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HUMAN RIGHTS LAW
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The Human Rights Law
Resource Centre Ltd aims to:

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

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

OPINION

The Death Penalty in Australia: A Matter of Principle

It is almost 40 years since the last person was hanged in Australia. Today, the death penalty has been abolished in every Australian jurisdiction. Opposition to the death penalty attracts bipartisan political support. Yet, in a region where many of our closest neighbours still maintain the death penalty, I believe Australia can – and should – take a stronger stand against state sanctioned execution.

There are many convincing arguments against the death penalty. Our Prime Minister opposes the death penalty for ‘pragmatic reasons’ because ‘the law makes mistakes’. There is, after all, little comfort for families in a finding of miscarriage of justice after the funeral. The rationale that the death penalty acts as a deterrent has been discredited and dismissed. In fact, the chilling response of one of the Bali Bombers’ to his death sentence – ‘it will be a martyr’s death and that is what I am looking for’ – reminds us that, for terrorists, the prospect of the death penalty may even serve as an incentive.

Ultimately, the most compelling argument against the death penalty is simply that we should respect the sanctity of human life. The belief that we should respect the inherent dignity and value of human life is the foundation of all human rights and reflects a deeply held moral vision of the type of world we want to live in. To quote the preamble of the *Second Optional Protocol to the Covenant on Civil and Political Rights*, the abolition of the death penalty ‘contributes to enhancement of human dignity and progressive development of human rights’.

Justice Michael Kirby has written that ‘the death penalty brutalises the State that carries it out. Public servants must prepare the messy business of the termination of human life ... [the death penalty] is a left over from an earlier and more barbaric time’. In Australia, there was a collective flinch, when the hangman for Nguyen Tuong Van (the young Australian man executed in Singapore) described how doomed men ‘struggle like chickens, like fish out of the water’.

We are lucky then, as Kirby J observes, that ‘we have set ourselves upon a path to a higher form of civilisation’. Yet recent events – the fate of Nguyen Tuong Van and the news that members of the ‘Bali nine’ will face execution – confirms that even though Australia is an abolitionist country, the issue of the death

penalty still concerns Australians and, perhaps most importantly, the Australian Government.

In an era where law enforcement requires international cooperation, Australian commitment to the universal abolition of the death penalty should be uncompromising – not vary from case-to-case depending on the crime, citizenship and country. We need to make sure that our mutual assistance and agency assistance arrangements reflect Australia's commitment to abolishing the death penalty.

The question is, having set ourselves upon a path to a higher civilisation, are we prepared to go the distance? Are we prepared to oppose the death penalty wherever and whenever it occurs?

Australia's International Obligations

By ratifying the *Second Optional Protocol*, Australia has committed itself to opposing the death penalty. As a signatory, Australia can not reintroduce the death penalty and must ensure that no one within Australia's jurisdiction is executed. Crucially, the United Nations Human Rights Committee has held that 'countries that have abolished the death penalty, [have] ... an obligation not to expose a person to the real risk of its application'.

Australia's obligation to protect individuals within its jurisdiction from the application of the death penalty is not as straight forward as simply abolishing the death penalty in all Australian jurisdictions.

In a region where many of our nearest neighbours maintain the mandatory death penalty for a wide range of offences, it is inevitable that occasionally Australians will find themselves on death row. And, in rare circumstances, Australians may find themselves facing the death penalty in a foreign country as a result of the actions of Australia.

There has, for example, been considerable media coverage about the question of whether or not the actions of the Australian Federal Police exposed members of the so-called 'Bali Nine' to the risk of the death penalty. This raises the issue of how Australia should respond to a request for assistance in criminal investigations and prosecutions when providing assistance may expose a person to the risk of the death penalty.

There are two key ways in which Australia can provide a foreign country with information about a criminal investigation or prosecution. The first way is by 'mutual assistance'. Mutual assistance is a formal process whereby governments can ask other governments for assistance in criminal investigation and prosecutions. The second way is by 'agency-to-agency assistance'. Under agency-to-agency assistance – which includes police to police assistance – Australian law enforcement agencies can share information about criminal investigations with their overseas counterparts.

Mutual Assistance

Currently, s 8(1A) of the *Mutual Assistance Act* (Cth) provides that a request for mutual assistance **must** be refused if the request relates to the prosecution or punishment of an offence where the death penalty may be imposed unless the Attorney-General believes there are 'special circumstances' which mean that assistance should be granted.

Section 8(1B) provides that a request for mutual assistance **may** be refused if the Attorney-General believes that granting the request may result in the death penalty and, after considering the interests of international criminal co-operation, is of the opinion that in the circumstances, the request should not be granted.

I am concerned that the *Mutual Assistance Act* does not take a strong enough stance to prevent a person being exposed to the death penalty as a result of assistance provided by Australia. While the *Mutual Assistance Act* offers some protection, this protection is undermined by the fact that s 8(1B) does not provide for the mandatory refusal of a request for mutual assistance in relation to an investigation which may expose a person to the risk of the death penalty.

