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Rights Agenda Children's Rights Edition

Monthly Bulletin of the Human Rights Law Centre

OPINION

Detaining children does not stop the boats – Professor Gillian Triggs

NEWS

A recent UN report provides a reminder that Australia is failing children in our youth detention facilities.

High Court action against NT to challenge police powers which will disproportionately impact Aboriginal people.

Equality needed to protect children in rainbow families, say community and rights groups to Adoption review.

INTERVIEW

Rahila Haidary and the UNICEF Australia Young Ambassador Program.

TABLE OF CONTENTS

WELCOME	2
OPINION - GILLIAN TRIGGS	3
CHILDREN'S RIGHTS ARTICLES	7
OPINION - ANNA BROWN	29
A COFFEE WITH…JOHN TOBIN	30
HRLC POLICY & CASE WORK	32
HUMAN RIGHTS DINNER	38
HRLC MEDIA HIGHLIGHTS	38
NOTICEBOARD	39

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CHILDREN'S RIGHTS EDITION 2015

Welcome from Matthew Keeley

It is my great pleasure to present this year's children's rights edition of the Human Rights Law Centre Bulletin, developed in collaboration with King & Wood Mallesons, the Human Rights Law Centre and UNICEF Australia. I am pleased that the voice of young people appears in this year's edition, including through an interview with Rahila Haidary, one of UNICEF Australia's Young Ambassadors.

This special edition is now in its sixth year. In that time it has reported on significant issues affecting children across Australia. This year's edition continues this tradition, exploring the legal and human rights frameworks that affect our children and young people from their birth through their adolescence and beyond.

The articles on surrogacy and migration describe the complex legal situation that determines rights most of us take for granted – our parentage and nationality upon birth. Picking up on the issue of migration status, and exploring many other issues related to the detention and treatment of children, the article on Australia's review under the Convention Against Torture emphasises that there is still work to be done to ensure that Australian laws afford children with the level of protection due to them under international law. From here, the article on the 2014 Children's Rights Report outlines some of the specific things that we need to do to understand and address one of the major threats to young people's health and well-being – self-harm.

The treatment, participation and protection of children arriving or residing in Australia and elsewhere require constant vigilance. We need look no further than the articles in this edition for support of that proposition. These articles call for governments across Australia to ensure the safety and wellbeing of all children in Australia so that they can reach their fullest potential. They also recognise the positive things that Australia has to offer – particularly access to education, which was denied to Rahila Haidary in Afghanistan but has allowed her to flourish in Australia.

I thank King & Wood Mallesons, the Human Rights Law Centre and our newest contributor, UNICEF Australia for their generous support of this project. Since 2010, summer clerks and paralegals at King & Wood Mallesons have written the articles contained in these special editions and I extend my thanks to them for their diligence in shedding light on the inequalities and injustices affecting children across Australia.

Matthew Keeley *is the Director of the National Children's and Youth Law Centre.*

DISCLAIMER

OPINION

Detaining children does not stop the boats

'How did it come to this?' asks the Australian Human Rights Commission's ***Professor Gillian Triggs*** *about Australia rejecting fundamental human rights along with the international monitoring processes designed to give them effect.*

The Report by the Australian Human Rights Commission of the National Inquiry into Children in Immigration Detention was tabled in Parliament in February 2014. Since the Inquiry began in January 2013, hundreds of children have been moved out of detention into the community. However, currently, 133 children continue to be detained on mainland Australia and 107 children are held on Nauru. The average length of time children spend in detention in Australia is 1 year and two months. Some have been held for years.

In March this year, the United Nations Special Rapporteur on Torture, Juan Mendez, found that Australia's policy of indefinite and mandatory detention violates the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Prime Minister rejected the Report saying he was 'sick of being lectured to by the UN'. In response, Mr Mendez pointed out that 'we in the UN also deserve respect and I wish the PM had taken our views on this more seriously'.

The exchange follows similar expressions of concern from within the UN Human Rights regime over the last few months about Australia's refugee detention policy from the Human Rights Council, the High Commissioner for Human Rights, the Committee against Torture and the Working Group on Arbitrary Detention.

The United Nations Committee on the Rights of the Child has expressed deep concern about Australia's policy of mandatory detention and has repeatedly urged Australia to 'reconsider its policy of detaining children who are asylum-seeking, refugees and/or irregular migrants; and, ensure that if immigration detention is imposed, it is subject to time limits and judicial review'.

The United Nations High Commissioner for Refugees has also called for Australia to end offshore processing. After visiting the detention centre on Nauru, the High Commissioner stated that 'no child, whether an unaccompanied child or within a family group, should be transferred from Australia to Nauru'.

During my recent meetings in Geneva with the 110 national human rights institutions around the world, I was struck by the virtually unanimous bewilderment of experienced UN human rights diplomats that Australia should reject fundamental human rights along with the international monitoring processes designed to give them effect. Genuine concern was expressed that Australia was turning its back on its traditional leadership in international human rights protection. This was especially so as Australia has, since Dr Evatt took part in negotiating the Universal Declaration on Human Rights in 1948, been an active proponent of international human rights, including the creation of the International Criminal Court.

How has it come to this?

There is no simple explanation. Australia played a valuable role in the Security Council over the last two years, particularly as President during the crisis in the Ukraine. Australia is currently seeking a seat on the Human Rights Council and continues to sponsor an important General Assembly Resolution supporting the work of national human rights institutions.

One explanation lies in the Government's concern that the Inquiry conducted by the AHRC into the impact on children of long term and indefinite immigration detention might challenge its border security policies. Any such concern is curious as the Ministers of Immigration of both the former and current Governments have denied that detaining children has any deterrent effect on people smuggling. In short, detaining children does not stop the boats.

Both the Labor and Coalition Governments have adopted the practice of detaining asylum seeker children since the legislation mandating detention was passed by Parliament in 1992. The Report is even handed in condemning this long-standing policy of immigration detention on the ground that it violates Australia's international obligations.

We have been at a loss to understand why Australia should detain children in locked environments for so long. No other country in the world mandates the indefinite detention of children as the first policy option and then denies them access to the courts to challenge the necessity of their detention over many months and sometimes years.

The immigration practices of comparable nations are in stark contrast to those of Australia. For example, in 2010 the United Kingdom Government of Prime Minister David Cameron committed to ending the detention of asylum-seeking children.

Children who arrive without visas in the UK are immediately screened and released into the community while their asylum status is determined.

If immigration detention happens at all in the UK, it is usually only at the point of exit from the county after an unsuccessful asylum or visa application and only for a maximum of 72 hours for children. In very rare cases, this can be extended to a maximum of 7 days, but only with ministerial approval.

Why did the AHRC launch the Inquiry?

2013 saw a peak in the number of asylum seekers globally – largely as a result of the unrest of the Arab Spring. In Australia, asylum seeker numbers rose to a record high in July 2013. There were 1992 children in detention in that month. The peak in the numbers of children in detention coincided with a steady increase in the length of time that asylum seekers, including children, were spending in detention.

By the time of the Federal election in September 2013, the then Government had moved about 900 children into the community. However, in the months following the election, the numbers of children in detention remained relatively constant at approximately 1,100 children and the periods for which they were being held were increasing.

These alarming developments confirmed that it was time for the Commission to conduct a comprehensive Inquiry into the impacts on children's health and development while they remained in prolonged, indefinite detention. As the law is well settled that such detention breaches Australia's international obligations, the focus of the Inquiry lay on the mental and physical health impacts of detention rather than on the legal principles.

What was the methodology adopted by the Inquiry?

It was vital to the credibility of the Inquiry that its findings should withstand critical and objective assessment. The Report reflects the views and experiences of 638 children; the largest cohort of children ever surveyed about prolonged immigration detention. The Report provided unprecedented first-hand evidence of the impact that prolonged immigration detention has on the mental and physical health of children. It also identified the impact of detention on the key developmental stages of children as infants, pre-schoolers, primary aged children and teenagers.

The Inquiry team visited 11 detention centres, with repeat visits to Christmas Island after reports of attempted suicide and self-harm. The Inquiry also received 239 submissions from the public and stakeholders, took evidence from 41 witnesses at 5 public hearings, and relied significantly on data provided by the Department of Immigration and Border Protection. Perhaps the single most important aspect of the Inquiry methodology was the inclusion of internationally recognised medical experts, child psychiatrists and paediatricians in each detention centre visit. Their expertise confirmed the scholarly literature and added significant credibility to the findings of the health impacts of long-term detention.

For all these reasons, we believe the data and findings by the Inquiry are nationally and internationally significant.

Inquiry findings and recommendations

The Inquiry confirmed many disturbing facts:

- Detention creates and compounds mental health disorders amongst children according to all medical evidence.
- According to the clinical assessments made by the detention health provider, 34 percent of children have a mental health disorder of such severity that they require psychiatric support. Less than 2 percent of children in the Australian community have mental health disorders of this severity.
- Children are self-harming in detention at very high rates.
- Children have been exposed to unacceptable levels of violence in detention.
- Children have been locked up for close to 16 months without any known date for release.
- Children live in very cramped conditions – on Christmas Island many shared a tiny room of 2.5 x 3 metres with up to 4 people.
- Children live in locked environments with adults who are mentally unwell.
- More than 30 percent of adults in detention have moderate to severe mental health disorders.

The Report confirms that the detention environment is dangerous. Consider the following statistics of violence in the detention environment over a 15 month period:

- 57 serious assaults
- 233 assaults involving children
- 207 incidents of actual self-harm (128 involving children)
- 436 incidents of threatened self-harm
- 33 incidents of reported sexual assault (the majority involving children); and
- 183 incidents of voluntary starvation/hunger strikes (with a further 27 involving children).

These statistics do not give a complete picture. Rather, it was each individual story that most moved the Inquiry team. We met a distressed seven year old girl on Christmas Island who had been banging her head and having regular nightmares during which time she would wet the bed. Her parents said she had stopped making sense to them when she spoke. The family had been requesting help from the medical health provider (IHMS), but were told to wait. After many months, the child was referred to a psychologist and is receiving ongoing support.

Bed wetting problems are common amongst children in detention of all ages. Many children spoke of their fear of the night headcounts. At approximately 11pm and 5am every night, a guard shines a torch into the rooms of sleeping families and asks for the identification of people in the room. Many children described these head counts as the 'visit of the ghosts'.

While we were not able to visit Nauru the evidence we received about the conditions of detention was truly shocking. The Inquiry found that children on Nauru are suffering from extreme levels of physical, emotional, psychological and developmental distress.

Children are being detained in vinyl tents which house 12 to 15 families. Individual family areas are separated by vinyl partitions. There is no privacy.

Inside these tents temperatures regularly reach 45-50 degrees and there is no air-conditioning.

Evidence to the inquiry identified serious water shortages with showers being restricted at times to 30 seconds each day.

Problems of cleanliness and hygiene appeared to be especially serious as they relate to toilets and showers. The Inquiry was told by a doctor who had worked on Nauru that the state of the toilets and the lack of water contributed to dehydration:

> And the dehydration was often related to both the fact they didn't have access to water during the day on demand and the other reason was that a lot of them, particularly women and children, didn't want to drink water during the day because they didn't want to use the shared toileting facilities.

The Inquiry received evidence from staff working in Nauru of incidents of harassment, bullying and abuse.

The recent report into allegations relating to conditions in Nauru by Philip Moss confirmed the Commission's concerns about the welfare and protection of children. The Moss Review found that in relation to children there were both reported and unreported allegations of sexual and other physical assault. The Moss Review reported that between October 2013 and October 2014, 17 minors engaged in self-harm (including one attempted hanging). The youngest child involved in self-harm was an 11 year old.

Despite the findings of the Moss Review and my Inquiry, it is unconscionable that 107 children remain in detention on Nauru and 133 children are held in Australia.

