



INDEX

OPINION ..... 1

NEWS..... 2

VICTORIAN CHARTER OF RIGHTS DEVELOPMENTS .... 3

OTHER CHARTER OF RIGHTS DEVELOPMENTS .... 5

CASE NOTES ..... 6

HRLRC POLICY, ADVOCACY AND LAW REFORM ..... 13

HRLRC CASEWORK..... 14

SEMINARS AND EVENTS... 14

EDUCATION, TRAINING AND RESOURCES..... 15

FOREIGN CORRESPONDENT ..... 16

IF I WERE ATTORNEY-GENERAL... ..... 18

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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

A Happy New Year for Human Rights and Democracy

New Year’s Day heralded more than just the start of another year; it marked an important milestone in Australian democracy as the Victorian *Charter of Human Rights and Responsibilities* became fully operational.

Based on similar mechanisms which operate successfully in the UK, New Zealand and our own ACT, the *Charter* is a common sense form of democratic insurance that holds government accountable – one that ensures that those who make decisions make them in accordance with civil and political rights.

The *Charter* contains 20 rights that reflect four basic principles; freedom, respect, equality and dignity.

For the first time in our state’s history, key rights are clearly protected in law including freedom of expression, freedom of peaceful assembly, taking part in public life, protection against inhuman or degrading treatment, freedom of thought, conscience, religion and belief, and protection of families and children.

The *Charter* creates a dialogue between the government, parliament, judiciary and community, in which all have a role to play in protecting, promoting and respecting fundamental rights and freedoms.

The government is required to take into account human rights in decision-making, service delivery and policy development. All new legislation now has to be accompanied by a Statement of Compatibility to inform parliament whether the new laws meet the standard set by the *Charter*.

In addition, respect for human rights is now a public sector value under the *Public Administration Act 2004* and it is unlawful for a public authority to act in a manner incompatible with a relevant human right or to fail to give it proper consideration when making a decision.

In turn, parliament is required to scrutinise proposed legislation for any impacts on human rights.

Under the *Charter*, courts must interpret laws consistently with human rights where that is possible. If this cannot be done, the Supreme Court may issue a declaration of inconsistent interpretation. The declaration does not invalidate the law but it triggers a response in parliament and it is up to parliament to decide whether to amend the law or retain the status quo.

The *Charter* does not transfer power from Parliament to the judiciary – in fact the opposite is true. Parliament plays the primary role in protecting human rights and in balancing rights with other public policy interests.

Claims by some critics that the *Charter* will result in more litigation have not been borne out when you look at precedents in other jurisdictions. For example, the UK Annual Court Report for 2001-2002 stated that 'there is no evidence that the *Human Rights Act* has increased the number of cases lodged, nor that hearing times have lengthened since the implementation of the Act'.

Of course along with rights, come responsibilities. The Victorian *Charter* makes it clear that the enjoyment of specific rights carry special duties and responsibilities.

Reasonable restrictions can be placed on people's rights in order to respect the rights and reputation of others, to protect national security, public order, public health or public morality. For example, exercising the right of freedom of expression does not mean it is acceptable to unlawfully attack another person's reputation.

Similarly, the *Charter* does not stop the government from taking strong and decisive action on issues of state and national security. There will be situations in which rights will be limited in the public interest but such limitation must be fully explained and justified. This provides a transparent process by which rights and duties can be appropriately balanced and it will encourage an open and healthy debate about what limits can be justified in a civilised society.

With respect to the operation of the *Charter*, New Years Day marked an inception, not a culmination. I have established a Human Rights Leadership Forum that will help guide the *Charter's* operation and promote a rights culture across the public service, legal profession, Parliament and the wider community. I am very pleased that the Human Rights Law Resource Centre has accepted my invitation to be a member of this Forum.

In addition, the Victorian Equal Opportunity and Human Rights Commission will report to me annually on the *Charter's* operation, provide education and when, requested by public authorities, review their policies and practices for Charter compliance.

The *Charter* will be reviewed after four years and again after eight years of operation. But in the meantime, it's incumbent upon all of us to nurture this *Charter* into existence and entrench a respect for basic human rights and freedoms across Victorian civic life.

*The Hon Rob Hulls MP is Deputy Premier and Attorney-General for Victoria*

## News

### Major UK Report Finds Clear Link between Human Rights and Improved Public Services but Need for Better Human Rights Education

The UK Ministry of Justice, which has overall responsibility for the effective operation of the UK *Human Rights Act 1998*, has recently published a major report, entitled *Human Rights Insights*, examining public perceptions of human rights and whether human rights 'could be used empirically as a tool to improve the public's experiences of public services'. The impetus for the research came from a number of reports which concluded that the potential of the Human Rights Act to improve lives and protect vulnerable people was 'not yet being realised'. For example, the 6<sup>th</sup> Report of the Parliamentary Joint Committee on Human Rights in 2003 found that

Too often human rights are looked upon as something from which the state needs to defend itself, rather than to promote as its core ethical values. There is a failure to recognise the part that they could play in promoting social justice and social inclusion and in the drive to improve public services. We have found widespread evidence of a lack of respect for the rights of those who use public services, especially the rights of those who are most vulnerable and in need of protection.

The key findings from the Human Rights Insight Project include that:

- Key human rights principles such as respect, dignity, equality and fairness are highly valued, both in relation to public service delivery and more widely, but are not generally or necessarily associated with 'human rights' or the *Human Rights Act*;
- Among the public, the term 'human rights' has mainly positive associations, but there is limited understanding of the 'every day' relevance or applicability of human rights;

- There is a general public view that there is a need for a law to protect human rights in the UK, but there is also a view that too many people – especially asylum seekers and immigrants – take advantage of the *Human Rights Act*;
- Marginalised, disadvantaged, vulnerable and frequent users of public services are ‘particularly exposed to service delivery that fails to respect their human rights’;
- A human rights approach to the development and delivery of public services could increase user satisfaction and public service outcomes;
- ‘Customer care’ policies founded on human rights values assist in ensuring that key human rights principles are respected in the delivery of services and reduce the risk of breaches and challenges; and
- Appropriate human rights training for managers and decision-makers in public authorities is key to ensuring that service delivery complies with the *Human Rights Act*.

The Report is available at <http://www.justice.gov.uk/docs/human-rights-insight-full.pdf>.

### UN Creates New Post to Address Violence against Children

The UN General Assembly has established a new special post to promote and protect the rights of children. The decision to establish a Special Representative on Violence against Children, reporting directly to the UN Secretary-General, was adopted by a vote of 176 to 1, with the United States being the only country in opposition.

The appointment follows the 2006 release of the UN Secretary-General’s Study on Violence against Children, which examined the incidence of violence against children and its devastating impact on children, families, communities, public health and the economy.

The mandate for the Special Representative includes enhancing the visibility of all forms of violence against children, advocating for the elimination of this violence, and supporting the implementation of the study’s recommendations. Other aspects of the mandate include identifying and sharing good practices, and enhancing coordination and communication among key actors (including the UN system, member states, NGOs, children and youth).

The establishment of the Special Representative follows an international campaign involving more than 1000 NGOs from 34 countries around the world.

