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The Human Rights Law  
Resource Centre Ltd aims to:

1. Promote and protect human rights in Australia through litigation, advocacy, research, education and training.
2. Build capacity in the legal and community sectors to use human rights in casework, advocacy and service delivery.
3. Empower people that are disadvantaged or living in poverty by operating within a human rights framework.

Opinion

Civiliter Mortuus? Not Me?

On 3 September 2004, in the County Court of Victoria, I, Vickie Lee Roach, Indigenous woman, mother of one child and the daughter of an aging mother, was sentenced to 'death'.

Okay – so I won't be 'hanged by the neck until dead', or strapped to a trolley and fed an intravenous cocktail of lethal drugs. I won't face the gas chamber, nor blindly await a volley of rifle shots with my back against a wall. The truth is, under the law as it stood that year, I and thousands of other prisoners, faced a death sentence of a different kind; in attracting a prison sentence of 3 years or more, we also incurred the additional penalty of forfeiture of our civil rights, expressly, the right to vote.

Approximately 11,000 Australians thus became non-citizens, invisible to society and excluded from participating in almost every aspect of that society – including the right to participate in the electoral process. We were in effect, sentenced to a kind of 'civil death'.

Civil death, or 'civiliter mortuus', can be traced from ancient Roman and Greek practices, through medieval times in continental Europe, to feudal England and the common law doctrines of 'attainder' and 'corruption of the blood' whereby, at law, the convicted person was, in effect, pronounced 'dead'.

From feudal England, to convict settlement of Australia, and surviving in various forums to the present day, this additional punishment twice removes from society those who have breached the 'social contract' – in the first instance by their physical removal from the community by their imprisonment, and in the second instance, by the symbolic removal of their right to participate in public life.

Our current Government appears to hold firm to the colonial concept of a convicted person being somehow 'tainted'. John Howard's legislation of August 2006 disenfranchising all sentenced prisoners relied on, and was justified by the supposition, that anyone who had breached the social contract was an 'undesirable element of society' whose participation in the electoral process would undermine the integrity of the electoral system.

My view, along with that of many civil libertarians, human rights advocates and people of good conscience, is that the disenfranchisement of prisoners has the directly opposite effect. Far from 'supporting civic responsibility', denying us this right serves only to exclude us from the democratic process and further alienate us from society. Exclusion of this nature ensures that the

exiting prisoner (and we will all be released eventually, some sooner rather than later) feels no connection, commitment or loyalty to his or her community and will therefore not feel bound to respect its laws or social mores.

For Aboriginal people in particular (who are unarguably the most disenfranchised and marginalised people in the country), this legislation had even deeper significance. With Indigenous imprisonment rates continuing to rise and Indigenous people over 15 times more likely to be imprisoned than non-Indigenous people and comprising up to 24% of Australia's prison population, the Howard Government's decision to ban prisoners from voting served only to further marginalise an already over marginalised group of society. In doing so, it effectively interfered with the entire group's ability to participate in Australia's representative democracy.

In March 2007 I filed a constitutional challenge to the legislation. I wanted to take this argument to the High Court because I believed Howard's legislation was inherently wrong. Not only was it unconstitutional and undemocratic, it was also unprincipled, ill-considered and nonsensical. It was also a gross erosion of human rights that threatened to reduce democracy to autocracy, and supplant the concept of a representative government elected 'by the people' with an unrecognisably *undemocratic* electoral process that could only result in an unrepresentative government, elected by only those people the government deemed 'worthy'.

Evidently the full bench of the High Court in Canberra agreed. On 30 August 2007 in a 4-2 majority decision, the High Court of Australia held that the Constitution does indeed enshrine the right to vote and, moreover, that this right may only be limited for a 'substantial reason' and in a way that is 'appropriate and adapted' to that reason. Their important, landmark decision reversed the Federal Government's 2006 legislation and returned to its previous position of disenfranchising only those prisoners serving sentences of 3 years or more. For 8,000 prisoners around the country, the right to political communication and participation, and the opportunity to say, 'I belong, and I matter', is once again a reality.

Phillip Lynch from the Human Rights Law Resource Centre (part of the legal team led by Ron Merkel QC and Allens Arthur Robinson), said the decision was a 'victory for representative democracy, accountable government, the rule of law and fundamental human rights'.

Personally, I feel a huge sense of vindication. Even though the decision hasn't affected my own eligibility to vote as I am serving more than 3 years, I feel privileged to have been able to stand up for something I believe in and had that belief ratified by no less than the highest court in the land.

I remain ineligible to vote, but 'civiliter mortuus'? – Not me!

*Vickie Roach is an Indigenous woman who is imprisoned at the Dame Phyllis Frost Centre in Melbourne. While a prisoner, she has completed a Master of Professional Writing and is now undertaking a PhD on Indigenous history and the Stolen Generations. She is a peer educator in prison, which involves her providing advice, assistance and counselling to other prisoners. On 30 August 2007, the High Court of Australia upheld Vickie's challenge to the constitutional validity of legislation which prohibited all sentenced prisoners from voting. In challenging the prisoner disenfranchisement legislation, Vickie stood up not just for the human rights of prisoners and Aboriginal Australians (who constitute almost ¼ of the prison population), but the interests of the entire community in representative democracy and fundamental human rights. She did so with courage, integrity and commitment, and at risk of being personally subject to a substantial adverse costs order if unsuccessful.*

## News

### Australian Constitution Enshrines Universal Suffrage or the Right to Vote: High Court Delivers Reasons in Prisoner Voting Case

On 26 September 2007, the High Court published reasons for its orders of 30 August 2007 in the matter of *Roach v Australian Electoral Commissioner and the Commonwealth* which invalidated amendments to the *Electoral Act* made in 2006. The amendments operated such that all prisoners serving a full-time sentence of detention were not entitled to vote at federal elections.

By a 4-2 majority, the Court held that the amendments were unconstitutional. The majority comprised Gummow, Kirby and Crennan JJ, with Gleeson CJ concurring in a separate judgment. Justices Hayne and Heydon dissented in separate judgments.

### **Gummow, Kirby and Crennan JJ**

For the majority, the key issue was whether the 2006 amendments were inconsistent with the 'system of representative and responsible government mandated by the Constitution' ([40] and [45]), in particular by the requirements of ss 7 and 24 that the houses of parliament be 'directly chosen by the people'. Discussing the relevance of voting to 'representative government', the majority stated at [81] – [83] that:

Voting in elections for the Parliament lies at the very heart of the system of government for which the Constitution provides...

Representative government as that notion is understood in the Australian constitutional context comprehends not only the bringing of concerns and grievances to the attention of legislators but also the presence of a voice in the selection of those legislators...[T]he existence and exercise of the franchise reflects notions of citizenship and membership of the Australian federal body politic. [Citations omitted]

The majority then considered the relevance and importance of representative government and the franchise to prisoners, concluding at [84] that:

Such notions are not extinguished by the mere fact of imprisonment. Prisoners who are citizens and members of the Australian community remain so. Their interest in, and duty to, their society and its governance survives incarceration.

