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The Human Rights Law  
Resource Centre Ltd is a joint  
initiative of the Public Interest  
Law Clearing House (Vic) and  
Liberty Victoria.

The HRLRC aims to:

1. Contribute to the harmonisation of Australian law and policy with international human rights norms;
2. Support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and
3. Empower people that are disadvantaged or living in poverty by operating within a human rights framework.

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

OPINION

**Torturing Rights at Home and Abroad**

In the grand scheme of human rights law, some rights are more equal than others. Consider, for example, the right to life in art 6 of the *ICCPR*. The UN Human Rights Committee calls it the 'supreme right' from which no derogation is permissible. Nothing justifies a State's failure to guarantee it. Few human rights compare for gravity.

But at least one other does: the right to freedom from torture, or cruel, inhuman or degrading treatment or punishment contained in arts 7 and 10 of the *ICCPR* and elsewhere. In the Human Rights Committee's view, it admits of no restriction or limitation under any circumstances – not even in situations of public emergency. This is as emphatic a jurisprudential statement as it is possible to make. And rhetorically, no human right carries more force. Indeed, given the post-World War II environment that so profoundly informed the development of international human rights, freedom from torture and other heinous treatment is easily seen as the very reason that the concept of human rights exists at all.

Now consider three separate cases, each with a clear connection to Australia, and each of which concerns the treatment of detainees, that must surely call into question the extent to which a culture of human rights negligence has taken root in the Australian public consciousness.

In January 2002, David Hicks was captured fighting alongside the Taliban in Afghanistan and sent to Guantanamo Bay, Cuba, where he has been detained since. The details of the conditions of Hicks' detention are largely secret, and unsurprisingly therefore, contested.

On Hicks' version, he has been tortured: shackled, blindfolded, beaten severely with fists and rifle butts, and subject to anal penetration with objects. He has experienced eight months of solitary confinement, which an FBI agent at Guantanamo says has induced behaviour consistent with extreme psychological trauma in other detainees in a much shorter period. Hicks has considered suicide by smashing his skull against the walls of his cell. Today he remains in a cement room with little light for 22 hours per day.

There are, of course, governmental denials in Australia and the United States that Hicks has been tortured. But what we do know is that the US government has sought, and obtained, legal advice that Guantanamo Bay detainees were not subject to the

protections of the Geneva Convention, and that the infliction of pain of up to anything short of 'organ failure' was legal. We also know Defence Secretary Donald Rumsfeld has issued instructions for carrying out what is euphemistically called 'coercive interrogation'. Such measures were so controversial they were suspended for debate. Then restored. The UN Human Rights Committee and various UN Special Rapporteurs have labelled the treatment of Guantanamo detainees 'torture'.

This is why UN Secretary-General Kofi Annan called for the detention facility to be closed. Senior politicians in Britain, Germany and the European Parliament, as well as the UN Committee on Torture, have expressed similar sentiments. Former Guantanamo detainees claim that Hicks has suffered more than most. Whatever the truth of Hicks' experience, the signs are not encouraging.

Indeed, they were discouraging enough for almost every nation with citizens detained in Guantanamo, to demand their release. Almost. Unlike Britain, Saudi Arabia, or even Afghanistan, Australia has been almost mute. It has resolutely ignored expert condemnations of the Guantanamo detention facility, and the tribunal designed to try detainees away from the scrutiny of US courts and the rules of evidence. Certainly it has not protested their treatment. The Australian government has devoted far more energy to defending its inaction than remedying it.

Now, symbolically, Hicks is seeking a means of escape by claiming British citizenship.

Closer to home, 13 men are being detained at HM Barwon Prison in Melbourne awaiting trial for terrorism-related charges. According to their lawyers, here too, the detainees are being held in solitary confinement, and denied physical contact with their family.

In the course of a bail application for one detainee, Justice Osborn noted the 'seriously confined conditions...with very little access to the open air' where the detainee's 'opportunities for outside contact are materially limited.' Justice Osborn who had personally observed the conditions in question, stated judicially that 'these are not [conditions] in which ordinary Australians would expect any member of the public to be held on remand for extended periods of time when charged with no more than membership of an organisation.' Perhaps, but no one seems to have expressed

any alarm. Neither federal nor state governments have given any indication that this concerns them even slightly. And no one has asked.