### Victorian Charter of Rights Developments

#### Relevance of Victorian Charter of Rights to Delay in Prosecution and Grant of Bail

*Gray v DPP* [2008] VSC 4 (16 January 2008)

In the first decision to substantively consider the Victorian *Charter of Human Rights* since it became justiciable on 1 January 2008, Bongiorno J has held that the Charter guarantees the right to a timely trial and that the appropriate remedies for failure of the Crown to provide such a trial are release of the accused on bail or, alternatively, a permanent stay of proceedings.

#### Facts

The accused, Kelly Gray, was charged with a number of indictable offences, including aggravated burglary, arising from an assault on 4 November 2007. He was remanded in custody and refused bail by a magistrate on 10 December 2007 pursuant to s 4(4)(c) of the *Bail Act*, which relevantly provides that a person charged with aggravated burglary is to be remanded in custody unless that person can satisfy the court that detention is not justified.

Gray subsequently applied for bail in the Supreme Court, arguing that his continued detention was not justified, particularly given that the trial was unlikely to commence before October or November 2008 and unlikely to conclude before the end of 2008. It was submitted that having regard to the seriousness of the offence, the relatively minor injuries suffered by the victim, and the applicant’s prior convictions, there was a real risk that the applicant could serve more time on remand than he would serve under any subsequent sentence.

## Decision

Although neither party mentioned the *Charter* in their submissions, Bongiorno J considered various of its provisions to be 'highly relevant to the question of bail', including in particular s 21(5)(c) (which provides that a person detained on a criminal charge has the right to be promptly brought before the court and tried without unreasonable delay, failing which they are to be released) and s 25(2)(c) (which provides that a person charged with a criminal offence is entitled to be tried without unreasonable delay).

Considering the application of the *Charter* to the present case, His Honour made a number of important observations:

1. Sections 21(5)(c) and 25(2)(c) of the *Charter* guarantee the right to a timely trial (ie, 'a trial held within a reasonable time').
2. The inability of the Crown to provide a timely trial is relevant to the question of bail.
3. A trial which may not be held until after the accused has spent more time on remand than he or she is likely to serve upon sentence is very unlikely to be a timely trial.
4. The remedies available to the Court to address failure by the Crown to ensure a timely trial include releasing the applicant on bail or, alternatively, a permanent stay of proceedings.

Having regard to these factors, among others, Bongiorno J concluded that the applicant's continued incarceration was not justified and that he should be released on bail.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VSC/2008/4.html>.

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

## Parole Boards Exempted from Operation of Charter of Rights

On 18 December 2007, the Governor in Council promulgated the *Charter of Human Rights and Responsibilities (Public Authorities) (Interim) Regulations 2007* (Vic). The Regulations declare that the following entities are not 'public authorities' for the purposes of the Victorian *Charter of Human Rights* and therefore do not have a legal obligation under s 38 to act compatibly with, or give proper consideration to, human rights:

- the Adult Parole Board;
- the Youth Parole Board; and
- the Youth Residential Board.

The Regulations were made to enable the Boards to undertake further activities to ensure the compliance of their policies and operations with human rights before such compliance becomes a legal obligation. The Regulations came into operation on 1 January 2008 and expire on 31 December 2008.

The Regulations are available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under Victorian Charter of Human Rights and Responsibilities>Charter of Human Rights and Responsibilities Act 2006 and other Primary Documents.

## 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.

### **Gambling Legislation Amendment (Problem Gambling and Other Measures) Bill 2007**

The *Gambling Legislation Amendment (Problem Gambling and Other Measures) Bill 2007* aims to counter problem gambling and ensure that the industry makes appropriate contributions back to the community.

These objectives are achieved by amending the *Gambling Regulation Act 2003* (Vic) and the *Casino Control Act 1991* (Vic) to:

- prohibit gaming operators from knowingly allowing an intoxicated person to gamble;
- require venue operators to conduct voluntary self-exclusion programs;
- reduce the availability of cash at gaming venues;
- prohibit the location of gaming machines outdoors;

- require a range of licence-holders to have an approved responsible gambling code of conduct; and
- amend the requirements relating to the order that the Minister makes in respect of community benefit statements.

The Statement of Compatibility identifies three rights contained in the *Charter of Human Rights* that are engaged by these measures: the right to freedom of movement (s 12), property rights (s 20) and privacy (s 13(a)).

The prohibition on gambling by an intoxicated person and operation of voluntary self-exclusion programs will limit the 'right to move freely within Victoria' by prohibiting certain people from gaming venues. The Statement contends the self-exclusion program is a reasonable limitation on the right, as it is contingent upon the will of the individual to exclude themselves, and because of the broader public interest in combating problem gambling. The Statement also states that exclusion of intoxicated persons is a reasonable limitation as it minimises the public harm arising from the combination of problem gambling and substance abuse.

Property rights are engaged by limiting the uses to which gaming venue operators may apply their property. Specifically, the limitation on the availability of cash and the location of gaming machines outdoors reduce the profit that may be derived from gaming venue property. The Statement contends that these limitations are 'in accordance with law and [are] not arbitrary' (s 20) and therefore do not amount to an unreasonable limitation. Furthermore, the limitations do not amount to an unlawful deprivation of property as they only limit a specific use of property.

The right of privacy is engaged by new powers permitting the controlling body to request information when applicants apply for gaming licences. The Statement contends that the right to privacy is not 'unlawfully or arbitrarily interfered with' as these requirements are consistent with the objective of ensuring that licences are only granted to people of good character.

*Nicholas Chenu, Summer Clerk and Jonathan Kelp, Solicitor, Human Rights Law Group, Mallesons Stephen Jaques*

## Other Charter of Rights Developments

### Consultation Committee Recommends Adoption of WA Human Rights Act

On 20 December 2007, the Consultation Committee for a Proposed WA Human Rights Act, chaired by the Hon Fred Chaney, published its Final Report. The consultations and Report found 'clear majority support for', and recommended the enactment of, a WA Human Rights Act.

Similarly to the Victorian *Charter* and the ACT and UK *Human Rights Acts*, the Committee recommended that this instrument promote a human rights dialogue across the three branches of government while maintaining parliamentary sovereignty. Unlike the Victorian, ACT and UK legislation, however, the Committee recommended that a WA Human Rights Act incorporate economic, social and cultural rights.

The Report was informed by 377 submissions, a 'clear majority' of which supported the proposed WA Human Rights Act. Many submissions also called for stronger legislative protection than that proposed. The consultation revealed that 'many people believe their rights, or the rights of others, are not given sufficient respect and need greater protection.'

The Committee found that a WA Human Rights Act should:

- maintain parliamentary sovereignty – democratically elected politicians and not judges should retain the responsibility for determining how rights should be balanced and when rights should be limited for the common good of the community;
- encourage a human rights culture in government departments and agencies;
- discourage litigation as a way to resolve human rights issues – the emphasis should be placed on conciliation to settle disputes; and
- equally protect civil, political, social, economic and cultural rights.

The Centre's submission to the Committee, prepared with substantial input from Allens Arthur Robinson, one of Australia's leading commercial law firms, is cited over 35 times in the Committee's Report.