The majority accepted that the right to vote, however, is not unlimited and stated that the test as to whether a legislative disqualification from adult suffrage is constitutionally permissible is whether the disqualification is for a 'substantial reason' [85]. A reason will be 'substantial' if it is 'reasonably appropriate and adapted to serve an end which is consistent or compatible with...representative government' [85]. According to the majority, the phrase 'reasonably appropriate and adapted', in this context, is very similar to the notion of 'proportionate', stating, 'What upon close scrutiny is disproportionate or arbitrary may not answer to the description reasonably appropriate and adapted for an end consistent or compatible with observance of the relevant constitutional restraint upon legislative power.' [85]

The majority then turned to consider whether the blanket disenfranchisement of prisoners was for a 'substantial reason' stating at [89]:

The end served by the denial in s 93(8AA) of the exercise of the franchise by electors then serving a sentence of imprisonment...is further to stigmatise this particular class of prisoner by denying them during the period of imprisonment the exercise of the civic right and responsibility entailed in the franchise.

As to whether the disenfranchisement was 'reasonably appropriate and adapted' to that end, Gummow, Kirby and Hayne JJ concluded at [90] – [93]:

Section 93(8AA) operates without regard to the nature of the offence committed, the length of the term of imprisonment imposed, or the personal circumstances of the offender...[T]here is long established law and custom, stemming from the terms of the institution in the Australasian colonies of representative government, whereby disqualification of electors (and candidates) was based upon a view that conviction for certain descriptions of offence evinced an incompatible culpability which rendered those electors unfit (at least until the sentence had been served or a pardon granted) to participate in the electoral process. That tradition is broken by a law in the terms of s 93(8AA) as such a law has no regard to culpability...

Having regard to these matters, the majority concluded at [95] that:

The legislative pursuit of an end which stigmatises offenders by imposing a civil disability during any term of imprisonment takes s 93(8AA) beyond what is reasonably appropriate and adapted (or 'proportionate') to the maintenance of representative government.

Having invalidated the 2006 amendments, the majority then considered the constitutionality of the thereby reinstated prior regime, pursuant to which prisoners serving sentences of three or more years were disqualified from voting. Upholding the validity of this regime, the majority stated at [98] that:

The three year provisions...of the 2004 Act differ in their nature from the 2006 Act. They operate to deny the exercise of the franchise during one normal electoral cycle but do not operate without regard to the seriousness of the offence committed as an indicium of culpability and temporary unfitness to participate in the electoral process. In that way the three year provisions are reflective of long established law and custom, preceding the adoption of the Constitution, whereby legislative disqualification of electors has been made on the basis of such culpability beyond the bare fact of imprisonment.

### **Gleeson CJ**

The Chief Justice concurred with the majority judgment for substantially similar reasons. Notably, his Honour held that 'the words of ss 7 and 24, because of changed historical circumstances including legislative history, have come to be a *constitutional protection of the right to vote*' [7]. Similarly to the majority, he stated at [7] that:

Because the franchise is critical to representative government, and lies at the centre of our concept of participation in the life of the community, and of citizenship, disenfranchisement of any group of adult citizens on a basis that does not constitute a substantial reason for exclusion from such participation would not be consistent with choice by the people.

Turning to the issue as to what constitutes a 'substantial reason', the Chief Justice stated at [8] that:

An arbitrary exception would be inconsistent with choice by the people. There would need to be some rationale for the exception; the definition of the excluded class or group would need to have a rational connection with the identification of community membership or with the capacity to exercise free choice.

The Chief Justice then identified the rationale for excluding prisoners, stating at [12] that:

...since deprivation of the franchise takes away a right associated with citizenship, that is, with full membership of the community, the rationale for the exclusion must be that serious offending represents such a form of civic irresponsibility that it is appropriate for Parliament to mark such behaviour as anti-social and to direct that physical separation from the community will be accompanied by symbolic separation in the form of loss of a fundamental political right...*Serious offending* may warrant temporary suspension of one of the rights of membership, that is, the right to vote. Emphasis upon civic responsibilities as the corollary of political rights and freedoms, and upon society's legitimate interest in promoting recognition of responsibilities as well as acknowledgment of rights, has been influential in contemporary legal explanation of exclusions from the franchise as consistent with the idea of universal adult suffrage.

Having regard to this, the Chief Justice accepted that the disenfranchisement of prisoners serving three or more years is valid because, overwhelmingly, such people have been convicted of serious offences. His Honour considered, however, that this rationale 'breaks down at the level of short-term prisoners', stating at [23] – [24] that:

They include a not insubstantial number of people who, by reason of their personal characteristics (such as poverty, homelessness, or mental problems), or geographical circumstances, do not qualify for, or, do not qualify for a full range of, non-custodial sentencing options. At this level, the method of discriminating between offences, for the purpose of deciding which are so serious as to warrant disenfranchisement and which are not, becomes arbitrary.

The step that was taken by Parliament in 2006 of abandoning any attempt to identify prisoners who have committed serious crimes by reference to either the term of imprisonment imposed or the maximum penalty for the offence broke the rational connection necessary to reconcile the disenfranchisement with the constitutional imperative of choice by the people.

Accordingly, the Chief Justice upheld the challenge to the validity of s 93(8AA), but affirmed the validity of the three year provisions (at [25] – [26]).

## Hayne and Heydon JJ

In upholding the validity of the impugned legislation, Hayne J (with whom Heydon J agreed) interpreted s 30 of the Constitution, which permits the Commonwealth to legislate for the qualification of electors, as conferring upon the Commonwealth a broad power to determine which persons should be afforded the vote.

Justice Hayne considered that the drafting history of s 30, along with other textual indications, require that the expression 'directly chosen by the people' in ss 7 and 24 be seen as an expression of 'generality' that was 'not intended to convey a requirement for universal adult suffrage'. Whereas the majority considered that social, political and legislative developments in the area of representative government since federation affected the scope of the Commonwealth's power to set the franchise, Hayne and Heydon JJ considered that the drafting history 'provides the only certain guide'. Accordingly, their Honours focused on various pieces of state legislation which, at federation, prescribed the qualification of electors for state parliaments. Justices Hayne and Heydon considered that this legislation, all of which excluded some prisoners from voting, as indicating the content that is to be given to the expression 'directly chosen by the people'.

Their Honours rejected the notion that the content to be afforded to the expression 'directly chosen by the people' might be informed either by reference to 'common understanding' or 'generally accepted Australian standards'. They also firmly rejected the notion that international human rights may be in any way relevant to constitutional interpretation, stating in response to the issue as to 'whether it would be possible now to narrow the franchise on the basis of race, age, gender, religion, educational standards or political beliefs' that 'narrowing the franchise in any of these ways may be highly undesirable; it does not follow that it is unconstitutional'.

