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The Human Rights Law  
Resource Centre Ltd aims to:

1. Contribute to the harmonisation of Australian law and policy with international human rights norms.
2. Build 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.

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

Opinion

**Australian Government Must Get Serious About UN Human Rights Reporting**

The Australian Government recently signed the new *Convention on the Rights of Persons with Disabilities* in a ceremonial opening of the Convention on 30 March 2007 at the UN Headquarters in New York. This is a significant achievement for people with disability in Australia and globally, many of whom have been engaged in the development of the Convention over many years. The Australian Government is to be congratulated for its contribution to the development and signing of the Convention and for taking this important step in the development of international human rights law.

Sadly, however, the signing of the *Convention on the Rights of Persons with Disabilities* is one positive step amongst an accumulation of much reluctance on the part of the current Australian Government. Over the past 10 years, the Australian Government's engagement with the international human rights system has become increasingly unenthusiastic and reluctant. The Government has become particularly disdainful of the international human rights treaty monitoring system and of treaty body findings about the state of human rights in Australia.

Australia is party to the six core international human rights conventions, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention on the Elimination of all forms of Racial Discrimination* (CERD), the *Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW), the *Convention on the Rights of the Child* (CRC), and the *Convention Against Torture* (CAT). Each convention requires that the Government submit a periodic report on the state of human rights in Australia in relation to the specified convention (generally every 4-5 years). Government reports should include positive actions that have been taken in the reporting period and any challenges faced. When it comes to protecting human rights in Australia, the Australian Government's approach to engaging in this process has been, at best, one of reluctance and, at worst, dismissive and unwilling. For example, in 2000 following a damning review by the Committee on the Elimination of Racial Discrimination, the Government launched an unprecedented attack on the human rights treaty bodies and threatened to wind back Australia's engagement with the reporting system.

Since then, the Australian Government has played a key role in international deliberations about UN reform generally and human rights treaty reform specifically, including, in its own words 'vigorously promoting' the creation of the new *harmonized*

*guidelines on reporting under the international human rights treaties.* These guidelines reinforce that the reporting process is an opportunity to 'take stock of human rights protection... for the purpose of policy planning and implementation'.

Although the Australian Government states that it 'encourages universal adherence' to all the international human rights conventions, it appears to think that signing a human rights treaty sufficiently constitutes 'adherence'. Rather than seeing the reporting process as an opportunity to take stock of the state of human rights in Australia and identifying key areas in need of attention, the Government's recently released Draft Common Core Document demonstrates its continued disinclination to engage in any meaningful way with the human rights reporting process.

In late 2006 the Government released for public consultation its Draft Common Core Document, which incorporates its reports under both the ICCPR and ICESCR. Reports under these two Covenants were due to be submitted in mid 2005. As at April 2007 the Australian Government has not submitted either report.

Together with the *Universal Declaration on Human Rights*, the ICCPR and ICESCR form what is known as the International Bill of Human Rights. That these two periodic reports are due concurrently presents a significant opportunity to really take stock of the state of human rights in Australia. The Draft Core Document and the preparation of reports under ICCPR and ICESCR represents Australia's first opportunity to report under the new *harmonised guidelines* and streamlined processes for national reporting which they played a key role in promoting. It is also an opportunity to set an example for other States' reporting practices. The Draft Core Document was a great disappointment on both counts. It largely documents laws, policies and programs that have been introduced during the reporting period that have some, though at times vague, relationship to the articles of the Covenants. Ultimately, however, it fails to substantively engage with the human rights principles of the Covenants or an analysis of their implementation.

When the Core Document and the ICESCR and ICCPR reports have received ministerial signoff and are finally submitted, the UN committee for each Covenant will review them. This will be followed by, what is supposed to be, an open and constructive dialogue with representatives of the Government to discuss achievements and any challenges that have been experienced in achieving the full realisation of the rights in Australia.

Will the Government take the same positive approach to its reporting obligations under the ICCPR and the ICESCR as it has done with development of the *Convention on the Rights of People with Disabilities*? Importantly, is the Government's receptiveness to the human rights reporting process dependent on favourable committee reports? It remains to be seen.

*Annie Pettitt is a Member of the National Human Rights Network of the National Association of Community Legal Centres*

## News

### Australia Signs UN Convention on the Rights of Persons with Disabilities

On 30 March 2007, the Australian Government signed the Convention on the Rights of Persons with Disabilities at a signing ceremony at the UN headquarters in New York.

The Convention is the first ever binding international instrument concerned exclusively with disability rights. The purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms, for all persons with disability, and to promote respect for their inherent dignity. The Convention is intended to have both a practical and a symbolic effect by reducing the physical, attitudinal and social barriers that confront people with disability across the globe.

Article 3 sets out the general principles of the Convention. These include:

- Respect for inherent dignity and individual autonomy;
- Non-discrimination;
- Full effective participation in society;
- Respect for difference and acceptance of disability as part of human diversity and humanity;
- Equality of opportunity;

- Accessibility;
- Equality between men and women; and
- Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

In a joint statement issued by the Minister for Foreign Affairs, Alexander Downer MP, the Attorney-General, Philip Ruddock MP, and the Minister for Community Services, Mal Brough MP, Mr Downer said, 'I am particularly pleased that Australia is signing this treaty, given Australia's leadership role in its negotiation. Australians with disability now have a dedicated treaty to protect their rights. What makes this a particularly meaningful achievement is that representatives from the disability sector helped to shape and strengthen this treaty through their participation in Australian delegations at UN negotiations.