Meanwhile, asylum seekers continue to be detained in remote centres conditions harsh enough to have contributed to several cases of sustained psychological damage and attempted suicide. The UN Human Rights Committee has specifically found that, in the cases that have come before it, this detention regime is a violation of art 7 of the *ICCPR*. Far from retreating from these arrangements, the Australian Government is now pushing a Bill that would export it; sending unauthorised arrivals on the Australian mainland to detention centres in Nauru while their applications are processed without the protection of judicial oversight.

Detention is an unpleasant, but often necessary business. It carries with it a degree of unavoidable harm. But this only serves to emphasise the necessary vigilance we must have to ensure that harm is limited only to what is necessary. This could not be said of any of these three cases.

None of the detainees discussed has been convicted of a crime. In the case of asylum seekers, no charges are even laid. Yet all have claims to having been denied their most fundamental of human rights. At best, their treatment can properly be called cruel, inhuman or degrading. At worst, it can, and in the case of Hicks has, been called torture. Australia's responses, federal, state and even public, taken collectively, make a mess of the *ICCPR*'s most inviolable provisions.

Why is this possible? How is it that the most rhetorically forceful of human rights has been rendered so rhetorically impotent? Perhaps it is that we apprehend these detainees, not as human, but as the embodiment of a threat. A threat – notwithstanding the absence of conviction – that permits us to violate the very principles we espouse. Yet these are precisely the circumstances where human rights assume heightened importance.

In the meantime, such people can have no human rights, because we refuse to see them as human.

*Waleed Aly is a secondee solicitor with the Human Rights Law Resource Centre*

## NEWS

### **Human Rights Law Resource Centre Receives Funding in Victorian State Budget**

'It is no good having a proper law without a proper lawyer,' said Jenny Park, a homeless woman, in her submission to the Inquiry of the Victorian Human Rights Consultation Committee. Consistent with this, the Committee acknowledged and recommended that the effective implementation and operation of the Victorian Charter of Human Rights and Responsibilities include the provision of access to appropriate advocacy and legal services.

The HRLRC very warmly welcomes the Bracks Labor Government's response to this recommendation by an allocation of funding of \$6.5 million over four years in the 2006/07 Budget. The HRLRC is particularly delighted that this includes funding of approximately \$100,000 per annum to 'support the HRLRC to assist their advocacy work in relation to disadvantaged Victorians'. This recognises both the important work of the HRLRC, and that access to human rights-focused legal services is a critical component of the right to equality before the law and access to justice which is, in turn, crucial to the promotion, protection and realisation of other human rights.

The 2006/07 Budget also provided funding for a range of other implementation initiatives associated with the Charter, including:

- A community education program run by the Equal Opportunity Commission;
- Human rights training for key government agencies and services, including Victoria Police and Corrections Victoria;
- A human rights unit to coordinate a 'whole of government' approach to implementation and operation of the Charter; and
- Resources to enable the Equal Opportunity Commission to monitor and report on human rights in Victoria.

### **UN Special Rapporteur on the Right to Adequate Housing to Visit Australia**

The UN Special Rapporteur on Adequate Housing ('SRAH'), Miloon Kothari, has been authorised by the Australian Government to undertake a country visit to Australia from 31 July – 15 August 2006.

The purpose of the visit is to examine and report on the status of realisation of the right to adequate housing and other related rights in Australia, with particular attention to aspects of gender equality and non-discrimination.

Through a process of dialogue and consultation with civil society and Australian governments, the SRAH will also seek to identify practical solutions and best practices in relation to the right to adequate housing.

The SRAH is an independent expert mandated by the UN Human Rights Council to investigate, monitor, research, report and advise on the realisation and violation of the right to adequate housing.

Following the SRAH's mission to Australia, he will report his findings and recommendations to the Australian Government and the UN Human Rights Council.

The SRAH is particularly interested in meeting with and gathering information from community members and organisations regarding:

- The general situation of housing and the process of realisation of housing rights;
- Access to adequate housing and related rights and services for specific groups, including:
  - women;
  - Indigenous peoples;
  - refugees;
  - migrants;
  - people with disabilities;
  - people living with HIV/AIDS;
  - people with mental health issues;
  - children and youth;
  - lesbian, gay, bisexual and transgender people;
  - people in rural and regional areas;
  - tenants;
  - boarders and lodgers;
  - prisoners;
  - single women;
  - victims of domestic violence; and
  - homeless persons;
- Issues related to evictions and security of tenure, including in the context of tenancy;

- The judicial system, including with respect to the legal recognition and protection of the right to housing, access to legal remedies, and existing measures related to housing and land;
- Forced evictions and related loss of life and property;
- The role and potential of the Human Rights and Equal Opportunity Commission regarding the right to adequate housing;
- The role of the civil society in monitoring, protecting and promoting the right to adequate housing and related rights; and
- The role of the UN, its agencies and programs in relation to housing rights in Australia.

