of the decision.

Notably, the Committee held that Mr Shafiq's failure to pursue Full Federal Court and High Court appeals did not prevent the admissibility of claims raised under arts 7 and 10; the Committee finding that a victim need only exhaust domestic remedies which are 'effective' in order for a complaint to be admissible under the First Optional Protocol to the *ICCPR*. The Committee considered that, given the courts only consider the question of refoulement in the context of obligations arising under the *Migration Act* (and, by extension, the

Refugees Convention) but not those arising from the *ICCPR*, they could not be said to provide an effective remedy within the meaning of art 2(3) of the Covenant.

Views under Art 9

The Committee, however, found the communication admissible to the extent that issues under art 9(1) and (4) were raised. In this regard, Mr Shafiq alleged a violation of the *ICCPR* on the basis that his mandatory detention is arbitrary, bearing no relation to the circumstances of the case, and is indefinite as the grounds for his detention cannot be reviewed by a court and he has no recourse for legal determination of his refugee status.

In relation to art 9(1), the Committee restated its opinion that remand in immigration detention will be arbitrary if it is not necessary in all the circumstances of the case and proportionate to the ends sought. The Committee further found that open periodical review of detention is required in order to reassess the necessity of detention in light of the circumstances. Therefore, a State party has a continuing responsibility to provide justification throughout the period of detention, and that detention must only continue where the State party can provide appropriate justification in light of changing circumstances.

In the present case, Australia asserted that the 'general experience is that asylum seekers abscond if not retained in custody' constituted appropriate justification for Mr Shafiq's continued detention. The Committee found, however, that as Mr Shafiq had not attempted to abscond over a period amounting to almost seven years, including over a year in an open mental health facility, the 'general experience' was no longer appropriate justification for his detention. In the absence of further appropriate justification in the particular case, Mr Shafiq's mandatory detention was found to be arbitrary within the meaning of art 9(1).

The Committee further took the view that an individual's right under art 9(4) to have his or her detention reviewed by a court must include the possibility of release. Australian courts are, therefore, ineffective in this regard as they are unable to undertake a substantive review of the grounds for detention (the individual's status as a non-citizen) or order release. Although the recently introduced Removal Pending Bridging Visa provides a potential effective remedy for detention, in practical terms it did not remedy

the breach as Mr Shafiq was not invited by the Minister to apply. A breach of art 9(4) was accordingly found on the grounds that no effective remedy for the author's detention was available.

Conclusion

The Committee has requested provision of information about the measures taken to provide Mr Shafiq with an effective remedy, including release and appropriate compensation, by 11 February 2007.

The decision is available at:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/32cae9a7f6c3e94ec125723a005826ff?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/32cae9a7f6c3e94ec125723a005826ff?Opendocument).

Chantal Encavey is an Articled Clerk with Arnold Bloch Leibler in Melbourne

HRLRC POLICY, ADVOCACY and LAW REFORM

Why are Non-Parties Non-Starters?

HRLRC makes Submission to VLRC Civil Justice Review

In May 2004, the Attorney-General Rob Hulls issued a Justice Statement outlining directions for reform of Victoria's justice system. The Victorian Law Reform Commission's ('VLRC') Civil Justice Review is part of this reform program, and will take place over the next year. Its objectives are the reform of rules of civil procedure to streamline litigation processes, reduce costs and court delays, and achieve greater uniformity among different courts.

In November, the HRLRC, jointly with Blake Dawson Waldron ('BDW'), made a submission to the VLRC on the need for reform of the rules and procedures relating to non-party intervention in civil proceedings.

The submission, *Why are Non-Parties Non-Starters?*, calls for clearer guidelines for amicus curiae applications in Victoria. An amicus curiae is an intervening third party, sometimes referred to as a 'friend of the court', that is not a party to the proceedings. Its role has traditionally been limited to drawing a court's attention to points of law or relevant fact which may assist the court and may not otherwise have been put before it.

Where an issue of public interest is at stake, amici may bring to the court's attention to

issues which go beyond the immediate litigation between parties. This could include drawing the court's attention to relevant values, standards and policy issues, or legal principles arising out of international law and foreign jurisdictions. Amici curiae may also assist a court to assess more fully the issues being litigated where one or both of the parties lack the time or resources to explore them adequately.

The recommendations are based on the HRLRC's and BDW's experiences in the Jack Thomas appeal in August 2006. BDW was retained in that matter to assist the HRLRC to intervene in proceedings as amicus curiae in order to draw the court's attention to principles of international human rights law relevant to the appeal. The Court of Appeal refused the HRLRC's application.