Australia's signature of the Convention was widely welcomed by disability advocates and organisations. Robert Farley, President of People with Disabilities ('PWD') said, 'this is a huge achievement for people with disability in Australia. Along with the wider disability community, we congratulate the Australian Government. The work begins now to translate the articles of the Convention into practical outcomes that will enhance the lives of all people with disability in Australia.' Mr Farley said that the process of participation in the development of the Convention had been a positive collaboration between government, NGOs and people with disability themselves. The delegations, comprising Australian Government officials and representatives of the disability sector and the Human Rights and Equal Opportunity Commission, participated in all eight sessions of the Ad Hoc Committee between 2002 and 2006.

Australia's signature of the Convention was also welcomed by the Human and Equal Opportunity Commission. 'I'm very proud and happy that Australia was among the first nations to sign this Convention,' said Human Rights Commissioner Graeme Innes AM. According to Commissioner Innes, who served as part of the Australian Government delegation which negotiated the Convention, the Convention adds to existing human rights laws by confirming once and for all that people with disability are entitled to the full range of human rights. 'It also provides clearer goals for governments throughout the world to work towards ensuring human rights in practice for people with disability,' he said.

Australia's signature of the Convention imposes an obligation of good faith under international law to act in accordance with the Convention, including through reviewing laws and government programs. The next steps will be for Australia to ratify, or formally become party to, the Convention, and to then incorporate the terms of the Convention in Australian domestic law.

For further information about the Convention, see Rosemary Kayess and Ben Fogarty, 'The Rights and Dignity of Persons with Disabilities: A United Nations Convention' (2007) 32 *Alternative Law Journal* 22. *Lisa Mortimer is a volunteer law student with the Human Rights Law Resource Centre*

### **Labor Commits to National Inquiry on a Charter of Human Rights**

The Federal Opposition has committed to a national inquiry into the promotion and protection of human rights in Australia.

Speaking at Labor's National Conference, Shadow Attorney General Senator Joe Ludwig committed a Labor Government to holding a full public inquiry into how best to protect the civil and political rights and freedoms of Australians. Senator Ludwig stated that, 'to move forward on the recognition of fundamental human rights, we must reach beyond party politics for a process that will be embraced by all Australians'.

In 2006, a similar inquiry in Victoria led to the enactment of the Victorian *Charter of Human Rights and Responsibilities*, with over 90 per cent of Victorians supporting the comprehensive legislative protection of civil and political human rights. The Tasmanian Law Reform Institute is currently inquiring into the need for a Tasmanian Charter of Rights on reference from the Tasmanian Government.

## Victorian Charter of Rights Developments

### The Meaning of 'Public Authority' under the *Human Rights Act 1998* (UK)

The House of Lords and House of Commons Joint Committee on Human Rights ('Joint Committee') has recently published a report regarding the meaning of 'public authority' under the *Human Rights Act 1998* (UK). Pursuant to s 32(2) of the Victorian *Charter of Human Rights and Responsibilities*, which provides that international and comparative human rights jurisprudence may be relevant to the interpretation and application of the Charter, this report may assist in the elucidation of the meaning of 'public authority' under s 4 of the Charter.

Like s 38(1) of the Victorian Charter, s 6(1) of the UK *Human Rights Act* makes it unlawful for a 'public authority' to act in a way which is incompatible with human rights. Section 6(3)(b) of the Act defines a public authority to include 'any person certain of whose functions are functions of a public nature'. Unlike the Victorian Charter, however, which enumerates a number of factors that may be taken into account to determine whether functions are of a 'public nature' (most of which are derived from UK caselaw), the UK Act contains no further definition of 'public authority'. The meaning of 'public authority' has therefore largely been developed through judicial interpretation.

The Joint Committee is highly critical of the restrictive approach that the UK courts, particularly the Court of Appeal in *Leonard Cheshire* [2002] EWCA Civ 366, have taken to the meaning of 'public authority'. This approach has prevailed notwithstanding, firstly, the House of Lords view that there should be a 'generously wide' interpretation of 'public authority' and 'functions of a public nature' so as to further the statutory aim of promoting human rights and remedying human rights breaches (*Aston Cantlow v Wallbank* [2003] 3 WLR 283) and, secondly, that in the course of parliamentary debates on the Act, the Home Secretary and the Lord Chancellor, 'made it clear that persons or bodies delivering privatised or contracted-out public services were intended to be brought within the scope of the Act by the "public function" provision'.

The Joint Committee states that:

In a series of cases our domestic courts have adopted a more restrictive interpretation of the meaning of public authority, potentially depriving numerous, often vulnerable people...from the human rights protection afforded by the Act. We consider that this is a problem of great importance, which is seriously at odds with the express intention that the Act would help to establish a widespread and deeply rooted culture of human rights in the UK.

The Joint Committee continues, stating,

In an environment where many services previously delivered by public authorities are being privatised or contracted out to private suppliers, the law is out of step with reality. The implications of the narrow interpretation...are particularly acute for a range of particularly vulnerable people in society, including elderly people in private care homes, people in housing association accommodation, and children outside the maintained education sector, or in receipt of children's services provided by private or voluntary sector bodies.

