The role of lawyers in protecting human rights

By Jon Stanhope

Lawyers have an important social role as champions of the human rights of the most disadvantaged members of our community, both locally and internationally. Human rights can be protected only through the combination of a strong, independent legal profession, which is able to argue cases on the basis of domestic human rights legislation. In other words, what we need are both 'good lawyers' and 'good laws'.

THE NEED FOR 'GOOD LAWYERS'

The most prominent way in which lawyers defend human rights is through their advocacy, both through the courts and the media. Many who take on such commendable work provide their services 'pro bono'; that is, without financial charge. They often put up with other costs as well, such as disparaging comment from the media, from government or elements of the public who do not like to see the status quo being challenged.

Stephen Kenny is a great example of the human rights advocacy tradition in Australia, which continues to be vital and dynamic. Mr Kenny has been outspoken in his defence of the human rights of David Hicks, an Australian citizen who continues to languish in the US Guantanamo Bay military complex. Mr Hicks, along with many others, is being held in detention indefinitely for interrogation by the US military, in contravention of human rights standards.[1] The human rights issues at stake at Guantanamo Bay include the right to freedom from arbitrary detention – Mr Hicks has been held for years without charge, and his detention has no fixed limit; the right to a fair trial – the 'military tribunals' which have been established to hear the cases of detainees have been marred by conflicts of interest and lack of legal experience; and the apparent breach of the prohibition against torture – the testimony of fellow detainee and Australian citizen Mamdouh Habib, who was only recently released, is powerful evidence that detainees held in Guantanamo Bay have been subject to abuse amounting to torture.[2]

The Law Council of Australia has also played an important role in this issue, sending an independent observer, Lex Lasry QC, to attend and report on the military tribunal process. Mr Lasry's report highlighted key deficiencies in the fairness of the tribunal process. In particular, he noted problems of bias in the membership of the tribunal, the lack of an appellate process for the tribunal, and the lack of legal background for the non-presidential members of the tribunal.[3]

Other lawyers have contributed significantly to the key human rights issues of recent times in Australia, particularly our treatment of refugees, who are protected by the 1951 United Nations Refugee Convention. One of the darkest hours in our recent history was the *Tampa* crisis of 2001, during which basic legal principles were flouted at considerable cost both to those involved and to Australia's reputation for upholding the rule of law.

Who can forget 26 August 2001, when 433 people, mostly of Afghan origin, were rescued at sea near Christmas Island off the North-West coast of the Australian mainland and taken on board the *MV Tampa*. Out of concern for asylum-seekers requiring urgent medical treatment, Captain Arne Rinnan from Norway initially sought assistance by radio, and then sent the *Tampa* into Australian territorial waters off Christmas Island. The Australian Government, at the time in the grip of a national election, was determined not to permit the asylum-seekers to land on Christmas Island. When the *MV Tampa* entered Australian waters, 45 SAS troops boarded the ship, and the asylum-seekers were transported by the Australian navy to Nauru and Papua New Guinea to be detained, pending processing of their claims for refugee status. The central human rights issue at stake is the right of a person who has not committed any crime to be free from detention, whether aboard a naval ship, or within a detention centre located in Australia or abroad. Also of concern are the conditions in which people are held while detained, conditions which are made difficult to verify by the ongoing Australian policy of using detention centres that are located on small islands away from the Australian mainland.

At this point, it is important to mention the vital role of the human rights advocates in this case, notably Julian Burnside QC, who was counsel for the asylum-seekers; and Eric Vadarlis and the Victorian Council for Civil Liberties, who acted as their

solicitors. The applicants achieved initial success in the Federal Court before Justice North, who relied on the ancient English action of *habeus corpus* to find that the asylum-seekers were detained aboard the *Tampa* without lawful authority, and should therefore be released.[4] Unfortunately, this decision was overturned on appeal to the full Federal Court, which argued that the Australian army's occupation of the *Tampa* did not fall within the legal meaning of 'detention' for the purpose of the law of *habeus corpus*.[5] A final application for appeal to the High Court on behalf of the asylum-seekers was unsuccessful.[6]

Despite the ultimate failure of the legal action, the case must be considered a success for several reasons. Firstly, it succeeded at first instance, and none of the adverse decisions on appeal were unanimous, which shows that court victory was always a possible outcome. The case also highlighted the plight of the refugees aboard the *Tampa*, and brought the issue to national attention. There was extensive public and media debate regarding the merits or otherwise of the policy of intercepting asylum-seekers travelling to Australia on boats and holding them in other countries for processing.

