The Castan Centre for Human Rights Law

Castan Human Rights Report 2014

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Castan Centre for Human Rights Law

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Foreword

In this report, which is a first for the Castan Centre, you will find fresh perspectives on many important topics regularly featured in the news. These topics include asylum seekers, LGBTI rights, Indigenous rights and the federal government's hot-button issue of "freedom". Other academics featured here have written on areas that receive less attention, and often less sympathy. Prison overcrowding is a festering issue in Australia (and particularly Victoria), while conditions in other "closed environments" such as detention centres and "closed" mental health facilities also threaten people's basic human rights. Meanwhile, sporadic news coverage belies the continuing battle in this country over reproductive rights, terrorism laws and women's issues. And, internationally, debates rage over the role of corporations and aid agencies, particularly in the developing world.

We have decided to publish this report to improve the public's understanding of our world-renowned academic research. Each piece is written in plain English and designed to inform the public about human rights law and policy issues in key areas. There are no footnotes or case citations, although you will find a list of further reading for each article on the web version which you can access through our website (**law.monash.edu/castancentre**).

Although this report cannot hope to cover all of the pressing human rights issues here and around the globe, we hope that it will help to shed light on some of the important debates that the Centre's academics grapple with every day. I am sure that you will find it thought provoking.

Professor Sarah Joseph
Castan Centre Director

About the Castan Centre

Based in the Law Faculty at Monash University, the Castan Centre strives to create a stronger culture of human rights in Australia. We believe that human rights must be respected and protected, allowing people to pursue their lives in freedom and with dignity. Since the Centre's foundation in 2000, we have worked in six broad areas:

Policy, through engagement with parliaments, direct representations to governments and contributions to public debates on important issues.

Public education, including numerous public events featuring prominent Australian and international human rights figures, and a burgeoning social media presence.

Student programs including international and in-house internship programs, careers guidance and mooting competitions.

Teaching, through the oldest human rights law masters degree in Australia, as well as a thriving undergraduate human rights program.

World-renowned research on many of the most pressing human rights issues.

Human rights training and consultancies aimed at educating Australian and international government officials about human rights.

> *The Castan Centre is a jewel in the crown of Australian law*
>
> The Hon. Michael Kirby AC CMG
> former High Court judge

About Ron Castan

Ron Castan was a passionate advocate for the reconition and protection of human rights and a distinguished member of the Victorian Bar. He is best remembered for his role as lead counsel on the landmark *Mabo* case, which recognised native title over land. Ron toiled on the case for over 10 years and, according to Greg McIntyre, a lawyer who worked with Ron on the matter, he 'effectively under-wrote the whole claim'.

> *"There was a sort of a ruthlessness in Ron Castan. A ruthlessness on behalf of justice."*
>
> Thomas Kenneally AO, author

Prior to the *Mabo* case, Ron was involved in many landmark Indigenous and Constitutional rights cases, and helped found the the Victorian Aboriginal Legal Service. His commitment to human rights extended beyond Indigenous issues. He was a member of the Victorian Equal Opportunity Commission and President of the Victorian Council for Civil Liberties (now Liberty Victoria). Ron led the campaign against the Australia Card in the 1980s and was a key player in negotiations over the *Wik* native title legislation in the 1990s. He died in 1999.

Photo: Newtown graffiti

The "freedom" debate

Our Federal government is committed to promoting greater "freedom". We have a new "Freedom Commissioner", Tim Wilson. And, writing in January, Attorney General George Brandis described "freedom" as the "most fundamental of all human rights".

What does "freedom" mean?

But … freedom of what? Freedom to what? Freedom without an accompanying noun (like "speech") is virtually meaningless. Certainly, the government does not uphold all freedoms. It does not for example support freedom to marry a same sex partner, freedom to die with dignity, or freedom from random spying by a friendly foreign government.

The type of 'freedom' espoused by Brandis and Wilson is the classical 'freedom from' the government, where human activity is 'regulated' by voluntary interactions in the free market rather than by the State. And indeed, 'freedoms from', otherwise known as 'negative rights', are an important aspect of freedom and human rights.

But there are other important aspects to freedom. There are 'freedoms to' do the things that one wants to do. It is easier to do such things if one is rich, but harder if one is vulnerable or disadvantaged. The market does not fairly allocate such freedoms among people, as it pays no attention to pre-existing power relations and capabilities. Such an approach to freedom, if adopted exclusively, protects the strong but offers far less for others.

Therefore, the government must sometimes take positive steps to protect and promote freedom. For example, the government must protect one's rights and freedoms from being infringed by another. That's why anti-discrimination law prevents people from being deprived of opportunities (e.g. in the workforce, in the housing market) on irrelevant grounds, such as race or gender. Further, governments must provide for certain rights when a person cannot do so for themselves. For example, welfare prevents marginalised people from living in grinding poverty in this very wealthy country. Freedom from want is crucial.

Racial vilification

The freedom debate has focused on section 18C of the *Racial Discrimination Act*, which renders certain types of racist speech unlawful. Conservative columnist Andrew Bolt fell foul of section 18C in 2011, and became a cause celebré for those who want the law repealed. But Bolt hardly lacks freedom. He has immense capabilities to trumpet his views across the media, as well as privileged access to people in power. His 'silencing' has been very loud indeed.

The government's proposed amendments weaken controls on racist speech, but they still purport to ban racial vilification and intimidation. However, proposed defences are so broad as to protect all hate speech in public discourse, so that the new bans would be effectively confined to neighbourhood disputes. Yet hate can marginalise and silence, regardless of its source. Words can hurt. And harm another's freedom.

> Australia's freedom debate is dominated by a narrow, inconsistently applied definition of freedom.

Real threats to freedom

Restrictions on racist language are not even close to the gravest threats to freedom in this country. Far more concerning are overbearing defamation laws and Orwellian restrictions on freedom of association in Queensland.

In Victoria, police have greater powers to move on protesters, partly to protect business rights to trade without hindrance. Protection of commercial freedom is being enhanced at the expense of democratic political freedom. But demonstrations are a key means by which ordinary people engage in political action. Few have the same capacities as Bolt to make their views heard by other means.

Another way for ordinary people to voice political concerns is through boycotts. For example, artists withdrew from the Biennale of Sydney in protest over its connection to Transfield, which runs Australia's offshore detention centres. Ultimately, the Transfield connection was terminated. Arguments can be made over the effectiveness and appropriateness of the Biennale boycott. However, the Attorney General responded by directing the Australia Council to cut funding to arts groups which 'unreasonably' refuse corporate sponsorship. Is the Attorney-General creating a right for corporations to inflict its brand on others, or an inalienable right to sponsor? Artists should be free to refuse sponsorship on political or ethical grounds. Art is not apolitical: the best is opinionated not cowed.

The conditioning of government funding on depoliticised behaviour by recipients is inimical to 'freedom'. It leads to a skewed public sphere of debate: the privately funded have enormous freedom to express opinions while the publicly funded are muzzled. Furthermore, freedoms of capital are again favoured over other freedoms, here freedom of conscience for artists.