The Joint Committee considers that this problem has arisen largely due to a judicial approach favouring an 'institutional' rather than 'functional' analysis of 'functions of a public nature', stating,

Effectively, the protection of human rights is dependent not on the type of power being exercised, nor on its capacity to interfere with human rights, but on the relatively arbitrary criterion of the body's administrative links with institutions of State.

This is contrasted with other human rights legislation, such as the Equality Act (Sexual Orientation) Regulations 2006 which establishes that religious providers of functions relating to 'any form of social security, healthcare, any form of social protection or any form of social advantage' cannot be exempted from the application of anti-discrimination law on the ground of sexual orientation.

Calling for 'urgent action', the Joint Committee makes a range of recommendations to bring about a solution, including that:

- The Government enact an interpretative statute which provides that, for the purpose of s 6(3)(b) of the Act, a function of a public nature includes a function performed pursuant to a contract or other arrangement with a public authority which is under a duty to perform the function;

- The Government and 'pure' public authorities include clear terms which incorporate human rights obligations in contracts with private sector bodies to provide public services;
- The Government continue to intervene in litigation to promote a wide and flexible interpretation of 'public authority' and 'public functions' (with the Joint Committee noting with approval that the Government is currently intervening in an appeal before the House of Lords regarding the meaning of public authority); and
- The Government promote the view, which is supported by strong evidence, that the application of the Act to private sector bodies providing public services will not only benefit service users but could also lead to positive benefits for service providers in relation to the efficiency and effectiveness of their operating and decision making processes.

The Committee further concludes that, without such urgent action, many people, particularly vulnerable people, are deprived of their right to an effective remedy for any violation of their human rights and that the Act will continue to fall short of its aims of 'bringing rights home' to the UK.

The full text of the Report, together with other reports of the Joint Committee, is available at <http://www.publications.parliament.uk/pa/jt/jtrights.htm>.

## Casenotes

### UK Court of Appeal considers Presumption of Innocence and Principle that Legislation be Interpreted Consistently with Human Rights

*Keogh v R* [2007] EWCA Crim 528

The UK Court of Appeal has recently held that the requirement under the *Human Rights Act 1998* (UK) that, so far as it is possible to do so, legislation be interpreted and applied compatibly with human rights required that legislation which, on its natural meaning imposed a burden on defendants to establish their innocence, be read in such a way as to impose this substantive obligation on the prosecution.

#### Background

The appellant, a Crown servant, acquired possession of a highly confidential record of a meeting between the British Prime Minister and the President of the United States in relation to UK and US policy in Iraq. The discussions concerned current political, diplomatic and defence issues of a highly sensitive nature. The document subsequently found its way into the possession of a Labour Member of Parliament.

The appellant was charged with breaches of ss 2 and 3 of the *Official Secrets Act 1989* (UK), which make it an offence to make a damaging disclosure of information, documents or articles relating to defence or international relations without lawful authority. The Act provides that it is a defence to prove that, at the time of the alleged offence, the person did not know, or had no reasonable cause to believe, that disclosure of the information would be damaging.

#### The Issue

Article 6 of the *European Convention on Human Rights* provides, relevantly, that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. The issues for the Court of Appeal to consider were:

1. whether ss 2 and 3 of the Act, on their natural meaning, reversed the legal burden of proof in respect of the mental element of the offence in a way that was incompatible with art 6; and
2. if so, whether pursuant to s 3(1) of the *Human Rights Act 1998* (UK), the sections could be read and given effect to in a way which was compatible with art 6.

#### Trial Judge Decision

The Trial Judge concluded that ss 2 and 3 created offences of strict liability, to which any defence would be closely linked with the defendant's state of mind. His Honour held that such an infringement on the presumption of innocence was justifiable. His Honour reasoned that it would be too onerous a task for the prosecutor to disprove, beyond reasonable doubt, that the accused did know or believe that the

disclosure of the document would be damaging and that it was reasonable to require the accused to prove his own state of mind.

### **Right to Presumption of Innocence**

The Court of Appeal noted that to require a defendant to prove anything, positive or negative, in order to establish that he is not guilty prima facies conflicts with the presumption of innocence required by art 6. However, their Honours also noted that to interpret art 6 in this way would potentially conflict in some areas with the requirements of an effective criminal law. Their Honours considered three cases on this issue:

- In *R v Lambert* [2002] 2 AC 545, the House of Lords looked at whether it would be compatible with art 6 to interpret provisions of the *Misuse of Drugs Act 1971* (UK) as imposing on the defendant the burden of proving that he was unaware that the contents of a bag in his possession were prohibited drugs. The House of Lords held that the burden was incompatible with art 6, but expressed the view that the right to be presumed innocent is not absolute and that a departure from the presumption may be justifiable in certain circumstances having regard to the aim and proportionality of the limitation.
- In *R v Johnstone* [2003] 1 WLR 1736, the House of Lords held that a reverse burden of proof imposed by the *Trade Marks Act 1994* (UK) was compatible with art 6. The House of Lords noted that any derogation from the right to be presumed innocent required justification and that the more serious the punishment which may flow from conviction, the more compelling the reasons must be.
- In *Sheldrake v DPP* [2004] UKHL 43, Lord Bingham noted that the 'task of the Court is never to decide whether the reverse burden should be placed on a defendant, but always to assess whether a burden enacted by Parliament unjustifiably infringes the presumption of innocence'.