Following the election of the Rudd Labor Government and the Federal Attorney General Robert McClelland's announcement that he intends to consult the community about the introduction of a national charter, it appears that the enactment of a WA state-based charter will be deferred until the outcomes of the federal consultation process are known. The Report of the WA Consultation Committee will make an important contribution to this national discussion.

For further details, including the Committee's Report and the Centre's submission, see [www.hrlrc.org.au](http://www.hrlrc.org.au) under Policy Work>HRLRC Submissions>Fostering a Human Rights Culture: Submission to WA Human Rights Act Inquiry.

## Case Notes

### Inadequate Access to Health Care for Prisoner with Mental Illness a Violation of the Prohibition against Torture and Ill-Treatment

*Dybeku v Albania* [2007] ECHR 41153/06 (18 December 2007)

The European Court has held that public authorities have a particular duty and responsibility for the health and well-being of those in its custody or detention. The Court further held that a failure to provide adequate mental health care to detainees in circumstances which do not adequately accommodate, or which result in the deterioration of, a person's mental health, may amount to a violation of the prohibition on torture and ill-treatment.

#### Facts

The applicant, Ilir Dybeku, was diagnosed with paranoid schizophrenia in 1996 and received in-patient treatment at a number of psychiatric hospitals.

The applicant was sentenced to life imprisonment for murder in 2003. The applicant appealed his conviction on the basis that his psychiatric condition rendered him unfit to stand trial, but the appeals were dismissed and his requests for new medical examinations rejected as unnecessary.

Since December 2003 the applicant has been detained in three different prisons, where he has been treated as an ordinary prisoner, despite his state of health. He received treatment in a prison hospital for two periods in 2004 and 2005 when his condition deteriorated.

On a number of occasions, the applicant's father and lawyer lodged complaints with the competent authorities against the prison hospital administration and the medical unit, alleging that they had been negligent in failing to prescribe adequate medical treatment and that the applicant's health had deteriorated because of the lack of medical treatment. Their complaints were dismissed.

Given the applicant's increasingly disturbed state of mind, on 7 January 2005 his lawyer brought proceedings asking for him to be released or transferred to a medical facility on the ground that his detention conditions were inappropriate, given his state of health, and put his life at risk. The applicant's counsel also asked for psychiatric examinations to be undertaken. Those requests were rejected.

The applicant complained to the European Court of Human Rights, alleging that his conditions of detention and the medical treatment available in prison were inadequate in view of his state of health and contrary to art 3 of the *European Convention on Human Rights*, which prohibits torture and other cruel, inhuman or degrading treatment or punishment.

#### Decision

The Court first considered the nature and scope of the prohibition against torture and ill-treatment, stating that art 3 of the *Convention* 'enshrines one of the most fundamental values of democratic society' and 'prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour'. In order for treatment or punishment to fall within the scope of art 3, it must attain a 'minimum level of severity' which is to be assessed having regard to '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'. Treatment held by the Court to be 'inhuman' includes treatment causing 'either actual bodily injury or intense physical and mental suffering', while treatment may be 'degrading' if it is such as to arouse 'feelings of fear, anguish and

inferiority capable of humiliating and debasing' the victim. Although the purpose of the treatment is relevant, the absence of any purposive element does not 'conclusively rule out a violation of art 3'.

For persons in custody or detention, the suffering involved with the treatment 'must go beyond that inevitable element of suffering or humiliation' connected with the fact of deprivation of liberty itself in order to amount to a violation of art 3. However, the Court's jurisprudence makes clear that it is incumbent on the state to ensure that persons in detention are subject to conditions which are compatible with human dignity and not subject to any hardships or deprivations beyond those that are an unavoidable consequence of, and inherent to, detention itself. This particularly requires that the state 'adequately secure' the health and well-being of detainees, including by 'providing them with the requisite medical assistance', the lack of which 'may amount to treatment contrary to art 3'

In the case of persons with a mental illness, the state must particularly 'take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment'. In determining the compatibility of the detention of a person with a mental illness with art 3, the state must also have regard to factors including 'the adequacy of the medical assistance and care provided in detention' and 'the advisability of maintaining the detention measure in view of the state of health of an applicant'. The Court further observed that, given the 'feeling of inferiority and powerlessness which is typical of persons who suffer from a mental disorder', the relevant authorities must display 'increased vigilance in reviewing whether the *Convention* has been complied with'.

In the present case, it was clear that the applicant suffered from 'a chronic mental disorder'. While he was treated with drugs similar to those prescribed by his doctor, the lack of 'appropriate facilities and medicines' meant that, at least at various times, his condition deteriorated significantly and prison 'clearly had a detrimental effect on his health and well-being'. The Court observed that the fact that the applicant was 'treated like the other inmates, notwithstanding his particular state of health' demonstrated that the prison authorities had failed in their duty to provide for, and pay special attention to the needs of, prisoners with mental disorders and had failed to demonstrate that the applicant's detention was appropriate for a person with his history of mental disorder.

While the Court acknowledged the financial and resource implications of ensuring adequate mental health care, it reiterated that the prohibition against torture and ill-treatment is absolute and non-derogable and that, therefore, 'a lack of resources cannot in principle justify detention conditions which are so poor as to reach the threshold of severity for art 3 to apply'.

Having regard to the factors above, the Court concluded that 'the nature, duration and severity of the ill-treatment to which the applicant was subjected and the cumulative negative effects on his health were sufficient to be qualified as inhuman and degrading' and that there had therefore been a violation of art 3 of the *Convention*. The applicant was awarded €5000 for non-pecuniary damage.

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

A number of influential courts and bodies – including the European Court of Human Rights, the UK Court of Appeal and the UN Human Rights Committee – have consistently held that public authorities have a particular duty and responsibility for the health and well-being of those in its custody.

In recent cases, the European Court has stated that the quality of healthcare to those imprisoned by the state is not to be relative. While an individual in society may have no right to healthcare as such, where they are in the state's custody the state must ensure that they receive the medical care required (see, eg, *Holomiov v Moldova* ([2007] ECHR 30649/05); *Istratii and others v Moldova* ([2007] ECHR 8721/05)). Both the European Court and UK courts have stated that scarce resources or logistical difficulty will not be legitimate excuses for inadequate medical treatment to prisoners (see, eg, *Mamedova v Russia* [2007] ECHR 7064/05; *Frolov v Russia* [2007] ECHR 205/02; *R (Noorkoiv) v Secretary of State for the Home Department* [2002] EWCA Civ 770). Where authorities decide to place and maintain a seriously ill person in detention, they must demonstrate special care to provide conditions of detention to accommodate the disability (see, eg, *Testa v Croatia* [2007] ECHR 20877/04).

Given recent observations by the Victorian Ombudsman that 'there are significant deficiencies in the health care provided to prisoners' it is imperative that the relevant public authorities review and improve Victorian prison conditions and prisoner health care services if they are to meet the threshold required

by s 10 (protection from torture and cruel, inhuman or degrading treatment), s 21 (right to liberty and security of person) and s 22 (humane treatment when deprived of liberty) of the Victorian *Charter*.