The submission sets out the benefits of amicus curiae participation in appropriate civil proceedings, the current law governing amicus applications in Australia and Victoria, and recommendations for reform.

The recommendations propose, among other things, an amendment to the *Supreme Court Rules* or the creation of a practice note that sets out clear guidelines for the form and timing of an application; the factors that a court should take into account when considering an application; and the conditions a court may impose on successful amicus applicants. They further propose that courts be required where relevant to provide reasons for their decisions on amicus applications to assist with the development of jurisprudence.

The recommendations aim to assist potential amici curiae to decide whether to apply for amicus, determine their likelihood of success, establish efficient court practices for dealing with third party interventions, minimise inconvenience to the parties and the court, and define the scope of the role of the amicus.

On 1 January 2007, the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') will come into force. Based on the experience in Canada after the introduction of the *Canadian Charter of Rights and Freedoms 1982* and in the United Kingdom following the introduction of the *Human Rights Act 1998* (UK), this legislation is likely to have a significant impact on civil litigation and will almost certainly lead to an increased role for amici curiae.

The commencement of the *Charter* provides an impetus for the timely introduction of rules and procedures to clarify the process for making amicus applications. In order for the experience and expertise of legal practitioners and public interest organisations to be available to the court, and so that the law might gain the full benefit of the commitments made by the executive arm of government under the *Charter*, effective mechanisms for determining non-party participation in proceedings are imperative.

The submission was prepared by Steven Amendola, Beth Midgley and Cecilia Riebl at BDW, together with Phil Lynch (HRLRC) and Michael Kingston of Counsel.

A Tasmanian Charter of Rights? Tasmania's Historic Opportunity to Safeguard Human Rights

The Human Rights Law Resource Centre has thrown its support behind the creation of a Tasmanian Charter of Rights in a submission to the Tasmanian Law Reform Institute entitled, *Respecting, Protecting and Fulfilling Human Rights in Tasmania*.

Tasmania has an exceptional opportunity to be one of the first places in Australia to adopt a Charter of Rights and a leader in advancing human rights and social justice across the nation.

The introduction of a Charter would be an historic leap forward for the protection of human rights and democracy in Tasmania. It would demonstrate a real commitment to improving social justice and fairness throughout the community.

Current legal protection of human rights in Tasmania and throughout most of Australia is patchy. Many basic rights remain unprotected or are haphazardly covered by a hotchpotch of laws.

In the absence of national protection for human rights, it falls to state governments to bring their own human rights protections in line with other western democracies and the requirements of international law. Charters elsewhere have proven effective in dissuading governments from curtailing human rights and in opening parliament's eyes to human rights breaches that may be otherwise overlooked.

A Charter of Rights would provide important guidance to Tasmania's Government, the

courts and the community. New laws, policies and public programs would be measured against it to ensure that human rights are safeguarded.

Charters tend to encourage a broad culture of respect for human rights and social justice which is an important legacy for future generations.

The HRLRC is urging the inclusion of all fundamental human rights in the Tasmanian Charter, including civil and political rights as well as economic, social and cultural rights.

The HRLRC supports a model for the protection of human rights that safeguards the democratic role of parliament, keeping policy and budget decisions within the domain of our elected representatives. The HRLRC does not advocate a US-style model whereby courts can strike down laws made by parliament.

The HRLRC submission was written and researched with the outstanding assistance of: Emily Barnes, Jenny Brennan, Andrew Gun, Emily Howie, and Romy Weisfelt of Allens Arthur Robinson; and Nicole Rees.

The HRLRC submission is available at www.hrlrc.org.au

Nicole Rees is a volunteer with the Human Rights Law Resource Centre

HRLRC CASEWORK

Request for Urgent Action from UN Special Rapporteur on the Human Rights of Indigenous Peoples

A coalition of Indigenous and human rights organisations have urged the UN's Special Rapporteur on the Human Rights of Indigenous People to make his first ever visit to Australia when he is in the Asia-Pacific Region next year.

Indigenous Australians continue to suffer from a long record of human rights abuses that have wide-reaching and tragic consequences.

It is critical that the Special Rapporteur takes a first-hand look at the situation of Australia's Indigenous community to raise international awareness of their plight and help Australia move forward.

Major areas of concern flagged by the coalition include standards of living and health, access to traditional lands, political representation, the administration of justice, the ongoing impacts of

forced family separations, education and training.