Consistent with Australia's international obligations and bipartisan opposition to the death penalty, a request for mutual assistance should be refused if granting a request in relation to the investigation, prosecution or punishment of an offence may result in the death penalty being imposed in a foreign country **unless** the country undertakes not to impose or carry out the death penalty.

However, while inserting a provision like this into the *Mutual Assistance Act* would better reflect Australia's opposition to the death penalty, it would not resolve the serious

problem of inconsistency between Australia's mutual assistance arrangements and our agency-to-agency assistance arrangements.

Agency-to-Agency Assistance

Currently, the commitment to the abolition of the death penalty reflected in s 8(1A) and, to a lesser extent, s 8(1B) of the *Mutual Assistance Act* is undermined by the approach to police to police assistance in investigations which may result in the death penalty. This is because, in accordance with the *Australia Federal Police (AFP) Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations*, the AFP can assist foreign countries on a police-to-police basis where no charges have been laid, regardless of whether or not the requesting country is investigating offences that attract the death penalty.

The recent decision of Finn J in *Rush v Commissioner of Police [2006] FCA 12* confirms that the AFP can lawfully provide agency-to-agency assistance in the investigation of crime, regardless of whether or not the assistance may expose individuals in Australia's jurisdiction to the death penalty. However, in delivering his judgment, Finn J observed there is a need to address the procedures followed by the AFP 'when providing information to the police forces of another country in circumstances which predictably could result in the charging of a person with an offence that would expose that person to the risk of the death penalty ...'.

Australia's approach to international cooperation in criminal justice matters should always reflect Australia's commitment to the abolition of the death penalty. Currently there is a clear inconsistency between the way Australia's mutual assistance arrangements and agency-to-agency assistance arrangements address death penalty charge situations.

While it is legitimate under Australian law to provide agency-to-agency assistance that may expose a person to the risk of the death penalty in a foreign country, to do so could arguably breach Australia's obligations under the *ICCPR* and the *Second Optional Protocol* and undermine Australia's principled opposition to the death penalty.

There is a clear need to ensure that Australia's opposition to the death penalty is reflected in every aspect of Australia's approach to cooperation in international criminal justice

matters. This does not mean that Australia will be unable to provide assistance in matters where there is a risk that the death penalty will be imposed; it simply means that Australia's assistance will always be conditional on a guarantee from the requesting country that they will not impose or carry out the death penalty.

A Question of Leadership

I believe Australia should be steadfast in its opposition to the use of the death penalty in any country in any circumstances. Terrorism is a heinous crime and I understand why many people believe convicted terrorists deserve to die. However, we must resist the temptation to revert to the 'eye for an eye' mentality, otherwise, as the saying goes, 'we all end up blind'.

As a matter of practicality, terrorists may perceive the prospect of the death penalty as an invitation to martyrdom. As a matter of principle, opposition to the death penalty is not about the fact that the actions of criminals disrespect the sanctity of life, it is about the State respecting the sanctity of life.

Australia's opposition to the death penalty should be clear and consistent, regardless of the crime, regardless of the country, and regardless of the citizenship of the convicted. In a regional context, opposing the death penalty for some crimes but not for others, for some criminals but not our own citizens, opens Australia to charges of hypocrisy and undermines our commitment to the universal abolition of the death penalty.

In a region where many of Australia's neighbours still impose the death penalty, Australia has the opportunity to take a leadership stance on the road towards the universal abolition of the death penalty.

The Hon John von Doussa QC is President of the Human Rights and Equal Opportunity Commission. The full text of this speech is available at

http://www.hreoc.gov.au/about_the_commission/speeches_president/

NEWS

New Resource on UK Human Rights Act 1998: A Handbook for Public Authorities (2006)

The Human Rights Division of the UK Department for Constitutional Affairs has

recently published *Human Rights: Human Lives – A Handbook for Public Authorities* (October 2006).

Section 6(1) of the UK *Human Rights Act 1998* provides that 'it is unlawful for a public authority to act in a way which is incompatible with a [human] right'. Section 38(1) of the Victorian *Charter of Human Rights and Responsibilities Act 2006* similarly provides that 'it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a human right'. Public authorities in both jurisdictions include not only government departments, officials and bodies, but also private and community sector entities providing services 'of a public nature'.

Given the significant similarities between these provisions, it is likely that this *Handbook* will be of significant comparative value to Australian lawyers and human rights practitioners.

The *Handbook* provides a brief overview of the objects and purposes of the *Human Rights Act*, together with useful summaries of the rights protected by the Act:

- the right to life;
- freedom from torture or inhuman or degrading treatment;
- freedom from slavery or forced labour;
- the right to liberty and security;
- the right to a fair trial;
- the right to no punishment without law;
- the right to respect for private and family life;
- freedom of belief;
- freedom of expression;
- freedom of assembly and association;
- the right to marry;
- the right to freedom and protection from discrimination; and
- the right to education.