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

### UK High Court Considers Handcuffing of Prisoners with Medical Conditions

*R (on the application of Graham) v Secretary of State for Justice* [2007] All ER (D) 383 (Nov)  
(23 November 2007, Queen's Bench Division, Administrative Court, Mitting J)

The Queen's Bench Division of the UK High Court has considered whether handcuffing two sick prisoners during treatment violated their right to freedom from cruel, inhuman or degrading treatment under art 3 of the *European Convention on Human Rights*.

#### Facts

##### Elliott Graham

Mr Graham, a 28-year old man, was serving a 3-year prison sentence for possession and intent to supply cannabis, heroin and cocaine. He held an additional, previous conviction for violence when he was 18. Mr Graham was assessed as a Category C Prisoner, the lowest risk. Although he lacked the resources and connections to escape, his record indicated that he posed a potential threat to the public and to hospital staff. Therefore, he required handcuffing and a prison escort during his medical assessment and treatment.

In December 2006, Mr Graham began suffering symptoms of Hodgkin's lymphoma. He was admitted to hospital three times between December 2006 and January 2007. In February, his condition deteriorated and he began chemotherapy sessions. The combination of life-threatening illness and debilitating treatment prevented Mr Graham from taking part in any significant activity, let alone the possibility of escape. Following a plea from his physician, Mr Graham's restraints were removed and he was escorted to hospital by officers in civilian clothing to preserve his dignity. Shortly after this, the Deputy Governor decided that Mr Graham was suitable for compassionate release. His health improved and he began attending out-patient chemotherapy sessions. A fresh assessment was made as to the level of restraint required. Once again, he was accompanied by two prison officers, handcuffed during the taxi journey to the hospital and across the hospital yard, and while he remained in the hospital awaiting treatment.

##### Anthony Allen

Mr Allen, a 73-year-old man, was serving a life sentence for the murder of his wife and two children. Mr Allen also held convictions for offences against property, fraud and theft. He was regarded as a highly manipulative individual who tried to condition prison staff wherever possible. He was assessed as a Category B prisoner, as he posed a significant risk of escape and threat to the public. This was so despite his age and medical condition.

Mr Allen underwent treatment in January 2007 after a myocardial infarction and in April 2007 following an angina attack. He was restrained and accompanied by prison guards at all times. Mr Allen complained that the handcuffs were uncomfortable, caused him difficulty breathing and that they prevented proper insertion of a cannula into his arm. Medical staff maintained that no medical contraindications arose from his restraints.

#### Decision

Mitting J drew on several cases, including the test established in *Mouisel v France* [2004] 38 EHRR 34 in determining whether Mr Graham's and Mr Allen's rights under art 3 of the *European Convention* were breached. In *Mouisel*, it was established that handcuffing only gives rise to an issue when it entails the use of force, public exposure, or exceeds what is reasonably necessary to maintain public safety. This was expanded by *Gorodnichev v Russia* [2007] ECHR 52058/99 (24 May 2007), which identified the degrading aspect of handcuffing in public as giving rise to a breach of art 3. According to Mitting J, there is a point at which the judgment that a prisoner's risk of escape or of danger to the public were he to escape must be considered in the light of his medical condition. Where it is impossible for a prisoner to pose any risk due to ill-health or debilitating treatment, handcuffing will breach art 3 because it is inhumane, degrading and disproportionate to the needs of security.

In Mr Graham's case, Mitting J found two instances in which handcuffing crossed the threshold: first, when his illness was at its worst; and second, when he received chemotherapy and medical consultation as an out-patient following the improvement in his health, after which time he had been granted compassionate release and had for several days not attempted escape or posed a threat to the public.

Mitting J stated that in December 2006 and January 2007 there were grounds for believing Mr Graham posed a risk to the public, and as such it was appropriate to restrain him. However, the decision to maintain his restraints during chemotherapy and medical consultations lacked any objective justification. These were necessary to afford Mr Graham the chance of remission from a serious disease. The acute, life-threatening nature of his illness which for several weeks plainly disabled him from any significant activity made it unlikely, on any objective view, that he would deliberately forego treatment by escaping, let alone pose a risk to the public. When he recovered, Mitting J felt it was unnecessary to reimpose his restraints. Ample time had passed for assessments to be reconsidered and it was obvious that he posed no risk to members of the public.

Mr Allen's case, on the other hand, did not breach art 3. Despite his age and medical condition, Mitting J held that Mr Allen did pose a significant risk to members of the public if he were to escape. Further, there was no indication from hospital staff that handcuffing was medically inappropriate.

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

Section 10(b) of the Victorian *Charter* enshrines the right to freedom from inhuman or degrading treatment in terms very similar to those used in art 3 of the *European Convention*. Cases such as the present provide a useful illustration of the methodology which may be used in determining the circumstances in which handcuffing may breach a prisoner's right to freedom from inhuman or degrading treatment. As Mitting J points out, these are matters of fine judgment. As such, careful consideration needs to be made of the facts in order to balance the rights of the prisoner with the public's need for protection.

*Louise Fahy is a Lawyer with DLA Phillips Fox*

### **Prisoners and the Right to Privacy and Family Life**

*Dickson v United Kingdom* [2007] ECHR 44362/04 (Grand Chamber, 4 December 2007)

On 4 December 2007, the Grand Chamber of the European Court of Human Rights handed down its decision in *Dickson v The United Kingdom*, a case concerning prisoners' access to artificial insemination facilities. The applicants complained that the refusal by the Secretary of State to allow the first applicant access to artificial insemination facilities whilst in prison constituted a breach of the applicants' rights under art 8 (right to private and family life) and art 12 (right to marry and found a family) of the *European Convention on Human Rights*. The Grand Chamber held (by a 12:5 majority) that there had been a violation of art 8, but that it was not necessary to examine the complaint under art 12.

### **Facts**

The applicants are a married couple. The first applicant was convicted of murder in 1994 and was sentenced to life imprisonment, with an expected release date in 2009. The second applicant, his wife, lives in the community. The first applicant has no children and the second applicant has three children from earlier relationships. The second applicant was to be 51 years of age on the first applicant's earliest possible release date.

The applicants applied to the Secretary of State for access to facilities for artificial insemination, on the basis that it was unlikely, having regard to the first applicant's release date and the second applicant's age, that they would be able to have a child together without the use of artificial insemination facilities.

The policy applied by the Secretary of State was that requests for artificial insemination by prisoners be carefully considered on individual merit but would only be granted in exceptional circumstances and according to certain criteria set out in the Policy.

On 28 May 2003, the Secretary of State refused the application ('Decision').

The applicants exhausted their domestic remedies in the United Kingdom and the matter was subsequently heard by a Chamber of the European Court of Human Rights, and then the Grand Chamber of that Court.

## Decision

The Grand Chamber held that art 8 applies to the Decision in so far as it constitutes a breach of the applicants' right to private and family life, which includes the right to respect for the applicants' decision to become genetic parents (at para 62).

The Grand Chamber confirmed that prisoners continue to enjoy all their rights, save for those that are removed as a necessary consequence of imprisonment, and that any restriction on those rights must be justified in each individual case. It stated (at 22):

This justification can flow, *inter alia*, from the necessary and inevitable consequences of imprisonment ... or (as accepted by the applicants before the Grand Chamber) from an adequate link between the restriction and the circumstances of the prisoner in question.