Mr Burnside and Mr Vadarlis again came into the spotlight on a related refugee issue; this time, the matter of children being held in long-term detention centres in Australia. In what emerged as something of a 'cause celebre', two children from the Bakhtiari family escaped from South Australia's Baxter Detention Centre in 2003. The ensuing legal case was an opportunity for Mr Vadarlis to challenge the legality of Australia's detention system, particularly as it related to the rights of children. The story is similar to that of the *Tampa* – initial victory in the Family Court[7] followed, unfortunately, by reversal at a higher level, in this case when proceedings reached the High Court of Australia.[8] The result was also similar – it highlighted the ongoing human rights abuses faced by children in Australian detention facilities.

What emerges from the *Tampa* and *Bakhtiari* cases is that we have a tradition of a strong and independent legal profession which is able to hold executive government accountable through the courts system. The inability to achieve results in these cases cannot be attributed to any inadequacy on behalf of Australian human rights advocates, but rather reflects the antiquated state of Australia's legislative framework. That is, we have good lawyers, but not good laws.

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THE NEED FOR 'GOOD LAWS'

A notorious fact of the Australian legal system, at the federal level, is the absence of a written bill of rights. The expression of fundamental rights in a statutory or constitutional bill of rights is essential for any modern, pluralist democratic country; in this critically important respect, Australia is currently lagging far behind the rest of the common law world, including the UK and New Zealand.

The ACT has, however, broken with this entrenched cultural deadlock over bills of rights. The *ACT Human Rights Act* – Australia's first bill of rights – was passed by the Legislative Assembly on 2 March 2004 and commenced operation on 1 July 2004. Under the *Human Rights Act*, which reflects the International Covenant on Civil and Political Rights, all public officials must interpret and apply the law consistently with human rights, so far as it is possible to do so. The Supreme Court has the power to issue a declaration of incompatibility if any Territory law is found to be inconsistent with human rights. Compatibility with human rights is the new touchstone.

Would the existence of a federal bill of rights have enabled the plaintiffs in the *Tampa* and *Bakhtiari* cases to win their cases? A federal *Human Rights Act* would require that legislation be interpreted in the light of key human rights obligations – such as the right to freedom from arbitrary detention – in the context of international human rights jurisprudence. Federal immigration statutes would need to be interpreted in the light of this principle as far as possible. At best, such an interpretation would result in decisions to release asylum-seekers from immigration detention. At worst, where such an interpretation could not be sustained, a declaration of incompatibility would have resulted, providing further impetus to the reform of these statutes as part of the political process.

The *Human Rights Act* also creates new opportunities for lawyers practising in the ACT. Although it does not create a direct right of action in the Supreme Court, it will give rise to actions based on human rights grounds that did not previously exist, such as a challenge to an administrative decision based on interpretation of legislation underlying an administrative action. The action could, for example, question the compatibility of an administrator's interpretation of his or her powers with the *Human Rights Act* – an error of law. There is also, of course, the Supreme Court's power to issue a declaration of incompatibility. In New Zealand which, like the ACT, does not have a direct right of action, the High Court has in several cases established that there is an inherent right of remedy in the establishment of human rights that does not depend on the legal form in which they are declared.[9]

While it is not yet possible to say whether the ACT Supreme Court will recognise an inherent right of remedy under our *Human Rights Act*, a number of decisions by ACT courts and tribunals have already relied on the Act to develop new approaches on matters of law. During its first 10 months of operation, six judgments by the Supreme Court have taken account of the Act.[10] >>

A federal *Human Rights Act* would require legislation to be interpreted in the light of key human rights obligations.

The first three judgements made reference to the Act in the context of supporting the relevant common law position. For example, in *Szuty*, Higgins CJ referred to the right to freedom of expression to support the common law defence of 'fair comment' in relation to the tort of defamation. In *Firestone*, Higgins CJ referred to the rights to freedom of movement, freedom of association and the obligation to interpret the law consistently with human rights, as far as possible when assessing the scope of a Workplace Protection Order. In *R v O'Neill*, Connolly J referred to the right not to be tried or punished more than once to support the common law principle of double jeopardy.