In respect of each right, the *Handbook* provides information about:

- what the right means;
- examples of where the right may be relevant or engaged;
- a summary of what public authorities must do to comply with right; and
- case studies and best practice examples of implementation of the right.

The *Handbook* also includes a very useful flowchart to enable practitioners and public authorities to apply human rights in a practical and systematic way.

The *Handbook* is available at

<http://www.dca.gov.au/peoples-rights/human-rights/pdf/hr-handbook-public-authorities.pdf>

Human Rights Law Resource Manual: Updated Chapter on Victorian *Charter of Human Rights and Responsibilities*

A revised edition of the Human Rights Law Resource Manual, including a substantially expanded chapter on the Victorian *Charter of Human Rights and Responsibilities*, is now available online at www.hrlrc.org.au in the 'Human Rights Library'.

The Manual provides a practical and accessible overview of the international human rights framework and the use of relevant international and domestic human rights instruments in casework, litigation, advocacy, and policy analysis and design.

The Manual is divided into the following parts:

- Title Page, Table of Contents and Acknowledgements
- Chapter 1 – Overview of the Manual and the Human Rights Law Resource Centre
- Chapter 2 – Introduction to International Human Rights Law
- Chapter 3 – Responsibility for Implementation of Human Rights
- Chapter 4 – Implementation and Uses of International Human Rights in Domestic Law and Courts
- Chapter 5 – The Victorian *Charter of Human Rights and Responsibilities*
- Chapter 6 – International Human Rights Law Monitoring, Reporting and Complaints Mechanisms
- Chapter 7 – Choosing and Running a Human Rights Case

Each of the Chapters can be downloaded as a pdf file. If you require the Manual in Microsoft Word format, please contact the HRLRC Director on hrlrc@vicbar.com.au.

CASENOTES

Victorian Court of Appeal Makes First Reference to *Charter of Human Rights and Responsibilities*

TSL v Secretary to the Department of Justice [2006] VSCA (26 September 2006)

The Victorian Court of Appeal (comprising Callaway AP, Buchanan JA and Coldrey AJA) has recently made its first reference to the Victorian *Charter of Human Rights and Responsibilities*.

The *Charter*, which received royal assent in July 2006 but does not commence, for the most part, until 1 January 2007, enshrines a body of human rights derived from the *International Covenant on Civil and Political Rights*. Among the mechanisms established by the *Charter* to protect human rights is a requirement that, from 1 January 2008, all statutory provisions must be interpreted and applied, so far as is possible consistent with their statutory purpose, in a way that is compatible with human rights. The *Charter* also provides, at s 7, that human rights may only be subject to such 'reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom and taking into account all relevant factors'.

TSL v Secretary to the Department of Justice concerned an appeal against the imposition of an extended supervision order against a convicted sexual offender. The *Serious Sex Offenders Monitoring Act 2005* (Vic) provides that an extended supervision order may be made in respect of an offender if the court is 'satisfied, to a high degree of probability, that the offender is likely to commit a relevant offence if released in the community on completion of the service of any custodial sentence ... and not made subject to an extended supervision order.'

The Court of Appeal in *TSL* was required to interpret and apply the term 'likely to commit'. One possible meaning was that the risk of re-offending be a 'substantial – a "real and not remote" – chance'. Another possible meaning was that the word 'likely' incorporated the notion of 'high degree of probability', such that the Court must be satisfied that there is a high degree of probability that the offender will commit a relevant offence. In preferring the second meaning, the Court stated that it is 'almost inconceivable' that Parliament would

have intended that 'likely' mean 'real and not remote'. The Court stated that:

A person subject to an extended supervision order is a prisoner in all but name. The threshold would be far too low, in a free society, if a court had a discretion to make an extended supervision order simply because it was satisfied that there was 'a substantial – a "real and not remote" – chance' of his or her re-offending. That is why the word 'likely' ... is used in the sense of a high degree of probability. [9]

In a footnote to this passage, the Court referred to s 7 of the *Charter* which, as discussed above, requires that limitations on human rights be demonstrably justifiable having regard to factors such as the nature, extent and purpose of the limitation. The Court stated, moreover, that while 'the *Charter of Human Rights and Responsibilities Act 2006* is not yet in force, the nature of our society is a legitimate factor to take into account in construing the legislation.' This is consistent with the established common law position that 'the provisions of an international human rights convention to which Australia is a party can also serve as an indication of the value placed by Australia on the rights provided for in the convention and, therefore, as indicative of contemporary values' (*Royal Women's Hospital v Medical Practitioners' Board of Victoria* [2006] VSCA 85, [77]).

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VSCA/2006/199.html>.