The UK government relied upon the following three justifications for the Policy:

1. That losing the opportunity to beget children was an inevitable and necessary consequence of imprisonment.
2. That public confidence in the prison system would be undermined if the punitive and deterrent elements of a sentence would be circumvented by allowing prisoners guilty of certain serious offences to conceive children.
3. The absence of a parent for a long period would have a negative impact on any child conceived and consequently on society as a whole.

The Grand Chamber rejected the first justification, stating that an inability to beget children is not an *inevitable* consequence of imprisonment. Providing access to artificial insemination facilities would not create a security issue or any significant administrative or financial demands on the State (para 74). In relation to the second justification, the Grand Chamber accepted that it is necessary that there is public confidence in the penal system, but stated that rights could not be forfeited on the basis of what might offend public opinion. Further, penal policy had evolved towards increasing the relative importance of the rehabilitative aims of imprisonment (para 75). The third justification for the Policy was accepted on the basis that it is legitimate that the policy should be concerned with the welfare of a child (para 76).

The Grand Chamber considered that the Policy placed too onerous a burden on particular applicants. Just in order for the policy to apply, the applicants had to show that the deprivation of access would prevent conception altogether. Further, once they satisfied that initial threshold, they needed to prove 'exceptional' circumstances within the meaning of the criteria set out in the Policy. The court held that the Policy set the threshold so high against the applicants from the outset that there was no real balancing of the competing individual and public interests and that therefore a proportionality analysis had not been properly undertaken (para 82). As the proportionality assessment had not been made, the Decision fell outside 'any acceptable margin of appreciation so that a fair balance was not struck between the competing public and private interest involved' (para 85).

The court therefore ordered the respondent State to pay damages and the costs of the applicants.

*Emily Howie is a Senior Associate in the Allens Arthur Robinson Corporate Responsibility Group and a Board member of the Human Rights Law Resource Centre*

## European Court Considers the Right to an Oral Hearing and Permissible Limitations on the Right to a Fair Hearing

*Oganova v Georgia* [2007] ECHR 25717/03 (13 November 2007)

The European Court of Human Rights in *Oganova v Georgia* found that, generally, the right to a fair hearing implies the right to an oral hearing but that, in certain special circumstances, it may be permissible for an appellate court to determine a matter by written submissions in the interests of the efficient administration of justice.

## Facts

The applicant in this case had brought a civil claim in May 2002 in the Isani-Samgori district of Georgia against an individual for repayment of money the applicant had lent to them in 1998. A Georgian District Court allowed the claim at an oral hearing.

The respondent appealed the District Court's decision on the basis that the applicant's claim was time-barred. The Regional Court quashed the previous court's decision and found that the applicant's claim was in fact time-barred.

The applicant subsequently appealed to the Supreme Court of Georgia. The Supreme Court dismissed the applicant's claim without an oral hearing, finding that the domestic law in question had been correctly applied.

The European Court of Human Rights was concerned with the extent to which the absence of an oral hearing at second or third instance may be justified as compatible with the right to a fair hearing.

### **Decision**

The European Court found that, in this particular instance, the absence of an oral hearing was not in contravention of art 6(1) of the *Convention*.

The Court considered that the entitlement to a 'fair and public hearing' in art 6(1) necessarily implies a right to an 'oral hearing'. The right to an oral hearing, however, is not absolute and the absence of an oral hearing may be compatible with the requirements of art 6 when the issue which is to be decided raises no questions of fact or law which cannot be adequately resolved on the basis of the case file and the parties' written submissions.

The Court drew a distinction between the necessary elements of a fair hearing before a court of first instance, where there is 'normally a right to an oral hearing', and appellate courts where the absence of an oral hearing 'may be justified by the special features of the proceedings at issue, *provided a hearing has been held at first instance*'.

In the present case, the special features of the proceedings before the Supreme Court, including that it was primarily concerned with questions of law, was not competent to decide on matters of fact, and provided opportunity for both parties to make extensive written submissions, justified the absence of an oral hearing, particularly given other 'legitimate considerations' such as 'the demands of diligence and economy'.

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

This decision may be of relevance to the interpretation and application of s 24 of the Victorian *Charter*, which enshrines the right to a fair and public hearing in both criminal and civil matters.

The decision confirms that, *prima facie*, the right to a fair hearing subsumes the right to an oral hearing. Pursuant to s 7 of the *Charter*, it is likely that this right is not, however, absolute. This decision suggests that it may be reasonable and permissible for an appellate court to limit parties to written submissions in the interest of aims such as the efficient administration of justice, provided that the parties were provided with the opportunity to make oral submissions at first instance and that the nature of the appellate proceedings is such that the absence of an oral hearing would not be incompatible with the right to a fair hearing itself.

*Emma Wanchap, Human Rights Law Group, Mallesons Stephen Jaques*

### **Proximity or Imminence of Trial Not a 'Relevant and Sufficient Reason' Justifying Detention on Remand**

*Gault v United Kingdom* [2007] ECHR 1271/05 (20 November 2007)

In *Gault v United Kingdom*, the European Court of Human Rights held that the detention of Ms Lesley Gault pending re-trial violated art 5(1)(c) of the *European Convention on Human Rights*. The Court held that no separate issue arose under art 8 of the *Convention* in respect of the applicant's right to private and family life in relation to her three young children.

Relevantly, the Court held that, pursuant to art 5(1)(c), the proximity or imminence of a trial does not justify pre-trial detention that would not otherwise be permitted at law. Additionally, while suspicion of guilt is a prerequisite to detention, it is not of itself a relevant or sufficient reason to refuse bail.

## Facts

The applicant's husband was murdered in May 2000, and the applicant was charged in August 2001 with aiding and abetting her former lover to murder her husband. She was released on bail pending trial, neither the police nor prosecution objecting. In November 2002, the applicant's lover was unanimously convicted by the jury, yet the jury failed to agree on a verdict for the applicant. The prosecution elected to prosecute the applicant again and bail was also granted again, the prosecution not objecting.

In March 2003, the applicant was convicted of murder by majority verdict, sentenced to life imprisonment and commenced her custodial sentence. In July 2004, the Court of Appeal ordered a retrial after finding that the trial judge has misdirected the jury. The applicant again applied for bail and the prosecution did not object; however, the Court of Appeal refused the application. It was this detention which the applicant alleged violated the *Convention*.

## Decision

Under Article 5(1)(c) of the *Convention*, there must be relevant and sufficient reasons for pre-trial detention. The article provides:

Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

Under the relevant Northern Ireland domestic law, the grant of bail is governed by common law principles. Bail is discretionary, guided by certain factors, including the risk that the defendant will not appear at trial, interfere with witnesses or evidence, and may commit further offences while released. In considering the likelihood of a defendant absconding, the nature and seriousness of the offence, the applicable penalty for the offence and the strength of evidence against the defendant are relevant considerations.

The Court was critical of the scant reasons given by the Court of Appeal for refusing bail pending re-trial. The Court identified two reasons for refusing bail from the Court of Appeal's reasoning, namely that re-trial would be prompt, and that there was a material difference between the applicant's third trial and her first and second trials.

