Edition 100, October 2014


# Rights Agenda

Monthly Bulletin of the Human Rights Law Centre

## 100TH EDITION OF RIGHTS AGENDA

Welcome to the 100th edition of the Human Rights Law Centre's monthly bulletin!

## OPINION

Rob Hulls on the journey towards formal rights recognition, Hugh de Kretser on safeguarding our democracy, Ruth Barson on Indigenous over-imprisonment, Daniel Webb on the Cambodia deal and Tom Clarke on Indonesia's new President and human rights.

## CASE NOTES

Federal Court dismisses 'Occupy Melbourne' appeal

## POLICY & CASE WORK

High Court litigation, UN advocacy, legislative win in Victoria, business and human rights and lots more.

## TABLE OF CONTENTS



This edition of Rights Agenda is sponsored by

DLA PIPER

## 100 EDITIONS AND GOING STRONG

### Welcome to the 100th edition of *Rights Agenda* – the monthly bulletin of the Human Rights Law Centre!

*Rights Agenda* is the HRLC's flagship contribution to human rights education. First launched in 2006, one of its key aims was to improve capacity and expertise in using international human rights law in domestic legal practice and advocacy.

Over time we have delivered on that aim, from our first six-page edition to editions like this one topping 50 pages of human rights news, opinion and resources, as well as updates on our work and impact.

We've had opinion pieces written exclusively for *Rights Agenda* by Attorneys-General, High Court judges, politicians, leading barristers, UN experts, academics, leading human rights advocates and many others.

Thanks to the strong pro bono support from some of Australia's leading law firms and lawyers, we've built up a database with over 700 case-notes on local and international human rights law judgments. It's a great resource – it's publically available and it's free. Thanks to everyone who has contributed.

We regularly receive positive feedback about *Rights Agenda* from our 4,000 or so direct subscribers around the world which include UN Human Rights Committee members, judges, lawyers, community workers, politicians, public servants and members of the public interested in human rights. The bulletin reaches more people via social media and our website, and *Rights Agenda* articles and case-notes are distributed around national and international networks with our blessing.

Our ability to consistently produce high-quality human rights material for *Rights Agenda* relies on our pro bono support, sponsorship, grants from organisations like the Victoria Legal Services Board and on volunteers. In this regard, there's one particular volunteer to recognise – Miranda Webster who has been helping out with its production since April 2012.

With only six percent of our funding this year from government, the Human Rights Law Centre relies heavily on donations from people like you who are passionate about promoting and protecting human rights.

It's fitting that this 100th edition of *Rights Agenda* is jam-packed with examples of the impact the Human Rights Law Centre has on the Australian human rights landscape. Just looking at last week:

On Monday, our Director of Advocacy and Research, Emily Howie, was assembling a broad coalition of over 40 organisations to urge Attorney-General George Brandis to allow for further scrutiny of his new counter-terror measures.

On Tuesday, our Director of Legal Advocacy Daniel Webb and I, were in the High Court with Shine Lawyers and a team of barristers led by Ron Merkel QC, bringing vital legal scrutiny to the month-long high seas detention of 157 people, who the Australian Government tried and failed to send to India.

On Wednesday, our Director of Advocacy and Strategic Litigation Anna Brown, was in the Victorian Parliament having secured the passage of historic laws that for the first time allow gay men to apply to erase unjust criminal convictions left-over from when homosexual sex was illegal.

On Thursday, our Director of Advocacy and Campaigns Rachel Ball, submitted to the UN's Committee Against Torture a detailed report she coordinated with 77 other organisations warning of Australia's declining standards when it comes to the prevention of torture and cruel treatment.

On Friday… we had to get started on this bulletin! So here it is. We hope you enjoy it, find the resources useful, share it amongst friends and colleagues and continue to support the work of the Human Rights Law Centre. Any feedback you have would be most welcome.

**Hugh de Kretser**, Executive Director

## Congratulations to the Human Rights Law Centre on the publication of this 100th edition of Rights Agenda!

*As Executive Director of the freshly established HRLC in May 2006, Phil Lynch started the HRLC's monthly bulletin as six-page Word document that he circulated via email amongst the centre's small (but impressive) supporter base. Today, he tells us he still gets excited when it appears in his inbox.*

Having had the privilege of working with the HRLC over its first seven years, I'm now working with the International Service for Human Rights (www.ishr.ch) in Geneva.

