The Aboriginal Tutorial Assistance Scheme (ATAS) also contributed greatly to students completing law degrees. ATAS tutors were used for far more than strictly academic tutorials and it was clear that the academic and personal aspects of ATAS tutoring were intertwined. Students found it extremely helpful to have tutors who could tailor tutorial programs to individual needs, and to have contact with tutors who had studied in the Law School before them. While recognising the help that tutors could give, many students were keen to rely on themselves as far as possible, and to seek ATAS tutoring only as a last resort.

Cadetships, scholarships and traineeships were sought after by Indigenous students, who recognised that these could change the situation for Indigenous people generally, as well as assisting individual students to complete degrees. The financial aspects were extremely important, but so were the personal support and encouragement students received. Many felt that cadetships contributed to successfully completing degrees by exposing them to the workplace, giving experience which could then be applied directly to their studies, helping to gain a longer term focus, and helping in future employment, both in gaining jobs and in performing in them. However, cadetships did have some negative impacts as well. Students mentioned administrative difficulties, and some felt the weight of stereotyping and tokenism in the administration of cadetships and scholarships. They were keen, however, to fight for change.

An exchange program for Indigenous students also contributed greatly to the completion of studies for those who took it up. Students who went on the exchange program reported that it helped with motivation to study, and broadened their horizons generally, as well as giving an opportunity to compare the laws and life of other Indigenous peoples.

While acknowledging the many positive factors assisting Indigenous students to complete their studies, students also made suggestions for further improvement. These included the introduction of more preparatory programs, and the continued encouragement of networking and role modelling.

Further, students commonly suggested that a great deal of cross-cultural training was required within the university and the Law School. Responses suggested that the study experiences of Indigenous students would be much improved if teachers, administrators and other students had a better understanding of Aborigines and Torres Strait Islanders. Although they felt supported in their studies, Indigenous students also believed there was a marked lack of knowledge of Indigenous history and culture. Students anticipated that the appointment of Indigenous people to the academic and administrative staff of the Law School and to the counselling section of the university would significantly contribute to the completion of degrees. Students wanted university staff who understand how they feel, and who share their experiences.

Throughout these interviews, the impact of positive staff attitudes and behaviour was seen as crucially important, and respondents often evaluated even lecturing, tutoring and cadetships in terms of the personal encouragement and support given, rather than in terms of academic or financial assistance. While it is clear that student motivation is a major player in student success, it is also clear that that motivation can be bolstered through the encouragement of student networks, role modelling, a supportive law school, relevant and appropriate curricula, a far reaching student support scheme, ATAS tutoring, cadetships and exchange programs. Further, if universities will accept responsibility for the establishment and maintenance of structures which support and encourage Indigenous students, such as a centre for Indigenous students, discretionary admissions schemes, and faculty specific support schemes, the recent improvements in access, participation and graduation rates of Indigenous students should continue.

Carolyn Penfold teaches law at the University of New South Wales.

References

1. In 1984, 0.81% of UNSW law students were Indigenous Australians; by 1994 that figure had risen to 2.09%.
2. Eleven Indigenous students graduated from UNSW Law School in the 15 years prior to 1991, a further 12 students completed their degrees in the years 1992-95.
3. Penfold, C., 'Support for Indigenous Students in the Faculty of Law, University of New South Wales, 1989-1995', Report to the Dean, held on file UNSW Faculty of Law.
4. A comprehensive report on this project was published in: Penfold, C., 'Indigenous students' perceptions of factors contributing to successful law studies', (1996) 7(2) *Legal Educ Rev.*

HUMAN RIGHTS

'A' v Australia

NICK POYNDER reports the adverse finding of the UN Human Rights Committee in the case of a Cambodian boat person.

On 30 April 1997 the UN Human Rights Committee adopted its Views on a Communication lodged on behalf of 'A', a Cambodian boat person who had been held in detention by the Australian immigration authorities more than four years.

The Communication, lodged in Geneva on 20 June 1993, was made pursuant to the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), which entered into force for Australia on 25 December 1991. The First Optional Protocol provides a procedure where, after exhausting all available domestic remedies, an individual may allege to the Human Rights Committee that he or she has been a victim of a breach of the ICCPR by a state party. This procedure was used successfully in the case of *Toonen v Australia* in March 1994. The case of 'A' was only the second time that the Committee had adopted Views adverse to Australia.