More significantly, in *R v YL* the *Human Rights Act (ACT)* 2004 had a real impact on the interpretation of a Territory law. Crispin J applied the obligation to interpret the law consistently with human rights as far as possible, and the child's right to protection to remove any doubt that he should exercise his discretion under the *Supreme Court Act* 1933 not to coerce a child witness to give evidence against his stepmother. He also read the *Director of Public Prosecutions Act* 1990, which authorises the Director to 'decline to proceed' (enter a *nolle prosequi*) to literally mean 'to take no further steps', in order to prevent the Director from terminating a prosecution underway by entering a *nolle prosequi* upon receipt of a ruling that the Director considered to be adverse. Crispin J confirmed the construction of that section by relying upon the obligation to interpret the law consistently with human rights as far as possible, together with the requirement to protect the right to a fair trial and the right to be tried without unreasonable delay under the *Human Rights Act (ACT)* 2004. The right to be tried without unreasonable delay was also considered by Connolly J in *R v Peter Martinello* when considering whether or not to grant the DPP an adjournment of the trial at hand. Arguments based on section 14, freedom of thought, conscience, religion and belief were raised in *Kevin Buzzacott v R*, although Gray J of the ACT Court of Appeal did not consider the issue to be of sufficient weight in the context of the application to have the matter heard on appeal.

A Discrimination Tribunal appeal case is pending before the Supreme Court: *IF v Commissioner for Housing*. The applicant is appealing the Tribunal's decision to dismiss a discrimination complaint against the Commissioner for Housing on various grounds, including an error of law in failing to take account and apply the provisions of the *Human Rights Act (ACT)* 2004 and relevant international law, including the UN Declaration on the Rights of Disabled Persons.

Legislating for bills of rights is essential if we are to protect human rights through the creation of 'good laws'. The other key requirement is 'good lawyers' like Stephen Kenny, Eric Vadarlis and Julian Burnside, to ensure that legislative safeguards work to the real benefit of marginalised people, both in Australia and overseas. Peak professional bodies, such as the State and Territory Law Societies, Law Council of Australia and the Australian Lawyers Alliance also have a key role. An important initiative in this respect was the launch by the ACT Law Society of the ACT Pro Bono Clearing House on 15 November 2004 to assist people in the ACT community who have legal problems that they cannot afford to resolve, but who do not fall within Legal Aid guidelines. Another heartening development is the creation by the International Law Section of the Law Council of a 'Legal Panel to Observe Human Rights', which has a mandate to consider breaches of human rights and of adherence to the rule of law overseas, particularly where Australian citizens are involved. Finally, a further initiative in reaching out internationally with pro bono work is the effort of the Australian Lawyers Alliance to provide legal support to people in countries devastated by the Boxing Day Tsunami.[11] The ACT Law Society, the Law Council and the Australian Lawyers Alliance are all to be commended for these initiatives, which demonstrate the vital contribution to the protection of human rights that a strong and independent legal profession can make.

This article is an edited version of Mr Stanhope's speech at the ACT Legislative Assembly on 16 May 2005, launching Law Week.

Notes: **1** http://www.lawcouncil.asn.au/read/2003/2377361234 **2** http://sixtyminutes.ninemsn.com.au/sixtyminutes/stories/2005_02_13/story_1293.asp **3** The report is available at http://www.lawcouncil.asn.au/read/2004/2403092446 **4** *Victorian Council for Civil Liberties Incorporated v Minister for Immigration & Multicultural Affairs* (& summary) [2001] FCA 1297 (11 September 2001) **5** *Ruddock v Vadarlis* (includes Corrigenda dated 2 January 2002 & 4 January 2002) [2001] FCA 1865 (21 December 2001) **6** *Vadarlis v MIMA & Ors* M93/2001 (27 November 2001) **7** *B & B & Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FamCA 451 (19 June 2003) **8** *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20 (29 April 2004) **9** *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667. **10** *R v O'Neill* [2004] ACTSC 64 (30 July 2004); *Firestone v The Australian National University* [2004] ACTSC 76 (1 September 2004); *Szuty v Smyth* [2004] ACTSC 77 (1 September 2004); *R v YL* [2004] ACTSC 115 (27 October 2004); *R v Peter Martinello* [2005] ACTSC 9 (31 January 2005); and *Kevin Buzzacott v R* [2005] ACTCA 7 (1 March 2005). **11** http://www.apla.com/news.php?id=34