### **Court of Appeal Decision**

In overturning the Trial Judge's decision, the Court of Appeal determined that the critical ingredient of an offence under ss 2 and 3 of the Act is the appellant's state of mind at the time of intentional disclosure. Their Honours observed that if the onus of proof were placed on the appellant, he would be required to disprove a substantial ingredient of the offence and this would constitute a disproportionate and unjustifiable infringement on the presumption of innocence.

Their Honours concluded that the reverse burden of proof is not a necessary element in the effective operation of ss 2 and 3 and that, therefore, placing such a burden on the appellant cannot be justified. The Court of Appeal therefore held that, pursuant to s 3(1) of the *Human Rights Act 1998*, the provisions should be 'read down' and interpreted and applied to the effect that, 'if the person adduces evidence which is sufficient to raise an issue with respect to the matter the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not'. The Court of Appeal noted support for this approach from the House of Lords which, in *R v Director of Public Prosecutions (ex parte Kebilene)* [2000] 2 AC 326, was required to consider a similar reverse onus provision in the *Terrorism Act 2000* (UK).

### **What Might this Mean for the Victorian Charter?**

Section 32(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides that the judgments of foreign courts may be considered when interpreting statutory provisions.

It is likely that the Court of Appeal's reasoning in *Keogh* will therefore be considered by Victorian courts and tribunals when interpreting s 25(1) of the Charter, which provides for rights in respect of criminal proceedings, in determining in what circumstances it may be justifiable to derogate from the right to be presumed innocent until proved guilty according to law.

It is also notable that the decision in *Keogh* supports a robust approach to the interpretative principle enshrined in s 32(1) of the Charter which requires that, 'so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'. The approach in *Keogh*, which follows the approach of the House of Lords in cases such as *Ghaidan v Godin-Mendoza* [2004] AC 557, supports an approach that, subject to not unduly 'straining' the meaning and purpose of legislation, s 32 may involve the 'reading down' of express provisions and also the implication (or 'reading in') of provisions to ensure human rights compatibility.

The full text decision is available at <http://www.bailii.org/ew/cases/EWCA/Crim/2007/528.html>.

*Romy Weisfelt* is a volunteer lawyer with the Human Rights Law Resource Centre

### European Court Considers Circumstances in which Prison Conditions Violate Right to Freedom from Cruel Treatment or Punishment

In a series of recent cases, the European Court of Human Rights has found conditions of detention in prisons to be incompatible with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment enshrined in art 3 of the European Convention on Human Rights.

A number of principles can be ascertained from the cases of *Andrey Frolov v Russia* (Application No 205/02, 29 March 2007), *Istratii and others v Moldova* (Application No 8721/05, 27 March 2007) and *Todor Todorov v Bulgaria* (Application No 50765/99, 5 April 2007), including that:

- Ill-treatment must attain a minimum level of severity if it is to fall within the scope of art 3. The assessment of this minimum level is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.
- Both individually and collectively, the following conditions, among others, may violate art 3: overcrowding, insufficient opportunity for outdoor exercise, inadequate lighting, inadequate ventilation, insufficient or poor quality food, limited access to natural light and insufficient sanitary conditions.
- Although the purpose of such treatment is a factor to be taken into account, in particular whether it was intended to humiliate or debase the victim, the absence of any such purpose does not inevitably lead to a finding that there has been no violation of art 3. It is not necessary for a detainee alleging a violation to establish that the responsible authorities had any intention to cause humiliation, debasement or distress; it is sufficient that the detainee is forced to live in conditions which cause distress or hardship of an intensity exceeding that which is a necessary incident of deprivation of liberty.
- Irrespective of the reasons for oppressive or unsanitary conditions of detention, it is incumbent on the state to organise its penitentiary system in such a way as to ensure respect for the dignity of detainees, regardless of financial or logistical difficulties.
- The state has a positive obligation to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance. Failure to provide adequate and necessary medical assistance may amount to a violation of art 3.
- All prisoners have a right to conditions of detention which are compatible with human dignity, which do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and which adequately secure their health and well-being.

All of the decisions are available from 'HUDOC', a database of the case-law of the European Convention on Human Rights at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>.

### Collection and Monitoring of Employees' Communications may Violate Right to Privacy

*Copland v United Kingdom*, European Court of Human Rights, Application No 62617/00 (3 April 2007)

The European Court of Human Rights has held that a public college which monitored an employee's telephone, email and internet usage without her knowledge engaged in conduct amounting to an interference with her right to respect for private life and correspondence within the meaning of art 8 of the European Convention.