ISHR's mission focuses on supporting human rights defenders in their engagement with the UN and, in this capacity, I've had the opportunity to work with literally hundreds of NGOs from all regions of the world. Among other things, this has given me a comparative perspective on the work and impact of the HRLC, and the characteristics that make it a truly world-leading NGO.

Four characteristics stand out in particular…

First, the HRLC has a higher output and more significant impact than any comparably-sized NGO I have seen, offering an incredible return for donors. This is attributable, in part, to the second distinctive characteristic, being the HRLC's relationships with leading pro bono law firms and barristers and its ability to access and leverage the enormous expertise and capacity this represents.

It is also attributable to the third characteristic, being the incredible dedication, professionalism and expertise of the HRLC staff – they're not just among the leading human rights lawyers and advocates in Australia, but the world.

Finally, the HRLC is distinctive as one of the very few NGOs in the world to use such a range of tactics – from impact litigation, to policy advocacy, to media commentary, to UN engagement – in such a strategic and coordinated way. This is evident in their recent work to protect the human rights of asylum seekers, which has included High Court litigation, submissions and evidence to parliamentary inquiries, frequent media appearances and opinion pieces, and lobbying and advocacy at the UN in Geneva.

I congratulate the HRLC and all those involved in the production of Rights Agenda on the publication of this 100th edition and look forward to the publication of many hundreds more!

***Phil Lynch** is the Eexcutive Director of International Service for Human Rights.*

OPINION

## Time to call loudly for quiet, everyday things

Just over a decade ago, Victoria started its journey towards formal rights recognition. Through a widespread consultation process – not unlike that subsequently conducted at a Federal level – Victorians expressed a firm belief that our entitlements and obligations at international law were worth articulating; that they should shape the way in which the population interacted, both with each other and with the state.

A careful process of legislative development followed, with the ultimate decision being that, as civil and political rights were the least contentious and best understood in the public domain, these should be the initial priority. A review was scheduled to follow at a later date. Accordingly, in 2006, Victoria followed the ACT's example and became the first Australian state to enact a legislative Charter of Rights and Responsibilities, with a range of mechanisms, including the Human Rights Law Centre, in place to support it.

Despite gloomy forecasts from various quarters, including some pockets of the legal profession, the sky did not fall in. Activist judges did not storm the barricades, looking to wrest power from a jealous parliament. Hardened criminals did not flood the streets, having used the Charter for nefarious gain. Nor was that mysterious 'silent majority' suddenly oppressed by the rights of smaller and apparently noisier groups.

In fact, nothing especially dramatic happened at all.

Yes, the reach of the Charter was tested in some important court decisions, and I hope that this continues to be the case. For the most part, however, the real impact over the last eight years has been felt in quiet, everyday things – actions and decisions by policy makers and service providers alike which have moved the rights of community members from the periphery to the core and, in doing so, made a difference to individual lives. It has also been felt in the dialogue created between the judiciary and legislature – a process of checks and balances that compels government to contemplate the ways in which power is genuinely felt.

In other words, the Charter has achieved a shift in the way that public institutions work, building consideration of rights into each determination and making them an essential, rather than a luxury item, in the business of doing government. The existence of the Charter does not guarantee that every right will be observed every time, of course, while even its own future has sometimes stood on shaky political ground. Nevertheless, I believe that Victoria can now lay better claim to a human rights culture – one which holds a mirror to our shared humanity and comes closer to the forms of recognition which exist elsewhere around the globe.

What would recognition of this kind mean at a federal level, however? Certainly, the consultation process led a few years ago by Father Frank Brennan revealed a similar commitment on a national scale as was reflected in the Victorian experience. Yet ultimately government shirked at the final hurdle, opting instead for a policy framework which, though comprehensive, fell considerably short of the available potential.

This potential now seems even further out of reach. Recently, the current Commonwealth Attorney-General – the nation's Chief Law Officer no less – attempted to pit the right to free speech or, in his words, the 'right to be a bigot', against the rights of others to be free from discrimination. Meanwhile, a young man detained on Manus Island under the official watch of the

Minister for Immigration was denied adequate treatment for a cut on his foot and, left to succumb to infection, ultimately succumbed to death.