This situation is untenable. For this reason I have called for the Government to act. Some of the key recommendations of this report are:

- That all children and their families in detention in Australia and Nauru be released as soon as possible
- That legislation be enacted so that in future, children may only be detained for as long as is necessary for health, identity and security checks
- That no child be sent offshore for processing unless it is clear that their human rights will be respected
- That a royal commission be set up to examine the continued use of mandatory detention since 1992

My hope is that the Inquiry findings and recommendations provide an opportunity for governments to pledge bipartisan support for legislation that will stop the detention of children in this country.

The Commission's Report should serve as a record and a reminder of the damage that detention does to children so that never again are asylum seeker children detained for prolonged periods by Australia.

Professor Gillian Triggs *is President of the Australian Human Rights Commission.*

CHILDREN'S RIGHTS ARTICLES

UN Report a reminder that Australia's youth justice practices are failing to meet international standards

At the most recent United Nations Human Rights Council in March, the UN's Special Rapporteur on Torture tabled a report outlining the current international benchmarks expected of countries when it comes to detaining children in criminal and civil contexts.

The Human Rights Law Centre's Senior Lawyer, Ruth Barson, said the report is a reminder that Australia needs to change its youth justice policies in order to meet international standards.

"There's a lot of room for improvement when it comes to Australia's youth detention practices and policies. For example, the outdated use of strip searches and solitary conferment on children in Australia is of growing concern," said Ms Barson.

The independent UN expert, Juan Mendez, is tasked with interpreting and setting standards under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Mr Mendez made headlines in Australia after highlighting in a separate report the various ways in which Australia's asylum seeker policies breach the Convention.

"Obviously it's been well established that Australia's harsh and punitive asylum seeker policies breach international law in numerous ways, but this report is a reminder that we're also failing Australian children in our domestic youth detention facilities – of which, close to 50% are Aboriginal and Torres Strait Islander young people," said Ms Barson

Mr Barson says the standards set out in the Convention are even higher when it comes to children because they are particularly vulnerable.

"The bottom line is Australia's youth detention policies are out of date. We're allowing a number of physically and psychologically harmful practices to continue, and permitting punitive policies and practices, which do not prioritise young people's rehabilitation or reintegration," said Ms Barson.

The Report singles out particularly problematic practices, like solitary confinement regimes, mandatory sentencing of young people, and imposing life sentences without parole, and says that no circumstances warrant these practices.

"Solitary confinement is an inherently dangerous and damaging practice and the negative psychological and physical impacts on children are particularly pronounced. It's a practice that should be prohibited, but we know that jurisdictions like Western Australia continue to use solitary confinement regimes on children," said Ms Barson.

The Report recommends that the minimum age of criminal responsibility be twelve years, not ten as it is in Australia. It also says that children should be charged as minors until they are 18 years, not 17 as is current practice in Queensland. Further, the Report notes that detention should be limited to exceptional cases and alternatives to detention should be favoured. Children should only be detained for the shortest possible period of time, and only if is in their best interests.

"Some jurisdictions in Australia, like NSW where two child offenders are imprisoned without even the possibility of being granted parole, are clearly in breach of their human rights obligations. Queensland is also in breach given the previous Government removed the legislative provision that said that prison should only be used on children as a last report. As the report reminds us, children are different to adults; they are less emotionally and psychologically developed, and are less culpable for their actions," said Ms Barson.

The Report also notes that children should be held in age-appropriate detention centres, which offer non-prison like environments and which are run by specialised staff trained in dealing with children.

"The Northern Territory has recently moved their adult prison population into a new prison facility, but transferred youth prisoners in to the left over and run-down 30-year old adult prison. This Report should be a wake-up call for the Northern Territory Government that they need to urgently invest in purpose-built, youth facilities" said Ms Barson.

Ms Barson said rather than continuing with outdated and harmful practices, all Australian jurisdictions should develop policies which are in the best interests of children, and which do not risk being cruel, inhuman or degrading.

"Australia, like all countries that have signed up to the Convention, needs to continue to respect and uphold contemporary and appropriate standards when it comes to the treatment of children in detention," said Ms Barson.

A copy of the Committee's findings can be found online here.

Difference: The UNICEF Australia Young Ambassador Program

Rahila Haidary, one of UNICEF Australia's Young Ambassadors, knows the importance of children's rights better than most people her age. Growing up in the Uruzgan province of Afghanistan, which was then under Taliban rule, Rahila was denied the basic right of going to school. Boys, not girls, were the only children allowed to receive an education in her province.

> "I was the eldest girl child in the family and always questioned why my boy cousins got to go to learn at the mosque but I was never allowed to. No one really gave me a reasonable answer but just said that, 'You are a girl!'"

Rahila could only dream of what going to school every day would be like. It was her dream to have a notebook and pen and to go to a class that had a blackboard. She told us that she had heard about such things but had never seen them, except in her dreams. Not willing to be unfairly denied her education, Rahila tried to find a way to go to school, just like the boys in her town did. Bravely, she dressed up like a boy in an attempt to go unnoticed.

> "I thought I can look like a boy by just wearing a boy cloth [and] not a dress. One morning I wore my cousin's cloth and went to the mosque amongst the boys to start learning."

But Rahila was not able to disguise herself and people at the school recognised her. She faced severe consequences from the Taliban rulers in her province, who decided that she was no longer welcome in the area.

> "I had to pay for what I had done. The next day a group of men from our village got together to hear about what the punishment for my sin was. They decided that I shouldn't be seen in the area again."

Rahila's family were forced to make the difficult decision of sending her to live with her grandparents in Pakistan to escape further punishment. Rahila lived there for 5 years and was joined by her family in 2008 after they too were forced out of Afghanistan by the Taliban. Two years later, Rahila's family were granted humanitarian visas by the Australian Government.

Since arriving in Australia, Rahila has kept herself busy and is working to make a positive change both within Australia and beyond. Acting as a UNICEF Australia Young Ambassador since July 2014, she also works as an interpreter (in four dialects) and was recently accepted to study International Relations and Political Science at the University of Western Australia.

UNICEF Australia Young Ambassador Program

Rahila has always felt a connection with UNICEF and the important work that it does, having discovered at a young age the opportunities that it provides for children. While living with her grandparents in Pakistan, Rahila was finally able to achieve her dream of receiving an education by attending a school run by UNICEF.

> "I was extremely lucky to get accepted. The classes consisted of 25 students and the most exciting thing was that we got to sit on chairs."
>
> "There was one really attractive thing about the notebooks – that it had the UNICEF logo on the front cover. As I was growing, I learnt that UNICEF is an international organisation that works all around the word to create change for children. I never thought I will ever have an opportunity to become part of UNICEF until I came to Australia."

The UNICEF Australia Young Ambassador Program provides ten young Australians with a platform to speak up for and take action on children's rights. It is a one year, voluntary role that requires Young Ambassadors to travel around Australia to engage with the public, lobby the government and consult with UNICEF Australia in relation to the rights of children around the world and issues that affect children and young people in Australia. Young Ambassadors are directly involved in UNICEF Australia's decision-making and are its point-of-contact on all youth related issues. Young Ambassadors are aged between 15-24, from every state and territory in Australia and from a diverse range of backgrounds.

For Rahila, becoming a UNICEF Australia Young Ambassador was an opportunity to use her personal experiences to advocate for children forced into situations similar to her own.

> "I believe all the motivation and aiming for the UNICEF Young Ambassador role came to me from my own life experience as a child. I wanted to give back by advocating for the rights of the vulnerable."

In particular, having been denied the right to attend school solely on the basis of her gender, Rahila wanted to enhance awareness about the importance of every child having access to education.

> "I never knew as a child I had the right to education so I committed to let children know about what they have as a child and they deserve to live a childhood of joy and happiness."

A highlight for Rahila of her role as a Young Ambassador has been the opportunity to consult with Australian youth and to hear from "*so many amazing kids about their thoughts, their experiences and their concerns*". Describing the children and young people that she has met as "*the youngest talented creatures on earth*", Rahila aims to understand "*what is important to children, what they worry about and what they think can be done by government differently.*"

Another highlight for Rahila has been the opportunity to interact and meet with politicians about things such as the recent *Things That Matter* Report.

> "Another fabulous day as an ambassador would be talking to a politician about the amazing things children have told you. Getting their views and taking it to the right people is very necessary because it's their world and everyone should listen to what matters to children."

Things That Matter Report

Rahila's involvement in preparing the *Things that Matter* Report has taken up a major part of her time as a Young Ambassador. Prepared to coincide with the 25th anniversary of the *Convention on the Rights of the Child* (**Convention**), the *Things That Matter* Report was compiled and written by Rahila and the other UNICEF Australia Young Ambassadors following a national consultation that ran from September to November 2014. The Report was submitted to the UN Committee on the Rights of the Child and Australia's National Children's Commissioner, Megan Mitchell, in November 2014.

The *Things That Matter* Report provides a snapshot of the issues that are most concerning to Australian youth and their suggestions for how Australia could be improved so that every child has their rights fulfilled. In preparing the Report, the Young Ambassadors spoke to and received submissions from over 1500 children from a range of backgrounds about their ideas, concerns and hopes. For Rahila, the process was an incredible learning experience as much as an information-gathering exercise.

> "So far my greatest achievement as a young ambassador has been meeting with over 300 children face to face, hearing from them about the things that matter to them. No doubt that this journey has taught me things that I never imagined. Listening to every child about what they care for is the most pleasurable thing that I have done. Every second of the consultation was something that taught me so much. I learnt so much from the children I think I wouldn't have learnt talking to adults, children have different and unique experiences (to adults) and when they talk about it they speak in language spoken by children."

What particularly struck Rahila throughout the process was the diversity of experience of Australian youth, observing, "*Every child has a different story*." She noted that access to education, an issue close to her heart, was a major concern for rural children and young people. In particular, "*children would talk about not feeling OK about there being no university to go after school – they want the opportunity to graduate from school and further study*". In contrast, urban and city children "*spoke about not feeling safe when they walked outside of their houses. Too many children are addicted to alcohol, cigarette[s] and smoking at such a young age*."

Following the consultation process, the *Things That Matter* Report made a number of findings including that:

- children worry about other children who live in poverty and who are homeless and in need of care;
- children's own worries concern the absence of family and friends, especially when they think that they may be in danger;
- the most important thing to children is family, and keeping their family together;

- children want to feel safe in their community, and what makes them feel safe and secure may be different to what the wider community needs to feel safe. Children reported that they are very affected by media reporting on local and global issues and it contributes to how secure they feel; and
- children need to be, and to feel that they are, included in decisions, mostly at home. We need to do more to include their voice in big decisions that affect them.

What stood out to Rahila from her own consultations was the suffering of children from mental illness, the prevalence of bullying and cyberbullying, and that children were not given enough knowledge about how to deal with family violence. The major recommendation of the *Things That Matter* Report is that the Australian Government develops a National Plan for Children. The purpose of the Plan would be to fully reflect the articles of the *Convention* in the policies of the Government, providing a means by which we can measure how things are improving for children in Australia.

What Next?

Now that the *Things That Matter* Report has been submitted, Rahila's focus as a Young Ambassador is on two things – first, working towards creating and implementing a National Plan for Children, which will involve engaging with politicians in discussions about the issues facing children and the direction for the future; and second, the rights of children who are in detention centres, which Rahila believes is one of the "*biggest human rights issues in Australia*".

Rahila views children living in detention centres as "*children who don't get to go to school, children who don't even get to play, children who are punished for their parents' choices, children that are suffering from mental health issues and children that are not even listened to…*". Rahila, along with the other Young Ambassadors, plans to use her position to help these children in some way. As she told us, "*We want to fight for their rights and advocate for them so children are no longer kept there and are treated as human beings*." To achieve this Rahila and the other Young Ambassadors have been planning workshops through high schools, in order to raise awareness. Rahila hopes that doing so will encourage the Government to take action by the end of 2015.