The Court considered that telephone calls, emails and internet usage at business premises are prima facie covered by the terms 'private life' and 'correspondence' for the purposes of art 8. In the present case, the college did not give the employee any warning that her calls, emails or internet usage would be liable to monitoring. Nor did the college have a policy on such monitoring. The Court therefore held that she had a reasonable expectation as to the privacy of communications. This right to privacy was further considered to extend not only to prima facie prohibit actual monitoring, but to also prohibit 'the

use of information relating to the date and length of telephone conversations and in particular the numbers dialled...as such information constitutes an “integral element of the communications made by telephone”. The Court held that:

The mere fact that these data may have been legitimately obtained by the College, in the form of telephone bills, is no bar to finding an interference with rights guaranteed under art 8. Moreover, storing of personal data relating to the private life of an individual also falls within the application of art 8. Thus, it is irrelevant that the data held by the college were not disclosed or used against the applicant in disciplinary or other proceedings.

Article 8 of the European Convention requires that any interference with the right to privacy must be ‘in accordance with the law’ and ‘necessary in a democratic society’ having regard to a number of factors. In the present case, the monitoring of correspondence was not ‘authorised by law’ (which requires not only a consideration of whether a law permits the interference but also the ‘quality’ and clarity of that law) so it was therefore unnecessary for the Court to consider whether the interference was ‘necessary in a democratic society’.

The right to privacy is enshrined in the Victorian Charter of Human Rights at s 12 which provides that ‘a person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with’. An analogous case in Victoria would therefore presumably similarly involve a consideration not only of whether the monitoring of communications was ‘lawful’ (or ‘in accordance with law’) but also whether it was reasonable, necessary and proportionate (and therefore not ‘arbitrary’).

The full-text decision is available from ‘HUDOC’, a database of the case-law of the European Convention on Human Rights, at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>.

## **HRLRC Policy, Advocacy and Law Reform**

### **Centre Gives Evidence to Parliamentary Committee on Treaties regarding Human Rights Issues arising from Australia-Indonesia Security Agreement**

On 26 March 2007, Minter Ellison secondee solicitor Mat Tinkler appeared on behalf of the Centre to give evidence before the Joint Standing Committee on Treaties at Parliament House in Canberra. The hearing was the second of three by the Committee in relation to its inquiry into the Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation (Treaty).

The Treaty provides a framework for security cooperation between Australia and Indonesia, including provisions on defence, law enforcement, counter-terrorism, intelligence, maritime security, aviation safety and security, proliferation of weapons of mass destruction, emergency cooperation and cooperation in international organisations on security-related issues.

Members present at the hearing included Senators Bartlett, Ian Macdonald, McGauran, Trood and Wortley and MPs Dick Adams, Dr Andrew Southcott and Kim Wilkie.

The Centre made an opening statement to the Committee which focused on the four key areas of its earlier submission to the Inquiry, and recommended that:

1. The Treaty should include a preambular recognition that Australia and Indonesia are signatories to key international human rights covenants and, consistent with the obligations under those covenants and the UN Charter, the Treaty should be interpreted so as to promote universal respect for, and observance of, human rights and freedoms. The Centre criticised the evidence provided to the Inquiry by the Department of Foreign Affairs and Trade which placed great emphasis on Australia’s commitment to human rights and encouragement of a human rights awareness and accountability in Indonesia, notwithstanding that Treaty itself is entirely devoid of any mention of human rights.
2. In addition to preambular recognition, the Treaty should include the promotion, encouragement and respect for human rights as a fundamental principal. The Centre expressed deep concern with the apparent emphasis on principles of sovereignty and territorial integrity in the Treaty, seemingly at the expense of human rights protections, and recommended that clauses be inserted to redress this imbalance.

3. The Treaty should be amended to include an article that specifically provides for circumstances in which security cooperation may be refused where the human rights of an individual are threatened. The Centre cited the case of the Bali Nine as unambiguous proof that, without human rights protections in relation to informal intelligence sharing between Australia and Indonesia, the fundamental human rights of Australian citizens are at risk. The Centre recommended the inclusion of an absolute prohibition of intelligence sharing when it is foreseeable that the death penalty may result.
4. Clause 3 of Article 2 of the Treaty, which arguably created a prohibition on Australia from supporting lawful acts of political communication, should be deleted. This Clause was viewed by the Centre as an attempt to stymie legitimate public debate regarding the fate of particularly vulnerable groups in Indonesia, including West Papuans. The Centre submitted that the Clause was vague, ambiguous, arguably in violation of international law and binding upon Australia to refrain from raising legitimate concerns about human rights abuses in Indonesian territory.

The Centre then fielded several questions from Kym Wilkie and Senators Wortley, Bartlett and Toobell which focused on the most controversial aspect of the Treaty, Clause 3 of Article 2, and the Centre's submission that the Clause is offensive to human rights principles and should be deleted.

The Committee is due to report on the treaty later this year. For a full copy of the transcript of the hearing, visit <http://www.aph.gov.au/hansard/joint/committee/J10147.pdf>. The Centre acknowledges the generous support of Minter Ellison in making the appearance possible.

*Mat Tinkler is on secondment from Minter Ellison to the Public Interest Law Clearing House (Vic)*

## HRLRC Casework

### **Nystrom v Australia: Complaint to UN Human Rights Committee over Deportation of Permanent Resident**

As reported in Edition 10 of this Bulletin, the Centre acts for Stefan Nystrom, Britt Nystrom and Annette Turner. Stefan Nystrom was born in 1973 and, until very recently, had lived permanently in Australia since he was 27 days old. He is a Swedish citizen but has no relevant ties to Sweden or any State other than Australia.