These scenarios imply that Australia accepts the observance of some rights to be less important than others. Arguably, examples like these would be unthinkable if Australia had a better developed human rights culture – one in which rights were not seen as something to be asserted by the affected individual once they were violated, but considered at the outset in every decision along the way. A rights culture supported by proper legislative recognition would not pit one right against another, but instead recognise that all have equal value and must ultimately be appropriately balanced. Such a culture would also ensure that the value of quiet, everyday things – like adequate treatment for a cut foot – was observed as a matter of course.

Australia has a longstanding record of promoting human rights on the international stage. We do so at a diplomatic and economic level, often to great effect. Yet these calls will fail to ring true while we struggle to acknowledge or fully comprehend the meaning of rights at home. Victoria's journey to rights recognition is far from over, certainly, but its experience has a lot to offer the national agenda. So does the expertise which has developed at the HRLC, as well as the ongoing consideration of rights that this and other organisations justifiably demand. It is well past time that this knowledge was applied on the national stage – that we stopped viewing rights as an added extra or even sometimes as an impediment – that, instead, our shared humanity was perceived and understood in every context, every person, every single time.

***Rob Hulls** is Director of the Centre for Innovative Justice and was Victoria's Attorney-General between 1999 and 2010.*

## BUSINESS AND HUMAN RIGHTS

### Complaint of serious human rights abuses lodged against G4S, Australia's former security contractor on Manus

**23 September 2014**

A formal OECD complaint has been lodged against multinational security contractor G4S for failing to meet international standards and committing serious human rights violations in relation to conditions and abuse of asylum seekers detained at the Manus Regional Processing Centre.

G4S was contracted by the Australian government to oversee management and security at the Manus Island Centre between February 2013 and March 2014. Over this period, the Centre was repeatedly criticised by human rights organisations including the office of the United Nations High Commissioner for Refugees for breaching basic minimum standards of care. In February 2014, one detainee was killed and more than 60 others were injured in an outbreak of violence that is the subject of an ongoing Inquiry by the Australian Senate.

The complaint, made under the OECD Guidelines for Multinational Enterprises, has been submitted in Australia and the United Kingdom by UK NGO Rights and Accountability in Development (RAID) and the Australian-based Human Rights Law Centre (HRLC). RAID and the HRLC are assisted by UK human rights law firm, Leigh Day. The OECD Guidelines are a set of Government-backed standards for responsible business conduct.

Executive Director of RAID, Patricia Feeney, said companies do not operate in a human rights vacuum.

"G4S Australia and its parent company in the UK have a responsibility under the OECD Guidelines not to cause or contribute to human rights violations. G4S cannot evade responsibility simply because those violations are sanctioned by the Australian Government," said Ms Feeney.

The HRLC's Director of Advocacy and Campaigns, Rachel Ball, said G4S' direct involvement in the outbreak of violence at the Centre in February 2014 was of particular concern.

"G4S' locally-employed security guards participated in some of the worst violence against asylum seekers. In addition to the violence, the regime of indefinite, arbitrary detention on Manus is itself a violation of international human rights law and conditions under G4S' watch were consistently reported to be cruel and inhumane," said Ms Ball.

Martin Appleby, a former G4S safety and security officer and training officer, has lashed out his former employer's practices.

"G4S' training and risk management processes were woefully inadequate. The company must shoulder some of the responsibility for the human rights abuses suffered by asylum seekers as a result," said Mr Appleby.

Keren Adams, a lawyer with Leigh Day, said the complaint should serve as warning to other private companies involved in Australia's refugee detention regime.

"G4S' contract to run Manus has ended but Transfield has stepped into its place and there is little indication that conditions at the Centre have materially improved. Companies that profit from the Australian government's inhumane detention policies should be aware that they will also be held accountable for their actions," said Ms Adams.

Documents: Complaint | Appendix 1 | Appendix 2 | Appendix 3 | Appendix 4

## LGBTI RIGHTS

### Rights groups commend Victorian Parliament for erasing gay sex convictions

**14 October 2014**

The Victorian Parliament has became the first Australian jurisdiction to formally acknowledge that sex between consenting men should never have been a crime.

The Victorian Government's legislation will enable Victorians to apply to erase their criminal record for crimes of a homosexual nature. Crimes that may be expunged include "the abominable crime of buggery", "loitering for homosexual purposes" and other indecency offences where the conduct would otherwise be lawful under today's laws. Once applications are approved by the Secretary of the Department of Justice, their convictions will no longer appear on police checks and criminal records.