'A' had been taken into custody by immigration authorities along with 26 other Cambodian asylum seekers on their arrival in Australia in November 1989. He remained in custody until January 1994, when he was released because his wife had been granted refugee status. During the period of his custody, 'A' was moved between detention centres in Broome, Sydney, the Northern Territory and Port Hedland in Western Australia. He was not provided with any government-funded legal advice until almost a year after his arrival. His detention was effectively non-reviewable, under Division 4B (now Part 2, Division 6) of the *Migration Act 1958*, which had been rushed through Parliament in May 1992 in order to head off an application for release by Cambodian boat people. The latter provisions were held to be valid by the High Court in a constitutional challenge in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, and it was this 'exhaustion' of domestic remedies which allowed the matter to be taken by 'A' to the Human Rights Committee.

Summary of the decision

In summary, the Committee made the following findings:

Article 9(1)

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

The Committee found Australia to be in breach of article 9(1) on the grounds that the period of detention went beyond that for which Australia could provide appropriate justification. The Committee noted that while the fact of illegal entry may indicate a need for investigation, there must be other factors particular to the individual, such as likelihood of absconding and lack of cooperation, in order to justify detention. Without such factors detention may be considered arbitrary, and in the present case Australia had provided no such justification for the prolonged detention of 'A'.

Article 9(4)

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

The Committee found that every decision to keep a person in detention should be open to periodical review so that the grounds justifying the detention can be assessed. In the present case 'A' had no effective remedy to seek release in the courts. Under Division 4B, court review to 'A' was limited to a mere formal assessment of the self-evident fact that he came within the scope of the provision, and beyond that the court was unable to order his release. The Committee commented that court review of the lawfulness of detention under article 9(4) is not limited to mere compliance of the detention with domestic law — what is decisive is that such review is, in its effects, real and not merely formal.

Article 2(3)

Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

The Committee found, under article 2(3), that Australia is under an obligation to provide an effective remedy to 'A' for his illegal detention, which should include adequate compensation for the length of detention.

Articles 9(4) and 14(1)

The Committee rejected, on the facts, allegations of a breach of articles 9(4) and 14(1) in that 'A' had been denied access to lawyers because of the delay in providing legal assistance and frequent removal to distant detention centres. The Committee noted 'A' had signed a standard form when he arrived acknowledging he had been told of his right to a lawyer and, in any event, he had in fact managed to get access to lawyers throughout his detention. However, the Committee implicitly recognised the principle that a person should be advised of their right to a lawyer upon arrival.

Relevance of the findings

The Committee's findings are highly relevant to the situation currently facing asylum seekers in Australia. The Committee, in effect, provides a prescription for safeguards which must be met when a State detains asylum seekers. There must be *justification* for detention; *regular, effective, review* of detention; and adequate *compensation* for unlawful detention. These are not being met by the current provisions in the *Migration Act*:

- There is still no *individual* assessment of each new arrival in order to justify why each person is kept in detention. The effect of the *Migration Act*, s.189, is that *all* undocumented arrivals are held in detention, regardless of any risk factor. The onus has now clearly been placed on Australia to justify, *in each individual case*, why a person should be kept in detention.
- There is still no periodical *review* of detention. Such review should be supervised by an independent body, such as the Federal Court.
- There is no effective access by asylum seekers to the courts for release. Once a person is found to be an 'unlawful non-citizen' (effectively anyone without a valid entry visa), there is nothing a court can do to order their release.
- While certain categories of 'unlawful non-citizen' are eligible for bridging visas to allow their release, this is true only to a very limited extent. Such bridging visas are available primarily to those less than 18 years or over 75 years of age, and those who have 'special needs' based on health or prior torture and trauma (Regulation 2.20). However, such visas are not available for the vast majority of arrivals, and in reality very few persons have been given such visas. In addition, the grant of these visas is so hedged around by Ministerial discretions, which are non-reviewable in the courts, that it could not be said that there is adequate supervision of detention by the courts.

Follow-up

Australia now has 90 days from the date of the adoption of the Views to provide information to the Committee about the measures taken to give effect to its Views. This will require not only an effective and enforceable remedy to 'A' himself for the violation of the ICCPR, but also substantial amendments to the *Migration Act* so as to enable proper, individual consideration of the grounds upon which any person is to be held in detention, provisions for the release of any person for whom no justification can be advanced and effective periodical review by the courts of the detention of any person.

Australia's response will be closely monitored by the Special Rapporteur for Follow-Up, who has the task of seeking and receiving information from State parties on the measures taken in response to the Committee's Views.

A good starting point for Australia — apart from an apology and compensation to 'A' — would be to consider the provisions of an Alternative Detention Model, which was submitted to the Department of Immigration in September 1996 and may be found on the internet at:
http://www.austlii/edu/au/ahric/refugee_info/

Nick Poynder is a member of Australian Lawyers for Human Rights, and prepared the above Communication for A on a pro bono basis while at the Melbourne Bar in 1993.