As Rahila explained to us, her experiences over the first six months of being a Young Ambassador have broadened her goals and ambitions for the role.

> "After being in the role for six months my intentions have slightly changed. I want to work towards a world where every child enjoys their childhood in school, with friends, away from mental health issues, racism and bullying. Every child deserves these and it's their right."

A Positive Change

Rahila's personal story and achievements so far as a UNICEF Australia Young Ambassador should act as an inspiration for all Australian children and young people. Rahila's advice for those who are unsure whether to apply to be a Young Ambassador in 2015 is, "*it is really important to think about their childhood first and what they have been through. I'm sure every person in their childhood has had some ups and downs that they would want to share and talk about.*" She believes that initiatives such as the Young Ambassador program are very important to Australian youths as a way to improve dialogue and increase awareness on a number of contentious issues. She calls on all young people to apply, "*go for it and you will enjoy every second of it. It is not*

something that you can experience in your everyday life, it is a really unique experience, you will never forget it in your life. I have enjoyed every second of it."

Positive change can be effected beyond the Young Ambassador program though, and Rahila believes that "*every youth in Australia can have a role in increasing awareness of children's rights issues by simply contributing some time to listen to children*." Rahila plans to continue her advocacy work long after her position as a UNICEF Australia Young Ambassador ends as she feels that there is still much more to be done.

> "There is a lot missing in terms of us giving the children their rights in Australia. There is yet a lot to be done, but I am sure if every person stands for humanity we will be able to create the change and I will fight to the best of my ability for this change to become reality one day."

Tim Craven *and* ***Annabel Deans*** *are Law Clerks at King & Wood Mallesons.*

Mother of Tyler Cassidy progresses UN complaint in push for increased oversight for police related deaths

The mother of fifteen year old Melbourne boy, Tyler Cassidy, who was shot dead by police in 2008, has progressed her individual communication to the United Nation's Human Rights Committee aimed at highlighting Australia's failure to ensure police-related deaths are properly investigated by an independent body.

In March Ms Cassidy filed a reply in response to a submission from the Australian Government. Ms Cassidy hopes that her complaint will help to change the system to become more fair and independent, so that other families don't have to go through the suffering that she did.

"It's important that deaths like Tyler's are investigated properly by a truly independent body rather than by the police themselves. It's taken a long time to get to this point and I understand a ruling from the UN is still some time away, but I'm glad we're getting closer to an outcome," said Ms Cassidy.

The Human Rights Law Centre's Director of Advocacy & Strategic Litigation, Anna Brown, who has been assisting Ms Cassidy, said that the complaint was emblematic of a systemic problem.

"Sadly, in no state in Australia do we have a system where an independent body takes the investigation out of the hands of police. Ensuring that these deaths are independently investigated makes common sense and complies with international human rights law," said Ms Brown.

Since the complaint was filed in 2013, there continue to be police shootings across Australia that are investigated by members of the same police force responsible for the death.

"When I saw that NSW police had shot that poor young woman with Asperger's syndrome, I couldn't believe that all these years later nothing has changed and police are still investigating their own mistakes. If we want to learn, we need to make sure the investigation is done properly," said Ms Cassidy.

Only 73 seconds elapsed between the police first approaching Tyler and him being shot dead, during which time he was sprayed with capsicum foam twice and answered a phone call. Ten shots were fired, five of which hit Tyler.

Ms Cassidy is angered that the police officers who killed her son were not treated as suspects. Contrary to usual practices of dealing with people involved in homicides, the interviews of the police officers who shot Tyler were not audio or video recorded – only written statements were

provided. By contrast, Ms Cassidy said investigating officers treated her and her family like criminals and even secretly recorded conversations and meetings with police.

In its submission the Australian Government acknowledges the "regrettable practices" that occurred during the investigation into Tyler's death, and refers to a number of changes which are said to have been made to investigative processes since Tyler's death. However, critically, the conduct of the primary investigation into the death remains in the hands of police.

"In the same way that employers don't investigate workplace deaths, the police shouldn't investigate deaths where police are involved. Their interest in the welfare and reputation of their officers and their organisation conflicts with ensuring that the investigation is conducted in a completely impartial and independent manner," said Ms Brown.

The reply submission coincides with the new Victorian Government committing to consult widely on changes to the Independent Broad-based Anti-Corruption Commission, which subsumed the former Office of Police Integrity. The HLRC and Ms Cassidy hope that her complaint will prompt consideration of a properly independent and effective model of investigation of police related deaths in Victoria and elsewhere in Australia.

"When things go wrong, it's critical that we have faith in the impartiality and credibility of investigations into the death – this is in the public interest and also in the interest of the families of victims and officers involved. The good news is, we can learn from examples overseas and take practical steps to ensure this happens," Ms Brown said.

The reply submission and original communication was prepared for Ms Cassidy by the Human Rights Law Centre with the generous pro bono assistance of leading law firm Allens and barrister Tim Goodwin, and outlines the case for the Committee to find that Australia is in breach of its obligation to uphold the right to life by failing to introduce independent investigations into deaths resulting from the use of force by police.

Background to the Communication and Reply submission can be found here.

A copy of the entire Communication can be found here.

A copy of the Government's submission can be found here.

A copy of Ms Cassidy's Reply submission can be found here.

Please note that Shani Cassidy will not be making any further statements to the media, but her full public statement made when the complaint was lodged can be found here.

Regulating Surrogacy in Australia

Surrogacy is an intricate and sensitive subject, which raises a number of ethical and legal concerns. Surrogacy is where a woman (the "surrogate" or "birth mother") agrees to try to have a baby for another person or a couple (the "intended parent(s)"). If a baby is born, the surrogate gives custody and guardianship of the baby to the intended parents, through a court order. Over the past year surrogacy, both in Australia and internationally, has attracted significant media and political attention.

The ethical issues surrounding surrogacy arrangements were put under the international spotlight in 2014 by the case of baby Gammy. Gammy was born to a Thai surrogate who was paid by Australian intended parents. Gammy was born with down syndrome and a hole in his heart requiring extensive medical treatment. The intended parents chose to take Gammy's healthy twin sister back to Australia, leaving Gammy with his surrogate. This case caused international

concern, raising awareness of the lack of regulation of international surrogacy arrangements and highlighting the ethical considerations involved in the practice of surrogacy.

This article explores the regulation of surrogacy in Australia and considers the increasing trend of Australians entering into international surrogacy arrangements. It also compares the situation in Australia with other countries to highlight that there is an inconsistent international approach to regulation, and considers what obligations Australia has under international treaties, such as the Convention on the Rights of the Child (the Convention) and the International Covenant on Civil and Political Rights (ICCPR), in relation to surrogacy. We note that views on this topic are diverse and this article only highlights some of the views and issues in this area.

What does Australia's law say?

Each State and Territory has different laws about surrogacy. In all of the jurisdictions (except the Northern Territory where there are no laws regarding surrogacy), there are strict regulations and eligibility requirements that must be met before a surrogacy agreement can be entered into and performed and in what situations this may be done. Some aspects of surrogacy are also regulated by international law. This article does not examine the legal position of each jurisdiction in depth. Any person considering entering into surrogacy is advised to obtain independent legal advice.

Australian laws permit surrogacy in situations which are commonly called "altruistic" arrangements, this is where a surrogate does not receive any financial compensation, other than for "reasonable" medical expenses. In contrast, commercial arrangements, which are sometimes referred to as "compensated" surrogacy are generally prohibited in Australia. This is an arrangement in which the surrogate receives payment for taking part.

In New South Wales, Tasmania, Queensland and Victoria any person, regardless of sex, relationship status or sexual orientation can be an intended parent. In contrast, in the other States and the ACT only heterosexual married or de facto couples, or single women, are eligible. Tasmania, Victoria and Western Australia only allow surrogacy if the surrogate has given birth to a child before, and in all States except the ACT the surrogate must be at least 25.

Most jurisdictions require there to be a medical need for the surrogacy but some jurisdictions (New South Wales, Tasmania, Queensland and Victoria) also allow surrogacy when there is a social reason (e.g. a same-sex couple). The ACT does not require there to be a medical or social need for the surrogacy and Western Australia specifically excludes age as a suitable medical reason.

In New South Wales, the ACT and Queensland it is an offence for people from those jurisdictions to enter into commercial surrogacy arrangements overseas. This means that such people can be found guilty of an offence (punishable by a fine and/or imprisonment). In the remaining jurisdictions, it is not a crime to enter into commercial surrogacy arrangements overseas but the intended parent(s) may be unable to obtain, or have difficulty in obtaining, a parentage order due to the prohibition on commercial arrangements.

Also, the process for transferring parentage from the surrogate to the intended parents is different in each jurisdiction, particularly when it comes to international surrogacy arrangements (we talk about this more below). However generally, if parents can satisfy all the requirements, parentage is able to be transferred from the surrogate to the intended parent(s) through application to the court for a "parentage order".

A surrogacy arrangement is generally not enforceable, except to the extent that it provides for the payment of the surrogate's expenses related to the pregnancy. This means that a surrogate who

refuses to hand over the baby cannot be forced to under the agreement. If she refuses to do so, the only remedy for the intended parent(s) is to apply to the Family Court for a parenting order that the child live with them.

What rights are protected under international law?

Surrogacy arrangements raise a number of human rights issues and aspects of the arrangements can arguably conflict with the rights of children as protected under international law.

The Convention is an international treaty that contains certain human rights that State parties must provide to all children, regardless of to whom or under what arrangement they are born. Australia ratified the Convention in December 1990 which means that Australia has a duty under international law to ensure that all Australian children enjoy the rights set out in the treaty, however these provisions are not directly enforceable under Australia's domestic law.

An overarching obligation under the Convention is that the best interests of the child shall be a primary consideration in all actions concerning them (Article 3). Other rights which may be relevant to surrogacy include the rights of the child (under Articles 7, 8 and 9):

- to be registered immediately after birth;
- to a name, to acquire a nationality and, as far as possible, to know and be cared for by his or her parents;
- to preserve his or her own identity, including nationality, name and family relations; and
- not to be separated from his or her parents against their will, except in certain specified circumstances.

State parties which have ratified the Convention are also required to ensure that the best interests of the child are the paramount consideration in relation to the country's adoption system (which can arguably be closely linked to surrogacy arrangements) (Article 21).

Australia is also a party to the ICCPR. This treaty contains certain civil and political rights which are relevant to surrogacy. These include the protection of the family as the natural and fundamental group unit of society (Article 23) and, consistent with the Convention, the right of every child to be registered immediately after birth, to have a name and to acquire a nationality (Article 24).

There are diverse views on the issue of international human rights and the practice of surrogacy. Surrogacy involves a number of possible "parents", with the surrogate being the child's mother until a parentage order is made by a court. The question is then, who are the child's parents by whom he or she should be cared for and not separated from. Further, the uncertainty regarding the identity of the mother in a surrogacy arrangement can lead to confusion regarding a child's own identity, affecting the child's right to preserve his or her identity.

There are also complex issues concerning a child's right to acquire a nationality, in particular where that child would otherwise be stateless (Article 7, Convention), when they are born overseas in an international surrogate arrangement. This issue is considered further below.

How Does Australia Compare?

Australia is not the only country which faces inconsistencies in how surrogacy is regulated. Like Australia, surrogacy in the United States is also regulated on a State-by-State basis; however the situation is more complicated. The laws range from non-existent in the majority of States, to permitting both altruistic and commercial surrogacy arrangements in other States, through to criminalising all forms of surrogacy in other States.

California, in particular, has long been known as a surrogacy-friendly State. California permits and consistently enforces altruistic and commercial surrogacy arrangements, through the use of pre-birth orders and surrogacy contracts (in writing; prior to conception) which allow parentage to be transferred to the intended parents before birth. Californian law allows both genetic and non-genetic parents to receive a pre-birth parentage declaration so long as the pre-birth agreement is valid.