The SRAH will seek to meet with community members and organisations in Sydney, Melbourne, Canberra, Brisbane, Darwin and Alice Springs. For further information about his visit and itinerary, contact his Research Associate, Alison Aggarwal, at [Alison\\_Aggarwal@fcl.fl.asn.au](mailto:Alison_Aggarwal@fcl.fl.asn.au).

For further information about the SRAH's mandate and work, visit [www.ohchr.org/english/issues/housing/index.htm](http://www.ohchr.org/english/issues/housing/index.htm).

### **Inaugural National Australia Bank Human Rights Law Scholarship Conferred**

The HRLRC is proud to announce that Peter Henley is the inaugural recipient of the National Australia Bank Human Rights Law Scholarship.

The annual Scholarship, which is funded by the NAB and conferred by the HRLRC, enables the recipient to undertake a unit of postgraduate study in the area of human rights and public interest law. This year, the Scholarship will cover the tuition fee for 'Issues in Public Interest Law' within the new Masters of Public Interest Law at La Trobe University. The subject will run in July/August 2006 and is currently accepting enrolments. For further information about the Public Interest Law Postgraduate Program at La Trobe, see [www.latrobe.edu.au/law/pubint/index.html](http://www.latrobe.edu.au/law/pubint/index.html)

Peter, who was chosen from an outstanding group of candidates, is a solicitor with Mallesons Stephen Jaques and a very active member of the Mallesons Human Rights Law Group. Peter was a member of the initial Reference Group, chaired by Chris Maxwell, responsible for the development of the Human

Rights Law Resource Centre proposal. Peter is now a very active and valuable member of the HRLRC Advisory Committee. Peter also represents the HRLRC on a number of external bodies, including the National Anti-Death Penalty Roundtable and the LIV Anti-Death Penalty Working Group.

In addition to being instrumentally involved in the establishment and operation of the HRLRC, Peter has also worked very closely with PILCH and Alexandra Richards QC on a Communication to the UN Human Rights Committee regarding the treatment and detention of Australia's longest standing asylum-seeker. This has included, among other aspects, an urgent injunction application in the Federal Court which resulted in the client being disembarked from a plane in Bahrain and returned to Australia.

The HRLRC congratulates Peter as a very deserving recipient of the inaugural NAB Human Rights Law Scholarship.

### **POLICY, ADVOCACY AND LAW REFORM**

#### **Same Sex – Same Entitlements: HREOC Inquiry into Discrimination against People in Same-Sex Relationships in relation to Financial and Work-Related Benefits**

In early June, the HRLRC made a submission to the Human Rights and Equal Opportunity Commission's inquiry into discrimination in access to financial and work-related benefits and entitlements for same-sex couples.

The HRLRC submission considered a range of domestic legislation conferring such benefits and entitlements in the light of international human rights jurisprudence, and expressed concern that these and other laws risk placing Australia in breach of its international human rights obligations. The submission focussed particularly on rights to non-discrimination under the *International Covenant on Civil and Political Rights* ('ICCPR'), the *Convention on the Rights of the Child* ('CRC'), the *Discrimination (Employment and Occupation) Convention* of the International Labor Organisation ('ILO 111'), and the *International Convention on Economic, Social and Cultural Rights* ('ICESCR').

The focus of the submission was to provide authoritative jurisprudence on the content of the human right to non-discrimination,

particularly in the *ICCPR*. Accordingly, more consideration in this submission was devoted to elucidating the content of that right, rather than identifying specific federal and state laws that are in breach of it.

The submission provides an overview of the jurisprudence in connection with the human right to non-discrimination specifically as it relates to same-sex relationships. It identified two levels of differential treatment which, unless instituted on reasonable and objective criteria, constituted violations of human rights:

1. Differential treatment of people in same-sex relationships and people in *de facto* heterosexual relationships; and
2. Differential treatment of people in same-sex relationships and people who are married.

The question of whether or not the second kind of differential treatment constitutes discrimination is more jurisprudentially complex than the first. The HRLRC submission analysed the relevant jurisprudence in detail and concluded that, especially in the absence of a same-sex analogue to marriage, such differentiation would be discriminatory unless justified on the basis of reasonable and objective criteria.