Health indicators reflect a serious disparity in the wellbeing of Indigenous people compared with the broader population. Tragically, an Indigenous woman can expect to die 20 years earlier than other Australian women, and her child is three times more likely to die in infancy. Significant deficiencies in living standards deny Indigenous people an equal opportunity to be as healthy as non-Indigenous Australians.

Indigenous communities often lack access to primary health care and other basic needs such as safe drinking water, electricity and effective sewerage.

Housing conditions were described as a 'humanitarian tragedy' by the UN's Special Rapporteur on Adequate Housing during his Australian visit earlier this year.

Dispossession and access to traditional lands also continues to be a major human rights issue for Indigenous Australians. This has been compounded by the winding-back of land rights by the Australian Government and the legal difficulty of establishing native title.

The Australian Government has also wound back political representation of Indigenous communities, moving further away from realisation of the right to self-determination. Following the abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC), Indigenous Australians do not have an elected representative body and have little opportunity for meaningful participation in governance and decision-making.

The impact of the criminal justice system on Indigenous communities is also something that should be of interest to the Special Rapporteur. Indigenous Australians are among the most highly incarcerated peoples in the world. The striking over-representation in the prison system, high numbers of deaths in custody, the disproportionately high percentage of Indigenous children in the juvenile justice system and lack of fair treatment under the criminal justice system constitute serious human rights breaches.

The forced removal of over 100,000 Indigenous children from their families represents a major violation of human rights and was clearly documented in the Human Rights and Equal Opportunity Commission's Report entitled *Bringing Them Home*. The Australian Government's response to the Report has been

inadequate, with many recommendations aimed at restoring justice and dignity to the Stolen Generations and rectifying the ongoing impacts of family separation not implemented.

The Special Rapporteur on the Human Rights of Indigenous People has recently visited Mexico, Canada, South Africa and New Zealand. The Rapporteur investigates the situation of Indigenous peoples and makes recommendations regarding the realisation of human rights. He reports to the Human Rights Council of the UN. Country visits are normally carried out where an invite is issued by the national government.

The coalition urging the Rapporteur to visit Australia includes the Aboriginal and Torres Strait Islanders Legal Services Network, the Castan Centre for Human Rights, the Foundation for Aboriginal and Islander Research and Action, the Human Rights Law Resource Centre, the National Association of Community Legal Centres Human Rights Network, the North Australian Aboriginal Justice Agency Ltd, Oxfam Australia, the Victorian Aboriginal Community Controlled Health Organisation, the Victorian Aboriginal Legal Service Co-operative Ltd and the Victorian Council of Social Service.

Nicole Rees is a volunteer with the Human Rights Law Resource Centre

David Hicks: A War Crime Victim?

David Hicks has been consistently demonized as the perpetrator of some as yet ill-defined war crimes. But is he the victim of a plan or policy promoted by the Australian government which is just that – a serious war crime?

On 22 September 2005 the Attorney-General, the Hon Philip Ruddock MP, said in a doorstep interview in Sydney in relation to a proposal to try David Hicks by US Military Commission: 'We have been pressing the American government to get on with the trial of Mr Hicks.' Prime Minister John Howard and the ministers of his Cabinet have adopted this mantra for dealing with the rising tide of public concern about David Hicks. This stance is not only morally bereft, it ignores our commitments under international law and raises the prospect of a grave contravention of Australia's criminal law.

The *Rome Statute of the International Criminal Court* ('the Rome Statute') entered into force on 1 July 2002. The former Attorney-General of

Australia, Daryl Williams, oversaw Australia ratifying the Rome Statute on 1 July 2002. It entered into force for Australia on 1 September 2002 and from that date the International Criminal Court ('the ICC') had jurisdiction to exercise its functions and powers as provided in the Rome Statute on the territory of Australia and over persons within the territory of Australia.

The preamble to the Rome Statute includes the following affirmation which Australia agreed to support:

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation; Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes; and Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes...

Article 5 then introduces the war crimes defined in art 8 with the statement that: 'The jurisdiction of the Court [the ICC] shall be limited to the most serious crimes of concern to the international community as a whole.'

In further recognition of these principles, art 27 of the Rome Statute ensures that it applies equally to all persons in a signatory country like Australia without any distinction based on official capacity, and official capacity such as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official in no case exempted or exempts a person from criminal responsibility under the Rome Statute. Any vestige of state immunity is eliminated.