### Relevance of Prompt Re-trial

The Court held that the first ground was not a relevant reason for the purpose of art 5(1)(c) of the *Convention*. The court observed that the second limb of art 5(1)(c) does not give the domestic tribunal a choice between bringing an accused promptly to trial and granting provisional release pending trial. Clearly there is a practical choice, in that release pending trial or trial in a reasonable time is necessary for compliance with the article; however, the article does not permit a trial within a reasonable time to justify detention not otherwise permitted at law.

### Relevance of Suspicion of Guilt

In respect of the second ground, the Court inferred from the Court of Appeal's grant of a re-trial (rather than acquittal) that their Honours had a reasonable suspicion of the applicant's guilt. The Court observed that while such a suspicion is a prerequisite to detention, it is not of itself relevant or sufficient reason to refuse bail. Additionally, the Court did not accept the UK Government's argument that it was implicit in the Court of Appeal decision that the risk of absconding was higher for the third trial compared to the earlier trials.

### Reparation

The Court concluded that art 5(1)(c) had been contravened and awarded the applicant €7,500.

## Implications for the Victorian Charter

The decision may be relevant to the interpretation of art 21 of the Victorian *Charter*, which enshrines the right to liberty and security of person and makes specific provision for the rights of people who are arrested or detained.

*Lachlan McMurtrie, Human Rights Law Group, Mallesons Stephen Jaques*

## HRLRC Policy, Advocacy and Law Reform

### Promoting the Right to Equality and Protection from Discrimination

In November 2007, the Victorian Attorney-General initiated an independent review to make recommendations in relation to particular aspects of the *Equal Opportunity Act 1995* (Vic). The review seeks to reform the EO Act to 'better promote the right to equality and improve protection from discrimination'.

On 14 January 2008, the Human Rights Law Resource Centre, with the pro bono assistance of Clayton Utz, made a Submission to the Equal Opportunity Act Review. The Centre's submission focuses on the relevance of international human rights law to certain questions raised in the Discussion Paper. In this context, this submission also discusses the potential application of the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic), which has particular relevance to the scope of the Review.

The Centre's submission addresses the following aspects of the Discussion Paper:

- the range of attributes that should be protected by the EO Act;
- the scope for the EO Act to address systemic discrimination;
- the powers of the Victorian Equal Opportunity and Human Rights Commission to investigate and remedy discrimination; and
- whether the EO Act should provide access to a broader range of complainants through additional mechanisms such as class actions and representative complaints.

The Centre's submission, together with further information about the Review, is available at [www.hrlrc.org.au](http://www.hrlrc.org.au) at Policy Work>HRLRC Submissions>Submission to Equal Opportunity Act Review.

### Centre Contributes to Development of UN General Comment on the Right to Social Security

On 23 November 2007, the UN Committee on Economic, Social and Cultural Rights adopted General Comment 19 on the Right to Social Security under art 9 of the *International Covenant on Economic, Social and Cultural Rights*. A General Comment is an authoritative statement by a treaty body of the content and application of a particular right and may be relevant both to the interpretation and application of international and domestic law and policy.

The General Comment adopts a number of recommendations and observations made by the Human Rights Law Resource Centre in our June 2006 submission to the Committee in relation to their then Draft General Comment.

The Centre's submission, which was prepared with the pro bono assistance of Clayton Utz, considered aspects of the right to social security including: availability; adequacy; non-discrimination; the rights of non-citizens; conditionality; and minimum thresholds.

The Committee's final General Comment incorporates 3 specific recommendations/observations from the Centre's submission, namely that:

- 'Social security, through its redistributive character, plays an important role in poverty reduction and alleviation, preventing social exclusion and in promoting social inclusion.': GC para 3, HRLRC paras 1.1-1.2;
- 'The right to social security includes the right not to be subject to arbitrary and unreasonable restrictions with existing social security coverage, whether obtained publicly or privately, as well as the right to equal enjoyment of adequate protection from social risks and contingencies.': GC para 9, HRLRC para 6.1; and
- 'Qualifying conditions for benefits must be reasonable, proportionate and transparent. The withdrawal, reduction or suspension of benefits should be circumscribed, based on grounds that are reasonable, subject to due process, and be provided for in national law.': GC para 24, HRLRC paras 6.1-6.4.

The General Comment, together with the Centre's submission, is available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under Policy Work>HRLRC Submissions>General Comment on the Human Right to Social Security.

## HRLRC Casework

### Access to Legal Resources for Prisoners

With the pro bono assistance of Freehills, the Centre has provided advice to a prisoner who is seeking provision of and access to adequate legal resources to assist him in preparing for anticipated civil and criminal proceedings in which he is representing himself. The prisoner is currently serving a custodial sentence in Ararat Prison, where he does not have access to any legal resources such as textbooks, legislation and case law. Similar legal resources are available in other Victorian prisons such as the Melbourne Remand Centre, Port Phillip Prison and Barwon Prison.

The right to a fair hearing implies an entitlement to equal access to the justice system, which means that individuals must not be excluded from the court process. The lack of access to legal resources in this case leaves the prisoner unable to access the proceedings or participate in them in a meaningful way.

In addition, as a criminal accused, the prisoner is also entitled, under s 25(2)(b) of the *Charter*, to 'adequate time and facilities' to prepare his defence. As an unrepresented litigant in criminal proceedings, without access to legal textbooks, legislation and case law, the prisoner does not have 'adequate facilities' to mount a defence or appeal against his conviction.

### Advice to Homelessness Charity on the Obligations of Public Authorities

In conjunction with DLA Phillips Fox, the Centre is providing advice to a large homelessness charity on whether it is likely to be considered a 'public authority' under the Victorian *Charter*. The advice will investigate whether the charity discharges any 'functions of a public nature' (and is therefore a 'public authority') within the meaning of s 4 of the *Charter* and, if so, what it will need to do to comply with the obligations of public authorities pursuant to s 38.

Consideration of whether the homelessness charity is or may be a 'public authority' involves an analysis of factors such as how they are structured and funded, the nature of its services, and any contractual arrangements it has with the Victorian Government. If the ultimate advice is that the charity is, or may be, a 'public authority', a second stage will involve an assessment of their current policies and practices for human rights-compliance and the development of some practical resources and materials to enable the charity to monitor and promote compliance on an ongoing basis.

*Ben Schokman is the Centre's DLA Phillips Fox Human Rights Lawyer*

## Seminars and Events

### Human Rights, Good Government and the Constitution

with the Hon Sir Gerard Brennan, former Chief Justice of the High Court of Australia

**Date:** 5.45 for 6.00 – 7.45pm, Wednesday, 12 March 2008

**Venue:** Mallesons Stephen Jaques, Level 50, 600 Bourke Street, Melbourne

**Cost:** \$20 / \$10 concession

Registration is essential. Use Booking Form available at [www.hrlrc.org.au](http://www.hrlrc.org.au).