Unlike some Australian States and Territories, California is also more flexible regarding surrogacy and same sex couples: three recent court cases decided that where a child is born through assisted reproduction, both partners are deemed the legal parents, regardless of marital status or sexual orientation. This factor, alongside the fact that commercial arrangements are allowed, makes the United States and California in particular, one of the most popular destinations for Australians seeking international surrogacy arrangements. However, there is still difficulty for intended parents living outside the US. For a child born through surrogacy to be allowed to leave the US with legally recognised intended parents, the child must have a US passport, court approval, and a birth certificate listing the intended parents. Yet even these rules may be easier to follow than the difficult Australian surrogacy laws.

Australians and International Surrogacy

Australians are reported as the largest client market for international surrogacy arrangements.

This is likely due to the complicated and conflicting nature of Australian surrogacy laws, the prohibition on commercial surrogacy, the discriminatory laws that exclude same sex and single intended parents in a number of Australian States, and the continual decline in the number of children available for adoption both in Australia and overseas. As a result, Australians are some of the biggest seekers of international surrogacy arrangements, with a recorded 420 citizenship applications for children born through commercial surrogacy arrangements from 2008-2012, and 394 babies born in India to Australian citizens in 2011 alone. The major commercial surrogacy destinations for Australians are India, Thailand and the United States (California in particular), with Canada also an increasingly popular destination.

However, the use of international surrogacy arrangements can be tricky given the difficulties in securing citizenship for children born through surrogacy and legal recognition of the intended parents.

Lack of adequate regulation of international surrogacy can lead to exploitation of surrogates. There are surrogacy agencies that make money by finding potential surrogates for parents who want a surrogate baby, and these agencies are particularly popular in poorer countries. Because in many countries there aren't any laws regulating surrogacy, some women facing financial hardship turn to paid surrogacy out of desperation, and then often receive barely enough of the large fee paid by the intended parents to the agencies to cover expenses. This is because the surrogacy agencies take most of the money, rather than passing it on to the surrogate mother. These agencies make large profits by exploiting poor and undereducated women to provide wealthy Australians (amongst others) with children, and often use illegal practices to do so. The lack of regulation may also lead to additional issues including the risk to children in not having access to their genetic information and information regarding their identity.

Even where an international surrogacy arrangement occurs as planned and the intended parents wish to return with their child to Australia, there can be difficulties as the lack of adequate laws in place can make it hard to get parentage orders and citizenship for children born from international surrogacy. It is also an offence in three jurisdictions (NSW, ACT and Queensland) for intended

parents to enter into commercial surrogacy arrangements overseas. Australian law is reluctant to recognise parentage orders granted in other countries, and international commercial surrogacy arrangements are technically excluded from Australian surrogacy laws that allow transfer of parentage.

Inconsistency between Australian States, as well as problems for courts in balancing the welfare of children born through surrogacy with the desire to prevent international surrogacy arrangements, has resulted in inconsistency in granting or refusing parentage orders. The recent court case of *Dennis v Pradchapet* [2011] Fam CA 123 illustrates these issues: three children were born as a result of two separate international surrogacy arrangements entered into by the same intended parents, but a successful declaration of parentage was made in relation to only one of the three children, due to the wide discretion given to the court as a result of conflicting and incomplete laws.

Also, the conflicting laws on surrogacy between different countries can lead to confusion in determining who a child's legal parents are. Depending on the nationality of the intended parents, the surrogate, and those providing the genetic material, the resulting child may end up:

- with no nationality ("stateless") and no parents recognised by law ("parentless") (for example, this is the situation in India);
- parentless (e.g. California);
- parentless but with the citizenship of the birth county (e.g. United States;); or
- being the child of the surrogate only with the citizenship of the birth county (e.g. Thailand).

Potential reform for surrogacy laws in Australia?

The issues and concerns around surrogacy are live issues which are currently under government consideration. The House of Representatives Standing Committee on Social Policy and Legal Affairs (the Committee) recently held a Roundtable on surrogacy to investigate the complexities of regulation of surrogacy, and issues faced by the increasing number of Australians who seek and use surrogacy arrangements. The Committee tabled its report *Roundtable on Surrogacy* on 24 March 2015.

The Committee recommended that the Attorney-General refer back to the Committee an inquiry into the regulatory and legislative aspects of surrogacy arrangements, with a focus on:

- Domestic surrogacy arrangements including issues such as:
    - medical and welfare guidelines,
    - differences in domestic legislative arrangements,
    - informed consent, compensatory payments and protections for all parties involved, and
- International surrogacy arrangements involving Australian nationals including issues such as:
    - Australia's international obligations,
    - informed consent of surrogates, compensatory payments and protections for all parties involved,
    - requirements for immigration, citizenship, determining parentage and ongoing welfare, and

- adequacy of current information on risks, rights and protections.

We will be closely watching this space to see the outcome of this recommendation and to see the steps the government takes to reconcile the various opinions, views and ethical considerations in this area.

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We need to talk - the kids are not alright

> "I started very young, I started when I was ten and it was a year and a half or two years before somebody actually found out and I ended up telling the school counsellor and of course, she told my parents. I know that when my mum found out that she was really, really shocked. Neither of my parents knew what to do with that kind of behavior and I didn't know how to explain it to them in a way that would calm them down as well."

Australians don't talk about self-harm, they don't know much about self-harm, and they often don't realise it is the leading cause of death amongst 15-24 year olds in this country. The 2014 Children's Rights Report seeks to change this by recommending a National Research Agenda on self-harm. This will help us find out more information to better understand the problem and develop solutions, which is a push in the right direction for Australia.

What is the Report?

The Australian National Children's Commissioner, Megan Mitchell, releases an annual report on how government can better protect the human rights of all children and young people under the age of 18 in Australia. These rights are listed in the United Nations *Convention on the Rights of the Child*, and include protections for things like health care, education and safety. Relevantly, Article 6 of the Convention states that every child has the right to life and Article 19 protects children from physical and mental harm which can be a cause of self-harm and suicide. Our government has made a promise to make sure all Australian children can enjoy these rights.

To help the government fulfil its promise, the Report focused on what needs to be done to address self-harm and prevent children from suffering in the future. The Report is based on 140 submissions the Commissioner received after asking people to share their ideas and knowledge with her, roundtable discussions she had with Australian experts in self-harm and other statistics.

What the Report says

The Report looks at self-harm from a number of different angles, including: what is self-harm, how do we talk about self-harm and how do we support Australian children?

What is self-harm?

Defining the problem is one of the big issues addressed by the Commissioner. This is because researchers and healthcare workers are currently not using the same words and phrases, which means that we can't compare their research to gain a big-picture perspective. In particular, the Report emphasises that it is important for us to start distinguishing between self-harm that is done with or without the intention to commit suicide. This is to improve our understanding, as they are different behaviours which may require different solutions.

How do we talk about self-harm?

> "There seems to be a fear if you discuss mental health on an open level, more mental health problems are going to arise in students. This is not necessarily the case. I feel it has more to do with how the material is presented."

The Report revealed that it is commonly believed that not talking about self-harm and suicide will stop kids from doing it, by not "putting the idea in their minds". However, the high rates of media coverage and general interaction between friends (especially on social media) means that kids and young people are confronted with the idea of self-harm on a regular basis. Keeping silent will not solve the problem.

The organisation Headspace suggested to the Commissioner that to solve the problem it was important to provide permission and a safe place for young people to talk about their feelings, reducing distress and decreasing the likelihood that self-harm will be seen as a good idea or something cool to do – a major cause of copy-cat behaviour.

> "I found tremendous support on online forums. We would help each other commit to cutting less often and just share our stories and frustrations for the day. It was nice to know that there were people out there who understood, which put me in good stead when I did eventually get help at age 20."

It is clear that suffering children want social connection – they want to talk. This is further demonstrated by the 80,142 children receiving counselling services from the Kids Helpline every year. It is hoped that the Report will provide an outlet for this need and generate chatter about self-harm, making it a topic that people feel more comfortable with.

The Commissioner's recommendation to establish a National Research Agenda for children engaging in self-harm, with or without suicidal intent, should help efforts to understand the motivations behind self-harm. The focus of the National Research Agenda includes improving our understanding of the range of risk factors which increase the likelihood that certain children will self-harm (such as exposure to physical and mental harm). This will mean that at-risk children can be better targeted with support services.

How do we support children?

> "We do not have a clear picture of suicide in this country and until we have access to that information we are limited in how we can effect change."

The main finding of the Report is that much remains unknown about the issue, which hinders efforts to predict and prevent self-harm and suicide amongst children. However, Australia already provides some services to predict and prevent self-harm, including strategies such as "no-suicide contracts" in schools and emergency "green cards" providing guaranteed access to inpatient health care. Non-profit organisations, such as Kids Helpline, Reachout, Beyondblue and Headspace, are also making great progress in bringing awareness to depression and self-harm, but the effectiveness of these programs is hampered by a lack of funding, inadequate data and limited access to experts.

Given the seriousness of self-harm and suicidal behaviour, in their submissions Headspace and Orygen Youth Health Research Centre both stressed the pressing need to develop, implement and evaluate programs and interventions that address these behaviours in order to build a robust evidence base for effective early interventions. Headspace has recognised the need for research and development around intervention and has developed the Headspace School Support program and SAFE Minds project. These programs are based on the best research available and have built-in research and evaluation components in order to contribute to a stronger evidence

base for the future; however Headspace acknowledges that more research is needed. The Commissioner's recommendations act to provide a practical way that this future research can be funded and conducted to hopefully implement the right support Australia's children need.

What needs to be done?

In addition to the National Research Agenda discussed above, the Report outlines two more calls to action:

- improve the data available, which will hopefully strengthen surveillance and awareness of self-harm; and
- update the Royal Australian and New Zealand College of Psychiatrists guidelines for management of self-harm in young people (last reviewed in 2000).

These goals will hopefully help to set the foundations for a national conversation, and provide the insight, education, understanding and data we need to build awareness and shed light on self-harm.

Conclusion

The Report highlights that we do not know enough about self-harm to be able to prevent the injury and death of children and young people who are currently suffering in silence. As a result, their rights as children and young people are at risk. We need more information, and creating a research agenda might help to bridge this gap. The practical goals of the Report will hopefully begin a much needed national dialogue, which will help us to learn, support and grow together.

Priscilla Hejtmanek *and* ***Lauren Murphy*** *are Summer Clerks, King & Wood Mallesons.*

Note: If you or someone you care about is in crisis and you think immediate action is needed, call emergency services (triple zero – 000), contact your doctor or local mental health crisis service or go to your local hospital emergency department. Other contacts you may find useful include:

headspace	**Kids Help Line**	**ReachOut**
www.headspace.org.au	www.kidshelp.com.au	Reachout.com
1800 650 890	1800 55 1800	
Lifeline	**Suicide Call Back Service**	
www.lifeline.org.au	www.suicidecallbackservice.org.au	
13 11 14	1300 659 467	

Update on detaining kids in Queensland

On 28 March 2014, the *Youth Justice and Other Legislation Amendment Act 2014* (Qld) came into force in Queensland. As outlined in the article "*Detaining kids in Queensland*" in the 2014 Children's Rights Edition of this Bulletin, the amendments expressly ousted the 'last resort principle' which was previously contained in the Queensland legislation and provided that a detention order should only be imposed on youth as a last resort and for the shortest appropriate period. The last resort principle is the current standard set out in the Convention on the Rights of the Child. The Queensland government at the time, led by Campbell Newman, implemented this change on the basis that the last resort principle restricted the Court's ability to make sentencing orders that were proportionate to the severity of the offender's behaviour. As discussed in the

"*Detaining kids in Queensland*" article, the reform is not only contrary to Australia's international obligations but is also unlikely to be effective in preventing youth reoffending.