## Conclusion

The High Court's decision not only has important consequences for those prisoners now able to vote in the upcoming federal election, but also provides a significant addition to the jurisprudence concerning the system of representative government mandated by the Constitution. The Commonwealth's power to make laws affecting the extent of the franchise, as with laws affecting other fundamentals of our system of representative government, are subject to limitations. The majority decision in this case supports a view that these limitations, though derived from the text and structure of the Constitution, are themselves capable of evolution, including by reference to international and comparative human rights standards and jurisprudence.

The decision is available at <http://www.austlii.edu.au/au/cases/cth/HCA/2007/43.html>.

*Philip Lynch is Director of the Human Rights Law Resource Centre. Peter O'Donahoo is a Partner and Peter Haig is a Lawyer with Allens Arthur Robinson. For a detailed analysis of the decision prepared by Allens Arthur Robinson, see <http://www.aar.com.au/pubs/ldr/focloct07.htm>.*

## Victorian Charter of Rights Developments

### A Charter of Rights for Tasmania

On 12 October 2007, the Tasmanian Law Reform Institute published its report on *A Charter of Rights for Tasmania*. The Report, which was commissioned by the Tasmanian Government, recommends that a legislative *Charter of Human Rights* be enacted in Tasmania. Similarly to the Victorian *Charter*, it is recommended that this instrument promote a 'human rights dialogue across the three branches of government while ultimately maintaining parliamentary sovereignty'. Unlike the Victorian *Charter* and ACT *Human Rights Act*, however, the Institute recommends that a Tasmanian *Charter* incorporate economic, social and cultural rights (as well as civil and political rights), confer a free standing cause of action, and entitle victims to such remedies as are 'just and appropriate', including damages.

The Report was informed by a record 407 submissions – the largest number of submissions received on any project undertaken by the Institute – of which the vast majority (94.1%) supported the enactment of a Charter of Human Rights. Having regard to these submissions, the Institute concluded that a Tasmanian *Charter* would:

- 'provide a single, comprehensible statement of the fundamental rights applicable in Tasmania';

- 'foster community awareness of human rights'; and
- 'encourage the systematic development and observance across all arms of government of processes responsive to human rights'.

The Centre's submission to the Institute, which was prepared with the very substantial assistance of Allens Arthur Robinson, is cited extensively and approvingly throughout the report. It is referred to as 'clear and forceful'. The Institute's Report is available at [http://www.law.utas.edu.au/reform/Human\\_Rights\\_A4\\_Final\\_10\\_Oct\\_2007\\_revised.pdf](http://www.law.utas.edu.au/reform/Human_Rights_A4_Final_10_Oct_2007_revised.pdf).

In other Charter of Rights developments, the Consultation Committee for a WA Human Rights Act is due to report to the WA Attorney General by 16 November 2007.

### Statements of Compatibility under the Victorian *Charter*

Section 28 of the *Charter of Human Rights and Responsibilities* requires a Statement of Compatibility to be issued for every Bill that is introduced into a House of Parliament.

#### **Working with Children Amendment Bill**

##### Background

The *Working with Children Act 2005* (Vic) establishes a scheme which mandates a 'working-with-children' check for persons involved in child-related work. The check assists in preventing those who pose a risk to the physical and sexual safety of children from working with them, either in paid or voluntary work. The Act sets out the criteria for issuing assessment notices, indicating an applicant's suitability to work with children.

The Working with Children Amendment Bill 2007 aims to enhance the existing assessment mechanisms established under the Act by:

- adding four offences to be considered in assessing an application; and
- giving the decision-maker an 'exceptional circumstances' discretion to refuse an assessment notice to a person who, despite not having committed a 'relevant offence', is still seen to pose a significant risk to the physical and sexual safety of children.

##### Recognition and equality before the law

Section 8(3) of the Victorian *Charter* provides that every person is equal before the law and is entitled to equal protection of the law without discrimination.

The Statement of Compatibility issued with this Bill notes that as the Bill requires assessment of a person's suitability to work with children to be based on a past criminal record, there could potentially be an indirect and disproportionate impact on groups who are overrepresented in the criminal justice system, for example, Indigenous groups and people with an intellectual disability.

However, the Statement concludes that the safeguards within the Act (for example, the right of appeal to VCAT) mean that while the rights set out in s 8(3) may be limited, the limits imposed are reasonable and proportionate.

##### Privacy and reputation

Section 13 of the *Charter* outlines that a person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with. However, the Bill, among other things:

- allows for the collection and disclosure of personal and sensitive information; and
- provides that copies of assessment notices, interim negative notices, or negative notices (all of which contain personal information) are provided to an applicant's employer.

The Statement asserts that because the Bill sets out the circumstances in which interferences with privacy are permitted, the interferences with privacy are not unlawful. Furthermore, the Statement reasons that the limitations to the right to privacy are not arbitrary because they are consistent with one of the important aims of the *Charter* (protection of children), and because the use and disclosure of personal information is a proportionate response to the risk that the offences pose to the safety of children. As such, it is concluded that the intrusion on the right to privacy is acceptable as it is neither unlawful nor arbitrary.

### Right not to be tried or punished more than once

Section 26 of the *Charter* provides that a person must not be tried or punished more than once for an offence in respect of which he or she has already been finally convicted or acquitted in accordance with law. Despite this, the Bill enables government to place restrictions on individuals with records for certain types of offences. This may appear to be a form of double-punishment.

However, international jurisprudence suggests that the 'punishment' referred to in s 26 does not include penalties imposed outside of the criminal law. As such, the Statement concludes that the Bill does not directly engage s 26 of the *Charter*.

*Thea Schwartz, Human Rights Law Group, Mallesons Stephen Jaques*

## Case Notes

### Eviction from Public Housing a Violation of the Right to Privacy, Family and the Home

*Stanková v Slovakia* [2007] ECHR 7205/02 (9 October 2007)

The European Court of Human Rights has held that the eviction of a woman from public housing in circumstances where the public authority had not ensured that she had adequate alternative housing constituted a violation of the right to respect for private life and the home.

#### Facts

The applicant, Milota Stanková, had lived in a two-room flat with her father and two children since 1992. The flat was leased by the applicant's father from Poprad Municipality. Following the father's death in 1994, the applicant sought to be registered as the tenant of the flat. The Municipality refused to transfer the tenancy and argued that she could move into her son's one-room flat. The Municipality sought and obtained an eviction order and placed the applicant on a public housing waiting list.

The applicant challenged the Municipality's decision in the domestic courts, including by filing a petition with the Slovakian Constitutional Court alleging a violation of her constitutional right to protection of her private and family life. The Constitutional Court stated that in order for an interference with the applicant's private and family life to be permissible, it was necessary to consider whether there had been a pressing social need for the interference and whether it had been proportionate to the legitimate aim pursued, having regard to the particular circumstances of the case. In this respect, the Constitutional Court held that the Municipality's ownership rights in respect of the flat 'could not be dissociated from its obligation to assist citizens of Poprad in having their basic needs satisfied'. It found that, particularly having regard to the likely impact of evicting the applicant and her under-age daughter, the interference could not be regarded as being 'necessary in a democratic society'.