The Human Rights Law Centre's Director of Advocacy and Strategic Litigation, Anna Brown, welcomed the passage of the legislation.

"Today Victoria has made history by becoming the first parliament to formally acknowledge that consenting sex between men should never have been a crime. The new scheme will ensure that countless numbers of gay men will no longer have a black mark on their record when seeking a police check for a job or volunteer position," said Ms Brown.

The Government accepted amendments proposed by the Opposition that amended the bill to include a statement that consensual homosexual conduct should never have been a crime; that

the grounds of discrimination on the basis of a 'historical homosexual conviction' would be protected under the Equal Opportunity Act 2010; and enable a surviving partner or family member to apply for an expungement on behalf of a deceased loved one.

VGLRL Co-convenor Corey Irlam commended the Parliament for working together to improve the bill and achieve the best possible outcome for the LGBTI community.

"Today's collaboration between the Government, Opposition and cross bench was an example of Parliament working at its best for its constituents. We congratulate and thank the Parliament for the sensible approach they have taken to pass this legislation before the election," said Mr Irlam.

The Human Rights Law Centre in partnership with the VGLRL, Liberty Victoria, Victorian AIDS Council and Gay & Lesbian Health Victoria developed a discussion paper to help Government explore the issue and released the final version of the report earlier this year. Since then, the HRLC and VGLRL have continued to engage with Government about the bill.

The bill has passed both Houses of Parliament. It is anticipated the scheme will allow people to apply to have convictions erased from mid-2015. If you wish to be kept informed on the start-date of the scheme please email info@vglrl.org.au

For a copy of the bill and amendments click here.

## NSW joins Victoria in announcing plans to erase historic gay sex convictions

**16 September 2014**

The NSW Government will join Victoria in erasing the criminal records of men who were convicted for having consensual sex in the past when homosexuality was illegal.

Following the Victorian Government's announcement, NSW Coalition MP Bruce Notley-Smith has given notice of a similar Bill in the NSW parliament.

The Human Rights Law Centre's Director of Advocacy & Strategic Litigation, Anna Brown, has been providing legal assistance to men who have been unfairly burdened by unjust criminal records for outdated crimes, has warmly welcomed the dual announcements.

"Acknowledging these laws were wrong and legislating to abolish the left-over convictions will start to heal the harm that these discriminatory laws have caused. Sex between consenting adults should never have been criminalised," said Ms Brown.

Ms Brown said it was extremely pleasing to see the NSW and Victorian Government showing leadership on this issue.

"Having these manifestly unjust convictions erased will help end the stigma, shame and practical difficulties they have inflicted for decades," said Ms Brown.

Until 1984 in NSW, gay men were convicted and even imprisoned for offences ranging from "the abominable crime of buggery" and "gross indecency between male persons" to summary offences dealing with offensive or indecent behaviour.

Today, unknown numbers of men (and possibly women) live with the shame, stigma and barriers to work, volunteer and travel caused by a criminal conviction for conduct that is lawful today.

One NSW man affected by a historical conviction and client of the Human Rights Law Centre is Tim*. When Tim applied for a job, he had to get a police check and was horrified to see an undated "indecent assault" conviction listed and withdrew his job application.

Tim is immensely relieved that the black cloud he has been living under has finally been lifted.

“I don’t see what I did as any different to a couple that goes car-parking, like on Happy Days, but I’ve been punished for what I did for decades. I would feel closure to a horrible experience in my past and finally able to move forward without the anxiety of thinking that my conviction could be disclosed,” said Tim.

*Click here for a detailed statement from HRLC client “Tim”*

**Not his real name.*

## Erasing unfair convictions for gay men

*In 1977, long time gay rights activist Jamie Gardiner wrote a brief seeking expungement of homosexual convictions. Last week, he sat in Victoria’s parliament and watched it happen. Here he reflects on his decades long journey from campaigning for the decriminalization of homosexuality in the 1970’s to the challenges that reamin today.*

It was surreal. Robert Clark, Attorney-General in the LNP Coalition Government, was publicly acknowledging—as he introduced a Bill to expunge historical gay sex convictions—that they “should never have been a crime”. Known for his previous vehement opposition to LGBTI rights, the Attorney’s words suggested a remarkable, welcome reversal, both personally and for the government. So here I was, in the Speaker’s Gallery, listening to the implementation of a reform I first put forward almost forty years ago. It had been a long journey.