### The Future of International Human Rights Protection: Reflections from the UN Special Rapporteur on Human Rights and Counter-Terrorism

with Professor Martin Scheinin, UN Special Rapporteur on the Promotion of Human Rights while Countering Terrorism

**Date:** 5.45 for 6.00 – 7.45pm, Tuesday, 18 March 2008

**Venue:** Clayton Utz, Level 18, 333 Collins Street, Melbourne

**Cost:** \$20 / \$10 concession

Registration is essential. Use Booking Form available at [www.hrlrc.org.au](http://www.hrlrc.org.au).

## 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 over the last month:

- Philip Lynch, 'Charters of Rights are Profoundly Democratic', *The Age* (Melbourne), 22 January 2008
- Justice Marcia Neave, 'Introduction to Charter of Human Rights and Responsibilities', Paper to Judicial College of Victoria Human Rights Intensive, October 2007
- Alice Rolls, 'Avoiding Tragedy: Would the Decision of the High Court in Al-Kateb have been any Different if Australia had a Bill of Rights like Victoria?' (2007) 18 *Public Law Review* 119

### Charter of Human Rights Workshops for Community and Non-Government Organisations

The Victorian Equal Opportunity and Human Rights Commission is running a series of free Charter of Human Rights and Responsibilities Workshops for community and non-government organisations from February – June 2008. The workshops are designed to help community organisations understand and apply the rights and obligations contained in the *Charter*, including:

- ensuring human rights standards are maintained and upheld;
- promoting access and equity, especially for disadvantaged and marginalised people; and
- meeting legal obligations.

For further information and to register, see

<http://www.humanrightscommission.vic.gov.au/pdf/VEOHRCHRCHARTERWORKSHOPS08.pdf>.

### LexisNexis Butterworths Immigration and Human Rights Service

With the recent enactment of the ACT *Human Rights Act 2004* and the Victorian *Charter of Human Rights and Responsibilities 2006*, together with the proposed development of Human Rights Acts in Tasmania and Western Australia, it is both inevitable and important that domestic human rights law be informed by comparative human rights jurisprudence. Given that each of these instruments is closely based on the 'dialogic' model of legislative human rights protection adopted in the United Kingdom under the *Human Rights Act 1998*, the online 'Immigration and Human Rights' service offered by LexisNexis Butterworths UK is likely to be very valuable to any Australian public law practitioner.

The online service, available by subscription, offers a selection of fully searchable UK, Commonwealth and European human rights cases, commentaries, articles and analyses.

Featured caselaw includes European Court of Human Rights Cases (full-text judgments from the European Court with a digest and catchwords) and Butterworths Human Rights Cases (full-text judgments of 'landmark and interesting human rights decisions from international and national courts and tribunals that make a significant contribution to the way in which a particular right or freedom is interpreted or applied'). European Court cases are summarized and uploaded within days of judgment, while the Butterworths Human Rights Case series is published 10 times per year. The subscription also enables access to the Law Reports of the Commonwealth, published about 5 times per year.

Commentary available via the service is comprehensive although at times somewhat dated. The subscription enables access to the full-text of *Human Rights Law and Practice* (2<sup>nd</sup> ed, 2004) by Lord Lester QC and David Pannick QC, which is an authoritative and indispensable text on UK and European human rights law. The text is fully searchable and hyperlinked to cases and legislation. Available analysis also includes the Doughty Street Human Rights Commentary, which itself contains useful case summaries (current to 2007) and articles (disappointingly only current to 2005) prepared by the barristers at Doughty Street Chambers.

One of the most valuable functions of the service is that of 'Scheduled Searches'. This function enables automatic searching of all available sources at specified intervals (eg, daily) on a particular topic or topics, such as 'Human Rights and Civil Liberties'. Alerts as to search results are periodically delivered

to your email inbox as you specify. This is a very easy way to remain comprehensively apprised of UK and European human rights law issues and developments.

A recent review of the first five years of the UK *Human Rights Act* concluded that UK law, policy and jurisprudence benefited significantly from the 'positive dialogue between UK judges and those of the European Court of Human Rights'. Such beneficial dialogue is encouraged under both the Victorian *Charter* and the ACT *HRA*, which both direct practitioners and courts to consider 'International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right' in the interpretation of human rights and statutory provisions. The LexisNexis Butterworths UK 'Immigration and Human Rights' service will be a very valuable resource for Australian judges and practitioners committed to engaging in, contributing to, and benefiting from this important international human rights dialogue.

The cost of an annual subscription to the service is \$3267. For subscription details, contact [jonathan.dalton@lexisnexis.com.au](mailto:jonathan.dalton@lexisnexis.com.au).

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

## Foreign Correspondent

### Developments in the International World of Human Rights

There has been significant progress in the world of international human rights in 2007, and 2008 promises even more. Indeed, 2008 is already shaping up to be a year of big celebrations in the international human rights world. The *Universal Declaration of Human Rights* celebrates its 60<sup>th</sup> anniversary, the Genocide Convention also turns 60, and the Rome Statute of the International Criminal Court marks the first decade of its existence. That's a lot of big birthday parties in the year ahead!

### The Human Rights Council and Universal Periodic Review

Amidst this historic backdrop, we begin 2008 with a United Nations human rights system that has been completely overhauled, providing new opportunities for monitoring human rights, and a universal system of review to hold governments accountable for their progress. The new Human Rights Council, which was established in 2006, spent most of 2007 in embryonic state, still trying to establish the modalities for its future work. Now that the operational details have been somewhat ironed out, we can put it to work. A new Advisory Body of independent experts will begin work this year, investigating thematic and theoretical human rights issues. Meanwhile, the new Complaints Procedure will also begin investigating gross violations of human rights and fundamental freedoms all over the world.

In April we will experience the first ever session of the Universal Periodic Review, a process whereby each government's progress in the area of human rights will be reviewed by the international community – every country will be examined, on a rotating basis, on all human rights. The most promising aspect of this process is that governments are committed to subjecting themselves to a system that will scrutinize them in a universal, transparent, objective manner. While Australia is not due to be examined under the Universal Periodic Review until 2011, the first year of the process in 2008 will shape how well this system will work as a way for governments and civil society to review the human rights progress in all corners of the world.

In terms of new year's resolutions, this is the 'I'm going to go to the gym and get fit' one for the international human rights community; 2008 will be the year of establishing all those good exercise habits to ensure future human rights health checks can usefully diagnose the problem areas we still need to work on.

### Indigenous Populations at the United Nations

Another development at the Human Rights Council was the establishment in December 2007 of a new Expert Mechanism on the Human Rights of Indigenous Peoples, which is hoped will aid in the implementation of the new UN Declaration on the Rights of Indigenous Peoples. This expert mechanism replaces the former Working Group on Indigenous Populations, which had been well known as a unique forum in the UN system, allowing for direct access and a voice for Indigenous peoples. The establishment of the new mechanism was marred by some controversy, particularly over the extent to which full participation of Indigenous peoples is guaranteed. Nonetheless, there will be an opportunity

for Indigenous experts to be appointed to make their contribution, and we hope that in 2008 the mechanism can play an active role in highlighting the importance of Indigenous rights issues at the UN. This is more like the 'I'm going to clean out my wardrobe' resolution; getting rid of those tired old outfits may be necessary, but we need to make sure we don't accidentally throw out some of the most useful and beautiful pieces in the process. Discovering that the much-loved but outgrown classic at the back of wardrobe can be altered to fit can be a welcome relief.