As the remedial powers of the Constitutional Court are only declaratory and did not provide an effective remedy, the applicant filed a complaint with the European Court of Human Rights.

#### Decision

Before the European Court, the applicant argued that her eviction constituted a violation of art 8(1) of the *European Convention* which provides that 'everyone has the right to respect for private and family life, the home and correspondence'. Pursuant to art 8(2), limitations on this right are only permissible if they are in accordance with law and necessary in a democratic society.

The Court held, and it was not disputed between the parties, that the eviction of the applicant from her flat amounted to an interference with her right to respect for her home. The Court further held that the eviction was based on relevant provisions of the Slovakian Civil Code and the interference was therefore 'in accordance with the law'. The Court further accepted that the eviction pursued the legitimate aim of protecting the rights of the Poprad Municipality, which owned the flat. The issue, therefore, was whether that interference was 'necessary in a democratic society' to achieve this aim.

The Court held that in order for an interference with a right to be 'necessary in a democratic society', it must pursue a legitimate aim, being a 'pressing social need', and the measure employed must be proportionate to this aim. The Court must also consider whether the reasons adduced to justify the interference are 'relevant and sufficient'.

In the present case, the European Court considered that the facts of the case and the issues of legitimacy, necessity and proportionality were examined in detail by the Slovakian Constitutional Court and held that there were no grounds for reaching a different conclusion to that of the Constitutional Court (namely, that the applicant's right to respect for her home and private life had been violated). Adopting the reasoning of the Constitutional Court, the European Court stated that the effect of the order 'to leave the flat without being provided with any alternative accommodation produced effects which were incompatible with her right to respect for her private and family life and for her home, regard also being had to the special protection of children and juveniles'. The Court noted that Poprad Municipality had *de facto* acknowledged the 'gravity' of the eviction by placing the applicant on a public housing waiting list, albeit at the same time as it had initiated eviction proceedings. It also took into account that the Municipality was 'in charge of public housing' and, in that capacity, was 'under an obligation to assist the town's citizens in resolving their accommodation problems'.

The European Court held, accordingly, that there had been a violation of art 8 of the *European Convention* and ordered payment of damages and just satisfaction.

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

This decision is significant for the interpretation and application of s 13(a) of the *Charter*, which provides that 'a person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with', particularly as that provision relates to access to, and eviction from, public housing.

Although s 13(a) of the *Charter* is arguably narrower than art 8 of the *European Convention*, in that it prohibits unlawful or arbitrary interference with the home rather than requires 'respect' for the home, it is well established under international and comparative law that the notion of 'arbitrariness' incorporates considerations of 'appropriateness', 'justice' and 'proportionality'. Accordingly, the eviction of a person from public housing may constitute an interference with s 13(a) of the *Charter* in circumstances where it is not just or proportionate, particularly in circumstances where the eviction may impact on children who are entitled, pursuant to s 17(2) of the *Charter*, to protection in their best interests.

The decision also has significance for s 7 of the *Charter*, suggesting that any limitation on human rights must be in pursuit of a pressing social need under s 7(2)(b), proportionate under s 7(2)(c) and supported by relevant and sufficient reasons under s 7(2)(d).

*Philip Lynch is Director of the Human Rights Law Resource Centre*

### **Independence of Parole Board Insufficient to Comply with Human Rights**

*Brooke & Anor, R (on the application of) v Parole Board & Anor [2007] EWHC 2036 (7 September 2007)*

A recent decision of the England and Wales High Court considered whether the Parole Board had the necessary independence required by art 5(4) of the *European Convention on Human Rights* and may be relevant to a determination under s 24 of the Victorian *Charter* as to whether a court or tribunal is 'competent, independent and impartial'.

### **Background to the Application**

The Board was created under s 59 of the *Criminal Justice Act 1967* and its status throughout had been that of an Executive Non-Departmental Public Body, operating under the 'sponsorship' of the relevant Department of State. However, its function had changed over time from that of an advisory board to the Minister with limited decision-making powers, to that of a body charged with the great majority of decisions relating to the release of prisoners.

### **The Claimants' Case**

The claimants applied for judicial review of the structure of the Board, contending that the way it was controlled by the Minister was such as to give it insufficient and real independence from the Executive. They referred in particular to the role of the Minister and his Department in appointing and dismissing Board members, controlling its budget, making its rules, housing and staffing it within the Department, and closely monitoring its activities. Not only was the Minister responsible for the Board, but he was also concerned as a party. Accordingly, the claimants argued that there was a breach of the

requirements of art 5(4) of the *European Convention* that every court demonstrate independence and freedom from even unconscious bias.

### **The Court's Findings**

The Court considered whether each of the abovementioned factors, either alone or in combined effect, created an objective absence of independence of the Board.

#### Appointment of members of the Parole Board

The Court acknowledged that a distinguishing feature in this case was that the appointing Minister was not only responsible for the Board but was also a principal party in every case the Board decides, which required clear evidence that the Minister 'demonstrably abjures any significant input into the selection of members.' Though the Minister had the statutory role of appointing members, in practice, the Minister was not personally involved. In the case of lay members, an external recruitment consultant conducted the advertisement process, and a three-member panel comprised of representatives from the Department, Board and the Office of Commissioner for Public Appointments (OCPA), interviewed candidates. The process was governed by OCPA principles, which included merit-based appointments and independent scrutiny. The High Court Judge members were appointed by the Lord Chief Justice. The Court held that, provided the arrangements in place for appointment of these members were strictly adhered to, the power of appointment alone did not create an objective absence of independence.

Probation officer members, on the other hand were appointed by a process of ministerial interviews and, moreover, remained employed within the Department. The Court, following the Court of Appeal decision in *R (PD) v West Midlands and North West Mental Health Review Tribunal* [2004] EWCA Civ 311, held that the practical realities of the availability of suitable qualified persons was a relevant consideration on the question of independence. The Court found that given the difficulties recruiting experienced probation officers, and the fact that these members sit alongside judges and other lay and specialist members, there was not a significant risk that the performance of their duties as members would be affected by the likelihood of their returning to the Department at the end of their tenure on the Board.

#### Tenure of members

The Court held that the period of appointment (3 + 3 years) was near the low borderline of what is capable of providing the necessary guarantee of independence, but would, if taken alone, pass the test. However, coupled with the power to terminate the appointment of any member, without any procedure for the assessment of the merits, the provisions for tenure failed the test of independence.

#### Power of Minister of State to make rules

While of the view that rules being made by a party to the proceedings before the Board was not ideal, the Court held that the tabling of the rules before Parliament saved the rule-making power, by itself, from creating an appearance of lack of independence.