Although expungement has long been a goal, this final result has been quite quick. Many people have contributed.

I put expungement of old gay sex convictions on the agenda of the Attorney-General’s Advisory Committee on GLBTI Issues around 2001, but the other reforms sought by the LGBTI community were ranked ahead, each term. Many vital reforms were achieved, but the old convictions lingered on. In 2009 Dr Paula Gerber invited me to address her students about the protection of sexual minorities in human rights law. While surveying the journey I noted the lingering harm old convictions did to those persecuted under the past bad laws and prejudiced attitudes. Tom Anderson’s case, discussed in *Righting Historical Wrongs*, figured prominently.

The path to reform often depends on coincidences and quirky connections, and this may have been one. For it was Paula Gerber who noticed a small report of a UK omnibus reform in mid 2012 that included a measure to “disregard,” in their words, old gay sex offences. Following this up she published “Wiping the slate clean: historic convictions for gay sex must be expunged” in *The Conversation*, 26 September 2012. Her article quoted me on how the shadow cast by old conviction records:

> can have a cruel impact on the lives of older gay men prosecuted in the 1970s and before, for conduct which should never have been criminal, and has been legal for over three decades. It can unfairly constrain their employment options and the volunteer work they undertake. Criminal records for breaking bad laws should have been expunged long ago. Such discriminatory laws should not continue to poison the lives of many hundreds of gay and bisexual men.

She concluded: “Fundamental principles of justice, equality and human rights dictate that action be taken so as to remove any lingering stigma.”

With the issue gaining attention I raised it again with the ALP’s LGBTI Affairs policy committee as one that Labor should promise at the 2014 election. The committee agreed. Even before it could

go to Labor's 2013 Conference Opposition Leader Daniel Andrews agreed, and announced at Pride March that a Labor Government would implement this reform. "The pain and stigma of a criminal record has been a burden for many gay men for too long," Andrews said. "The time has come to clean the slate… "

Meanwhile, and independently, a constituent had urged Prahran MP Clem Newton-Brown to read Noel Tovey's memoir *Little Black Bastard*. Moved by the injustice of Tovey's teenage conviction for buggery, and the unfairness of his treatment, Newton-Brown announced he would seek to persuade his Liberal Party colleagues of the need for reform. A group of human rights and LGBTI organisations met with Newton-Brown, and offered to assist his quest.

It seemed quixotic. I recalled how difficult the Homosexual Law Reform Coalition's campaign against the offending laws had been in the late 1970s, even with the clear support of the Premier, R J (later Sir Rupert) Hamer, and his attorney-general Haddon Storey. Some nine Liberal MPs crossed the floor against their own Government – all but one National voted against – when the bill was voted on in 1980. (The Labor Opposition supported it unanimously.) I recalled how Liberal MLCs three times frustrated the Cain Government's attempts from 1983 to add sexual orientation to the *Equal Opportunity Act*. I recalled the strong currents of prejudice which several Liberal and National MPs still displayed in the 2000s. Still, ever optimistic, not to mention persistent, I agreed with the others we should give it a go.

Led by the Human Rights Law Centre's Anna Brown, and including Gay and Lesbian Health Victoria, the Victorian Gay & Lesbian Rights Lobby, the Victorian AIDS Council and Liberty Victoria, the group's offer led to the thorough consideration of the UK scheme to disregard old gay sex convictions, other overseas parallels, the history of laws against gay sex in Victoria, and the story of their abolition over 30 years ago, together with stories of affected individuals. By that time the HRLC was assisting a number of men affected by historical convictions. This research, published as *Righting Historical Wrongs*, resulted in detailed recommendations for an expungement scheme.

By the end of 2013 doubts were dissipating: Newton-Brown's efforts at persuasion might bear fruit. And so it proved. Premier Napthine announced at Midsumma Carnival that his government would legislate for expungement before the election. He invited Noel Tovey, the HRLC and the other groups to join him at Carnival for the announcement, and we were able to present the finalised report to him on the day. We were particularly pleased that the Premier acknowledged in our conversation the need for an apology, not just the legal formalities, and said, as his Attorney-General was to say again in September, that consensual sex between men "should never have been a crime".