### **Disabilities Convention**

2007 again disproved the adage that the era of human rights standard setting is over. Now 2008 gives us the opportunity to breathe life into new standards that have been established for persons with disabilities, and those who have been enforcedly disappeared. The new Convention on the Rights of Persons with Disabilities had gathered 120 signatures by the end of 2007, with 14 ratifications, and 7 ratifications of its Optional Protocol (OP). Australia has signed, but not yet ratified, the Convention. It has not signed its Optional Protocol which establishes a complaints procedure for individuals and groups to petition the newly established Committee on the Rights of Persons with Disabilities if their rights have been violated and they have been unable to obtain redress domestically. Only 6 more countries are required to ratify the Convention before it will come into force, and only 3 for the OP. There is still an opportunity for Australia to become an instrumental part of one of 2008's successes – the operationalisation of the Disabilities Convention.

This is rather like the 'I'm going to learn how to dance salsa' resolution; we think we can move well in the lounge room at home, and it couldn't be that difficult to learn, but something has usually held us back. Now all our friends are doing it, although they really need us to get the party started. Time to stop feeling like a wallflower – what have we got to lose?

### **Economic, Social and Cultural Rights and the Optional Protocol**

In her first major interview this year, the United Nations High Commissioner for Human Rights, Louise Arbour, spoke about her desire to see economic, social and cultural rights become an important focus for the international human rights community in 2008. She explained that since 11 September 2001, civil and political rights had been preoccupying so much of our human rights space that economic, social and cultural rights have been left relatively unattended.

In many ways this is true, yet behind the scenes in conference rooms in Geneva and other cities around the world, the debates on ESC rights have continued. We hope that 2008 will be the year these debates crystallize into a long overdue end to the human rights hierarchy, and that individual victims of ESC rights violations will finally be granted a forum in which to seek redress, through the adoption of an optional protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR). The OP-ICESCR would establish a communications procedure similar to that which exists for almost all other core international human rights treaties, protecting the rights that governments have already committed to in their ratification of ICESCR (in Australia's case, in 1976). A Working Group, currently mandated to draft this instrument, will meet in February and again in April to finalise its negotiations. All indications are that the hopeful adoption of this text will be a key part of the UDHR's 60<sup>th</sup> anniversary celebrations.

Disappointingly, Australia has been in the vocal minority objecting to this development – something we hope will also change in 2008. Which means this becomes the 'I'm going to stop being so negative this year' resolution. The international community has a real chance to change the course of history for victims of ESC rights violations; all that is needed is a little more positive attitude and willingness to promptly negotiate this new mechanism.

So, some promising new year's resolutions have been set. But will 2008 be the year that we can really make progress on some of these important human rights issues? I'll keep you updated from my end ...

*Claire Mahon is an Australian international human rights lawyer based in Geneva, Switzerland. She works as a consultant for NGOs and the UN, and as a research associate at the Graduate Institute of International and Development Studies.*

## If I Were Attorney-General...

### Recalibrating Australia's Counter-Terrorism Law and Policy

Changes in government carry with them a certain energy. Clearly, for supporters of the vanquished, these are moments of melancholy. But for the broader electorate, the mood is an excited brand of hope. Suddenly, the next three years seem fresh, free and open. The familiar patterns of the past no longer apply. Anything is possible, and for a moment everyone dreams of a nation approximating their own designs.

And for the new government, it is a time of rare opportunity. Politics is a choking endeavour. Principles and ideals are regularly compromised for powerful political imperatives. There are factions to placate, key demographics to appease, media critics to rebuff and ultimately, elections to win, all of which has the potential to lead to bad policy. If these compromising factors are ever suspended, or at least mitigated, it is in a new government's brief honeymoon.

My hypothetical ascension to the Attorney-General's portfolio occurs in that environment. The nation's mood for change has been expressed, and in the most politically charged area of my duties – terrorism – the electorate seems to have discovered a hitherto absent cynicism. A recent survey by security company Unisys has terrorism dropping down the list of Australians' security concerns. It seems identity theft and credit card fraud bother us more. Undoubtedly the Haneef debacle informs this growing cynicism. More than at any other time since 11 September 2001, the Australian public is prepared to accept that it is possible for counter-terrorism to be too indiscriminate, and too aggressive. The fact that there have been no successful terrorist attacks on Western soil since 2005 has no doubt had an impact, too.

Now would be the time, then, for me as federal Attorney-General to re-calibrate Australia's counter-terrorism law and policy. It is difficult to believe the Haneef case was merely an isolated accident. No less troubling is the case of Izhar Ul-Haque, who, according to the New South Wales Supreme Court, was kidnapped and falsely imprisoned by over-zealous ASIO officers. The facts of that case, and the treatment of Haneef by both police and the Howard government, point to a more general orientation in Australian counter-terrorism, contemptuous of suspects' presumed innocence, muscularly asserting the power of the state, and skewed towards aggression. This has been something of a cultural phenomenon in recent years that pervades law enforcement and intelligence agencies, but also the parliament.

My aim would be to set a different cultural tone. A starting point might be an emphasis on terrorism as more than a national security problem, but as a community problem as well. Community-based approaches to policing and intelligence would be encouraged, where these agencies develop strong community relations and eventually come to be seen as serving the public rather than surveilling and policing it. It is an approach that has long been successful in Victoria, Britain and Queensland, but it is sorely missing at the federal level. Clearly, government cannot control these agencies, but it can set an example.

Legislation might be a good place to start. As Andrew Lynch has written in previous editions of this column, the Howard government has certainly had the benefit of numerous recommendations and evaluations of its anti-terrorism legislative regime. Much of it has been critical, often on human rights grounds, and almost all of it has been ignored. Naturally, I would echo Lynch's call to pay greater heed to these recommendations. But I would add an extra dimension to these inquiries. I would seek a comprehensive review of our anti-terrorism laws specifically analysing their social and psychological impact on minority groups, with a particular focus – in human rights terms – on the extent to which they are discriminatory either in letter or in practice.

I say this not only as a human rights concern, but as a key plank in assessing the efficacy of these laws. A substantial body of academic literature concludes that when the state resorts to strong demonstrations of power in response to a terror threat, and especially where they do so in a way perceived to be discriminatory, it has the long-term effect of exacerbating the threat it is aiming to counter. This was true of the British experience with the IRA. It is true of Spain's experience with Basque separatists. It is true of the Sri Lankan struggle with the Tamils. Discriminatory, muscular counter-terrorism only increases support for the terrorists' cause and causes their ranks to swell. A Monash University study suggests a similar phenomenon might be at work in Australia. We urgently need a more comprehensive examination of this.

It is difficult for governments to resist these aggressive counter-terrorism responses. It is even harder to sell a message to an electorate that human rights and counter-terrorism are not in tension. But our best knowledge suggests this is true, and if ever there was a time where the politics allow that message to be sold, it is now. That is an opportunity I would hope to use.

*Waleed Aly is a Lecturer in the Global Terrorism Research Centre at Monash University, a lawyer and a former secondee with the Human Rights Law Resource Centre*