HRLRC POLICY, ADVOCACY and LAW REFORM

Report to UN Human Rights Experts regarding Homelessness and Lack of Adequate Housing in Australia

From 31 July to 16 August 2006, the UN Special Rapporteur on the Right to Adequate Housing conducted an official country visit to Australia. In his Preliminary Observations regarding implementation of the right to adequate housing, the Special Rapporteur noted that there is a 'serious, hidden national housing crisis in Australia'.

Following his visit, the HRLRC and the PILCH Homeless Persons' Legal Clinic produced a detailed report to further inform the Special

Rapporteur for the purpose of completing his final report which will be tabled before the UN Human Rights Council. The report draws attention to the ongoing serious human rights violations experienced by people who are homeless in Australia and also urges investigation of this situation by the Special Rapporteurs in the areas of the:

- right to the highest attainable standard of health;
- the right to be free from all forms of discrimination;
- the right to be free from extreme poverty;
- the rights of Indigenous people; and
- the right of women to be free from violence.

By its own measure, Australia is a wealthy, developed and prosperous nation. The report contends that, despite this, it is not discharging either its progressive or core obligations in relation to these rights.

The report demonstrates the way in which inadequate public housing programs, chronic under-funding of the Supported Accommodation Assistance Program and crisis accommodation services, as well as a lack of available, affordable and quality housing in the private market, jeopardise the right of many Australians to adequate housing, and particularly the right to live somewhere in security, peace and dignity.

The right to health is also an area of great concern and the report highlights the strong associations between homelessness and poor health, particularly poor mental health. Poor health, both mental and physical, can be the cause of, a contributor to, and a consequence of homelessness. The report argues that people experiencing homelessness confront a range of barriers to adequate health care and that Australian governments, at federal and state levels, must adopt legislative and practical measures to ensure that those who are homeless or at risk of homelessness are able to access health care and the benefits of good health that much of the rest of the community enjoys.

According to Amartya Sen, Nobel Prize Winner for Economics, 'inadequate income is a strong predisposing condition for an impoverished life'. In this context, the report argues that, in Australia, the absence of a guaranteed minimum income, together with inadequate

income support and social security arrangements, contribute significantly to people either living in or being at risk of poverty and homelessness. The report is also critical of the punitive reforms introduced by the Welfare to Work legislation and contends that the human and social consequences of inadequate income support to those who need it can be devastating.

In his Preliminary Observations, the Special Rapporteur on the Right to Adequate Housing described the lack of housing and civic services for Indigenous people in Australia as a 'humanitarian tragedy'. The report provides detailed information about the situation many Indigenous people face with respect to housing, health and discrimination.

Women escaping domestic and family violence account for about 33 per cent of people who seek assistance from homelessness assistance services in Australia each year. The report deals with this issue, demonstrating the associations between homelessness and violence against women in Australia. It also highlights the considerable difficulty women in this situation face in securing safe and adequate accommodation, as well as access to civic services, and the impact this has on their physical, mental, emotional social and financial wellbeing.

Finally, the report submits that the Australian government is failing in its legal and moral responsibility to protect and fulfil the rights of persons experiencing homelessness or at risk of homelessness and requests urgent investigation by the relevant Special Rapporteurs. We are hopeful that the report will prompt investigation, action or comment on their parts.

We are very grateful for the important contributions of a number of community and non-profit organisations that have enhanced the report considerably and have helped ensure that it provides a comprehensive overview of the situation in Australia.

The full report can be found at www.hrlrc.org.au.

Caroline Adler works part-time as a lawyer and policy officer with the PILCH Homeless Persons' Legal Clinic. She also works part-time as a lawyer with Allens Arthur Robison.

HRLRC CASEWORK

Challenge to Legality of David Hicks' Trial under International and Australian Domestic Law

A group of eminent Australian lawyers has prepared an Opinion about the continued detention of David Hicks in Guantanamo Bay and his proposed trial by a Military Commission. The Opinion has potentially alarming implications for the Federal Government and its Ministers.

In essence, the lawyers have concluded:

- that the US proposal to try David Hicks before a freshly constituted Military Commission contravenes Article 3 of the Geneva Conventions in that such a trial is not capable of being regarded as a fair trial at international law;
- that the conduct of such a trial by the Military Commission is also inconsistent with the recent decision of the US Supreme Court in *Hamdan*, which declared a previous such Commission unlawful;
- that such a trial would be in contravention of the *Australian Criminal Code*;
- that government ministers are subject to the *Australian Criminal Code*; and
- that to knowingly counsel or urge that such a trial be conducted before a Military Commission constituted under the relevant US legislation would constitute a war crime under the *Australian Criminal Code*.

In substance, the lawyers say that such a trial is in breach of the Geneva Conventions because:

- The Military Commission is not an independent and impartial tribunal. It will be composed of officers appointed by the President through his delegate, the US Secretary of Defense, and will be serving under the command of and at the pleasure of those individuals. The Secretary of Defense controls the manner in which trial counsel and military defense counsel are appointed and also administers the prosecuting authority.
- The US Secretary of Defense can control issues such as the law to be applied and the type of evidence that will be admitted. Further, evidence may be admitted even

where it was obtained by moral or physical 'coercion'.