A final example of business freedom perhaps outranking other freedoms arises with regard to copyright. Copyright protection in Australia is out of date. Our law fails us in the new frontier for freedom of speech, its application in the digital age. For example, many 'shares' on Facebook unwittingly breach copyright. Recognising this, the Law Reform Commission recommended the adoption of a more flexible defence of 'fair use' to copyright infringement. The Attorney General's response indicates that he sides with content-holders, meaning no change.

Yet Brandis is misguided if he thinks his position supports business. Google could not be based here. Wikipedia could not be based here. They are based in the US, which has a fair use defence for copyright, which encourages innovation. Current copyright law impacts badly on freedom, including political, social, informational, cultural and commercial freedom.

Conclusion

Australia's freedom debate is dominated by a narrow, inconsistently applied definition of freedom. It is, bizarrely, focused on the freedom, 'to be a bigot'. Real freedom is far more complex. And real freedom will be jeopardised unless that complexity is recognised and respected.

Sarah Joseph is a Professor of Law in the Monash Law Faculty and Director of the Castan Centre.

The Manus Island detention centre is paid for out of Australia's aid budget. Photo: DIBP images

Human rights in need of aid

Foreign aid and human rights are inextricably linked, as aid is often the only way to fulfil peoples' rights in developing countries. This is especially true for economic, social and cultural rights such as the rights to water, housing, health, education and a sustainable livelihood. However, it is also true for many civil and political rights.

For instance, a well-funded justice system is necessary to avoid corruption and moonlighting by judges, police and court officers, and to provide sufficient resources to protect the right to a fair trial and associated rights, such as freedom from arbitrary detention. Any country that does not have sufficient resources to achieve these ends – including the vast majority of countries in our own region – will need to rely on aid to improve the human rights situation, or in some cases, just to prevent it from deteriorating.

Millennium Development Goals

Foreign aid is a primary vehicle for achieving the Millennium Development Goals (MDGs). In 2000, the governments of the world agreed on a set of measurable targets to fight extreme poverty and its consequences as efficiently as possible. Those targets were divided into eight MDGs including eradicating extreme poverty and hunger; reducing child mortality; and improving maternal health. Each goal had a series of targets, most ending in 2015. For example, the first target of the goal, 'eradicate extreme poverty and hunger', was to halve the proportion of people living on incomes of less than US$1.25 per day, between 1990 and 2015.

The approach of the MDGs differs from human rights theory, which assumes that no person should ever be deprived of any of his or her rights. The MDGs take the more utilitarian approach of improving the lot of as many people as possible. From a human rights perspective, halving world poverty still equates to a breach of the rights of the half left behind. Nevertheless, the MDGs are an important mechanism for combating entrenched suffering around the world and the federal government must continue to support the international community's efforts to develop the Sustainable Development Goals, which will supersede the MDGs after 2015.

Australian aid spending

Given the inextricable link between human rights and foreign aid spending, there are two very worrying trends in Australia, which started under the Labor Government and are accelerating under the Liberal Government. They are the levels of aid spending and the 'creative' way that governments include certain spending as aid.

Australian aid spending has for decades languished at around 0.3 per cent of Australia's Gross National Income – less than half the OECD benchmark of 0.7 per cent for developed countries. During the Howard Government, the Rudd-led opposition pledged to increase Australian aid to 0.5 per cent of GNI by 2015. Once in government, Rudd and co put off that commitment, to 2017 and then 2018, before losing office. The Abbott Government has surpassed Labor's procrastination and taken the axe to the aid budget, with the current year's spending going backwards in dollar terms for the first time in living memory. The government has announced that future aid spending will be linked to the consumer price index – in other words, guaranteeing zero growth in real terms, rather than incrementally increasing towards the global benchmark as Labor had promised (but not delivered).

> ... it is now untenable to claim that the aid budget is designed to foster human rights and development abroad.

All of this focus on the bottom line also obscures the second, far more alarming trend: shoehorning all sorts of activity that has nothing to do with fighting world poverty or securing human rights into the aid budget. Governments of both stripes have long had a habit of gilding the aid lily by labelling such things as programs to boost Australian companies' exports as aid programs. Often, the bulk of spending in such programs ended up in the pockets of Australian companies and consultants. Even infrastructure spending such as roads, ports and rail was often designed to help Australian mining companies get minerals out of a developing country's soil and out of the country for their own commercial gain.

The Rudd and Gillard Governments stretched credulity to new levels by including spending on border protection and offshore processing of asylum seekers under the aid budget. Given that the rationale of offshore processing is deliberate cruelty – that is, to devise treatment so abhorrent that even a person fleeing for his or her life will think twice before getting on a boat – it is now untenable to claim that the aid budget is designed to foster human rights and development abroad. The current Foreign Minister, Julie Bishop, has continued these practices apace. The most recent example is Australian mining companies' proposal that they be reimbursed from Australia's aid budget for any 'good works' they undertake in the countries where they operate, in the name of corporate social responsibility. Put another way, Australia's aid budget is being asked to fund the social quid pro quo that developing countries require from Australian mining companies that are profiting from their natural resources.

Conclusion

While the abolition of AusAID itself, which was absorbed into the Department of Foreign Affairs and Trade, is not necessarily a bad thing, it may be an indicator of the broader intention to subordinate aid to Australia's commercial and diplomatic interests. At this juncture, it is crucial to remember that the protection and promotion of human rights worldwide is, in itself, a responsibility of Australia and its wealthy country counterparts.

Dr Adam McBeth is an Associate Professor in the Monash Law Faculty and a Deputy Director of the Castan Centre.

A relative holds a picture of a missing garment worker, who was in the Rana Plaza building when it collapsed in Bangladesh in 2013. Photo: Weronika

Corporations now less accountable

The Bangladesh Rana Plaza disaster in 2013 was a stark reminder of the human costs of a poorly regulated global economy. A supplier of major retailers like Benetton, Walmart and Coles, the garment factory collapsed as a result of poor construction and little safety regulation. 1,129 people died, making it the worst recorded disaster in the industry to date.

The case, while shocking, is not unique. From slavery in supply chains; to reliance on abusive military forces providing security; to growing evidence of transnational corporate tax evasion – the human rights costs of simply continuing business-as-usual are increasingly untenable. It is a problem the United Nations has been grappling with, in various guises, since the 1970s.

UN initiatives on business and human rights

The UN's core business and human rights initiative is the Protect, Respect, and Remedy Framework drafted by the UN Special Representative on Business and Human Rights. Endorsed by the UN Human Rights Council in 2011, the Framework puts the onus on states to better protect human rights in business contexts, while also encouraging business to internalise human rights due diligence in decision making. While it has its critics, the Framework is the pivot around which business and human rights issues will be tackled internationally in the foreseeable future.

The focus in 2014 will be on what states are doing to implement the measures recommended by the Special Representative. This includes incorporating human rights considerations in domestic laws, policies and practices across all government departments, but particularly trade, development, and foreign affairs. It also includes states taking seriously the prospect of regulating the activities of their corporate nationals abroad. Last year, the UK was the first country to release its National Action Plan (NAP) on business and human rights. The European Union has also issued a directive to EU member states to prepare their NAPs. The Australian government should be developing its own NAP, as the integration of human rights across departments requires a coordinated effort. Important issues include ensuring that business loans and grants by Australian export credit and aid agencies include human rights conditions, and that human rights are considered in Australian bilateral investment treaty negotiations.