#### Power of Minister to give directions

The Court, applying the principle laid down by the Court of Appeal in *R (Girling) v Parole Board* [2006] EWCA Civ 1779, held that while the power to give directions as to matters to be taken into account by the Board in discharging its functions is not in principle inconsistent with the Board's independence, the particular use made of it may create the appearance of want of independence, the more so when the Executive is a party to the proceedings. The Court held that where, for example, as was the case in *Girling*, directions would have the effect of narrowing the statutory test for the release of prisoners, this would create the appearance (and indeed fact) of lack of independence.

#### Funding of the Board by the Department

The Court held that while an independent budget granted by Parliament would enhance independence, such independent funding is not essential to independence. The Court held that '[p]rovided the Board's independence of decision making is scrupulously preserved from the exercise of departmental supervision of budget allocation', there is no breach of art 5(4).

#### Sponsorship within the Department of State

The practice of regular and confidential meetings between representatives of the Board and one party to its decision, and the appearance given by housing of the Board within a departmental building and integration of its information technology with in-house Departmental provision, might not alone be inconsistent with objective independence, but taken together with the other incidents of sponsorship,

such as funding, appointment of members, inadequate protection for security of tenure and the power to give directions, they were.

### **Conclusion**

The Court made clear that there was no question about the independence of mind and impartiality of the individual members of the Board and no sign of any attempt by the Department to influence individual cases. In some respects the structure of the Board was consistent with the necessary objective independence. However, the Court held that the particular incidents of sponsorship in this case was such as to create what objectively appeared to be a lack of independence as required by art 5(4) of the *European Convention*.

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

In the Victorian context, this decision has relevance to the scope, interpretation and application of s 24 of the *Charter* – which requires that a tribunal be competent, independent and impartial – to bodies such as the Parole Board and the Mental Health Review Board. If a body falls so far short of the requirements of independence and impartiality that it fails the test of being a ‘tribunal’ for the purposes of the *Charter*, consideration would need to be given to whether the entity is a ‘public authority’, and if so, must comply with the requirements of s 38 to act compatibly with human rights and properly consider relevant human rights in decision-making processes.

The decision is available at <http://www.baillii.org/ew/cases/EWHC/Admin/2007/2036.html>.

*Rachel Nicholson and Jacqueline Goodall are members of the Allens Arthur Robinson Corporate Responsibility Group*

## **Inadequate Treatment and Restraint of Person with Schizophrenia a Violation of Prohibition on Torture**

*Kucheruk v Ukraine* [2007] ECHR Application No 2570/04 (6 September 2007)

The applicant, a man with chronic schizophrenia, was convicted of theft and hooliganism. The Ukraine Court suspended the criminal proceedings against him committing him first for psychiatric treatment. He was subsequently detained in the medical wing of a pre-trial detention centre for a month before being transferred to a specialised facility. While detained, he was subjected to the practices of restraint and seclusion.

The applicant successfully complained to the European Court of Human Rights of violations of art 3 (prohibition on cruel, inhuman or degrading treatment or punishment) and art 5 (right to liberty and security of person and freedom from arbitrary detention) of the *European Convention on Human Rights* in relation to his detention, seclusion, restraint, and the investigation by the authorities of his subsequent complaints. The European Court’s findings may be of particular interest in Victoria if the Supreme Court is asked to consider which limitations on the rights contained in the *Charter* are reasonable for the purposes of s 7 when authorities are exercising their powers under the *Mental Health Act 1986* (Vic).

### **Article 3: Prohibition on Cruel, Inhuman or Degrading Treatment**

The Court found four violations of art 3.

#### Use of truncheons to restrain applicant

Three prison guards used truncheons to restrain the applicant. The recourse to physical force on a person deprived of liberty must be strictly necessary. The Ukraine stated that the applicant's own conduct made the force necessary, but the European Court disagreed, finding that:

- the applicant’s behaviour was not an unexpected development, and so the authorities had time to prepare for its management in a different way;
- there were three guards available to restrain the applicant; and
- the applicant had not attempted to attack the officers or fellow inmates, and his behaviour did not constitute any danger to his own health or that of others.

#### Handcuffing and solitary confinement

The applicant was placed in solitary confinement for nine days, and was handcuffed for seven of the nine days. Such measures are regarded as inhuman and degrading if they cannot be shown to be of therapeutic necessity (from the point of view of established principles of medicine). Further, the medical necessity must be convincingly shown to exist, in that procedural guarantees for the decision to restrain must be complied with.

The Ukraine stated that the applicant was handcuffed to prevent him from injuring himself. However, the European Court found:

- there was no advice sought from a psychiatrist regarding the applicant's fitness for these measures, nor as to what treatment should be undertaken in the future;
- handcuffing was not the normal protocol for restraining mentally-ill patients in the Ukraine;
- there was no evidence that the applicant attempted to assault any person; and
- the handcuffs were not effective in keeping the applicant from hurting himself through banging his head against the wall. Therefore, they did not serve the purpose submitted by the Ukraine. Furthermore, they caused deep abrasions to his wrists, for which he was not given any medical attention.

#### Lack of medical assistance and treatment

Lack of medical care given to mentally-ill patients deprived of liberty can amount to violation of art 3. The vulnerability and inability of these persons to complain coherently with respect to medical treatment is a relevant consideration. The European Court found that the following actions were neither adequate nor reasonable:

- solitary confinement;
- handcuffing, the resultant injuries and the lack of treatment for the injuries;
- inadequate examination by a psychiatrist; and
- delay in following the recommendation to place the applicant in a specialised facility.

#### Effectiveness of the investigation into applicant's complaints

The minimum standard of an investigation is that it must be 'independent, impartial and subject to public scrutiny, and the competent authorities must act with exemplary diligence and promptness'. The European Court found that the investigation into the applicant's complaints of excessive use of force by the prison guards was in violation of art 3 as:

- the investigation lacked independence (as the governor of the detention centre at which the incident occurred represented the investigating authority);
- there was little public scrutiny;
- there was lack of promptness (the applicant's complaints had lasted five years at the time of hearing); and
- the investigation lacked effectiveness (as was supported by the findings of the Ukraine courts).

### **Article 5: Right to Liberty and Security of Person and Freedom from Arbitrary Detention**

#### Article 5(1)

The order enabling the applicant's detention was revoked, but the applicant was not released. Therefore, the applicant complained that he was detained unlawfully in violation of art 5(1). The Ukraine submitted that the delay was caused through administrative issues. However, the Court rejected this submission stating that 'administrative formalities connected with release cannot justify a delay of more than several hours'.

#### Article 5(4)

At least two important procedural safeguards should be made available to a detained mentally-ill patient: firstly, periodic review of the lawfulness of the person's detention; and secondly, the ability for the person to seek judicial review on his or her own motion. The European Court found that the applicant was not afforded the latter safeguard, and therefore found a violation of art 5(4).

*Daveena Sidhu is a member of the Allens Arthur Robinson Corporate Responsibility Group*

## HRLRC Policy, Advocacy and Law Reform

### Centre Submits Shadow Report to UN Committee Against Torture

As discussed in Edition 15, the UN Committee Against Torture will review Australia's implementation of and compliance with the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment* in November 2007. The Centre will attend this review on behalf of the National Association of Community Legal Centres – together with representatives from Amnesty International, the NSW Council for Civil Liberties and Australian Lawyers for Human Rights – to make oral submissions regarding Australia's performance against the Convention.