The submission also considers some domestic legislation concerning financial and work-related entitlements and benefits that, in the light of the human rights jurisprudence, risks breaching Australia's human rights obligations. Typically this revolves around the legislative definitions of terms like 'spouse' and 'partner', which are usually defined to include people in *de facto* heterosexual relationships, but not people in same-sex relationships, or are confined to marriage.

The submission concludes by recommending that the laws considered in the submission be amended to be aligned with Australia's human rights obligations, and suggests in general terms, some ways in which this may be achieved. Often, this may simply be a matter of amending legislative definitions so they are entirely gender neutral. However, other discriminatory provisions would require the recognition of a same-sex analogue to marriage, or the harmonisation of state and federal laws.

The submission is available at [www.pilch.org.au](http://www.pilch.org.au)

## **Time to Think Federally about Human Rights**

The progress of Victoria towards a *Charter of Human Rights and Responsibilities* has been heartening for those concerned about the passage of extreme anti-terrorism laws, the tabling of recent migration laws, and the proposal for a national smart-card. It comes as the ACT is celebrating the second anniversary of its *Human Rights Act 2004* and has aroused the interest of the Attorneys General of NSW, Western Australia and Tasmania, who have publicly stated their support for the enactment of similar legislation for their states.

There is also a push for federal legislation to protect human rights.

Last October New Matilda launched a campaign for a federal Human Rights Act. A fully drafted Human Rights Bill was prepared and released to the community via the website [www.humanrightsact.com.au](http://www.humanrightsact.com.au). Since then launches have been held in every capital city except Darwin and Melbourne (Darwin will take place in mid-July and Melbourne in mid-August).

The campaign has been accepting submissions on its draft Bill which it intends to refine and re-release. The initial aim of the campaign is to have a Human Rights Bill tabled and debated in the federal parliament as a Private Member's Bill before the end of 2006. We believe that this will raise the profile of human rights and help debunk the myths peddled by the federal government on the issue.

The campaign's draft Human Rights Bill was led by Associate Professor Spencer Zifcak of La Trobe University. It is based on the major international covenants and treaties which Australia has signed and ratified, principally the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

The model that has been adopted in the New Matilda Bill is similar to that in the UK's *Human Rights Act 1998* and aspects of the Victorian Charter. It requires human rights impact statements to be brought forward with all new legislation. It creates a Parliamentary Joint Standing Committee to take responsibility for human rights. It also envisages a role for the courts in interpreting legislation, so far as it is possible, in a manner consistent with human rights and, where this is not possible, issuing 'declarations of incompatibility'.

Such a declaration would not affect in anyway the validity of the provisions in question, as is the case of similar mechanisms in the UK and Victorian instruments, but it would be sent to the Attorney General who would have to table it in parliament with a response. This mechanism therefore would not transfer power from the parliament to the courts as the Prime Minister has asserted; rather it would strengthen the role of parliament by promoting robust and informed debate on human rights issues.

The campaign has deliberately chosen to canvas a range of options available for protecting rights, such as the appropriateness of including economic, social and cultural rights, as well as allowing courts to grant remedies. We welcome feedback on these issues and the draft Bill generally in the form of submissions.

The campaign also welcomes volunteers and donations. We are also looking for partner organisations to assist in collecting petitions and lobbying members of parliament in the second half of the year.

The draft Bill can be downloaded from: [www.humanrightsact.com.au](http://www.humanrightsact.com.au). For more information contact Nick Carney at [nicholas.carney@newmatilda.com](mailto:nicholas.carney@newmatilda.com) or on (02) 9211 1635.

*Nick Carney is the Executive Officer of New Matilda's Human Rights Act campaign.*

## CASEWORK

**Perovic v CW**, No CH 05/1046  
ACT Children's Court, Unreported (1 June 2006)

### Summary

This case concerned the right of a child to a fair trial without unreasonable delay under the *Human Rights Act 2004* (ACT). After considering jurisprudence from the European Court of Human Rights, the Magistrate held that there had been an unreasonable delay contrary to the human right enshrined in the Act and ordered a permanent stay of proceedings.

### Facts

This case involved the prosecution of a young person for a sexual offence alleged to have occurred in November 2004. The police investigation was substantially complete by December 2004 but charges were not laid until October 2005, and were due to be heard by the

Children's Court in March 2006. The young person's lawyer applied for a stay of proceedings due to the delay in prosecution citing, among other arguments, a breach of s 20(3) of the *Human Rights Act 2004* (ACT) which provides that 'a child must be brought to trial as quickly as possible.'