- The accused may never be made aware of the evidence that has been admitted against him as it may be withheld for security reasons and may include hearsay evidence.
- The US Secretary of Defence, as part of the Executive, also controls the detention of prisoners being tried.
- The procedures deny an accused person any adequate opportunity to present his defence.

In addition, the lawyers say that such a trial has been excessively delayed and violates David Hicks' right to a trial without unreasonable delay and that his continued detention also violates international law.

The Opinion has been signed by the Hon Alastair Nicholson AO RFD QC (Former Judge Advocate General of the ADF, Honorary Professorial Fellow, Department of Criminology, University of Melbourne); Peter Vickery QC (Special Rapporteur, International Commission of Jurists, Victoria); Professor Hilary Charlesworth (Professor of International Law and Human Rights, ANU); Professor Andrew Byrnes (Professor of International Law, Faculty of Law, UNSW); Gavan Griffith AO QC (Solicitor-General of Australia 1984 – 97); and Professor Tim McCormack (Australian Red Cross Professor of International Humanitarian Law, University of Melbourne).

The Opinion has been delivered to the HRLRC and to the Law Council of Australia. The Law Council of Australia has supplied the Opinion to the Federal Attorney-General, the Hon Philip Ruddock MP.

The HRLRC is now undertaking a factual investigation and analysis of material to form a view as to whether, in fact, the conduct of any person or persons in relation to David Hicks may amount to a war crime. Contravening conduct could lead to prosecution in Australian courts under the *Australian Criminal Code* or before the International Criminal Court under the Rome Statute.

The Opinion is available for download from www.hrlrc.org.au.

Does a Gambling Addiction Constitute a 'Disability' under International Law?

The Centre has recently provided assistance to the Disability Discrimination Legal Service and Counsel in a case regarding the issue as to whether a gambling addiction can constitute a 'disability' or 'impairment' within the meaning of the *Equal Opportunity Act 1995* (Vic).

The assistance provided by the Centre pertained to:

- the sources of international human rights law;
- the uses of international human rights law in domestic courts; and
- discrimination and the meaning of 'disability' under international human rights law.

Set out below is a brief summary of the Centre's conclusions in relation to the third issue, namely the meaning of 'disability'.

The right to equality and freedom from discrimination is an integral component of the international human rights framework and is entrenched in both the *ICCPR* and the *ICESCR*. Australia is a party to both of these covenants.

The obligation of all Australian governments to guarantee, by law, equal and effective protection against discrimination is set out in art 26 of the *ICCPR* which provides that:

All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Although 'discrimination' is not defined in the *ICCPR*, the Human Rights Committee, being the treaty body established under the *ICCPR* to monitor and report on its content and implementation, has defined it as:

any distinction, exclusion, restriction or preference ... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, by all persons, on an equal footing, of all rights and freedoms.

The norm of non-discrimination is also enshrined in art 2(1) of the *ICCPR* and art 2(2) of *ICESCR* and probably constitutes a peremptory principle of customary international law.

While the term 'disability' is not expressly used in either the *ICCPR* or the *ICESCR*, it is well established that the terms 'other status' clearly encompass discrimination on the grounds of disability. Thus, the Committee on Economic, Social and Cultural Rights ('CESCR'), being the treaty body established under the *ICESCR* to monitor and report on its content and implementation, has stated that:

- persons with disabilities are clearly entitled to the full range of human rights;
- States Parties are required to take appropriate measures to enable people with disabilities to overcome any disadvantages; and
- the human rights of persons with disabilities must be protected and promoted through general, as well as specially designed, laws, policies and programs.

The CESCR has also stated that the Standard Rules on the Equalization of Opportunities for Persons with Disabilities ('Standard Rules'), adopted by the UN General Assembly by Resolution 48/96 of 20 December 1993, 'are of major importance and constitute a particularly valuable reference guide in identifying more precisely the obligations of States parties' in relation to the implementation of human rights, particularly the right to non-discrimination on the grounds of disability.

The Standard Rules, which may be considered rules of customary international law, provide in relation to 'disability' that:

The term 'disability' summarizes a great number of functional limitations occurring in any population in any country of the world. People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments may be permanent or transitory in nature.

They further provide, in relation to the term 'handicap', that:

The term 'handicap' means the loss or limitation of opportunities to take part in the life of the community on an equal level with others. It describes the encounter between the person with a disability and the environment. The purpose of this term

is to emphasize the focus on the shortcomings in the environment and in many organized activities in society, for example, information, communication and education, which prevent persons with disabilities from participating on equal terms.