The amendments were strenuously opposed by human rights groups, as well as the then Labor Opposition. Since the reforms were introduced, the official Labor Party policy has been that a Labor government would wind-back the amendments and restore the last resort principle. This position was re-enforced in the lead up to the recent election held on 31 January 2015, with the Labor Party committing to standards proposed by the Queensland Law Society in regards to children's law. These commitments included:

- reinstating the principle of detention as a last resort
- preventing publication of identifying information of repeat offenders other than in exceptional circumstances
- making breach of bail no longer an offence
- holding all children's law matters in closed court
- making childhood findings of guilt for which no conviction was recorded inadmissible in relation to adult offences
- stopping the automatic transfer of 17 year olds who have six months or more left to serve in detention to adult corrective services facilities.

The Labor Party was elected into power in February 2015. The commitments made by the Labor Party during the election campaign, as outlined above, suggest that the Labor government may reinstate the last resort principle. These changes would bring Queensland more in line with the approach in other Australian states and territories and Australia's international obligations, and importantly would provide more adequate protection for the rights of children. No further statements on the issue have been made since the Labor formed came into power.

We note that the definition of a young person in Queensland would remain persons under 17 years, contrary to the international standard of 18 years suggesting that even if amendments were made by the Labor Party, Queensland would not be complying with Australia's international obligations.

We will be watching closely to see if the new Government keeps its election commitment.

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Australian Migration Law Amendments: What this means for asylum seeker children

The Australian Government recently passed legislation to amend the *Migration Act 1958* (Cth) and the *Maritime Powers Act 2013* (Cth) making it even more difficult for asylum seeker children and children born to asylum seeker parents to be processed and settled in Australia.

These changes were introduced on 25 September 2014 in the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill* 2014. Despite considerable debate and submissions as to the desirability of the Bill, the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* was passed by Parliament on 4 December 2014 and received Assent on 15 December 2014.

(The HRLC made a joint submission to the Senate's Legal and Constitutional Affairs Legislation Committee outlining the grave human rights risks posed by the laws. A copy of which can be found here: New migration Bill would allow Government to breach international law and sideline

the courts say leading human rights organisations And a related opinion piece here: Decency to one group of refugees shouldn't be contingent on licensing Scott Morrison to brutalise others)

The Act has received significant attention due to the serious implications it has for persons seeking asylum in Australia and Australia's compliance with its obligations under international law. Importantly, the Act has also received attention in relation to how it will affect the rights of asylum seeker children and children born to asylum seeker parents.

What are the changes?

The key amendments that result from the Act are as follows:

- **Maritime powers:** increase in the Executive and non-Executive powers to detain and transfer people at sea and restriction on the ability of courts to review such actions;
- **Protection Visas and other measures:** re-introduction of Temporary Protection Visas (TPVs) and introduction of Safe Haven Enterprise Visas (SHEVs). As a result, asylum seekers who arrive in Australia without valid visas are no longer eligible to apply for permanent Protection Visas;
- **Fast track assessment process:** introduction of a new review process for the "legacy caseload" which will be reviewed by a new statutory body called the Immigration Assessment Authority, instead of the Refugee Review Tribunal. This will result in the removal, or restriction, of merits review applications;
- **Clarification of Australia's international obligations:** removal of most references to the *Convention relating to the Status of Refugees* from the Act and the requirement to consider Australia's *non-refoulement* obligations;
- **Reclassification of newborn babies of asylum seekers**: children born in Australia or in offshore processing centres to asylum seeker parents will retrospectively be given the same legal status as their parents; and
- **Power to cap permanent Protection Visas:** the Minister for Immigration and Border Protection will be able to put a statutory limit on the number of permanent Protection Visas which can be granted.

What does this mean for children?

The amendments

The amendments affecting children are set out in Schedule 6 to the Act. Effectively this schedule provides that children born to asylum seeker parents, either in Australia or in a regional processing country (which currently means either Nauru or Papua New Guinea), will have the same legal status as their parents. This means they will be considered as either *transitory persons* or *unauthorised maritime arrivals* for the purposes of the Act and as such they can be detained, processed offshore and denied permanent protection in Australia. Prior to these amendments, it was not clear how children born to asylum seekers in Australia or in a regional processing country would be detained and processed.

In particular, this schedule expands the previous definition of a *transitory person* in the Act to include: the child of a transitory person if the child was born in a regional processing country to which the parent was taken and the child was not an Australian citizen at the time of birth; and the child of a transitory person if the child was born in the migration zone (meaning the land and sea of Australia, and certain other areas taken to form the migration zone under the Act) and the child was not an Australian citizen at the time of birth.

The definition of *unauthorised maritime arrival* in the Act has also been expanded to include: a person who was born in the migration zone if the parent of the person is, at the time of the person's birth, an unauthorised maritime arrival and the person is not an Australian citizen at the time of birth. A person will also be considered an unauthorised maritime arrival if the person is born in a regional processing country and the parent of the person is, at the time of the person's birth, an unauthorised maritime arrival and the person is not an Australian citizen at the time of his or her birth.

Amendments to section 198 of the Act mean that where an unlawful non-citizen has been brought to Australia for a temporary purpose and gives birth to a child while in Australia, the child becomes a *transitory person* and "an officer must remove the non-citizen and the child as soon as reasonably practicable after the non-citizen no longer needs to be in Australia for that purpose (whether or not that purpose has been achieved)."

The Act further provides that the amendments made to the Act will be applied retrospectively in certain cases.

What the Government says

In the Explanatory Memorandum to the Bill, the Government stated that the amendments are intended to clarify the position of children and ensure consistency within the family unit so that families are not separated by the operation of the Act. This is said to be in support of Article 3 of the *Convention on the Rights of the Child* (Convention) as it is treating the best interests of the child as a primary consideration, in addition to discouraging unauthorised arrivals from taking potentially life threatening avenues to achieve resettlement for their families in Australia.

The Government also pointed to its obligations under the International Covenant on Civil and Political Rights (ICCPR), in particular Article 17 which confirms the right that *"no one shall be subjected to arbitrary or unlawful interference with his…family…"* and Article 23 which provides that *"the family is the natural and fundamental group unit of society and is entitled to protection by society and the State"*. In relation to these obligations the Government stated in the Explanatory Memorandum:

> "consistent with current policy and practice, where possible, family units will not be separated by Australia and consideration will be given to family unity and to the best interests of the child on a case-by-case basis to ensure that the obligations in Articles 17 and 23 of the Covenant on Civil and Political Rights (ICCPR) and Article 3 of the [Convention] are met."

In addition, the Government indicated that the amendments comply with Article 24 of the ICCPR, which affords every child the right to acquire a nationality, as a stateless child's status as an unauthorised maritime arrival does not alter that child's eligibility for citizenship under Australian laws or the laws of the current regional processing countries.

Opposing views

Critics have cast doubt over the efficacy of the amendments and whether they do in fact uphold the rights of asylum seeker children. A major concern, amongst others, is that the rights under the ICCPR and CRC are not afforded to the children subject to these laws. For example, despite keeping the family unit together, it is unlikely that sending a child to a regional processing country for indefinite detention is actually in the best interests of that child pursuant to Article 3 of the Convention. Furthermore, it is debatable whether the conditions at detention centres in regional processing countries do indeed provide good quality health care, clean water, nutritious food and a clean environment for children to stay healthy as provided for in Article 24 of the Convention.

Over 200 individuals and organisations made submissions to the Senate Legal and Constitutional Affairs Committee Inquiry on the Bill. Notably, the Australian Red Cross submitted that the Government is in breach of its obligations under Article 22 of the CRC which provides that a State Party shall take appropriate measures to ensure that a child who is seeking refugee status receives appropriate protection and humanitarian assistance. In addition, the Australian Red Cross submitted that it is well established that children and young people are particularly vulnerable to the detention experience, and by its very nature, detention is a traumatic experience which has a significant impact on the full physical, emotional and cognitive development of children and young people, which can extend long into their post detention futures.

The Refugee & Immigration Legal Centre Inc (RILC) also made a submission to the Senate Inquiry setting out their concern that the amendments expose newborn children and young children to a risk of mistreatment and danger to their well-being due to the poor conditions of regional processing countries, a risk of *refoulement* to their country of origin, or an uncertain future on a TPV. In addition, the RILC submitted that Australia owes obligations under the CRC to children within its territory, and these obligations extend to their substantive rights relating to their well-being and development, as well as a prohibition on *refoulement* and a prohibition on being subjected to torture or to deprivation of life.

The amendments were also criticised by politicians from the Labor, Greens and Palmer United parties, as well as several independent MPs. However, at the end of 2014 the Coalition Government announced that an agreement had been made with crossbench Senators in exchange for their support for the Bill. As part of this agreement, the Government agreed to lift Australia's refugee intake by 7,500 places over four years, give asylum seekers on bridging visas the right to work, and remove all children from detention on Christmas Island.

Example of baby Ferouz

The potential effects of these amendments can be illustrated by the experiences of baby Ferouz. Ferouz is a baby boy who was born in November 2013, before the amendments were passed, to parents who arrived to Australia by boat as unauthorised maritime arrivals and who were then sent to Nauru. Shortly after going to Nauru, Ferouz's mother was flown to Brisbane where Ferouz was born. Ferouz's father applied for a protection visa for him but this application was deemed invalid on the basis that Ferouz was an unauthorised maritime arrival who was in Australia as an unlawful non-citizen. Ferouz and his family applied for judicial review and on 15 October 2014 the Federal Circuit Court of Australia found that Ferouz was an unauthorised maritime arrival and so, pursuant to s 46A of the Act, he was not able to apply for a protection visa. This decision was appealed to the Full Federal Court however the appeal was not allowed.

Fortunately for Ferouz and his family, the Government agreed as part of its agreement with crossbench Senators that as a special one-off arrangement 31 babies (and their families) born to unauthorised maritime arrivals who were transferred from Nauru to Australia before 4 December 2014 would be allowed to stay in Australia and have their refugee claims assessed. However, this case highlights the complexities and the uncertainties already faced by those born to asylum seeker parents which will arguably be exacerbated by these amendments.

Conclusion

The amendments made by the Act address a range of complex issues and are likely to have significant implications for the rights of persons seeking asylum in Australia and, most importantly for the purposes of this article, asylum seeker children. Whilst there is still much uncertainty as to the effects of these amendments, there are real concerns that Australia is compromising its

international obligations which will in turn have serious ramifications for the protection of the rights of children asylum seekers and children born to asylum seeker parents.

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Tortured truth: Australia's non-compliance with the Convention

Australia was recently reviewed by the UN Committee against Torture for its compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, commonly referred to as the Convention Against Torture.

(You can read about the Human Rights Law Centre's advocacy on this issue here: UN finds Australia's treatment of asylum seekers violates the Convention Against Torture)

The Convention Against Torture, which came into force on 26 June 1987, compels State parties to take positive steps to prevent torture (and other cruel, inhuman or degrading treatment or punishment) and to pass domestic laws to prohibit torture. The Convention Against Torture also prohibits State parties from returning or extraditing persons to a State where there are substantial grounds for believing they would be subjected to torture. While the definition of 'torture' is very strict, the type of treatment taken to constitute 'cruel, inhuman or degrading treatment or punishment' is much broader. For example, in its review of Australia's compliance with the Convention Against Torture, the Committee considered situations of detention where the State has control and custody over the individual (such as mandatory immigration detention), violence against women and the involuntary sterilisation of persons with a disability to all fall within its ambit.

Many of the Committee's observations and recommendations related (either explicitly or implicitly) to Australia's treatment of children and found that although Australia is making tentative steps in the right direction it remains far from a model signatory.