On 22 December 2006, the Centre submitted to the Human Rights Committee a Request for Urgent Interim Measures in relation to the imminent deportation that was then faced by Mr Nystrom. That request was denied by the Special Rapporteur on New Communications and Interim Measures and Mr Nystrom was deported from Australia to Sweden on 29 December 2006.

In our initial request, we foreshadowed that we would submit a more detailed form of individual communication for the consideration of the Human Rights Committee. The detailed Individual Communication, which was submitted on 4 April 2007, alleges that Mr Nystrom's detention and deportation were in violation of articles 9, 12(4), 14(7), 17 and 23 of the ICCPR. The Communication seeks reinstatement of permanent residency and payment of compensation in respect of these alleged violations.

The Centre was provided with considerable and expert pro bono assistance in this matter by Brian Walters SC and Michael Kingston of Counsel, together with a leading Australian law firm.

Both the Request for Urgent Interim Measures and the detailed Individual Communication are available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under 'Legal Briefs'.

### **The Human Rights of Women in Prison**

In 2005, the Victorian Council of Social Service ('VCOSS') and the Federation of Community Legal Centres ('Federation') compiled a report on the issue of systemic discrimination against women in prison in Victoria. The report raised significant concerns about such fundamental human rights issues as: access to health care; strip searches; the detention of low security prisoners in high security facilities; oppressive disciplinary regimes; restrictive visitations; limited access to educational and employment programs; and the significant overrepresentation of Indigenous women and women from cultural, ethnic and religious minorities. A copy of the report is available at <http://www.sistersinside.com.au/media/VICComplaint.pdf>.

The Centre, together with Blake Dawson Waldron, is now working with VCOSS and the Federation to investigate the legal and strategic merits of potential avenues of redress in relation to the human rights breaches alleged.

At a domestic level, such redress may be available through a representative complaint under s 104 of the *Equal Opportunity Act 1995* (Vic) or, alternatively, pursuant to proceedings under the Victorian *Charter of Human Rights and Responsibilities 2006*.

At an international level, many of the allegations raised arguably fall within the jurisdiction of the UN Human Rights Committee pursuant to the *First Optional Protocol to the ICCPR* and also that of various Special Procedures of the UN Human Rights Council, including the Working Group on Arbitrary Detention, the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment, and the Special Rapporteur on Violence against Women.

## Seminars and Events

### 'Killings and the UN: The Strengths and Weaknesses of UN Human Rights Monitoring' with Professor Philip Alston – 14 May

In this lecture, Professor Philip Alston will reflect on his experience and expertise as a member of a UN human rights treaty body and, more recently, as the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, to discuss the efficacy of international human rights monitoring.

Prof Alston is a globally renowned international human rights lawyer and the Director of the Center for Human Rights and Global Justice at New York University.

During his distinguished human rights career, Prof Alston has been Chair of the UN Committee on Economic, Social and Cultural Rights and was instrumentally involved in drafting the Convention on the Rights of the Child. Prof Alston has also worked with the International Labour Organisation, UNICEF, UNESCO, the Office of the UN High Commissioner for Human Rights and the UN Development Program.

The lecture will be followed by a public discussion between Prof Alston and **Professor Tim McCormack**, the Australian Red Cross Professor of International Humanitarian Law at the Melbourne Law School. Prof McCormack is also Director of the Asia-Pacific Centre for Military Law.

Time: 5.45 for 6.00pm, Monday 14 May

Venue: Clayton Utz  
Level 18, 333 Collins Street

Cost: \$20 / \$10 concession

RSVP: Use Booking Form available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under 'Seminars and Events'

### Other Forthcoming HRLRC Seminars

The HRLRC is pleased to announce the following further seminars as part of its 2007 Human Rights Seminar Series:

- 8 August – Professor Claudio Grossman, UN Committee Against Torture
- 13 August – Gareth Evans AO QC, President, International Crisis Group
- 15 August – Lord Robert Walker, UK House of Lords

Further details will be available closer to each date.

### The Right to Humane Treatment in Detention: How do Victorian Prisons Rate? – 17 May

This seminar, jointly presented by PILCH and the Federation of Community Legal Centres, will consider the right to humane treatment in detention in a Victorian prison context.

Speakers include Brian Walters SC (immediate past-President of Liberty Victoria), Amanda George (Federation of Community Legal Centres) and Beth Midgley and Cecilia Riebl (Blake Dawson Waldron).

Time: 5.45 – 7.45pm, Thursday 17 May 2007

Venue: Blake Dawson Waldron  
Level 39, 101 Collins Street  
Cost: Gold coin  
RSVP: By 4 May on (03) 9225 6680 or [marlena.pitrone@vicbar.com.au](mailto:marlena.pitrone@vicbar.com.au)

### 2007 LIV Victorian Charter of Human Rights Conference – 18 May

The Law Institute of Victoria is presenting a major conference on the Victorian *Charter of Human Rights and Responsibilities* on 18 May 2007.