On 27 August 2006, the UN Human Rights Council settled the text for a proposed International Convention on the Rights of Persons with Disabilities. Australia voted in favour of the text. It is likely that the Convention will be adopted by the General Assembly in December 2006 and opened for signature shortly thereafter.

The proposed Convention does not contain a definition of 'disability', instead containing a preambular recognition that:

disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.

It also provides, at art 1, that 'persons with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.

Article 5 of the proposed Convention requires that States Parties 'prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.'

The approach adopted in the proposed Convention, namely that 'disability' is an evolving concept and the term should not be interpreted or applied rigidly or restrictively, is consistent with the fundamental principles for the interpretation and application of treaties articulated in the *Vienna Convention on the Law of Treaties*, to which Australia is a party. It is also consistent with decisions of the International Court of Justice and the European Court of Human Rights. Relevantly, those principles include that:

- Treaties should be interpreted and applied in good faith and in the light of their objects and purposes (in this case, 'to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with

disabilities, and to promote respect for their inherent dignity');

- Human rights treaties, in particular, should be interpreted and applied 'so as to make their safeguards practical and effective';
- Human rights treaties, in particular, are 'living instruments which must be interpreted in the light of present day conditions'. The International Court of Justice has stated that treaties must be read and applied in the international legal environment prevailing at the time of the interpretation, rather than at the time of agreement; and
- In situations where a person alleges that their rights have been breached, the rights should be interpreted in favour of that person, particularly where they bear on issues of civil liberty, equality or human dignity. The Human Rights Committee has, on a number of occasions, been critical of the tendency of States to interpret and apply rights too narrowly.

The Centre did not express a view as to whether international law does or does not support an argument that the terms 'impairment' or 'disability' would include a gambling addiction.

The matter was heard in VCAT on 30 and 31 October and judgment was delivered on 10 November 2006. In dismissing the complaint, VCAT found that, on the facts, the complainant did not suffer from a gambling addiction at the relevant time. VCAT was therefore not required to make a finding as to whether a gambling addiction may constitute a disability or impairment: see *McDougall v Kimberly-Clark Australia Pty Ltd* [2006] VCAT 2211 at <http://www.austlii.edu.au/au/cases/vic/VCAT/2006/2211.html>.

SEMINARS and EVENTS

Refugee Rights, Responsibilities and Temporary Protection

presented by

Human Rights Law Resource Centre and
Australian Lawyers for Human Rights

with

Dr Guy Goodwin-Gill

Details

Time: 7.20am for a 7.30am start. The seminar will conclude by 9.00am

Date: Thursday, 30 November 2006

Venue: Allens Arthur Robinson
Level 34, 530 Collins Street
Melbourne

Cost: \$20/\$10 concession
Breakfast provided

Registration is essential.

RSVP by 23 November 2006 using the Booking Form available in 'What's New' at www.hrlrc.org.au.

Dr Goodwin-Gill is one of the world's leading scholars in international refugee law. He is currently a Senior Research Fellow at All Souls College at the University of Oxford and has previously held appointments as Professor of International Refugee Law at Oxford and Professor of Asylum Law at the University of Amsterdam. Dr Goodwin-Gill worked for over a decade for the United Nations High Commissioner for Refugees and is the author of the premiere refugee law text, *The Refugee in International Law*. He also practises as a barrister from Blackstone Chambers in London.

Equal Opportunity Commission 6th Annual Human Rights Oration Protecting Rights in a Climate of Fear

with

Julian Burnside QC

Details

Date: Wednesday, 13 December 2006

Time: 12.00pm – 1.00pm

Venue: Zinc at Federation Square
Cnr Flinders and Swanston Streets
Melbourne

Cost: Free (includes lunch)

Registration is essential.

RSVP by 7 December to Ellen Orm at ellen.orm@eoc.vic.gov.au or (03) 9281 7147.

Human Rights Conference Freedom, Respect, Equality and Dignity

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

Keynote speakers include:

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

Further information about the Conference, including a Call for Abstracts and Registrations, is available at www.eoc.vic.gov.au.

EDUCATION, RESOURCES and TRAINING

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

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

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

Set out below is a selection of key regional jurisprudential sources that are available online. The last edition of the Bulletin featured

key international sources, while the next edition will feature key comparative domestic sources.

European Court of Human Rights

The *European Convention on Human Rights* contains a range of civil and political rights that are similar in content and form to those contained in the *Charter*.

The European Court of Human Rights in Strasbourg is the supreme court for the adjudication of matters under the *European Convention*.

For jurisprudence and case law from the European Court, see:

- <http://www.worldlii.org/eu/cases/ECHR/>; or
- <http://www.echr.coe.int/>.

Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights is responsible for the determination of matters arising under the *American Declaration of the Rights and Duties of Man* and the *American Convention on Human Rights*.

Both of these instruments enshrine a range of civil and political rights of similar content and form to those in the *Charter*.