In conjunction with NACLC, the Centre has made two written submissions to the Committee to assist its scrutiny of Australia. These submissions have considered the incompatibility with the Convention of issues including:

- certain aspects of Australia's counter-terrorism law and practice;
- various aspects of the imprisonment of persons with mental illnesses in Australia;
- mandatory immigration detention and its physical and psychological effects;
- expulsion and refoulement of asylum-seekers;
- the disproportionate incarceration of Indigenous people and the incidence of Indigenous deaths in custody;
- mandatory sentencing;
- conditions for women prisoners; and
- the treatment of Australian citizens abroad, including David Hicks, Mamdouh Habib and the 'Bali 9'.

The submissions are available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under Policy Work>HRLRC Submissions>NGO Reports to UN Committee Against Torture regarding Australia.

### Civil Justice Reform and the Right to a Fair Hearing

On 6 September 2007, the Victorian Law Reform Commission released a Second Exposure Draft of Civil Justice Reform Proposals. On 12 September 2007, the Centre made a submission in response to the Second Exposure Draft, welcoming and supporting many of the recommendations, including particularly in relation to self-represented litigants, interpreters and costs.

The Centre's submission contends, however, that a range of further proposals are necessary if civil justice procedure in Victoria is to be compatible with the right to a fair hearing enshrined in s 24 of the *Charter*, including particularly in the areas of:

- access to legal advice and legal aid – The rights to legal representation, equality before the law and a fair hearing are human rights in and of themselves, and are critical aspects of the promotion and protection of other human rights. Recognising this, the availability of advice, assistance and advocacy about human rights must be an integral component of civil justice reform.
- costs and disbursements in pro bono, human rights and public interest matters – It is well established that the right to a fair hearing subsumes a right of access to the courts. It is also well established that costs and disbursements associated with litigation impact disproportionately on indigent persons and may constitute a restriction on the right of access to a court contrary to the right to a fair hearing
- third party interveners - The Victorian *Charter* is likely to have a significant impact on civil litigation and will almost certainly lead to third parties seeking an increased role in such litigation. 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 important.

The Centre's submission is available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under Policy Work>HRLRC Submissions>Relevance of the Victorian Charter of Rights to Civil Justice.

## Prisoners' Rights: The Use of Force and the Interception and Censorship of Correspondence

In August 2007, the Brumby Government introduced the Justice Legislation Amendment Bill 2007, which, among other things, provides for:

- the interception or censorship of correspondence sent by or to prisoners; and
- the use of firearms by prison officers when prisoners are attempting to escape.

The Bill was accompanied by a Statement of Compatibility under the Victorian *Charter* which concluded that the provisions were consistent with human rights. The Bill was then considered by the independent Scrutiny of Acts and Regulations Committee ('SARC') pursuant to its powers under the *Charter* and, on 14 September 2007, the Centre made a submission to SARC.

### Statement of Compatibility

#### Intercepting and censoring correspondence

The Statement of Compatibility considers the jurisprudence relating to arbitrary interference with a right, and concludes that the proposed amendments are not arbitrary. According to the Statement, the amendments 'ensure interferences will only occur on a case-by-case basis in accordance with the merits of the particular case'.

However, the amendments give a prison Governor a broad discretion in relation to interception and censorship, which carries an inherent risk that it may be arbitrarily applied. Despite comments of the UN Human Rights Committee that interference 'should be...reasonable in the particular circumstances', the Statement does not consider the risk that decisions by a prison Governor, which might have the practical effect of imposing a 'blanket' ban on correspondence to or from a particular person, could be made:

- without due consideration of the particular circumstances, on a case-by-case basis; or
- without a proper balancing of the impact of the limitation on the prisoner with the potential harm which may be suffered by the victim.

Accordingly, the Statement gives insufficient consideration to the principle of proportionate interference.

The proposed amendments also relate to intercepting or censoring correspondence sent to prisoners. Although the Statement states that it is 'in accordance with the interests of justice that correspondence to prisoners be stopped or censored if it would be regarded by a victim as traumatic or distressing', this is not explained further.

#### Use of firearms against escaping prisoners

According to the Bill's Explanatory Memorandum, cl 20 was introduced to 'confirm the powers to issue and use firearms currently in the *Corrections Regulations 1998*'. However, the new s 112A (inserted by cl 20 of the Bill) confers on the Governor-in-Council the power to make regulations which are much broader than those already in force. The Statement relies on the regulations in force at any particular time to maintain limitations on the use of force by prison officers.

Further, although the Statement speaks of the Bill in terms of 'restricting' the use of firearms, the Bill in fact positively authorises Regulations which allow such use in certain situations.

The Statement recognises and discusses the human rights jurisprudence relating to the right to life. However, these principles are not applied to the analysis of the actual limitation on the right contained in cl 20 of the Bill. Rather, it is simply stated that 'clause 20 of the Bill and policy informing this (sic) principles accords with these principles of international law'.

The Statement refers to a number of factors which are not actually addressed under the Bill, such as a distinction between high and maximum security prisoners and the existence of a 'hierarchy of force'.

### The Centre's Submission

In the Centre's view, the provisions relating to interception and censorship of prisoner correspondence engage human rights under s 13 (right to freedom from unlawful or arbitrary interference with privacy, family, home or correspondence) and s 15 (right to freedom of expression) of the *Charter*, while the provisions regarding the use of firearms against escaping prisoners engage s 9 (right to life).

The Centre's submission concludes that, in relation to both issues, the provisions are overbroad, potentially arbitrary, and are insufficiently proportionate and justified. For example, the provisions relating to prisoner correspondence would, on one view, preclude a prisoner sending a letter to *any* person who has been a victim of *any* crime. Similarly, the provisions relating to the use of firearms may permit a prison officer to shoot an escaping prisoner regardless of the threat posed by that prisoner, contrary to the requirements under human rights law that firearms be used as a last resort to prevent the escape of a prisoner who presents an imminent and grave threat to life or likelihood of serious injury.

The Centre was provided with excellent pro bono assistance in researching and drafting the submission by Ros Grady, Jonathan Kelp, Peter Henley, Lachlan McMurtrie, Rebecca Pereira, and Jane Tipping of the Mallesons Human Rights Law Group and Hugh de Kretser and Charandev Singh of the Federation of Community Legal Centres.

The Centre's submission is available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under Policy Work>HRLRC Submissions>Prisoners' Rights: Use of Force and the Interception and Censorship of Correspondence.

*Jonathan Kelp, Solicitor, Human Rights Law Group, Mallesons Stephen Jaques*

## HRLRC Casework

### Access to Court and the Right to a Fair Hearing: Centre Ensures Prisoner's Right to Attend Court Proceedings

The Centre has recently successfully advocated for the waiver of prohibitive escort costs to enable a prisoner to attend his hearing in Court. The prisoner has initiated civil action against prison officers of the Fulham Correctional Centre in relation to property that has been lost when he was transferred to Port Phillip Prison. An arbitration hearing had been set down at the Magistrates' Court in Sale.