Topics to be covered include:

- The meaning of the Charter for administrative and judicial review
- Remedies and limitations under the Charter
- Human rights responsibilities of 'public authorities' under the Charter
- The impact of the Charter on public interest litigation
- Using the Charter to empower disadvantaged groups
- The impact of the Charter on criminal law
- The impact of the Charter on corporations
- The role of the Victorian Equal Opportunity and Human Rights Commission under the Charter

For further information, call (03) 9521 5044 or see <http://www.cpd.liv.asn.au/categories.asp?cID=6> or [http://www.cpd.liv.asn.au/downloads/2007\\_Brochures/CharterOfRights\\_conference2007.web.pdf](http://www.cpd.liv.asn.au/downloads/2007_Brochures/CharterOfRights_conference2007.web.pdf).

### Symposium on Law & Liberty in the War on Terror – 4-6 July 2007

The Gilbert + Tobin Centre of Public Law is convening a major symposium on the challenges that responding to the threat of terrorism presents to the rule of law. Since 11 September 2001, governments across the world have developed a range of new laws as a key component of their efforts to combat terrorism. The symposium will bring together experts from Australia, Canada, the United Kingdom and the United States to provide in-depth analysis of these laws and debate the complex issues raised by them, such as torture, freedom of speech and detention without trial.

The symposium will be addressed by leading practitioners, government lawyers, politicians, journalists, judges, and legal, political science and media academics. The speakers participating include Hon Sir Gerard Brennan AC KBE, The Hon Duncan Kerr SC MP, Lex Lasry QC, Geoff McDonald, Senator Marise Payne, The Hon Philip Ruddock MP and Justice Margaret White.

*Law and Liberty in the War on Terror* will be held in Sydney on 4 – 6 July 2007 at the University of New South Wales. A symposium dinner will be held at New South Wales Parliament House on Wednesday, 4 July, with special guest speaker Sir Gerard Brennan AC KBE, former Chief Justice of Australia.

For further details visit [www.llwt.unsw.edu.au](http://www.llwt.unsw.edu.au).

## Education, Training and Resources

### New Database on Economic, Social and Cultural Rights related Jurisprudence

The ESCR-Net Caselaw Database ('ESCR Database') is an excellent resource on economic, social and cultural rights (ESCR) jurisprudence and caselaw from around the world.

The Database currently includes about 70 ESCR-related cases, including decisions of decisions of courts, administrative tribunals, international judicial and quasi-judicial bodies, review bodies of international financial institutions, national human rights institutions and other legal entities. Cases are selected for inclusion by reference to: the binding force of decision; the level of the court/decision-making body; the nature of the decision; the significance of the case for ESCR advocacy; precedent value; the nature of the order; and the possible uses of the decision by advocates in other countries.

Each caselaw entry includes:

- The title of the case

- The country where the case was decided or to which the decision applies
- The forum that decided the case and date of the release of the decision
- The nature of case
- A summary of the case focusing on what the court decided or the order issued
- Outcomes of the case, including issues of enforcement
- General information on the groups involved on the case
- Commentary on the significance of the case for ESC rights advocates and claimants.

The majority of case entries also include relevant legal documents, such as the judgments, legal briefs or copies of orders.

The ESCR Database also includes a compilation of secondary literature on ESCR cases and jurisprudence.

The ESCR Database is a very useful and accessible tool which aims to encourage the use of legal strategies as valid and effective means for claiming economic, social and cultural rights.

The ESCR Database is available at <http://www.escr-net.org/caselaw/>.

## Human Rights Law Jobs

### Executive Director of Public Interest Law Clearing House (Vic)

PILCH is a leading Victorian, not-for-profit organisation in the legal sector, which is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education.

With the departure of the current ED (to further her studies), an exciting opportunity exists to join this highly regarded organisation. Reporting to the Board of Directors, you will be responsible for leading the strategic direction of PILCH by maintaining and enhancing the position of the organisation at the forefront of pro bono and public interest lawyering in Australia. Your key responsibilities will include: developing strong relationships with key stakeholders of PILCH, driving fundraising activities, developing innovative pro bono projects, leading public policy debates and managing all key operational aspects of the organisation, including high level human resources and financial accountability.

You will be someone who is an original and innovative thinker, highly motivated and dynamic, and committed to PILCH's mission and values. You will be able to strategically plan for the future and implement the plan, manage the organisation according to the highest standards of corporate governance, have advanced stakeholder management skills, and lead a high performing team. Further, you will have the ability to hold a legal practising certificate and have an excellent understanding of the legal profession, the access to justice sector, and the pro bono sector in Victoria and Australia.

This is an exciting opportunity for someone interested in making a positive difference to the community. Interested applicants should visit [www.pilch.org.au](http://www.pilch.org.au) for an information package. Please direct inquiries about the position to Paula O'Brien at PILCH on 9225 6681.

### Coordinator of Refugee Advice + Casework Service

The Refugee Advice and Casework Service (Australia) is a community legal service specialising in the provision of legal advice and assistance to people seeking refugee status in Australia. While the organisation is based in Sydney, it also operates in other states on an occasional basis.

The Coordinator is responsible for the management of the organisation, including:

- recruitment, appointment and management of staff and volunteers;
- community relations, public policy engagement and networking;
- the Immigration Advice and Application Assistance Scheme (IAAAS) contract with DIAC and future tenders;
- financial management of the organisation;
- fundraising and corporate relationships;

- development of RACS' information systems;
- compliance with corporate and legal responsibilities;
- organisation of regular evening advice and telephone advice clinics;
- the Refugee Family Reunion Project (RFRP); and
- RACS' continuing professional development and training programs.