Noteworthy steps since Australia's 2008 review

The Committee commended Australia on steps taken since its last review in 2008 to observe its obligations toward children under the Convention Against Torture. These included:

> **Passing the Family Law Legislation Amendment (Family Violence and Other Measures) Act in 2011**. The Amendment affords greater protection to children, expanding the definition of 'abuse' to include psychological harm suffered as a consequence of exposure to family violence, directing the court to place greater emphasis on protecting the child from harm when determining their 'best interests' and removing the controversial 'friendly parent' provision from the Family Law Act.
>
> **Adopting the National Action Plan to reduce Violence against Women and Their Children 2010-2022**. The Plan is designed to target domestic and family violence and sexual assault, incorporating school and community initiatives, social media campaigns and telephone counselling and support services.

Australia still has work to do

The Committee found that Australia still has work to do to ensure that its laws, policies and practices ensure a level of protection for children (amongst others) that reflects its obligations under the Convention Against Torture.

The Committee expressed concern and made recommendations relating to a number of issues affecting children. Several areas of concern are outlined below, although we note that positive developments are taking place in these areas, highlighting that there is potential for change:

Indigenous incarceration. Indigenous persons are imprisoned at 15 times the rate of non-indigenous Australians and their overrepresentation in the criminal justice system is having a negative impact on Indigenous young people. The Committee recommended addressing the underlying causes of Indigenous incarceration, reconsidering mandatory sentencing laws to allow for greater judicial discretion and providing better legal aid and support services.

Encouragingly, there appears to be increasing awareness around this issue in Australia and a mounting push for change. This is made clear in the *Social Justice and Native Title Report 2014*, tabled in Parliament in December 2014 by the Aboriginal and Torres Strait Islander Social Justice Commissioner, which discusses recent initiatives relating to indigenous youth incarceration. Notable examples include the newly formed National Justice Coalition, which consists of a group of peak Aboriginal, human rights and community organisations from across Australia working towards reducing the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system. To do so, they are promoting safer communities, and community 'justice reinvestment' initiatives such as the Bourke Justice Reinvestment Project and the Cowra Justice Reinvestment Project which focus on investing in evidence based prevention and treatment programs by reinvesting money that would have been spent on imprisonment into services that address the underlying causes of crime in communities with high concentrations of offenders.

Child sexual abuse. The current Royal Commission into Institutional Responses to Child Sexual Abuse has helped to increase public awareness about issues relating to child sexual abuse. However, while the Royal Commission's findings and recommendations will no doubt be important in addressing the cultural and institutional issues that underlie the problem, it is not a court of law and its findings and recommendations will not be legally binding. Reflecting this, the Committee recommended that Australia ensure that all allegations of sexual abuse result in *criminal* investigations, prosecutions and sufficient redress and compensation for victims. There are some signs that this recommendation is already being heeded, such as the recent charges laid against Philip Wilson, the Catholic Archbishop of Adelaide, for concealing child sexual abuse by a priest in the Maitland-Newcastle Diocese of the Catholic Church after a 5-year investigation by the NSW police.

Mandatory immigration detention. Detention continues to be mandatory for all unauthorised arrivals, including children, until the individual concerned is either granted a visa or removed from the Country. As at 28 February 2015, 240 children were being held in closed immigration detention facilities both domestically and abroad.

The Committee was highly critical of the practice, finding that "the combination of … harsh conditions, the protracted periods of closed detention and uncertainty about the future… creates serious physical and mental pain and suffering".

The Committee suggested that the subjection of anyone - but especially children - to these conditions amounts to "cruel, inhuman or degrading treatment" prohibited under article 16 of the Convention Against Torture. The Committee called on the Australian

government to honour its' obligations under the Convention Against Torture as well as *Convention on the Rights of the Child* in ensuring that "families with children are not detained or, if at all, only as a measure of last resort… and for as short a period as possible".

Since the Committee conducted its review, the Australian Human Rights Commission has published its own report entitled 'The Forgotten Children' which presents the results of its national inquiry into children in immigration detention. The report found that, owing to the significant mental and physical illness and development delays caused by prolonged detention of asylum seeker children, Australia was in breach of its international obligations. As a result, the AHRC has called for a royal commission into the issue and the end of mandatory detention. While it must be noted that the number of children in immigration detention has decreased since its peak in 2013, there is much more to be done in this area and the publication of the AHRC's report, and the surrounding media coverage, has cast a light on this continuing issue.

Sterilisation of persons with disabilities. Following the High Court's 1992 decision in *Marion's* case, the authorisation of either the Family Court of Australia or a state or territory guardianship tribunal is required before a child that lacks capacity can undergo a sterilization procedure. However, the Committee remained concerned by reports that involuntary or coerced sterilisation of children with disabilities remains an ongoing practice. The Committee recommended enacting national uniform legislation prohibiting sterilisation without the free and informed consent of the person involved.

The issue was previously considered by the Australian Government in a 2013 Senate committee inquiry. Many submissions to the Senate committee echoed the sentiments of the Committee in calling for a nation-wide general prohibition on the sterilisation of persons with disabilities without their free and informed consent. Others argued *against* a broad-based prohibition, claiming that a blanket-ban was a form of discrimination that neglected the needs of children and other disabled persons who are mentally incompetent. After reviewing the submissions, the Senate committee recommended a prohibition on the sterilisation of people with disabilities without their consent, ***unless*** it can be proven that their capacity to consent will never develop. The Senate Committee also recommended that each Australian jurisdiction use the same definition of 'capacity' to ensure that an individual's right to "autonomy and bodily integrity" doesn't fluctuate across state borders.

Neither the Committee's concluding observations nor the Senate Committee's inquiry appear to have triggered any national legislative reform or action.

Where to from here?

In its appearance before the Committee in November 2014, the Australian delegation stated, in relation to the Convention Against Torture, that it:

> "takes its obligations under the Convention very seriously. Since ratifying the Convention in 1989, Australia has worked to ensure Australia's laws, policies and practices are consistent with our international obligations."

The Committee's concluding observations would suggest there is *much more* work to be done to ensure that Australia affords a level of protection to children consistent with its human rights obligations. Disappointingly, many of the Committee's recommendations arising out of this review mirror those made in the 2008 review, and many were also raised by the Committee on the

Rights of the Child in its own Concluding Observations in 2012. This suggests that Australia has been slow to make important changes to its laws, policies and practices as they pertain to the treatment of children.

Australia's compliance with its human rights obligations more broadly will come under review later this year by the UN Human Rights Council as part of the Universal Periodic Review. It will be interesting to see whether the findings and recommendations of the AHRC's 'The Forgotten Children' report will influence the Council and whether the Council will adopt the recommendation of the Joint NGO Submission on behalf of the Australian NGO Coalition that Australia should develop a National Plan for Children. These recommendations would help to address some of the Committee's concerns outlined above.

With this ongoing scrutiny of Australia's compliance with its international obligations in relation to the treatment of children, and in particular its obligation to protect them from torture and other cruel, inhuman or degrading treatment, we look forward to seeing how the political and legal landscape in this area will change over the next few years before the Committee's next scheduled review in 2018.

Henry Wells *is a Summer Clerk and* ***Tim Craven*** *a Law Clerk at King & Wood Mallesons.*

Equality needed to protect children in rainbow families, say community and rights groups to Adoption review

26 March 2015

Many children will benefit from removing discrimination in adoption laws, the independent review of Victoria's adoption laws has been told in submissions lodged by community groups last month.

Amelia Bassett, the Co-Convener of the Rainbow Families Council, said that rainbow families around Victoria were pleased to see that adoption equality was one step closer.

"There are hundreds of children living in rainbow families across Victoria who will positively benefit from this important reform. We should focus on a couple's ability to provide a loving and stable family environment, rather than their sexuality," said Ms Bassett.

The review is being conducted by Eamonn Moran PSM QC, former Chief Parliamentary Counsel and a current Commissioner of the Victorian Law Reform Commission, who was tasked with examining the best ways to legislate for adoption equality – not whether it should occur – and is due to report to the Minister for Equality Martin Foley by 8 May 2015.

The Victorian Gay & Lesbian Rights Lobby called on all members of parliament to consider the outcomes of the report, meet with constituents in same-sex families and assess the legislation on its merits.

"We are very pleased to be discussing how this should be done, rather than whether it should be done. The good news is we found that the changes required to the Adoption Act are fairly straightforward, so we can be confident this reform can move forward without delay," said Sean Mulcahy, VGLRL Co-Convener.

In 2007 the Victorian Law Reform Commission recommended the laws be changed to allow same-sex adoption. If passed, the law would finally enact the recommendations of the VLRC, bring Victoria into line with Tasmania, Western Australia, the ACT and NSW and comply with the principles of non-discrimination and equality enshrined in Victoria's Charter of Rights.

The Human Rights Law Centre's submission focused on the need for equality in adoption laws to avoid the legal uncertainty and practical difficulties currently faced by rainbow families.

"There are children living with same-sex parents that aren't able to formalize that relationship through adoption, which causes a great deal of uncertainty. For example, when the child turns 18 they no longer have any legal relationship with the person that raised them, which has flow on effects to wills and inheritance and a range of other situations," said Ms Brown, the Centre's Director of Advocacy & Strategic Litigation.

"Over 40 years of international and Australian research demonstrates that children in same-sex parented families do just as well, if not better, as their counterparts in heterosexual parented families," added Ms Brown.

The Victorian Gay & Lesbian Rights Lobby, Rainbow Families Council and Human Rights Law Centre call on the Coalition to join the Government in its commitment to equality and look forward to working with all sides of politics to ensure the swift passage of legislation.

Click here for a copy of the HRLC submission.
Click here for a copy of the VGLRL submission.

OPINION

Adoption reform a must for Victorian kids

Victoria is on the cusp of a reform that would see the State's last law to directly discriminate against same-sex couples consigned to the dustbin of history. Proposed reforms to the *Adoption Act 1984* (Vic) would be a step towards equality for gay and lesbian Victorians but also serve the best interests of children.

There are growing numbers of happy and healthy children being raised in rainbow families all across Victoria. It goes without saying that sexual orientation does not have a bearing on whether you can raise a happy, healthy child. In fact, over 40 years of international and Australian research demonstrates that children in same-sex parented families do just as well, if not better, emotionally, socially and educationally as their counterparts in heterosexual families.

Yet there are children living with same-sex parents that aren't able to formalise that relationship through adoption, causing a great deal of uncertainty for the children, their siblings and parents.

These children live in a diverse range of family situations. They could be cared for by same-sex couples as foster parents, and then on an ongoing basis under 'permanent care orders'. They could have one legal parent, with a new same-sex partner willing to adopt the child, or be born to same-sex parents through a surrogacy arrangement.

In these types of situations, parenting orders can be put in place but the child still cannot legally be adopted by their same-sex parents. This means that once the child turns 18 years old the parenting orders expire and the legal relationship between parent and child ceases. This can have flow on effects in wills and estates, and other areas of law. The child is left in limbo without the security, stability and practical benefits of legal recognition.

While this discrimination persists in the law, the state entrusts same-sex couples with the care of some of its most vulnerable children. Couples can be approved as carers for foster children. Indeed, many foster-care agencies actively target same-sex couples in their marketing materials. The Victorian Law Reform Commission (VLRC) highlighted this inconsistency in their 2007 report: "It makes no sense that people in same-sex relationships are able to be approved as

permanent and short-term carers of children in need, but cannot assume the full range of legal parental powers and responsibilities for these children".

These vulnerable children are entitled to the legal status and emotional security that would flow from equal recognition of their same-sex parents. And while the numbers of 'stranger-adoptions' in Victoria are very low and increasingly so, there is no reason why same-sex couples or individuals should not be considered on an equal footing to heterosexual couples. The underlying policy drivers in this area should be the providing children with safe and loving homes and protection under the law.

To its credit the new Victorian Government is steadfastly perusing its equality agenda and steaming towards the introduction of amending legislation this year. Leader of the Opposition Matthew Guy has signalled his personal support for the reforms and there are promising signs of a conscience vote within the Coalition ranks that would almost certainly ensure the passage of future legislation through the upper house.