For case law and analysis of these human rights see:

- the Commission's website at <http://www.cidh.oas.org/DefaultE.htm>; and
- the University of Minnesota Human Rights Library at <http://www1.umn.edu/humanrts/cases/commissn.htm>.

African Commission on Human and Peoples' Rights

The African Commission is charged with three major functions:

- the promotion of human and peoples' rights;
- the promotion of human and peoples' rights; and
- the interpretation of the *African Charter on Human and Peoples' Rights*.

For information, documentation and jurisprudence from the African Commission on Human and Peoples' Rights see:

- http://www.achpr.org/english/info/news_en.html

New Report: *Achieving Women's Economic and Social Rights: Strategies and Lessons from Experience* (2006)

It is well established that economic and social rights – such as the right to adequate housing and health care – are critical to human dignity, welfare and wellbeing. It is also well established that, throughout the world, women do not enjoy economic and social rights to the same extent as men.

In 2005, the Association for Women's Rights in Development ('AWID') asked over 50 activists working in diverse settings all over the world what strategies they found most useful in their efforts to improve economic and social rights for women? What were the greatest challenges they were encountering in their work? Did the ESCR framework actually fulfill its promise in presenting them with a new and more effective approach to their work? This report synthesises and analyses some important examples and lessons that emerged through this investigative process.

The report is available at <http://www.awid.org/publications/ESCR%20Report.pdf>

New Book: Andrew Lynch and George Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws*

In an era punctuated by terrorist attacks in New York, Washington, Bali, Madrid, London, Mumbai and elsewhere, new laws were needed in Australia to deal with terrorism to signal that we reject such violence and to ensure that our police and other agencies have the powers they need to protect the community.

Governments and parliaments across Australia deserve credit for recognising this need and passing laws that make terrorism a crime.

While Australia needs anti-terror laws, they must be the right ones. Unfortunately, many of the new laws suffer from serious problems, which is not surprising given they run to hundreds of pages and have often been enacted and amended with great speed. To go from having no federal law to having a comprehensive regime in just a few years was always going to be difficult, especially when the new laws realign our legal system through the

extensive powers they grant to government and their impact on basic freedoms.

Our response after September 11 has been essentially reactive, with each new bombing producing a new law – or several new laws. By itself, though, a terrorist strike should not automatically mean the government needs new powers. The need can only be determined by scrutinising our existing laws in light of what can be learnt from the attack.

Unfortunately, the new laws have been made with such haste that a careful assessment of where we already stand has been impossible. The laws passed after the London bombings in 2005 were enacted so quickly that they came into force before two ongoing inquiries into the effectiveness of the existing laws could report.

The cycle of attacks followed by new laws is dangerous. Driven by fear and the need to act, we run the risk of a series of overreactions. This is the dynamic that terrorists rely on. What they cannot achieve by military might, they seek to achieve by stimulating our fears.

By our own actions we may isolate and ostracise members of our community who, instead of assisting with intelligence-gathering, may then become susceptible targets for terrorist recruitment. Through our attempts to feel safe in the immediate term, we may actually make ourselves more vulnerable to terrorist attack.

The object of new terror laws cannot be national security at all costs. They can only be justified to the extent that they protect our democratic freedoms and way of life. National security at the price of living in a totalitarian state is not something that Australians would accept. This does not mean that our response to terrorism should be timid or that new laws are not warranted but that the case for departing from accepted civil rights must be fully justified and proportionate to the harm.

The question is how best to balance the security of the nation against the rights of its citizens. In other countries, the answer is grounded in a domestic charter of rights. Australia is the only democratic country without such a national law. Charters of rights not only set out the fundamental rights of a nation's citizens, they also establish a way of weighing those rights against other competing demands such as national security. They remind governments and communities of a society's basic values and of the principles that might

otherwise be compromised at a time of grief and fear. After new laws have been made, a charter can also allow courts to assess the changes against human rights principles, thus providing a final check on laws that, with the benefit of hindsight, ought not to have been passed.

The lack of a legal check means that political and legal debate in the 'war on terror' is largely unconstrained by fundamental human rights principles. Instead, the debate may reflect the majoritarian pressures of Australian political life. The only check on the power of parliament or government to abrogate human rights depends on the quality of political debate and the goodwill of our political leaders. This is not a check that is regarded as sufficient in other nations.

What Australia needs at such a time are leaders who, rather than playing to our fears, help us to understand that we must accept a level of risk of terrorist attack, that there are limits to what the law can achieve and that the wrong laws can be costly.

Five years since September 11, we risk reinforcing our legislative mistakes. Unfortunately, there is no sign that our law-makers will change course. New attacks will lead to new laws that will further erode our fundamental freedoms, increase fear and anger in parts of the community and make the problem more intractable. The laws we have today were unthinkable prior to September 11. It is equally hard to imagine the laws that we will end up with in the event of future attacks.