When seeking to arrange transportation from Port Phillip Prison to Sale Magistrates' Court, the prisoner was advised by the Department of Justice that GSL Custodial Services Pty Ltd, the private prison operator, was able to facilitate an escort but that it would be at a cost of \$1,380 to the prisoner.

The Centre was very concerned that this extraordinarily high cost was a significant impediment to the prisoner's access to the civil justice system and his right to a fair hearing, as enshrined in s 24 of the Victorian *Charter*. The prisoner had no means to pay the amount requested by GSL.

The Centre was able to successfully negotiate with GSL, the Department of Justice and the Sale Magistrates' Court for his arbitration hearing to be transferred to the Melbourne Magistrates' Court and for GSL to escort him to the court at its cost.

*Ben Schokman is the DLA Phillips Fox Human Rights Lawyer*

### Access to Appropriate Medical Care for Involuntary Mental Health Patient

Lawyers at Clayton Utz, acting pro bono with the Centre, have successfully advocated for appropriate medical treatment to be provided to an involuntary inpatient at the Thomas Embling Hospital. The inpatient was seeking access to medical treatment in relation to a liver condition. The Centre considered that a lack of adequate medical services may raise issues in relation to ss 9 (right to life), 10 (protection from cruel, inhuman or degrading treatment), 13 (right to privacy), 21 (right to security of person) and 22 (right to humane treatment in detention) of the Victorian *Charter*. Clayton Utz managed to negotiate with the Thomas Embling Hospital and the Austin Hospital to arrange for a medical appointment for the inpatient.

*Ben Schokman is the DLA Phillips Fox Human Rights Lawyer*

### Compelling ASIO to Provide a Security Assessment

The Centre has recently assisted an individual who had been unable to obtain a security assessment from ASIO for over 2 years. The individual, who was born in Iran but is an Australian citizen, had been offered positions with both the Department of Defence and Department of Foreign Affairs and Trade. Both offers of employment were conditional upon him receiving a positive security assessment from ASIO. The period of time for a security assessment to be completed is usually 4 or 5 months.

With the pro bono assistance of the Centre, Maurice Blackburn, Julian Burnside QC and Rowena Orr of counsel, the individual commenced proceedings in the Federal Court seeking a writ in the nature of mandamus to compel ASIO to furnish a security assessment. After the proceedings were issued, ASIO decided to issue a positive but conditional security assessment, which allowed the individual to take up employment with the Department of Foreign Affairs and Trade. As a result, the proceedings against ASIO were discontinued.

*Ben Schokman is the DLA Phillips Fox Human Rights Lawyer*

## Seminars and Events

### Charters of Rights and Indigenous Rights: 25 Years of the Canadian Experience 1 November 2007

PILCH and La Trobe Law School are hosting a free public seminar to discuss the protections that Bills of Rights can offer for Indigenous people.

Guest speaker, Professor Brad Morse from the University of Ottawa Faculty of Law, will draw on a 25 year history of litigation under the *Canadian Charter of Rights & Freedoms* in which Aboriginal people have been directly and indirectly affected to discuss the relevance of such legislation for Victoria and Australia. Ron Merkel QC will provide a contextual introduction that will examine the rights implications of the recent Northern Territory intervention legislation.

Date: 6pm, Thursday 1 November 2007

Venue: Maddocks, Level 6, 140 William Street

RSVP essential by 29 November 2007 to Caroline Turnley on (03) 9225 6693 or [admin@pilch.org.au](mailto:admin@pilch.org.au).

### Castan Centre Annual Conference: Human Rights 2007 – The Year in Review 30 November 2007

The Castan's Centre's Annual Human Rights Conference will be held at the Malthouse Theatre from 9am – 4.45pm on Friday, 30 November 2007.

The conference theme for 2007 is 'Human Rights and the Environment' and will feature speakers including Martin Wagner (Managing Attorney of Earthjustice), Cam Walker (Friends of the Earth) and the Hon Judge Weeramantry (former President of the International Court of Justice). Keynote speakers will also discuss critical contemporary human rights issues and developments, including Indigenous rights, children's rights, prisoners' rights and the right to vote. For further information or to register, see <http://www.law.monash.edu.au/castancentre/events/2007/conf-07-gen-info.html>.

## Education, Training and Resources

### What's New on the HRLRC Website?

The following full-text articles, among others, have been posted to the Centre's website, [www.hrlrc.org.au](http://www.hrlrc.org.au), over the last month:

- David Brown, 'The Disenfranchisement of Prisoners: Roach v Electoral Commissioner & Anor - Modernity v Feudalism' (2007) 32 *Alternative Law Journal* 132
- David Guttman, 'Roach v Commonwealth: Is the Blanket Disenfranchisement of Convicted Prisoners Unconstitutional?' (2007) 29 *Sydney Law Review* 297
- Peter O'Donahoo and Peter Haig, 'High Court Strikes Down Commonwealth Legislation Disqualifying Prisoners from Voting', *Focus* (October 2007)

### 2007 Protecting Human Rights Conference

Papers and presentations from the 2007 Protecting Human Rights Conference are available at <http://cccs.law.unimelb.edu.au/index.cfm?objectid=8CBE15D9-1422-207C-BACDCBB595F4481B&flushcache=1&showdraft=1>.

## Human Rights and Visions of Equality

The British Institute of Human Rights has recently published its report on the 'Human Rights and Visions of Equality Conference'. Among other matters, the papers, key findings and recommendations contained in the report, discuss the importance of and strategies for:

- entrenching a human rights 'culture';
- improving public services through a 'human rights approach';
- empowering communities through participation in a human rights dialogue; and
- developing better social cohesion through close human rights partnerships between the public and community sectors.

The report is available at [http://www.bihhr.org/downloads/BIHR\\_Conference\\_Report.pdf](http://www.bihhr.org/downloads/BIHR_Conference_Report.pdf).

## George Bizos, *Odyssey to Freedom* (Random House, 2007)

In his Foreword to *Odyssey to Freedom*, Nelson Mandela describes George Bizos SC as a close friend, an advocate of 'integrity, great dedication and complete commitment' and a man whose 'contribution towards entrenching the human rights that lie at the heart of South Africa's constitutional values is impossible to overrate'. Reading Bizos' autobiography, *Odyssey to Freedom*, one could also add that Bizos is clearly a man of humility, courage, legal acumen and incisive intellect.

George Bizos fled to South Africa from his native Greece as the Nazis occupied his homeland in 1940-41. Bizos and Mandela met while law students at the University of Witwatersrand and began a personal, professional and political relationship that has endured for over 60 years. During that time, Bizos has been involved in many of the most significant political and human rights trials of the period; involvements that saw him conferred with the International Trial Lawyer of the Year Prize in 2001 and the Duma Nokwe Human Rights and Democracy Award in 2004.