One sticking point in any future bill will be the issue of exemptions for religious bodies. The Australian Christian Lobby has argued for carve outs from the law to allow faith based adoption agencies to discriminate. Thankfully, it appears the ACL is out of step with the views of adoption agencies including faith based Anglicare. Meanwhile, we have argued for additional measures to ensure that faith based agencies are not able to rely on the existing exceptions for religious organisations in Victoria's equal opportunity laws.

When announcing Government's plans for adoption equality the Premier said that equality is not negotiable. It's important that the drafting of the bill gives life to this principle and doesn't place religious organisations above the law, particularly when tax payer dollars are funding an organisation to deliver important public services.

As Farrah Tomazin has recently commented, it remains to be seen whether the Victorian Government will deliver a reform that matches its rhetoric on equality. However, there is no doubt that change is long overdue. Nearly a decade after the Law Reform Commission recommended reform, Victoria still lags behind a growing list of jurisdictions that have legislated for equality – NSW, WA, Tasmania and the ACT and over 16 other countries internationally. Amending our adoption laws would remove the last stain of discrimination against gay and lesbian parents from the statute books and have an immediate practical benefit for many hundreds of parents and children. And it's the interests of these children that should be paramount.

Anna Brown *is Director of Advocacy and Strategic Litigation at the Human Rights Law Centre.*

A COFFEE WITH…JOHN TOBIN

John Tobin *is a Professor in the Melbourne Law School at the University of Melbourne. In 2011 he was awarded a national citation for outstanding contribution to student learning in the area of human rights, and is currently working with Professor Philip Alston from NYU on a comprehensive commentary on the Convention on the Rights of the Child. Editor at large of Right Now,* ***Andre Dao****, recently caught up for a chat.*

What motivated you to become involved with children's rights? And what keeps you going?

There are probably several factors. I was educated by the Christian Brothers which were founded by a man who was committed to the education of poor children in Ireland. I know the Brothers

often get a bad rap within the context of institutional abuse of children. But I was fortunate enough to be educated by some genuinely inspirational men and women who were committed to serving the interests of children who came from disadvantaged backgrounds. There is no doubt that they have influenced my career choices. I have worked with young people in various capacities as a volunteer and as a lawyer with Victoria Legal Aid. I always found the work to be challenging but also incredibly rewarding. Young people have an energy and enthusiasm that can be contagious. As to why I now research and teach in the area of children's rights, it's just a fascinating area. The legal and ethical issues are complex and very often unresolved. So there are enormous opportunities for research that is both intellectually stimulating but also potentially transformative in practice.

To what extent can children be involved with the creation of laws and treaties that purport to protect their rights, like the Convention on the Rights of the Child?

To a far greater extent than is presently the case. Adults make assumptions about what is best for children all the time. This is no less so when it comes to the creation of laws that are designed to protect them. The challenge for adults is to recognise that children and young adults also have expertise that will invariably be relevant to the design not just of law but also policies affecting them.

You've written before about the need for adults to learn to see that children and young people may see the world differently from adults, and that that alternative view might be more appropriate in certain circumstances. How can we as adults learn to see as children?

I think it's a real challenge because in contemporary society the transition to adulthood is often associated with a devaluing of the habits and characteristics that we associate with childhood. Adulthood is assumed to confer knowledge and understanding of what is best for a child and childhood is defined as a period of immaturity and incapacity. As adults we too easily forget that children may often view and experience the world quite differently to us. So how can we see the world as children do? Maybe adulthood has robbed us of that capacity but I'd like to think that it's still possible. The best way to start is to acknowledge that adulthood doesn't give us a licence on knowing what is best for children. We need to become far more reflective. We also need to start not just talking with children about their views but also listening to them carefully and treating their views with respect. It's about creating a dialogue and recognising that expertise and insight is not the sole province of adults.

What's the greatest challenge facing children's rights campaigners?

The challenges are many. Even a cursory glance of the newspaper will reveal the multitude of challenges confronting children – detention of refugee children; institutional abuse; bullying; cyber abuse; family violence, corporal punishment and the list could go on. A critical challenge is actually gaining acceptance of the idea that children have rights and that this idea doesn't mean the end of the family as we know it. Indeed a careful reading of the Convention on the Rights of the Child reveals a model of rights that is deeply sympathetic and supportive of the idea of the family and the special role for parents in securing the upbringing and development of children. But still there persists an anxiety that giving children rights will somehow destroy the world as we know it. So we need to have a more informed discussion about what it means to recognise the rights of children and the benefits of this approach.

What are you proudest of in your professional career so far?

I don't think I've done enough to become proud of anything I've achieved so far. But what I am inspired by is the resilience, insight and capacity shown by young people of all ages globally. For example, some of the pictures, stories and poems written by children in refugee detention which were captured in the recent report by the Australian Human Rights Commission were extraordinary. Heart breaking stuff but also incredibly powerful and a real reminder of the challenge we all face if we are to ensure the effective protection of children's rights both within Australia and also abroad.

HUMAN RIGHTS LAW CENTRE – POLICY & CASE WORK

High Court action against NT to challenge police powers which will disproportionately impact Aboriginal people

31 March 2015

The North Australian Aboriginal Justice Agency (NAAJA) has commenced a High Court challenge against the 'paperless arrest' regime in the Northern Territory that gives police new detention powers.

The regime under the *Police Administration Act* grants police power to detain someone for up to four hours if they suspect the person has committed, or is about to commit, an 'infringement notice offence', which includes minor offences such as making undue noise and failing to keep a front yard clean.

Ruth Barson, Senior Lawyer at the Human Rights Law Centre which is part of the legal team running the case, said the case is about ensuring people cannot be detained in circumstances which breach well-established legal principles.

"These laws allow police to lock someone up for minor offences like swearing which would usually only attract a small fine. The laws allow police to effectively act as prosecutor and judge. The right to liberty is a fundamental human right and should only be restricted by the courts, save for well-established exceptions," said Ms Barson.

Under the laws, there is no opportunity for someone to protest their innocence, and police can keep someone in detention for up to four hours without giving them the opportunity to apply for bail. Police do not need to charge the person at the end of the four hour detention, and do not need to provide them with the opportunity to receive legal advice.

"Police can essentially punish people on suspicion of committing a minor offence. The ability to sidestep the courts is particularly concerning, and it's important that the High Court has the opportunity to consider the validity of these laws," said Ms Barson.

Ms Barson said that the laws will inevitably have a disproportionate impact on Aboriginal people.

"At a time when we should be finding ways to reduce the number of Aboriginal people in custody, these laws will see many more Aboriginal people locked up for minor offences," said Ms Barson.

The Northern Territory already has the highest imprisonment rate in the country and Aboriginal people comprise over 85% of the prison population.

"The Royal Commission into Aboriginal Deaths in Custody emphasised the need to avoid locking people up for minor offences. In challenging this regime, NAAJA is taking issue with the validity of new police powers which do just that," said Ms Barson.

The HRLC is coordinating the pro bono legal team comprised of lawyers from law firm Ashurst and barristers led by Mark Moshinsky QC, who are representing NAAJA. IMF Bentham is also supporting NAAJA through its pro bono program.

"We are pleased to support this important case as part of our commitment to promoting access to justice in Australia," said Tania Sulan, Coordinator of IMF's pro bono program.

Background information about the laws and case can be found here.

Australia's increasing disrespect for UN to be highlighted in lead up to major human rights review in Geneva

20 March 2015

The United Nations' peak human rights body has been urged to question Australia on its increasingly regressive approach to human rights in the lead up to a major review.

The statement to be presented by the Human Rights Law Centre to the UN Human Rights Council in Geneva highlighted concerns about Australia's growing hostility to the UN as well as regression in key areas.

The HRLC's Director of Advocacy and Strategic Litigation, Anna Brown, said the statement aimed to alert the nations of the Council of the widening gulf between Australia's domestic actions and statements the Government makes to the international community.

"Australia has a good track record of engaging with important UN forums, but there's concern that not only is Australia's human rights record deteriorating, but that Australia is also becoming increasingly belligerent in the face of external criticism," said Ms Brown.

The statement quoted Prime Minister Tony Abbott saying that "Australians are sick of being lectured to by the United Nations" and his Immigration Minister, Peter Dutton, dismissing a recent UN report criticising Australia's asylum seeker policies as "absolute rubbish".

"In Geneva Australia has been at the forefront of discussions about the importance of ensuring the independence of human rights institutions, yet at home the Government has significantly cut funding to the Australian Human Rights Commission, publicly attack the credibility of and sought the resignation of its President, Professor Triggs. Such actions are manifestly incompatible with resolutions Australia leads at the UN," said Ms Brown.

The HRLC is part of a NGO Coalition preparing a joint NGO report for the Human Rights Council ahead of Australia's upcoming Universal Periodic Review – a peer based review of a nation's overall human rights performance which takes place every four years.

"At Australia's last review it was encouraging to see the Government engaging constructively with the UN, accepting criticism and committing to lifting its game in a number of areas. This time round, things might be different and that's a real concern, because it's in Australia's interests that the UN system and international law is respected by all members," said Ms Brown.

The statement also highlighted key areas of concern, including increasingly punitive asylum seeker and refugee policies, the over-imprisonment of Aboriginal and Torres Strait Islander peoples, and the introduction of laws, policies and arrangements that threaten democratic freedoms.

"Since Australia's last review, we've witnessed the erosion of basic democratic freedoms at both state and federal levels of government. When you add to this funding cuts and restrictions on the ability of independent organisations to speak out about human rights violations, then clearly you're heading into pretty concerning territory," said Ms Brown.

Australia is currently campaigning to become a member of the Human Rights Council in 2018 and Ms Brown said the Government needed to lift its game.

"If Australia develops a reputation for snubbing UN processes and letting human rights standards slide, then its chances of being elected are likely to be damaged," said Ms Brown.

Australia's Universal Periodic Review by the UN Human Rights Council will take place in November. The Australian Government will need to lodge its report in July ahead of the review. For more information about the UPR visit: www.hrlc.org.au/upr

A copy of the statement can be found here.

Aboriginal imprisonment rates jump in Victoria prompting calls for 'justice reinvestment' trials

7 April 2015

A recent report by the Australian Bureau of Statistics shows Victoria has seen one of the largest jumps in Aboriginal and Torres Strait Islander imprisonment rates in the country.

Aboriginal people in Victoria are locked up at 11 times the rate of the non-Aboriginal population. Aboriginal people comprise approximately eight percent of the prison population, yet less than one percent of the general Victorian population.

Senior Lawyer at the Human Rights Law Centre, Ruth Barson, said that while the new Victorian Government had inherited an unprecedented crisis in prisoner numbers, it had an opportunity to introduce better justice policies that do not disproportionately impact Aboriginal people.

"Aboriginal over-imprisonment is not just a problem in remote Australia. These latest statistics confirm that it is equally important for Victoria to find solutions to address this systemic injustice," said Ms Barson.

Acting CEO of the Victorian Aboriginal Legal Service, Meena Singh, said the Victorian Government should commit to reducing Aboriginal imprisonment rates by introducing ways to divert people away from the criminal justice system.

"There is a lack of regional diversionary programs for young people, particularly programs that are culturally appropriate and responsive to the needs of Aboriginal people. There needs to be proper consideration of the reasons behind why people are offending. The issues are complex and often can't be dealt with by a prison sentence," said Ms Singh.

Ms Singh called on the Victoria Government to use the Aboriginal Justice Forum to have real dialogue with community organisations.

"There are a number of expert, on-the-ground organisations with years of experience working with the Victorian Aboriginal community. Ultimately, communities know how best to address offending in ways that are culturally appropriate, therapeutic and provide long term impact. We urge the Victorian Government to think holistically and therapeutically about how to make real and positive change in our community," said Ms Singh.