This is an edited extract from the book What Price Security? Taking Stock Of Australia's Anti-Terror Laws by Andrew Lynch and George Williams, published by UNSW Press, \$16.95. They are based at the Gilbert + Tobin Centre of Public Law at the University of New South Wales.

IF I WERE ATTORNEY-GENERAL...

If I were Attorney-General, I would approach the task with several guiding principles in mind. First, protection of the rule of law. Second, that Law and Justice should be synonymous. Third, that Justice should mean Justice for all.

Protection of the rule of law should never arise as a matter of concern in a healthy democracy. One element of the rule of law is that a person should not be detained without trial. Another is

that executive action should be examinable by courts. That is the foundation of habeas corpus.

Recent anti-terrorism legislation provides for preventative detention orders and control orders. This law is incompatible with the rule of law. First, it enables basic liberties to be seriously interfered with by orders made in secret. This cuts against centuries of learning about the process by which basic liberties can be curtailed.

Second, the legal test for the orders to be made is the balance of probabilities, which is much lower than the standard of satisfaction necessary in the ordinary criminal process.

Third, and most important, the legislation allows that evidence against a person be withheld from that person and their lawyer. It is the most basic requirement of a fair trial that the person know the case against them.

In 2004, the UK House of Lords decided a case concerning the indefinite detention of terrorist suspects. Lord Hope said that 'the right to liberty belongs to each and every individual'. Lord Bingham traced these rights to Magna Carta, and made the point that the struggle for democracy has long focused on the need to protect individual liberty against the might of executive government. Lord Nicholls said:

Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law. It deprives the detained person of the protection a criminal trial is intended to afford. Wholly exceptional circumstances must exist before this extreme step can be justified.

Lord Hoffman said:

The real threat to the life of the nation comes not from terrorism but from laws such as these.

The so-called Pacific Solution involves intercepting would-be asylum seekers and taking them against their will to Nauru. While in Nauru, they are held in a detention centre constructed by Australia and guarded by Australians. Their claim of refugee status is processed by Australian officials. All of this is done under arrangements made by the Australian government, and it is paid for by Australian taxpayers. The conduct of the Australians involved is not examinable by Australian courts, because the Australian officials are not administering any Australian

legislation. Australian lawyers have been refused access to the asylum seekers held in Nauru.

Every aspect of the Pacific Solution is a betrayal of the rule of law. The current Attorney-General has not expressed any concern about these arrangements: as Immigration minister, he helped create them.

If I were Attorney-General I would defend the courts against attack. Recently, Federal Attorneys-General have abandoned that important function. The current Attorney-General has himself been one of the people attacking our courts.

If I were Attorney-General, I would try to ensure that law and justice were synonymous. In Australia today innocent people are held in executive detention. They can be held for life if necessary. They are not suspected of or charged with any offence. Whilst in detention, they can be subjected to solitary confinement: not by virtue of any regulations, but at the whim of the executive government through its private prison operator. If they are released on a bridging visa E, they are allowed into the community but are denied the right to Centrelink benefits and are not allowed to work. All asylum seekers held in immigration detention are liable for the cost of their own detention, even if they are ultimately found to be refugees.

The laws which permit these things are not merely unjust. They are a disgrace to the nation and a stain on our history.

If I were Attorney-General, I would strive to see that Justice meant Justice for all. If access to justice has any meaning, funding for legal aid is plainly inadequate. For practical purposes, legal aid is trimmed to stay within available resources instead of being expanded to meet actual needs. Even in family law and criminal matters, litigants go unrepresented because they cannot afford lawyers and do not qualify for legal aid. If they are lucky, they may get some free advice from a Community Legal Centre. Shamefully, the current Attorney-General has threatened to reduce funding to Community Legal Centres because he does not approve of their 'political' activities.

In civil litigation, legal aid is effectively unavailable. This, presumably, is because funding bodies consider fights about money and property less important than fights about

children and crime. Other aspects of our social arrangements suggest a much greater concern for money and property than legal aid funding suggests. The absence of legal aid in civil litigation can work profound injustice, especially when the other litigants can afford their own lawyers. When one party is a well-resourced company, the individual litigant's rights are irrelevant: they will almost certainly have to sacrifice their rights because they cannot afford to vindicate them.

Tenancy disputes, consumer disputes and credit disputes all have a profound impact on the affected litigant. To deny them access to legal aid is to subject them to the certainty of injustice.

Civil litigation, of course, can involve questions beyond money and property. Discrimination and employment law are two examples. Victims of discrimination are doubly disadvantaged if they cannot get legal help to address the wrong already suffered. It is bad enough to be the victim of unlawful discrimination, but worse again if that fact means that you cannot get legal aid to help redress the balance.

If I were Attorney-General I would fight for the rule of law and Justice for all.

If I were Attorney-General I would hope that wearing an Amnesty International badge was a measure of my commitment rather than a mark of hypocrisy.

Julian Burnside QC