Bizos commenced practice at the Johannesburg Bar in 1954, a time when advocates of the rule of law and fundamental human rights were persistently harassed by the apartheid regime, accused of being 'fellow travellers' with 'communists' and 'terrorists'. Bizos received some of his earliest briefs from Mandela & Tambo, many of which involved defending Black Africans against violations of the oppressive pass-laws. When Mandela himself, together with nine other leaders of the ANC, was charged with offences including sabotage and terrorism in 1963, offences punishable by death, Bizos was briefed together with Bram Fischer SC to appear for the defence. Infamously, the trial resulted in Mandela's conviction and sentence to life imprisonment on Robben Island, although the accused were all spared the death penalty. During the apartheid years, Bizos was also briefed to appear at the inquest into the death in custody of Black consciousness leader Steve Biko, the defence of leaders of the United Democratic Front against capital charges of treason, and the defence of leaders of the ANC's armed resistance movement, Umkhonto we Sizwe, against charges of sabotage, among many others.

As personal legal advisor to Mandela, Bizos played a critical role in South Africa's transformation to a constitutional democracy. In addition to acting as a 'conduit' between the ANC leaders imprisoned on Robben Island and those, such as Oliver Tambo and Joe Slovo, in exile, Bizos was appointed a member of the ANC's Legal and Constitutional Committee, playing what Mandela describes as an 'important role in our country's Bill of Rights as well as the shaping of its new constitution'. Critically, Bizos led the team which appeared before the newly formed Constitutional Court to argue, successfully, for the certification of what is regarded as one of the most progressive and transformative constitutions in the world.

Bizos has continued to contribute significantly to human rights and social justice in post-apartheid South and Southern Africa, appearing for the families of many murdered ANC and South African Communist Party activists before the Truth and Reconciliation Commission. He also led the team which successfully challenged the death penalty as incompatible with the rights to life and human dignity and the prohibition on cruel, inhuman or degrading treatment or punishment. Bizos describes this as the 'most significant case I have ever argued'. It has been described by legal academics as the 'cornerstone of the Constitutional Court's jurisprudence', marking 'a powerful indication of the court's intention to part ways from the old order' and affirming the supremacy of 'the rights to dignity, equality

and life'. In 2004, Bizos also led the team that successfully defended Morgan Tsvangiri, leader of the Zimbabwean opposition Movement for Democratic Change, against conspiring to assassinate President Robert Mugabe.

Bizos' life has, indeed, been an odyssey to freedom. This book is an extraordinary and compelling account of an extraordinary life. It is a book that speaks to the past, present and future. It is a warning against strict legal positivism and conservatism, evidence of the critical role of agitation and dissent to progress, and, perhaps most critically to our times, an affirmation of the importance of human rights as a bulwark against discrimination, oppression and executive excess.

*Odyssey to Freedom* is available from [www.kalahari.net](http://www.kalahari.net) and from [www.exclusivebooks.com](http://www.exclusivebooks.com).

*Philip Lynch is Director of the Human Rights Law Resource Centre*

## If I Were Attorney-General...

### Attending to Unfinished Business: Anti-Terrorism and Human Rights

If I were Attorney-General my first priority would be to attend to unfinished business – namely to address pressing matters of law reform which have been recommended by bi-partisan or independent bodies after a suitably consultative and deliberative process of review. This may seem an odd, rather mundane place to start work. However, while there is certainly a case for more sweeping structural reforms of the Australian legal and political system (among which I would include a judicial appointments commission and greater regulation of political donations and lobbyists), the reality is that law's effectiveness in the achievement of the goals which our society views as desirable – as well as its ability to guarantee the essential liberties of individuals – lies just as much in its detail as it does in the 'bigger picture'.

So, for instance, the Commonwealth Parliament has enacted over 45 laws dealing with terrorism since September 2001 but there are many elements in what has been produced which are problematic. This is probably not surprising in light of how much legislative activity has occurred over such a brief time in an area where we have had so little experience. But the flaws in these laws are not a mystery – many have been identified in a succession of parliamentary and other committee reports to which the present government has only offered the most minimal response. These reports require action.

In 2006 alone, three major reviews delivered reports which the government could have used to improve our anti-terrorism laws. One of these was the work of the Security Legislation Review Committee, chaired by former NSW Supreme Court Justice, Simon Sheller AO. The Committee's report highlighted a number of problems with the existing criminal offences relating to terrorism. For example, it recommended that the crime of 'association' with a terrorist organisation be repealed since it considered that this was not properly targeted to criminalise active support of a terrorist cell yet counter-productively fed feelings of alarm and mistrust in Australia's Muslim communities. Elsewhere in its report, the Sheller Committee suggested that the section criminalising the provision of 'training' to a terrorist organisation was unworkable and required urgent amendment. The Committee also expressed strong dissatisfaction over the current powers invested in the Attorney-General to ban organisations if he is of the view that they are 'terrorist' in character. None of these recommendations – many replicated by the Parliamentary Joint Committee on Intelligence and Security's mid-year report on the offence provisions – was accepted by the government.

Similarly, the very considered recommendations put forward by the Australian Law Reform Commission in its review of the revamped crime of sedition – a process undertaken by the Attorney-General as a sop to the objections of members of his own government to the introduction of these changes in 2005 – have lain dormant. This is despite the fact that some of the ALRC's recommendations would actually increase the scope of the offences – namely to deal with incitements to racial tension.

Of course there are some aspects of our current anti-terrorism law which require a more substantial reappraisal than offered to date by these processes. Some people would repeal the lot but this is not a view I share. However, I certainly think a case can be made for far greater constraints over many of the laws. Control orders, for example, can only be justified, if at all, as a deprivation of liberty upon those who have been previously convicted of a terrorism-related offence, much as similar orders may be applied to released sex offenders. Other powers, such as preventative detention orders, are, in my view, completely unwarranted – something reflected by the absence of anything comparable in other jurisdictions like Canada, New Zealand or the United Kingdom.

It is at this point, that attention to the specific necessarily requires a commitment to the larger issues. The defects and excesses of Australia's anti-terrorism laws largely stem from our lack of a commitment to human rights guarantees – either through a constitutional or statutory charter of rights. The beneficial impact of such an instrument upon the measures adopted to combat the threat of terrorism is clear from looking at what has transpired elsewhere. Worrying 'innovations' may still arise in those jurisdictions but they do so with a quality of scrutiny and debate sadly lacking here – and their final form is definitely more circumscribed than many of our new laws. It is just not the case that those nations with a formal instrument of rights protection are less safe than us – indeed the very opposite may be true.

So, the development of an Australian Charter of Rights must be a key goal. But in the meantime, there are plenty of steps – already publicly identified – which we can take to substantially improve the way in which our anti-terrorism laws protect us and protect our liberties.

*Dr Andrew Lynch is Director of the Terrorism and Law Project, Gilbert + Tobin Centre of Public Law, University of NSW*