Recent Developments and Setbacks

While we wait on states to implement the Framework, a major setback in 2013 was a series of decisions by the US Supreme Court that curb the potential of the *Alien Tort Statute* (ATS) as a way to hold corporations to account. The ATS is an old US law that was rediscovered by plaintiff lawyers a few decades ago as a way to sue transnational corporations involved in gross human rights violations. It has provided victims with a rare avenue for bringing their claims to the courts of a developed country. Cases tend to involve corporate activities in the developing world when victims have little prospects of a fair local trial, and when local laws are often inadequate or non-existent.

However, the recent *Kiobel* decision has effectively gutted the ATS as a mechanism for suing corporations for alleged abuses in the developing world. Contrary to the view of lower courts, the Supreme Court found a strong presumption against the ATS applying to events outside of the US, unless the plaintiff can prove that the defendant has a significant connection to US territory. A company doing business in the US will no longer be enough.

> ...some multinational companies are now "too big to sue" in the US.

In another case, *Daimler*, the Court held that, when considering whether a company has sufficient presence in the US to be sued under the ATS, the court should look at the size of the company's US presence relative to its overall global operations. In other words, the bigger and more multinational a company, the harder this test will be to satisfy. It could be said that some multinational companies are now "too big to sue" in the US.

In response to these setbacks, victims' lawyers are likely to increasingly test the courts of other developed countries under ordinary tort principles.

In contrast to the setbacks in the US courts, developments in transparency initiatives have been promising. Both the US and the EU have recently introduced mandatory disclosure of payment rules that apply to companies in industries including oil, gas, mining and logging. Disclosing payments by companies to foreign governments has significant human rights implications, as it empowers citizens in resource rich countries to follow the money and hold their governments to account. Given Australia has a significant overseas extractive industry, we should do the same. This is an area of business and human rights where international momentum toward stronger state regulation seems to be building.

Conclusion

The past year has seen some forward momentum and some backward steps towards the goal of ensuring human rights are respected and protected by business. Plaintiff groups are likely to be hindered by the closing of doors to the US courts, but this may lead to the creative opening of new doors. States seem increasingly willing to regulate specific issues with a bearing on human rights, and NAPs may prompt a much needed shift in government cultures. A comprehensive international solution that will ensure that disasters like Rana Plaza cease to be predictable, however, still seems some way away. Notably, a contingent of developing states recently raised the perennial prospect of a binding international treaty on business and human rights to the UN agenda. So, watch this space.

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Photo: Devar

ASIO's human rights problem

Last year, the Australian Security Intelligence Organisation's annual report referred to 'terrorism' more than 60 times while the phrase 'human rights' appeared once. This discrepancy reflects ASIO's willingness to prioritise its search for terrorists even when it may come at considerable expense to human rights.

The report, tabled in parliament last October by Attorney General George Brandis, tells us that '[t]errorism remains the most immediate threat to the security of Australians' and 'that Australia remains a target for a range of individuals and groups who would promote their belief systems and seek to destroy our democratic way of life – not by some imagined, slow-time conspiracy or slow-burning action, but in a violent and irreversible instant'.

The report tells us, too, who the terrorists are, warning of 'the potential for Australians in Syria to be exposed further to extremist groups' such as the recently proscribed Jabhat al-Nusra. Those people 'could return to Australia not only with the intent to facilitate attacks onshore but also with experience and skills in facilitating attacks'.

It is true that honouring human rights would not cure all political violence. Some people, after all, hate (some of) their fellow human beings, and will fight to deprive them of their rights. But some political violence is a response to wrongdoing. ASIO's report acknowledges both points – perhaps inadvertently – when it observes that '[i]ssues such as Australia's military deployments over the last decade, the Syrian conflict, or a belief that the ideals of Australia are in direct conflict with their extreme interpretation of Islam, fuel the radical views of' those 'individuals and small groups who believe an attack [in Australia] is justified'.

The connection between terrorism and human rights has deep historical roots. The Oxford English Dictionary tells us that the word 'terrorism' was first used in 1795 to refer to 'the reign of terrorism' by the 18th century French revolutionary government. This is the same government that promulgated the *Declaration of the Rights of Man and Citizen* six years earlier. The apparent paradox can be explained. Revolutionary France was in many ways the first modern state, with tremendous power to penetrate and change social life. This power can be used for good, by increasing people's freedom, security and well-being. It can also be used for evil, attacking individuals or whole elements of society with a contemptuous disregard for those same interests, or even in the conviction that only out of such destruction can utopia emerge. This observation remains true of governments today.

Over time, the general connotation of the word 'terrorism' has changed from describing the use of violence by governments to the unlawful political violence of non-state actors. But the two are connected, as the preamble to the Universal Declaration of Human Rights makes clear:

> [I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

Protecting and fulfilling human rights is an antidote to government terrorism and other wrongdoing. And ending wrongdoing by governments removes one reason for terrorism by non-state actors.

> To get these matters wrong, even for one individual, is to get things wrong for the community.

In its report, ASIO justifies its ability to play judge and jury, saying that it must 'make predictive judgements about what may happen, and if we get it wrong it can have a catastrophic impact on the safety of the community. It places great stress within ASIO to decide whether the community or the individual should get the benefit of doubt in an assessment'. This seems wrong-headed. The community is a collection of individuals, each enjoying human rights that must be respected, protected and fulfilled. These include rights to equality before the law, privacy, freedom of thought and conscience, freedom of expression and participation in the government of the country. These rights are not absolute, but they are real. To get these matters wrong, even for one individual, is to get things wrong for the community. If pendulum of state power swings from the satisfaction of rights to trampling upon them, it undermines our democratic way of life.

In 2010 the Parliament recognised some of these dangers and created the Independent National Security Legislation Monitor to advise on the consistency of Australian counter-terrorism law with human rights obligations. In his time as Monitor, Bret Walker SC has met with a wide range of people, including members of the communities who have been adversely affected by anti-terrorism law and policing. Unfortunately, on March 19th the government introduced legislation to abolish the Monitor. In the meantime, ASIO is preparing to take occupancy of its new $589 million offices.

We know that spies do not always respect human rights. Edward Snowden's revelations of the massive surveillance program operated by the US, Australian and other governments is one reminder of this. SBS's documentary series 'Persons of Interest', revealing the effect of ASIO's past activities on many ordinary Australians who were exercising their rights, is another. The casual confidence with which ASIO carves the world of political ideas, ideals and violence into the 'acceptable' and the 'terrorist' is yet another. In the eyes of this powerful state agency, a contentious foreign and military policy takes on a legitimacy independent of the outlooks and experiences of individual Australians; and those individuals become suspect because of their deviation from these imputed standards. This is an upending of the democratic relationship between government and citizen. It is not giving the real Australian community the benefit of the doubt.

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Photo: Guillaume Paumier

LGBTI rights around the world: A rollercoaster ride!

In 2014, one can barely read the news without coming across a story about lesbian, gay, bisexual, transgender and intersex (LGBTI) people. These stories range from celebrations that yet another jurisdiction has legalised marriage for same-sex couples, to despair at the violence, discrimination and persecution inflicted on individuals because of their sexual orientation or gender identity/expression.