Article 8 of the Rome Statute defines war crimes which are within the jurisdiction of the ICC and, it follows, are regarded as the most serious crimes of concern to the international community as a whole. One body of war crimes in this category is conduct which deprives a prisoner of war or other protected person of the right to a fair and regular trial. This is provided for in art 8(2)(a)(vi) and (2)(c)(iv).

Daryl Williams went further. He ensured that the provisions of the Rome Statute were given

direct local effect by incorporating the provisions of the Statute into Australia's criminal law. Division 268 of the *Criminal Code* is devoted entirely to this. Indeed, the war crimes prohibited by art 8 of the Rome Statute, which strike at conducting unfair and irregular trials, have been expanded in the Australian *Criminal Code*. By sections 268.31 and 268.76, the *Code* defines the standards for a fair and regular trial by reference to selected articles of the *ICCPR* and the *Geneva Conventions*.

By this means, the mandated standards for a fair and regular trial prescribed in Division 268 the Australian *Criminal Code* are relatively precise and include the following:

- the trial must be conducted by a 'regularly constituted court';
- it must offer the essential guarantees of independence and impartiality;
- its procedures must provide a facility for a fair hearing, which necessarily includes providing an accused person with an adequate opportunity to present his or her defence by cross-examination of witnesses first hand and the exclusion of hearsay evidence; the right to be present during all phases of the prosecution case and to hear all of the evidence presented by the prosecutor; and the right to have evidence obtained by the use of coercion excluded; and
- a detained person must be promptly charged and brought to trial as rapidly as possible.

The first Military Commissions set up for the trial of David Hicks and other Guantánamo Bay detainees, were established pursuant to a Presidential Order pronounced by President Bush on 13 November 2001, shortly after the World Trade Centre attacks. The Supreme Court of the United States, in its judgment in *Hamdan v Rumsfeld* delivered on 29 June 2006, held that the Presidential Order and the first Military Commissions established under it were invalid. The further effect of the *Hamdan* decision was that the charges against David Hicks instituted before the first Military Commissions were struck down and rendered ineffective.

Following the *Hamdan* decision, at the instigation of the President of the United States and his administration, the United States Congress passed the *Military Commissions Act*

of 2006. The *Military Commissions Act* was signed by the President of the United States on 17 October 2006 and thereafter became law in the United States. The Act set up the second experimental Military Commissions.

Both the first and the second Military Commissions are incapable of meeting the standards for a fair and regular trial prescribed by the Rome Statute and the Australian *Criminal Code*. Much has been written in recent times detailing the deficiencies. Another detailed analysis will not be undertaken here, save to say that the failings of these bodies to satisfy the mandated standards are manifest. Indeed, the structure and procedures of the Military Commissions are designed so that they will not meet the standards.

To return to the provisions of the Australian *Criminal Code*. The seriousness of conduct perpetrated in breach of ss 268.31 and 268.76 is reflected in the penalty provision which provides in each case for a sentence to a term of imprisonment for 10 years. Of further note are the strict liability provisions which apply to a number of the elements of the s 268.31 offence.

A combination of ss 15.4 and 268.117 gives the Code extra-territorial effect so that the offences comprising war crimes in the *Criminal Code* apply whether or not the conduct constituting the alleged offence occurs in Australia and whether or not a result of the conduct constituting the alleged offence occurs in Australia. Thus, the Division 268 war crimes potentially have application to the conduct of a trial of David Hicks before a Military Commission held in Guantanamo Bay, Cuba or elsewhere in the world.

The complicity provisions of the *Criminal Code* also have potential application. To 'counsel' or 'urge' another party to conduct a trial before Military Commissions which do not meet the mandated standards, could constitute a war crime under ss 11.2 and 11.4.

In this context, what do we make of the mantra of our Federal ministers in relation to the proposed Military Commission trials: 'We have been pressing the American government to get on with the trial of Mr Hicks'? Perhaps more pertinently, what do we make of the very next sentence which fell from the lips of the Attorney-General in the Sydney doorstep interview: 'People here in Australia have said to us we understand why it's important to see

people held accountable for their actions if they, they've committed serious war crimes...?'

Peter Vickery QC is a member of the Victorian Bar and a Special Rapporteur with the International Commission of Jurists

SEMINARS and EVENTS

Seminar with Justice Zak Yacoob, South African Constitutional Court 5 February 2007

The first seminar in the HRLRC's 2007 Human Rights Seminar Series will be held at 6.00pm on Monday, 5 February 2007 at the Law Institute of Victoria, 470 Bourke Street.