Ms Barson said that the Victorian Government should look to 'justice reinvestment' programs to address over-imprisonment. Justice reinvestment involves channeling some of the hundreds of

millions of dollars spent on prisons, into targeted community programs in high-need areas to address the underlying causes of offending.

“Justice reinvestment is an evidence-based approach that focuses resources on preventing crime instead of just responding after the damage is done. It attempts to treat the causes of crime, not the symptoms,” said Ms Barson.

Justice reinvestment emerged out of traditionally punitive American states like Texas in response to ballooning prison populations and the associated costs. It has proven transformative in those places. It is now being trialed in NSW and South Australia.

“Victoria’s justice system is at breaking point with growing prisoner numbers, growing prison costs, and growing reoffending rates. The Government has the tools to address this problem, it just needs the political will and determination to use them. At the very least the Government should commit to some trial programs,” said Ms Barson.

When Australia’s compliance with the Convention on the Elimination of Racial Discrimination was last reviewed by the United Nations, the expert committee specifically called for justice reinvestment trials to address Aboriginal over-imprisonment.

Nearly 200 organisations outline concern for UN over Australia’s declining human rights performance

1 April 2015

Australia’s steadily deteriorating human rights performance has been highlighted in a major report compiled by nearly 200 organisations around Australia. It will be presented to the United Nation’s peak human rights body in the lead up to a major review of Australia that takes place every four years.

Emma Golledge, Acting Director at Kingsford Legal Centre, which is part of a NGO Coalition that has prepared the joint NGO report for the process known as the “Universal Periodic Review”, said it was an important opportunity for Australia to engage with the international community to improve issues of concern.

“Increasingly punitive asylum seeker policies, the over-imprisonment of Aboriginal people and the erosion of basic democratic freedoms at both the state and federal level will all come under the spotlight for the international community’s scrutiny, and our hope is that Australia will see the benefit of constructively responding to criticism and addressing these important issues,” said Ms Golledge.

Australia was last reviewed by the Human Rights Council in 2011, and NGOs welcomed the Government’s acceptance of a large number of recommendations and its commitment to translate them into practical action. However, four years on, NGOs are concerned that progress has stalled and key recommendations have fallen by the wayside.

“While we have seen some positive developments in response to recommendations made as part of the last review, including for example the appointment of a federal Children’s Commissioner and the adoption of a second action plan under the National Plan to Reduce Violence against Women and their Children, the facts speak for themselves—only 11% of the recommendations have been fully implemented,” said Amanda Alford, Deputy Director Policy & Advocacy, National Association of Community Legal Centres, who also coordinated the report.

Legal and institutional protection of human rights is a large focus of the report as are the new counter-terror, metadata, whistleblower and anti-protest laws, said the Human Rights Law Centre's Director of Advocacy, Anna Brown, another coordinator of the report.

"Australia remains the only liberal democracy without a bill or charter of rights and we are witnessing a slow but steady erosion of our basic democratic freedoms. In this context, restrictions on the ability of independent organisations to speak out about human rights violations is cause for growing concern," said Ms Brown.

The report deals with a number of key population groups and human rights issues, including the following areas.

Asylum seekers

"Australia's asylum seeker policies violate the basic human rights of those who arrive in order to deter others thinking of coming. At a time of unprecedented global need when it comes to refugee protection, Australia should be stepping up to the plate and sharing responsibility rather than using cruel and unlawful measures to shift it," said Daniel Webb, Director of Legal Advocacy, Human Rights Law Centre.

Aboriginal and Torres Strait Islander Peoples

"Fifty-four recommendations from the 2011 Universal Periodic Review report directly related to the human rights of the Aboriginal and Torres Strait Islander Peoples," said Les Malezer, Co-Chair of the National Congress of Australia's First Peoples.

"Australia accepted all but two of these recommendations—in full or in part but has not followed up in good faith. Seven recommendations proposed that Australia consult and cooperate with the Aboriginal and Torres Strait Islander Peoples but consultation and collaboration is a glaring failure of government up to this time," added Mr Malezer.

As part of the process, the National Congress of Australia's First Peoples is calling for Australia to revise national, regional and local constitutions, laws and policies to fully recognise and protect the rights of the Indigenous Peoples in accordance with international human rights standards.

"It is important Australia lives up to its international human rights obligations towards its first people. Rates of family violence, incarceration, child removal and life expectancy are devastating for Aboriginal and Torres Strait Islander people and there's a long way to go to turn this around," added Antoinette Braybrook, Convenor of National Family Violence Prevention Legal Services.

Lesbian, gay, bisexual, transgender and intersex people

"Two years after Australia agreed to protect LGBTI people from discrimination at the Universal Periodic Review, laws were passed with bipartisan support, showing how this process can deliver tangible outcomes when Government engages with NGO's," said Mr Corey Irlam, spokesperson for the Victorian Gay & Lesbian Rights Lobby.

"This time round we're hoping to see commitments to end damaging medical interventions against intersex people, further steps taken to recognise gender identity, and equality for our relationships and families," added Mr Irlam.

People with disability

The report also urges action on a number of problems still faced by people with disability.

"People with disability can be forcibly sterilised, indefinitely detained, and subjected to involuntary treatment and restrictive practices. Unless action is taken to address these issues we will

continue to be denied equality and the ability to fully participate in society," said Ms Rosemary Kayess, spokesperson for the UPR Disability Coordination Group.

Older people

"The need for human rights protections don't stop when you get older," said Ian Yates, Chief Executive of COTA Australia.

"With the Intergenerational Report likely to influence this year's budget, our recommendations to increase workforce participation through a dedicated plan, tackle ageism and harmonise laws around elder abuse, have never been more important," added Mr Yates.

Women

"Increased resources are urgently needed to address epidemic levels of sexual assault and family violence in Australia, violence overwhelmingly perpetrated by men against women," said Liz Snell, Law Reform and Policy Co-ordinator at Women's Legal Services NSW.

"Achieving substantive equality through equal pay, adequate and affordable childcare, recognition of unpaid work, women in leadership and addressing intersectional and compounding discrimination often experienced by women will significantly help eliminate the underlying systemic contributors to violence against women," said Helen Dalley-Fisher, Program Manager of one of the National Women's Alliances, the Equality Rights Alliance.

Poverty and economic, social and cultural rights

"Poverty in Australia has increased since the last review. Current Government policy proposals and economic settings would accelerate this trend, including moves to cut young people off payments for 6 months each year, reductions in assistance to low income families, severe cuts to community services, moves to reduce the adequacy of indexation for Pensions and failure to improve the adequacy of the base rate and indexation of Allowances. In addition, the costs of housing in both the rental and home ownership markets are increasing at alarming levels. We cannot afford to go backwards in our effort to realise the right to an adequate standard of living for all," said Dr Cassandra Goldie, CEO of the Australian Council for Social Service.

Housing and homelessness

Since Australia's last Universal Periodic Review, homelessness has increased, housing affordability has worsened, and there continues to be a social housing shortage.

"Australia needs a coordinated housing strategy that recognises housing as a human rights issue. We're proud to join with a range of frontline housing, homelessness and legal services in calling for measures that will reduce homelessness and work toward all Australians having access to safe, affordable housing," said Lucy Adams, Manager and Principal Lawyer of Justice Connect Homeless Law.

Policing

The lack of independent investigations of police related deaths and continuing efforts to tackle racism within Australia's police forces were also covered in the report.

"For Australian police forces to be truly world-class, they must embrace the recommendations of the international community and this starts with police treatment of our most vulnerable – Indigenous people, people with disability, those experiencing mental health crises," said David Porter, an expert in police accountability at the Redfern Legal Centre.

"Too often vulnerable people are let down by those whose responsibility it is to protect them, and subjected to excessive force or unnecessary arrest," added Mr Porter.

Australia's Universal Periodic Review by the UN Human Rights Council will take place in November. The Australian Government will need to lodge its report in July ahead of the review.

A copy of the Joint NGO Report can be found here.

HUMAN RIGHTS DINNER

Tickets now on sale: Book now!

Tickets for the 2015 Human Rights Dinners are now available for purchase at: www.hrlc.org.au/humanrightsdinners2015

The Human Rights Law Centre and Justice Connect are extremely pleased to announce that the keynote speaker at our Annual Human Rights Dinners this year will be the Australian Human Rights Commission President, Gillian Triggs.

Melbourne: **Friday 5 June** | Sydney: **Friday 12 June**

Emeritus Professor Triggs has successfully combined a distinguished academic career with international commercial legal practice, and has worked with governments and international organizations on human rights law. Professor Triggs has accomplished an extraordinary amount. She is the former Dean of the Faculty of Law at the University of Sydney, has written five books and was a Director of the British Institute of International and Comparative Law. She is also a former Barrister with Seven Wentworth Chambers and a Governor of the College of Law. She became the President of the Human Rights Commission in 2012.

The Human Rights Dinners are an opportunity to come together to celebrate achievements and to energise the human rights movement to tackle the challenges that lie ahead. They are also an important fundraiser for Human Rights Law Centre and Justice Connect.

Tickets are expected to sell out so book now to join us and our friends at Justice Connect for what is sure to be a great night!

HRLC MEDIA HIGHLIGHTS

- Brianna Roberts, NGOs submit Australian human rights report to UN, *SBS News*, 6 April 2015
- Samantha Donovan, Australian bid for UN Human Rights Council under scrutiny over asylum seeker policy, *AM ABC Radio*, 21 March 2015
- Neda Vanovac, Legal challenge to NT's lock up powers, *The Australian*, 31 March 2015
- Alana Schetzer, Thousands march in Melbourne on Palm Sunday to protest asylum seeker policies, *The Age*, 30 March 2015
- Felicity James, NT's 'unprecedented' paperless arrest laws face High Court challenge from Indigenous justice group, *ABC News*, 1 April 2015
- Farrah Tomazin, Christian group asks Victorian government for right to discriminate on gay adoption, *The Age*, 29 March 2015

- Shalailah Medhora and Michael Safi, Tony Abbott declares only the Coalition strong enough to stop the boats, *The Guardian Australia*, 9 April 2015
- Paul Farrell, Government seeks immunity over use of force in immigration detention, *The Guardian Australian*, 8 April 2015
- Steve Holland, Aboriginal imprisonment rates: Barnett government failing, *WA Today*, 9 April 2015

NOTICEBOARD

Right Now Radio

The latest edition of Right Now Radio in now available here: http://rightnow.org.au/podcasts/right-now-radio-march-edition/

In this edition, the crew discuss with Amnesty International's **Tammy Solonec**, the impact the forced closure of Indigenous communities would have on the communities' residents in WA; chat with local funny lady **Sarah Jones** about her two shows at this year's comedy festival – Guinea Pigs and Political Asylum; talk with **Jenny Eljak** of Reproductive Choice Australia about just how many barriers to abortion there are across Australia; and hear from Young Liberty's **David Sandbach** and **Evan Ritli** about the people fleeing countries that would persecute them for being homosexual who Australia sends to PNG – a country that does exactly that?

Job

The Inner Melbourne Community Legal is seeking a new CEO.

Progress 2015

The Progress 2015 Conference will convene a who's who of Australia's leading policy experts, campaigners and change-makers. Details here: http://progress2015.org.au/

The Human Rights Law Centre would like to thank everyone who contributed to the production of this Bulletin.

Stephanie Puris and **Philippa Macaskill,** Solicitors, King & Wood Mallesons and Editors of this Special Children's Rights Edition of the HRLC Bulletin.

We would like to express thanks to all those solicitors and clerks at King & Wood Mallesons that helped research, coordinate and prepare articles for this Special Bulletin. Thank you also to **Taryn McCamley, Laura Smith and Marina Lauer** of King & Wood Mallesons who provided assistance for this Bulletin.

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The Human Rights Law Centre promotes human rights in Australia and beyond through a strategic mix of legal action, evidence-based advocacy, research and capacity building.

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution. All donations are tax deductible and gratefully received.

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