Unfortunately, stories of gay bashing, the passing of draconian homophobic laws and courts imposing harsh sentences for consensual homosexual conduct tend to outweigh the good news stories. This is not surprising as 80 countries still classify homosexuality as a crime (scan the QR code for a current list).

Global Trends

Africa has the most countries that still criminalise homosexuality (36), while Europe has the least (0). Europe has the most countries that permit same-sex couples to marry (11) while the Asia Pacific region has none, and Africa just one (South Africa). The widespread criminalisation of homosexuality in 2014 is dispiriting, and it is particularly disappointing that criminalisation appears to be a hallmark of the British Commonwealth.

Eighty per cent of Commonwealth countries (43 out of 53) treat gay sex as an offence, compared with only 25 per cent of non-Commonwealth countries. Indeed, human rights campaigner, Peter Tatchell has labelled the Commonwealth 'a bastion of global homophobia'. Yet the Commonwealth has shown little willingness to encourage reforms. Instead, the UN must become the vital global player in efforts to protect and promote the rights of LGBTI persons. Yet its three principal human rights organs have patchy records on LGBTI rights.

UN Human Rights Committee

The Committee – which oversees the *International Covenant on Civil and Political Rights* (ICCPR) – has played a pivotal role in promoting homosexual rights since its landmark 1994 decision in *Toonen v Australia*, clarifying that laws criminalising consensual homosexual conduct violate rights to privacy and non-discrimination. More recently, the Committee found that Russia's anti-gay 'propaganda' laws breach the right to freedom of expression.

However, the Committee's record of raising LGBTI concerns when reviewing a country's human rights record is somewhat unpredictable. Sometimes it recommends that a state repeal its laws criminalising homosexuality, and sometimes it is silent in the face of such laws. The explanation for this inconsistency appears to be twofold.

First, the issue is more likely to be raised if it is highlighted in an NGO's shadow report to the Committee. Second, the Committee's membership seems to influence whether LGBTI issues are raised. Professor Michael O'Flaherty of Ireland consistently raised LGBTI issues during country reviews. During his time on the Committee (2004-2012), O'Flaherty raised LGBTI concerns 25 times. Fabian Omar Salvioli of Argentina had the next highest number, raising LGBTI issues 11 times.

It is disappointing that the membership of the Committee seems to directly influence which human rights violations are raised. We hope that the Committee will continue to criticise states for laws criminalising homosexuality, even without O'Flaherty to lead the charge. If the Committee reduces its focus on LGBTI issues, the Office of the High Commissioner for Human Rights (OHCHR) should provide appropriate training to Committee members to ensure they are attuned to violations of the rights of sexual minorities.

> efforts to promote broader LGBTI rights within the HRC, such as to appoint a Special Rapporteur on the matter, have stalled.

Human Rights Council (HRC)

The HRC is a very different body to the Human Rights Committee, because, unlike the Committee, its members are not human rights experts. Rather they are state representatives, so the HRC's actions are as much influenced by politics and international relations as they are by international human rights law. Nevertheless, the HRC has raised the criminalisation of homosexuality while reviewing the human rights records of states, and many have accepted recommendations that they repeal these laws, including Mauritius, Nauru and Seychelles. On the negative side, efforts to promote broader LGBTI rights within the HRC, such as to appoint a Special Rapporteur on the matter, have stalled.

Office of the High Commissioner for Human Rights (OHCHR)

Finally, the OHCHR has a strong record of promoting LGBTI rights. Its achievements include the Free & Equal campaign (www.unfe.org/) launched in 2013, and the High Commissioner Navi Pillay's vocal criticism of recent moves to further oppress LGBTI people in Africa. In relation to new draconian Nigerian anti-gay legislation, she said:

> Rarely have I seen a piece of legislation that in so few paragraphs directly violates so many basic, universal human rights. Rights to privacy and non-discrimination, rights to freedom of expression, association and assembly, rights to freedom from arbitrary arrest and detention: this law undermines all of them.

The OHCHR has also published a guide for states setting out their core obligations towards LGBTI persons. A similar exercise was undertaken in 2006, when a group of human rights experts, lead by O'Flaherty, developed the landmark *Yogyakarta Principles*, which explain the application of human rights law to persons of diverse sexual orientation and gender identity.

The OHCHR's booklet is likely to have greater standing and authority because it is published by the UN, rather than an informal group of experts. It focuses on issues such as homophobic and transphobic violence, decriminalisation of homosexuality and discrimination based on sexual orientation and gender identity.

Conclusion

While some parts of the world are going backwards when it comes to respecting the rights of LGBTI people, we can take some comfort from the fact that the UN devotes significant resources to combatting this wave of homophobia. In the meantime, LGBTI people around the world must continue to ride the rollercoaster and fight to ensure that, over time, there are more highs than lows when it comes to respecting their rights and dignity.

Dr Paula Gerber is an Associate Professor in the Monash Law Faculty and a Deputy Director of the Castan Centre.

Photo: DIBP images

Asylum seekers punished more every year

The human rights of asylum seekers and refugees, in particular those who arrive in Australia by boat, continue to be gravely compromised. Australia has instigated a military response to 'unauthorised maritime arrivals' titled Operation Sovereign Borders, led by a three-star General.

We are concerned that the emphasis on denying asylum seekers access to Australian territory is compromising the safety and well-being of vulnerable people. Much of Australia's response to asylum seekers has become shrouded in secrecy with the government refusing to answer questions about 'on-water operational matters'. We believe that this lack of transparency diminishes the government's accountability to the Australian people and makes it difficult to monitor Australia's compliance with its international obligations.

Due process of asylum claims

We are concerned that some refugees may be returned to persecution in violation of Australia's obligation under the *Refugee Convention*. First, the new government has intercepted boats carrying asylum seekers before they reach Australian waters, forcing them to return to Indonesia. As Indonesia is not a signatory to the *Refugee Convention*, Australia cannot be certain that it will not return refugees to harm.

Second, Australia has also conducted 'enhanced screening' of certain asylum seekers, in particular Sri Lankans. These are brief interviews where asylum seekers are not told of their rights and are denied legal assistance. They are 'screened out' and deported if immigration officials determine their claims to be remote, unfounded or insufficient. Asylum seekers are not provided with a written record of the reasons for their rejection and cannot request an independent review of their assessment. This process increases the risk that mistakes may result in refugees being returned to persecution.

Third, asylum seekers are now denied access to government funded advice or assistance. Immigration advice enables asylum seekers to better articulate their claims. The removal of funding increases the likelihood of inaccuracies in decision making and may result in the return of refugees to harm.

Mandatory detention

This year marks the 22nd year of mandatory, indefinite detention of asylum seekers who make it to Australia. Furthermore, this cruel system has now been 'exported' to Nauru and Papua New Guinea (PNG). Since July 2013, all asylum seekers arriving by boat are detained in a Regional Processing Centre (RPC) in Nauru or PNG where they are processed under local law to determine if they are refugees. It is Australian policy that all refugees will be resettled in Nauru, PNG or a third country and will only be brought to Australia as a last resort.