The Coordinator is responsible to the Management Committee and reports to it on a monthly basis.

The position is full time. The salary range is up to \$57,998, or up to an equivalent of \$63,000 with superannuation salary sacrificing benefits. The terms and conditions of employment are as per the Social and Community Services (State) Consolidated Award and the Employment Practices as defined by the Management Committee.

A review will be conducted after an initial probationary period of 3 months. A further review will be conducted 12 months from the date of commencement of employment with RACS, and annually thereafter, subject to renewal of appointment.

For further information contact Christian Carney on (02) 9211 4001 or e-mail [admin@racs.org.au](mailto:admin@racs.org.au) or see [www.racs.org.au](http://www.racs.org.au). Applications will be accepted until the position is filled.

## If I Were Attorney-General...

### Human Rights under Labor

As part of the fresh approach that Labor will be taking to the next election, we have engaged in a substantial rewrite of our National Platform.

The most obvious improvement in this sense is our new position regarding a Bill or Charter of Rights.

In government, Labor will hold a full public inquiry into how best to protect the civil and political rights and freedoms of Australians. This represents a significant departure from the unfortunate 'Charter of Citizenship and Aspirations' that featured in the 2004 platform.

It is our view that this is an important question for the Australian people themselves – and ownership of the process must reside with them – rather than being determined by just one political party. To move forward on the recognition of fundamental human rights, we must therefore reach beyond party politics for a process that will be embraced by all Australians.

Some will be critical that this approach is not ideal. To them I point out that Labor has twice already pushed for constitutional amendment to secure important human rights (in 1944 and 1988) and on both occasions these were rejected. In my view, we Australians are a naturally cautious people, who like to be fully informed and comfortable about a decision before throwing in our lot. In 1988, this was not achieved. The broader human rights movement manifestly failed to make its case to the Australian people, and this resulted in the referendum securing the lowest level of support since federation. The lesson to learn from this experience is that we must move with greater caution in the future. This will, in the longer term, yield a far better solution and hopefully greater success.

So in government, Federal Labor will engage the Australian people in a dialogue about what they think on this issue - what rights require protection and how that should be achieved.

Labor will be moving to end discrimination in federal law against gays and lesbians. This will necessarily involve legislative change to a raft of federal laws covering tax, superannuation, social welfare payments and benefits and worker's compensation amongst other areas. However, this move does not extend to any changes that might alter the meaning of marriage under Australian law.

In addition, and following on from the good work of Tasmania and Victoria, Federal Labor will be pushing for nationally consistent relationship recognition schemes that will allow the registration of de facto heterosexual, same sex couples and certain carer relationships. The effect of these changes will be that homosexual couples have exactly the same rights under law as heterosexual couples.

In indigenous policy, 'Sorry' is good but it is no longer good enough – in this 40<sup>th</sup> anniversary of the 1967 referendum it is clear we have more to do to address the current situation of Aboriginal and Torres Strait Islander peoples. Jenny Macklin, Labor's Shadow Minister for Indigenous Affairs, has been working

hard to advance policy in her portfolio that will help overcome years of neglect under the Howard Government. But there is also work to be done in the Attorney-General's portfolio.

Wholesale reform of the process of adjudicating Native Title claims is clearly essential to break the log jam and free both industry and claimants from the endless red tape. The chronic under-resourcing of Native Title Representative Bodies has become a major issue in the eyes of all involved, except of course for the increasingly out of touch Howard Government which refuses to fix the situation.

Fundamental to the fresh approach of a Rudd Labor Government would be the separation of the role of the nation's first law officer from that of first security officer. Under the Howard Government, human rights issues are not treated with the gravity they deserve. This is despite the rights and freedoms of Australian citizens having never been more important than in an age when the threat of terror stalks our shores. Let me dispel the myth that our rights are just something for do-gooders and bleeding-hearts to feel good about. Adequate human rights protections provide guidance to law enforcement agencies and help ensure that they are clearly focussed on targeting genuine terrorist threats. Security without human rights is not real security at all – something proven time and time again to be a recipe for political unrest and attacks on democracy. Security without human rights means Abu Ghraib, or Guantanamo Bay. Yet the Howard Government's model of governance is one that does not allow for the full consideration of both. The merging of both the security and human rights Ministerial functions, leaves the Attorney-General hopelessly conflicted. Every time Phillip Ruddock prepares a security brief, he is forced to make a decision about what position he will take to Cabinet. The inevitable flaw in this model is that either the human rights component or the security component is edited out before the argument even reaches the Cabinet table. That's why Labor-in-Government has proposed to split the security and oversight functions between a Department of Homeland Security and the Attorney-General's Department. In this way, both streams of advice would get a proper hearing at the cabinet table. It is essential for good government, but Philip Ruddock remains vehemently opposed. Mr Ruddock simply doesn't understand the value in separating policy streams and ensuring adequate transparency and oversight. We only need look at his time as Minister for Immigration to see just how dangerous this can be, when that department became infected with a culture of concealment and cavalier attitude to human rights from the top down.

After 11 long years in power the Howard Government has clearly run out of puff. At the same time, Federal Labor has never been as ready or keen to step up to the plate and confront head on these and the many other challenges of the future.

*Senator Joe Ludwig is the Federal Shadow Attorney-General*