The seminar will be addressed by Justice Zak Yacoob, Judge of the South African Constitutional Court. Justice Yacoob was a member of the ANC and played an instrumental role in negotiating and drafting the South African Constitution and Bill of Rights.

Further information about the seminar, including venue and registration details, will be included in the February edition of this Bulletin and also available at www.hrlrc.org.au.

2007 Human Rights Dinner 23 February 2007

The HRLRC's 2007 Human Rights Dinner will be held at the Essoign Club, Melbourne, on Friday, 23 February 2007.

The dinner will be addressed by Prof Sir Nigel Rodley, Vice-Chair of the UN Human Rights Committee and former UN Special Rapporteur on Torture, and Debbie Kilroy, Director of Sisters Inside and recipient of the 2004 Australian Human Rights Medal.

Further information about the dinner will be included in the February edition of this Bulletin and also available at www.hrlrc.org.au.

Human Rights Conference: Freedom, Respect, Equality and Dignity

The Equal Opportunity Commission and Human Rights Commission of Victoria is convening a major human rights conference on 27 February 2007 at the ANZ Pavilion, Arts Centre, Melbourne.

Keynote speakers include:

- Sir Nigel Rodley, Vice-Chair of the UN Human Rights Committee;
- Major Michael Mori, Lawyer for David Hicks;
- Dr Sima Samar, Chairperson of the Afghanistan Independent Human Rights Commission; and
- Dr Rob Moodie, CEO of VicHealth.

Further information about the Conference, including the Program and Registrations, is available at www.eoc.vic.gov.au.

EDUCATION, RESOURCES and TRAINING

Online Domestic Human Rights Resources relevant to Victorian *Charter of Human Rights and Responsibilities*

The human rights contained in the Victorian *Charter of Human Rights and Responsibilities 2006* are largely modelled on the civil and political human rights enshrined in the *ICCPR*. Many of these civil and political rights have also been enshrined in regional human rights instruments (such as the *European Convention on Human Rights*) and domestic human rights instruments (such as the United Kingdom *Human Rights Act 1998* and the ACT *Human Rights Act 2004*).

Pursuant to s 32(2) of the *Charter* (which provides that 'international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision'), the considerable jurisprudence developed under these instruments can and should be considered in determining the content and application of *Charter* provisions.

Set out below is a selection of key comparative domestic jurisprudential sources that are available online. The last two editions of the Bulletin featured key international sources and key regional sources.

Australian Capital Territory – *Human Rights Act 2004*

- ACT Human Rights Act Research Project – <http://acthra.anu.edu.au/>
- ACT Human Rights Office – <http://www.hro.act.gov.au/index.html>

- ACT Department of Justice Human Rights Act Website – <http://www.jcs.act.gov.au/humanrightsact/indexbor.html>

United Kingdom – *Human Rights Act 1998*

- Department for Constitutional Affairs, *A Guide to the Human Rights Act 1998* (3rd ed, 2006) – <http://www.dca.gov.uk/peoples-rights/human-rights/pdf/act-studyguide.pdf>
- Liberty Guide to Human Rights under the Act – www.yourrights.org.uk
- One Crown Office Row Human Rights Update – <http://www.humanrights.org.uk/5/>
- Doughty Street Chambers Human Rights Practice – www.doughtystreet.co.uk/human_rights/index.cfm
- Department for Constitutional Affairs - <http://www.dca.gov.uk/peoples-rights/human-rights/index.htm>
- M Amos, *Human Rights Law* (2006)

New Zealand – *New Zealand Bill of Rights Act 1990*

- New Zealand Human Rights Network – <http://www.humanrights.net.nz/>
- New Zealand Human Rights Commission – <http://www.hrc.co.nz/home/default.php>
- New Zealand Department of Justice – <http://www.justice.govt.nz/pubs/reports/2004/bill-of-rights-guidelines/index.html>

Canada – *Canadian Charter of Rights and Freedoms 1982*

- Canadian Charter of Rights Decisions Digest – <http://www.canlii.org/ca/com/chart/index.html>

IF I WERE ATTORNEY-GENERAL...

The Right to Protest and Human Rights

If I were Attorney-General, I'd recognise the close interdependence between protest and human rights.

You can tell public opinion is going against protestors when even Bono, the activist lead singer of Irish rock group U2, condemns their behaviour. In the wake of the G20 protests in

Melbourne, Bono told the ABC that to 'argue rationally and emotionally is OK, but not to the point of smashing up the downtown area of Melbourne.'