As an added injustice, asylum seekers cannot have their detention reviewed by the courts of Nauru or PNG. Such a system clearly violates the prohibition against arbitrary detention and the right to be brought before a court. On the available evidence, it appears that the unacceptable conditions in the RPCs breach the ban on cruel, inhuman or degrading treatment or punishment and possibly also the ban on torture.

> The removal of funding increases the likelihood of inaccuracies in decision making and may result in the return of refugees to harm.

The death of young Iranian asylum seeker, Reza Barati, on 17 February 2014 in the PNG detention centre highlights the lack of safety afforded to detainees there and places both Australia and PNG in violation of their obligations to protect the right to life. Other disturbances in the RPCs have included fires lit by detainees in protest against their indefinite detention in July 2013 and reports of suicide attempts in both RPCs.

We believe that Australia would best meet its international obligations by processing all asylum seekers in Australia. We are particularly alarmed by the detention of children on Nauru in violation of Australia's obligations under the *Convention on the Rights of the Child* to ensure that the best interests of the child are a primary consideration 'in all actions concerning children'.

Harsh and unnecessary visa rules

Asylum seekers who arrived on the Australian mainland by boat after 13 August 2012 are subject to a 'no advantage test' which effectively means their claims are on hold indefinitely. If released from detention, they are given a Bridging Visa which prohibits them from working, gives only limited welfare assistance and denies them right to leave Australia or to sponsor their families to join them while their claims are being assessed.

Further, the Coalition attempted to re-introduce Temporary Protection Visas in October 2013 for people who arrive by boat and are granted refugee status. The Senate disallowed them, however the government has vowed to use other existing temporary visas instead. The temporary visas will separate families indefinitely because they do not permit sponsorship of family members and deny refugees the right of return should they leave Australia for any reason including to visit family in a third country.

The denial of family reunion for asylum seekers and refugees is needlessly cruel and a clear violation of Australia's international obligations to protect the family. Furthermore, the denial of work rights and the provision of a lower rate of welfare assistance to refugees on Bridging Visas compared to Australian nationals (89 percent of the full rate) violates the right to work and possibly the right to an adequate standard of living.

Conclusion

These extraordinary measures relate only to refugees arriving by boat. As a large percentage of asylum seekers arriving in Australia by boat are in fact refugees (89.6 percent in 2010-11), Australia is in violation of its obligation to refrain from punishing refugees for their mode of arrival, and it seems determined to punish them more harshly with every passing year.

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Photo: Freedom House

Europe: protecting asylum seekers' core rights

Just as the arrival of boats carrying asylum seekers has been a high-profile political issue in Australia for some years, asylum has been similarly controversial in Europe. However, events there highlight how governments can deal with this controversial issue while protecting asylum seekers' core human rights.

Two important developments in particular have softened some aspects of Europe's otherwise harsh national asylum seeker policies. First, there have been a number of important judgements of the European Court of Human Rights (ECHR) which place limits on national refugee policies. Second, European countries are working together to forge regional cooperation in managing boat arrivals. In this respect, Europe's human rights framework is a model which should be influencing policy makers both in Australia and our region.

Much has been made in Australia of the numbers of asylum seekers attempting to gain entry to our borders. However, many of those who seek asylum in industrialised nations do so in Europe. In 2012, Germany received 64,500 asylum claims; France received 54,900 and Sweden 43,900. Tens of thousands of migrants and asylum seekers also cross the Mediterranean from Africa each year.

The increase in boat arrivals from Africa has caused a great deal of tension between key Southern European countries (such as Greece, Italy and Spain) and other European states. The Southern members argue that they bear an unfair burden in processing and providing for these asylum seekers while struggling to look after their own citizens.

A number of NGOs have reported that these Southern European countries have 'pushed back' asylum-seekers to Africa and have failed to conduct adequate search and rescue operations to assist unseaworthy vessels. These problems were illustrated by last October's tragedy in the Mediterranean when more than 300 African migrants died after their ship sank off the Italian island Lampedusa.

Additionally, there is anti-immigration sentiment in some European countries, particularly those affected by economic crisis. Some anti-immigration political parties include the Golden Dawn in Greece, the Dutch far-right Freedom Party (PVV) and in France Marine Le Pen's National Front.

Despite these issues, Europe's legal structure is markedly different from that in the Australasian region. Australia does not have a domestic Bill of Rights and is not part of a regional human rights treaty. In contrast, forty-seven European states are signatories to the *European Convention on Human Rights*. EU Member States have also signed up the EU Charter on Fundamental Rights and to sophisticated regional refugee instruments which attempt to harmonise EU refugee law and practice. These binding documents ensure that Europe adheres to minimum standards on refugee law, procedures and living conditions based on the *Refugee Convention*. One significant development in 2013 was the adoption of 'recast' versions of these instruments which strengthen the protections granted to asylum seekers.

The practices of European countries are supported by strong regional oversight bodies, such as the European Court of Justice and ECHR. For instance, in 2011 the ECHR held that Greece had breached its human rights obligations because of deficiencies in its asylum system. Currently, no European country can transfer asylum seekers to Greece as a result of that ruling. The ECHR also ruled in 2012 that Italy had violated human rights by pushing asylum seeker boats back to Libya. These two key judgements continue to be highly influential on national practice in 2014 as they are binding on European signatories.

> Europe's human rights framework is a model which should be influencing policy makers both in Australia and our region

Unlike Europe, the Asia Pacific region lacks an effective regional asylum seeker protection mechanism. The Bali Process has operated since 2002, but this is a limited tool for the protection of asylum seekers as it is primarily an anti-people smuggling initiative.

The Australian government's offshore processing is one of its most widely criticised policies. In contrast, Europe conducts no such third-country processing. While European countries are permitted to transfer asylum-seekers *within* Europe, these transfers are strictly regulated by the *Dublin Convention*. In 2013, a redraft of that Convention included family reunion as a primary consideration. This is a very important improvement considering that asylum seekers from war-torn countries such as Syria and those in Africa frequently become separated from their families. In contrast, harsh new Australian visa laws prohibit family reunion for refugees who arrived by boat.

Finally, further work is being carried out in Europe to improve cooperation on search and rescue operations. A European Parliamentary Committee recently approved a Regulation for coordinated surveillance of external sea borders which will better protect the rights of migrants in distress at sea.

In summary, while there remain significant concerns about aspects of European refugee law and policy, Europe's strong regional human rights infrastructure continues to prohibit some harsh asylum policies. Many of the improvements in European refugee policy also arose out of a shared interest in harmonising laws and conditions. If Australia is to take the lead in establishing a Regional Processing Programme in the Asian region, it must also build a robust rights protection framework – domestically and regionally – and (in the longer term) work towards greater adherence to the *Refugee Convention*.

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Photo: 826 Paranormal

Australia's growing prisons crisis

Governments around the world have invested in prisons as places for the punishment of offenders. They are expensive, harmful and overused. In Australia, prisons are becoming increasingly overcrowded, and their populations demonstrate striking levels of vulnerability and disadvantage.