### Findings

Magistrate Somes found that the right of the young person to be brought to trial as quickly as possible had been breached. He considered that the unjustifiable delay in the prosecution had led to such injustice both to the young person and to the complainant, who was also a child, that it was appropriate to permanently stay the proceedings.

### Reasoning

Magistrate Somes commented on the distinction between the general right to a fair trial, which applies to adults, and the special rules which the legislature intended to apply to children involved in the criminal process. He cited the comments of Lord Bingham in the case of *Dwyer v Watson and another and K v HM Advocate* (2002) 3 WLR 1488 where he said:

...prejudice to the fairness of the trial altogether apart, delay has the highly undesirable result of prolonging the stress to which a vulnerable accused is inevitably subject and retarding the date at which his problems (if he has such) can be addressed and full counseling given to the young victims without the risk of tainting their evidence.

Magistrate Somes noted that value of comparative jurisprudence, particularly from the European Court of Human Rights, stating that such decisions are of particular benefit as more:

substantial consideration has been given to the concept of delay than has perhaps in other jurisdictions, especially in Australia, when delay involves a potential breach of the relevant charter of human rights in those jurisdictions.

His Honour referred, for example, to the decision of *Eckle v Germany* [1983] ECHR 8 in which the European Court of Human Rights held that the moment at which the 'clock starts running':

...may precede the trial and could be the 'date of arrest', the date when the person concerned was officially notified that he

would be prosecuted or the date when preliminary investigations were opened.

In considering the assessment of the period of delay, Magistrate Somes cited the test formulated by the European Court in *Philis v Greece* (No 2) [1997] ECHR 34 that:

the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and ... in particular the complexity of the case and the conduct of the applicant and of the relevant authorities.

He considered that the present case could not be regarded as complex, and that the investigation had finished by March 2005. The young person had not been in any way responsible for the delay. His Honour noted that the Informant had explained that she was engaged in a number of other tasks at the time, had been on leave at times, and later unwell, and had not put priority on this investigation, concentrating instead on what she regarded as more serious offences. The Magistrate commented that:

The authorities particularly from Strasburg make it clear that the absence of proper resources is not a valid reason for delay. The prosecuting authorities have a responsibility to ensure that all agencies are adequately supported so that proper consideration can be given to the expedition of criminal charges especially involving children...The requirements of the *Human Rights Act* in my view impose a very substantial onus on the investigating authorities to ensure that the child is brought before the court 'as quickly as possible.'

In the circumstances, Magistrate Somes found that the young person was not brought to trial as quickly as possible and that this amounted to a clear breach of the *Human Rights Act*. His Honour considered that injustice which would result from the breach of s 20(3) of the Act was such as to make it appropriate to stay the proceedings, and ordered that the proceedings be permanently stayed.

*Material for this case note was taken from the ACT Human Rights Act Research Project at <http://acthra.anu.edu.au/index.html>*

## SEMINARS AND EVENTS

### The Right of Indigenous Peoples to Self-Determination

On 1 August 2006, the HRLRC will present a seminar on 'The Right of Indigenous Peoples to Self-Determination and the Need for a Treaty in Australia'.

The keynote speaker will be Professor Larissa Behrendt, Professor of Law and Director of the Jumbunna Indigenous House of Learning at the University of Technology Sydney.

Further details will be posted closer to the date at [www.pilch.org.au](http://www.pilch.org.au) in 'What's New'.

### Human Rights in Australian Law and Courts

On 7 August 2006, the HRLRC will present a seminar on 'Human Rights in Domestic Law: Views from Australia and The Hague'.

The keynote speakers will be Justice Kenneth Keith (Judge, International Court of Justice) and Justice John Perry (Supreme Court of South Australia).

Further details will be posted closer to the date at [www.pilch.org.au](http://www.pilch.org.au) in 'What's New'.

## EDUCATION AND TRAINING

### Human Rights Law Resource Manual

The HRLRC is working with Allens Arthur Robinson, Blake Dawson Waldron and Mallesons Stephen Jaques, together with John Tobin (Melbourne University) and Rachel Doyle (Victorian Bar), to produce a comprehensive but accessible Human Rights Law Resource Manual.

The Manual will include chapters on:

- Introduction to Human Rights Law;
- Human Rights Implementation;
- Use of International Human Rights in Domestic Courts and Tribunals;
- The Victorian Charter of Human Rights and Responsibilities;
- International Human Rights Complaints, Monitoring and Reporting Mechanisms; and
- Running a Human Rights Campaign.

It is envisaged that the Manual will be published online and launched in or around September 2006.