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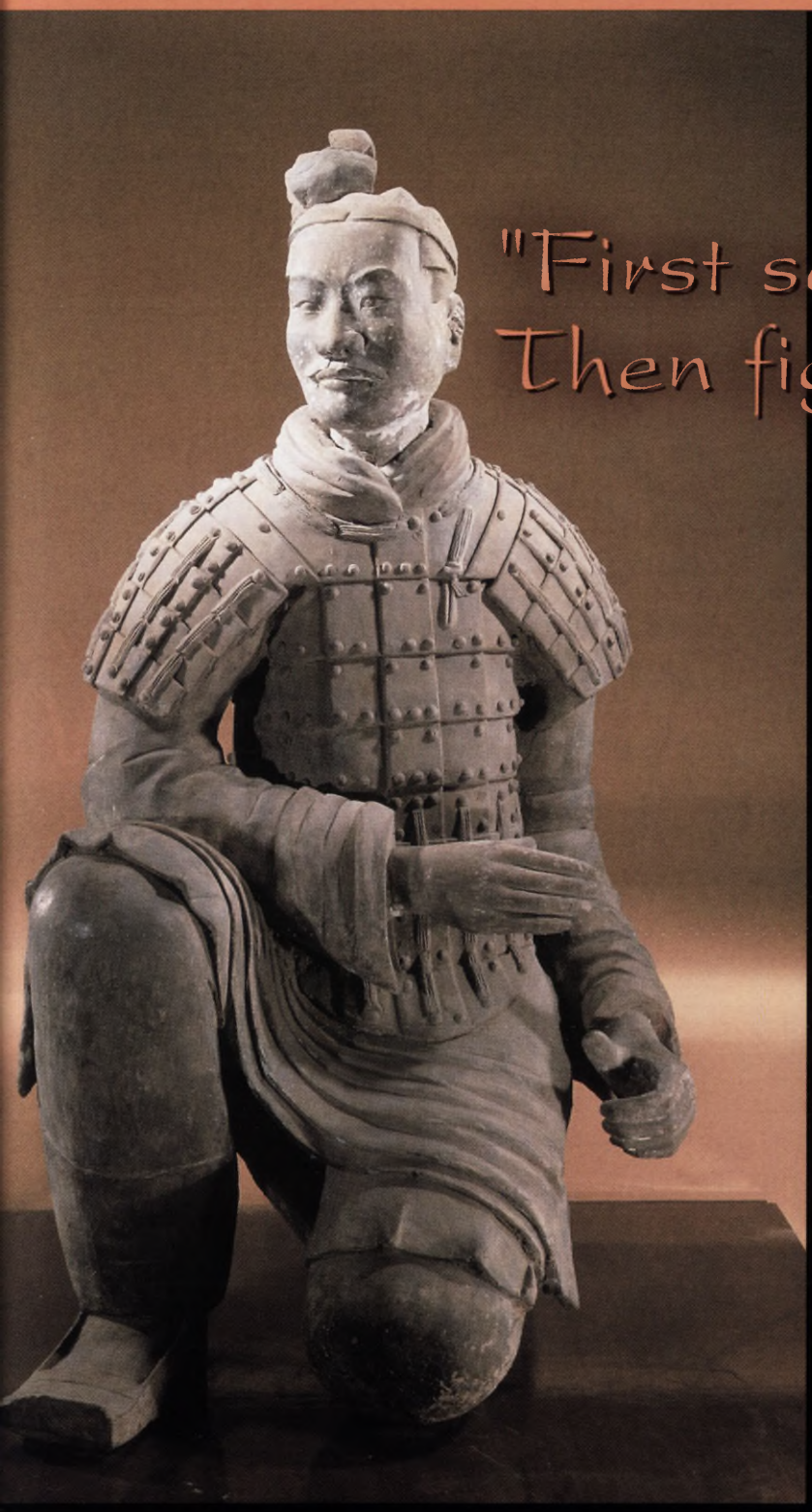

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