There were 29,383 prisoners (sentenced and unsentenced) in Australian prisons at 30 June 2012, and Aboriginal and Torres Strait Islander people comprised just over a quarter of the total prisoner population, despite being only 2 per cent of the overall Australian population. Prisons have been called the 'mental health institutions of the 21st century', with high levels of mental ill health, cognitive impairment and acquired brain injury among prisoners, in a population with significant histories of abuse and neglect, substance addiction, and low levels of educational achievement.

At the same time, governments are encouraging more and longer prison sentences in response to perceived increases in crime. Statistically, this fear is not warranted: most crimes continue to occur at the same or lower rates. It is now internationally recognised that rates of crime and rates of imprisonment bear little relationship; the use of imprisonment is a political choice, not a criminological necessity.

Overcrowding of prisons means cramped accommodation and sharing cells built originally for one person, longer waiting times for medical attention, and more limited access to education and therapeutic programs. In Victoria, it has meant that people held in prisons on remand – that is, not convicted but waiting to come to court for a hearing – have missed court dates due to overcrowding in custody cells, in breach of basic rights not to be arbitrarily detained, and to a fair and timely hearing.

Two issues are therefore important in this discussion: first, the negative impacts of overcrowding and over use of prisons; and second, whether governments could use alternative forms of punishment for crime. The underlying issue of whether tougher sentences are needed at all is beyond the scope of this report.

Prisoners' rights and overcrowding

It is now accepted that people who go to prison retain their rights as human beings, other than the rights that are inevitably lost when they forfeit their liberty. This general principle is recognised in legislation, in international treaties and in case law. However, in practice it can be problematic, for a number of reasons.

First, most Australian jurisdictions have no legislation spelling out prisoners' rights. In Victoria the *Corrections Act* sets out a range of rights, for example to visits, time out of cells, education, and religious practice. However it is far from a comprehensive list of prisoners' rights, and some other states have even less protection.

Second, basic international human rights that apply to people in prisons (unless explicitly excluded) are unenforceable in Australia. These include the right not to be subjected to cruel, inhuman or degrading treatment or punishment and more generally to the protection of life, family, reputation, privacy, and religious belief.

When these rights – which are set out in *the International Covenant on Civil and Political Rights* (ICCPR) – are breached, prisoners can only complain to the UN Human Rights Committee, but the committee's conclusions are non-binding. The exceptions are Victoria and the ACT, which have enshrined the ICCPR in domestic law. The recent Victorian case upholding a prisoner's right to access 'reasonable' medical care shows the importance of human rights legislation. In that case, the female prisoner was permitted to continue IVF treatment, in circumstances where she would be too old to continue if she waited to the end of her sentence (*Castles v Secretary to the Department of Justice & Ors*)

> ... governments in Australia should investigate all non-custodial forms of punishment and minimise the use of imprisonment.

Third, the daily practice of operating and managing a prison makes it difficult to protect rights, even when prison operators are aiming to do so. Community expectations of punitive conditions in detention discourage more humane prison conditions, as evidenced by tabloid media critiques to which governments can be extremely sensitive. Further, security requirements routinely take priority over other interests. Corrections legislation emphasises the primacy of maintaining security; this is of course the raison d'etre of a custodial facility, and the courts have accepted argument that security requirements can legitimately limit individual rights. Without human rights laws, courts can struggle to identify principles which challenge the primacy of security.

Finding alternatives to imprisonment

Prisons detain the most vulnerable and marginalised of the community, and risk causing them further harm. They are also expensive: in Australia it costs over $300 per day to keep someone behind bars. Scandinavian countries, as a comparison, have substantially lower imprisonment rates with no greater occurrence of crime. A number of countries are now recognising the need to reduce the use of imprisonment, if only for economic reasons.

There are alternatives to custodial sentences. Across Australia sentence options include fines and community work orders; they also include referral to mental health and drug treatment facilities. We need a debate in Australia about what we really want when we call for 'punishment' of offending behaviour. It is arguably impossible to imprison people and at the same time protect their human rights. Therefore, governments in Australia should investigate all non-custodial forms of punishment and minimise the use of imprisonment. Redirecting resources to mental health care, alcohol and drug treatment, supports for indigenous communities, and constructive forms of community punishment should be a priority for any government interested in human rights.

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Photo: Freedom House

Human rights in "closed environments"

Protecting the human rights of people in "closed environments" is crucial because the people detained in these facilities are removed from public scrutiny. Their relative powerlessness creates a serious risk of human rights abuse by staff members and fellow detainees. Closed environments are places where people are unable to leave of their own free will. Examples include prisons, police cells, forensic psychiatric units, closed mental health and disability facilities, and immigration detention centres.

Newspapers are littered with examples of violations of human rights in closed environments, including the harsh living conditions in immigration detention centres, physical and sexual abuse in residential disability and mental health facilities, and overcrowding in prisons and the consequent alternative forms of prison accommodation (such as shipping containers).

We are developing a strategic framework for implementing human rights in closed environments. The framework outlines the minimum conditions necessary for the protection and promotion of the human rights of people in closed environments.

Currently, Australia does not satisfy these minimum requirements. For this reason, federal, state and territory governments must adopt this framework, which has three inter-linked and mutually reinforcing elements.

1. Regulatory framework

A regulatory framework, with comprehensive human rights laws, adequate remedies and an effective means of enforcement is necessary to create the right environment for human rights protection in closed environments. Such a regulatory framework must include:

a) International human rights obligations: The internationally recognised suite of human rights guarantees is at the pinnacle of the framework. This reflects the international consensus as to the basic minimum human rights obligations, and the obligations to adopt legislative and other measures to secure those rights in domestic settings and to provide effective remedies. Australia is a party to many Conventions that contain human rights protections for people in closed environments, for example, the *International Covenant on Civil and Political Rights* which provides that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'. *The Convention Against Torture* and the *Convention on the Rights of Persons with Disabilities* also contain relevant protections.

b) Comprehensive national human rights legislation: although parliament has incorporated *some* aspects of *some* international human right treaties into domestic law, the patchwork of legal protections falls far short of full domestic implementation. Consequently, comprehensive protection of human rights is needed at federal, state and territory levels. Without a legal commitment to human rights, including effective remedies and enforcement mechanisms, protection of human rights in closed environment remains precarious.

> federal, state and territory governments must adopt this framework

c) Environment-specific legislation: Those general human rights protections must then be translated into detailed rights and duties specifically for closed environments. These rights and duties must be enshrined in legislation, regulations, and policy to ensure that people managing detention facilities have clear rules and guidelines to follow. Such legislation would be tailored to recognise the different aims of each type of environment.

2. Independent Monitoring

Effective monitoring by external organisations is vital for ensuring that the human rights regulatory framework is being complied with in closed environments on a daily basis. Monitoring includes investigation of complaints by people who are detained, and investigation of system-wide problems. The latter usually results in publicly available recommendations to government. Such 'naming and shaming' may inspire change; however, ideally the government will voluntarily respond to any recommendations.

This function is performed at the:

- international level, by the committee established under the *Optional Protocol to the Convention Against Torture* (OPCAT). Australia has signed but not yet ratified OPCAT and therefore this committee does not yet operate here; and
- national level, by organisations such as Ombudsmen, Human Rights Commissions, public advocates and prison inspectorates (such inspectorates exist in Western Australia and NSW). However, because of the lack of coordination between federal, state and territory agencies with different responsibilities and agendas, gaps in coverage remain. Without an overarching human rights framework, standards of monitoring will differ and most likely fail to comply with human rights standards.