The protests surrounding the two-day G20 summit on 18-19 November 2006 were widely reported as a raucous affair which on occasion tipped over into violence. Rumours were reported as fact in the often hysteria-tinged coverage of the protests.

The News Limited website, for instance, uploaded a story titled 'Arrests as anti-G20 turns violent', reporting that 'Protestors in bandannas hurled flares, horse manure, fake blood and urine-filled balloons.' In fact it was the Federal Treasurer Peter Costello who claimed that G20 protestors had flung urine-filled balloons, a claim later dismissed by Victoria Police. The story variously described the protestors as a 'hardcore mob' and 'thugs', unleashing 'mayhem' and 'chaos' when the protests 'exploded with violence.'

By contrast, the Human Rights Observer Team who monitored the event observed a 'series of disparate protests surrounding the G20 meeting [that] were generally peaceful and non-violent aside from a sporadic series of incidents.'

Demonstrations engender debates about their legitimacy, especially when they are characterized by considerable disruption or tainted by violence. It should not need to be said that violence is never acceptable, whether by citizens or by authorities. Violence is antithetical to the protection and promotion of human rights.

Violence presents a challenge for the legitimacy of protest. However, representations of violence in the context of particular protests should not tempt us into the wholesale delegitimation and devaluation of protest as a valid form of political expression and a fundamental human right.

In the context of political demonstrations, it is more often the 'threat of violence' that is used to justify banning of protests and the criminalisation of lawful political activity. In the lead up to many protests, police and media have vilified protesters in order to create a climate that attempts to justify any future violence against them.

Like violence itself, these practices are extremely damaging, as they corrode public confidence in the value of protest, and the

importance of the human rights which protect this form of democratic activity.

There are many forms of protest and protests are one form of political behaviour through a spectrum that includes 'voting, electioneering and opinionating over talkback radio.'

Protesting is underpinned by a number of important human rights, and is sometimes the only means of expression available for those most in need of human rights protection, the politically powerless or voiceless. As one example of this, witness asylum seekers in detention centres sewing their lips together in silent protest.

Australia has a long history of tolerance to and recognition of the right to protest as a legitimate form of political expression. In *Law, Liberty and Australian Democracy*, Gaze and Jones write:

Public assemblies are essential to the proper functioning of democracy, in situations ranging from election and political party meetings to demonstrations organized to protest about government policies or other issues. The right of public assembly is significant not only for political reasons, but also as an important aspect of respect for individual autonomy, because without the right to express views in public and to call public assemblies for this purpose, the right of the individual to self-expression is very limited. The right of public assembly gives the individual access to a public forum for expression of views and provides a mechanism for individuals to take action as a group. The right to assemble is closely based on the rights to freedom of speech and freedom of association.

A right to freedom of peaceful assembly is part of international law under art 20 of the *UN Declaration of Human Rights* and art 21 of the *ICCPR*. The right to engage in participatory democracy 'without unreasonable restrictions' is clearly acknowledged by art 25 of the *ICCPR*.

Notwithstanding this, the rights of protesters are regularly violated in protest situations. While art 9 of the *ICCPR* prohibits arbitrary arrest and detention, police in Australia commonly use arbitrary arrests and detention, special bail conditions to deny rights to peaceful assembly and other actions which contravene international law.

In this context, the experience of Drasko Boljevic is perhaps not so surprising. On 19 November, Boljevic was buying a drink at a Swanston Street convenience store when a group of men in casual clothes grabbed him and threw him into an unmarked white van. Boljevic was later released after the police realized they had the wrong person. The HRO Team who observed the G20 protests also expressed concern about the use excessive force by police including the use of over-handed baton strikes without warning leading to injuries of several protestors.

We shouldn't allow protest to be devalued and demeaned through associations with violence. When this occurs, we create the conditions for further human rights breaches. Like the rhetoric of 'children overboard' and the treatment of asylum seekers, devaluing the right to participate in democracy through peaceful assembly and other forms of political activity lays the groundwork for violence which is unacceptable in any form and by whomever perpetrated.

Protests are an important part of our participatory democracy. If activism and peaceful protest are under threat, so are human rights. Promoting and protecting all human rights, including the right to protest, is an important and valuable undertaking. Sometimes the two are indistinguishable. Those sweating in the hot sun at Federation Square in a peaceful assembly on 9 December 2006 in downtown Melbourne would probably agree with Bono on this point, who, like them, called for the release of David Hicks.

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