3. Culture change

A human rights regulatory framework can only be put into practice if organisations change their cultures to ensure that employees show respect for human rights at all times.

It is challenging to achieve a human rights culture in these environments when there is, arguably, an absence of human rights awareness among the general community, along with community expectations that security and control must be prioritised. There are, however, a number of strategies for achieving culture change (and a number of successful examples), including ensuring that leaders promote human rights; employing 'change agents' who assist staff as changes take place; and providing compulsory practical human rights training to staff .

Conclusion

The elements of the strategic framework are inter-linked and mutually reinforcing. For example, monitoring organisations use the regulatory framework when assessing the culture in closed environments for human rights compliance. The regulatory framework also provides the basis for staff training about human rights obligations as culture change is undertaken. Because of this, all three elements are needed to properly promote, protect and respect human rights in closed environments.

As a first step towards implementation of the framework, the Federal Government must ratify OPCAT as a priority to ensure better monitoring arrangements federally and in all states and territories.

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Photo: Progress Ohio

Reproductive rights still under threat

Decades after the fight for reproductive rights began in Australia, the issue is in the spotlight again because of three significant developments.

Report on Involuntary Sterilisation of People with Disabilities

Australia, together with many other countries, has a history of sterilising people with disabilities and intersex people. During 2012-13, the Senate Community Affairs Legislative Committee investigated the issue during two separate inquiries.

In a unique development for Australia, the Committee's 2013 report on the sterilisation of people with a disability took the view that the traditionally accepted test, which considers whether sterilisation is in the "best interests" of the person concerned, is *not* the preferred approach. The Committee recommended that the test should be replaced with a "best protection of rights test" which requires a decision maker to take the course of action which best protects the individual rights of the person with the disability. According to Disability Discrimination Commissioner Graeme Innes, the Committee's recommendations clearly 'recognise the importance of using a human rights based framework when considering sterilisation'. However, whether the report in fact adequately protects the rights of persons with disability is contentious. For example, in its submission to the inquiry Women With Disabilities Australia recommended that Australia prohibit *any* sterilisation procedure performed without full free and informed consent except whether there is a threat to life.

> Is it a giant leap forward and the continuation of a critical dialogue in the Australian community? Absolutely'

As part of this same reference, in October 2013 the Committee released a second report relating to the involuntary or coerced sterilisation of intersex people in which it recognised the human rights issues inherent in 'normalising' surgery which is frequently performed on intersex infants and children.

Although the reports into sterilisation clearly represent a step forward, many stakeholders remain critical and it is unclear whether anything will actually be done to implement the recommendations.

Tasmania Decriminalises Abortion

Last year, Tasmania became the third Australian jurisdiction to decriminalise abortion, after the ACT in 2002 and Victoria in 2008. The new Tasmanian law (which commenced on 12 February 2014) removes the crime of abortion from the *Criminal Code Act* and introduces a new legal framework, regulating abortion as a health issue rather than a criminal law issue. The Tasmanian legislation allows 'abortion on request' up to 16 weeks' gestation following which a pregnancy may be terminated if two medical practitioners agree 'that the continuation of the pregnancy would involve greater risk of injury to the physical or mental health of the pregnant woman than if the pregnancy were terminated'. In addition, the law imposes a duty to terminate a pregnancy where necessary to save the life of a pregnant woman. Like the Victorian legislation, the law also imposes a version of the 'obligation to refer' on doctors with a conscientious objection.

A particularly noteworthy component of the Tasmanian legislation concerns the introduction of 'access zones'. This section prevents anti-choice protesters from harassing women within 150 metres of a clinic that provides abortion services. Though concerns have been expressed regarding the potential for conflict with the right to free speech, in light of the humiliation and distress frequently endured by women whose dignity and privacy is undermined when protestors endeavour to infringe on their reproductive autonomy, the introduction of such access zones is significant.

As I have noted elsewhere, '[t]he Tasmanian legislation represents a negotiated solution. Is it a flawless piece of legislation from a women's rights perspective? No. Is it a giant leap forward and the continuation of a critical dialogue in the Australian community? Absolutely'. And while there may be some cause for concern regarding the 16 week gestation threshold for abortion on request and the requirement for the authorisation of two medical practitioners for abortion after 16 weeks gestation, other aspects of the legislation (particularly the introduction of "access zones") represent a unique and positive step forward in the Australian context.

Zoe's Law

On the same day as the Tasmanian Parliament passed its abortion law, the NSW Legislative Assembly voted in favour of Zoe's law, a Bill that explicitly recognises the foetus as a person in certain circumstances. This Bill was introduced into parliament following a tragic situation in which a woman who was 32 weeks pregnant was hit by a motor vehicle while crossing the road; her foetus was destroyed as a result. NSW law currently conceptualises such harm as harm to the woman, not the foetus.

The object of Zoe's law is to 'amend the *Crimes Act* to recognise the separate existence of the foetus of a pregnant women that is of at least 20 weeks' gestation (as a living person)' for the purposes of certain offenses relating to 'grievous bodily harm'. If Zoe's law passes the Legislative Council and becomes law, it could potentially undermine access to abortion in that State as it raises the question of whether an entity can be a 'person' for one legal purpose but not another. It is interesting to note that a similar Bill was introduced into the South Australian Parliament in 2013 but failed to pass.

Conclusion

Issues relating to reproductive rights in Australia continue to grab the spotlight, creating a situation where progress on one front is frequently accompanied by regression on a different front, as was the case when Tasmania decriminalised abortion as Zoe's Law was being introduced into the NSW Parliament.

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Photo: Stéphanie Amesse

Gender-based violence: beyond the first 20 years

Despite many advances in preventing gender-based violence, one in three Australian women over the age of 15 has experienced physical or sexual violence and roughly one woman a week is killed by their partner or ex-partner. As some commentators have pointed out, these figures dwarf the incidence of 'one-punch assaults' or shark attacks that allegedly require urgent and special intervention by the state.

Gender-based violence is a widespread problem and one of the most pervasive human rights abuses, both in Australia and globally. It includes physical, sexual and psychological abuse perpetrated by individuals (such as family members), harmful customary practices (for instance 'honour killings') and violence committed by the state on the basis of gender.

Australia has adopted a National Plan to Reduce Violence against Women and their Children (2010–22). The plan is a welcome development. The First Action Plan (2010–13) was about laying a foundation for long-term change and many valuable initiatives have been started. The Second Action Plan (until 2016) aims to build on this work, strengthening the implementation of violence reduction measures. The effectiveness of the plan will depend on the dedication of the federal and state and territory governments to adequately fund both services for victims of violence and comprehensive prevention strategies, in particular those aiming at long-term change in attitudes towards gender-based violence. Significant change requires sustained commitment to meeting the targets of the National Plan.

Recognition that gender-based violence is an international human rights issue is a relatively recent development. Although the elaboration on women's rights as human rights started in the 1970s, abuses occurring in the private sphere, such as domestic violence, rape and sexual abuse, did not feature in human rights instruments such as the *Convention for the Elimination of All Forms of Discrimination Against Women*. Gender-based violence finally became a shared rallying point for women all around the world in the early 1990s. In December 1993, the *Declaration on the Elimination of Violence against Women* was adopted by the United Nations General Assembly; in 1994, the UN created the post of Special Rapporteur on violence against women, including its causes and consequences; in 1995, the Beijing World Conference on Women declared violence against women a global concern.

In the last 20 years gender-based violence has emerged as a major challenge for international human rights law. In many societies, women are more likely to fear threats and violence by non-state actors such as family members than state actors such as the police, and international human rights law has struggled to cover these private acts. Some international and domestic experts see gender-based violence as a form of discrimination against women, arguing that unequal power relations underlie violence against women. Others have successfully applied human rights law – which most commonly covers individual-state relationships (e.g. freedom from torture, inhuman and degrading treatment) – to women's experiences. Using these strategies, great strides have been made to turn some traditionally neglected atrocities, such as rape in conflict, marital rape and trafficking for exploitation, into mainstream human rights issues.

> Gender-based violence is a widespread problem and one of the most pervasive human rights abuses, both in Australia and globally

Despite these advances, many challenges remain. Gender-based violence remains ill-defined in international human rights law and its causes and consequences are not always properly understood by international and domestic human rights actors. There still exists no international human rights treaty explicitly prohibiting gender-based violence. In practice, violence against women is also considered difficult to address – it is deeply ingrained and often seen as politically sensitive, culturally specific and divisive. These issues are often compounded with regard to women who experience multiple discrimination, such as indigenous women or women with disabilities.

Gender-based violence can nullify a victim's ability to enjoy her human rights. The effects of gender-based violence extend beyond the physical and mental consequences to immediate victims, their families, communities and society as a whole. States have a duty to ensure that all individuals in their jurisdiction are protected from violence. This duty requires states not only to refrain from engaging in or encouraging gender-based violence but to actively protect victims, prosecute and punish perpetrators and engage in long-term prevention strategies. The eradication of gender-based violence requires deep commitment to social change, most notably adjustment in the attitudes of men and boys regarding gender inequality and adaptation of institutions and structures of power to take gender-based violence seriously.

The adoption of the National Plan signalled Australia's commitment to reducing gender-based violence and provides a framework for working towards its elimination, but we are far from having reached the its aims. Meeting the due diligence requirements of international human rights law obliges governments to put the money where their mouth is. It is therefore essential that the Second Action Plan, which runs until 2016, is backed up with sufficient funding and effective implementation measures by both the federal and state and territory governments.

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Photo: Sidkid

Indigenous rights: hastening too slowly

In 2013 the then opposition leader, Tony Abbott, announced that if elected he would be the 'Prime Minister for Indigenous Affairs', raising hopes that law reform and better human rights protection for Aboriginal and Torres Strait Islander peoples would be central to the government's agenda. To some extent, they have been, but not necessarily in a way that any of us expected.

Slashing Indigenous Legal Services

The first worrying signs emerged when the then-Opposition announced on the eve of the election that it would cut some $42 million of federal funding from Indigenous (and some other) legal services' 'advocacy and policy reform' programs. Although the government has still not confirmed all of the cuts, we do know that around $13 million will be slashed from Indigenous legal services over four years. This figure includes cuts to the National Aboriginal and Torres Strait Islander Legal Services (NATILS), and all law reform and policy officer positions at peak Aboriginal legal services in each state and territory. Although it was asserted that no 'frontline' advocacy would suffer from these cuts, the Government has not provided figures to support this assertion. Organisations as diverse as the National Congress of Australia's First Peoples, the Indigenous Law Centre and the National Family Violence Prevention and Legal Service have been severely defunded, putting their viability at risk and forcing staff retrenchments and service closures.

Indigenous incarceration rates are still vastly higher than rates for the rest of the population, with up to 28 per cent of prisoners being Indigenous people (who make up about 3 per cent of the overall population). Given the longstanding and dramatic over-imprisonment of Indigenous Australians, it is hard to explain how the Prime Minister for Indigenous Affairs can preside over these massive cuts to Aboriginal legal aid which will undoubtedly further entrench Aborigines and Torres Strait Islanders as outcasts in their own country. Shane Duffy, chairperson of NATILS said 'without the advocacy work … more people are going to end up in prison, it's as simple as that'. He continued, 'Justice-related costs are spiralling out of control around Australia, and removing the ability of front-line services to provide government agencies with accurate policy advice will only serve to make our system more ineffective, inefficient and increasingly costly'. We believe that the legal aid cuts must be reversed as one part of a broader plan to reduce Indigenous incarceration rates.

Defunding the Indigenous representative body

The government has also reneged on $15 million of funding for the National Congress of Australia's First Peoples. At the same time, it has created a new body, the Indigenous Advisory Council, for advice on 'the policy implementation of the Coalition Government'. While the Council is a hand-picked body of 12 Indigenous and non-indigenous business and public sector experts, the National Congress is a representative body with 120 delegates elected by its membership. We are concerned that the government is relying on a very small group of people to advise on Indigenous policy, and we call on the government to clarify the new Council's role.

> The time has come for tangible constitutional reforms that address the very real issues of systemic racism and discrimination

Hastening Slowly on Constitutional Reform

The Prime Minister used his 2014 New Year's Message to reiterate his commitment to 'begin a conversation' about a national referendum to recognise Indigenous Australians in the Constitution. Hastening slowly, he committed to having a draft bill ready by September while warning that 'We want it to happen as quickly as possible but a rushed job might be a botched job'.

'Rushing' is hardly the issue here; the [former] Prime Minister's Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples properly spent all of 2011 consulting with the general public, Indigenous community groups and high-level stakeholders, and held a formal public submissions process. Qualitative and quantitative research was undertaken. It delivered a comprehensive and accessible report in January 2012. A Parliamentary committee outlined the necessary steps for a successful referendum on Indigenous Constitutional recognition. In addition, the *Aboriginal and Torres Strait Islander Peoples Recognition Act* sets out steps for gauging the readiness of the Australian public to support a referendum and evaluating proposals to amend the Constitution. It formally recognised that Australia was first occupied by Aboriginal and Torres Strait Islander peoples, acknowledged their continuing relationship with their traditional lands and waters, and acknowledged the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples. Although this Act was an important and sincere recognition of Indigenous rights, it is of no legal or constitutional consequence. The time has come for tangible constitutional reforms that address the very real issues of systemic racism and discrimination experienced by many Indigenous peoples in the legal (and particularly the criminal justice) system.

Conclusion

Last year was notable for the being the 21st Anniversary of the landmark *Mabo* case, the 20th Anniversary of Paul Keating's Redfern Speech, and the 5th Anniversary of the Commonwealth's Apology to the Stolen Generations. Meanwhile the annual Closing the Gap report showed some improvements in key indicators such as child mortality, school completion and life expectancy. Five years after Australia belatedly acceded to the UN *Declaration on the Rights of Indigenous Peoples*, we are making disappointingly slow progress in the recognition, protection and realization of Indigenous Australian's human rights. Indigenous Australians deserve more.

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