Quite a journey, from my August 1975 jotting, "It would be desirable to expunge criminal records," on a UK Sexual Offences Bill draft! The Coalition, founded in 1976, included this idea in its equality campaign. In 1977 it proposed expungement to the Premier's Equal Opportunity Advisory Council. The EOAC agreed and included it in its report to Premier Hamer recommending removing laws against gay sex. That reform took three years to reach Parliament. Expungement, however, was to take another 34 years.

The Bill that Robert Clark introduced is good. It could be better. The journey continues.

***Jamie Gardiner*** *is Vice President at Liberty Victoria and a member of the HRLC board.*

## ASYLUM SEEKER & REFUGEE RIGHTS

### High Court hearing on lawfulness of high seas detention of 157 Tamils

Last week the High Court heard a challenge to the lawfulness of the Australian Government's detention of 157 Sri Lankan asylum seekers for almost a month on board a customs vessel.

As the Human Rights Law Centre's Executive Director Hugh de Kretser told the Australian, the case is critically important and could have significant implications for the Government's boat turn-back policy.

"157 people – including 50 children as young as one – were detained on the high seas for almost a month, initially in secret, while the Australian Government tried to send them to India. This case concerns fundamental issues of liberty, safety and due process," said Mr de Kretser.

During a two day hearing, the Full Court of the High Court heard submissions on behalf of the asylum seekers and the Government, and received written submissions from the United Nations Refugee Agency and the Australian Human Rights Commission.

As HRLC Director of Legal Advocacy Daniel Webb explained to ABC RN Breakfast and RN Drive, the key questions at the heart of the case focus on the scope of the Government's power to detain people at sea and send them elsewhere. In particular, the Court heard submissions on whether such powers needed to be exercised fairly and with proper consideration of individual protection claims and also whether they are limited by our international law obligations to not return people to harm.

The HRLC was part of the legal team in the case, which was brought by Shine Lawyers and led by Ron Merkel QC.

The lead plaintiff in the case, known as CPCF, is a Sri Lankan Tamil who fled to India with his wife and children after receiving death threats due to his involvement in politics. As Hugh de Kretser explained to Lateline, CPCF came to Australia seeking "an ordinary life somewhere safe", yet he was detained for a month at sea without the Government even asking a single question about his refugee claims.

While the High Court will ultimately assess the lawfulness of CPCF's treatment, the broader story of his attempt to reach Australia reveals much more about how our refugee policies are failing us, wrote Daniel Webb in the Guardian.

"The fundamental flaw in Australia's refugee policies is that they just give people who lack options one less", said Mr Webb.

The treatment of our clients was the latest in a sequence of cruel measures being used by the Government to deter boat arrivals.

As Hugh de Kretser explained to the ABC's 7:30 Report, "we're sacrificing our international reputation, we're sacrificing our foreign policy capital, all in this one-eyed obsession with saying that we've stopped the boats."

### Background information about the High Court case

**The Plaintiff – CPCF**

The lead plaintiff in the case, who for legal and safety reasons can only be identified as CPCF, is a Sri Lankan Tamil who fled to India with his wife and children after receiving death threats due to his involvement in politics.

"In Sri Lanka we lived a very terrible life. Authorities came to my house and beat me. They threatened to shoot me just for standing up for my political beliefs," CPCF said.

After fleeing to India, which is not a signatory to the *Refugee Convention*, CPCF and his family were unable to obtain legal status and were unable to work.

"In India we had no status. We couldn't register with the authorities because we had no legal right to be in that country. It was like we were hiding. We couldn't stay." he explained.

CPCF described his time detained at sea as "very difficult".

"There were women and children on the boat. There was even a pregnant woman. There were people who were sick and people who had heart problems. We all suffered a lot."

"I was locked in a room with 80 people. I was kept apart from my wife and children and was very worried about them", he said.

After a month of high seas detention, including an aborted plan to offload the asylum seekers into orange lifeboats and tell them to make their own way back to India, CPCF and others aboard the boat were brought to the Cocos Islands and then the Curtin Immigration Detention Centre. As lawyers were making arrangements to go and visit them to provide further advice, they were suddenly and secretively taken to Nauru.

They continue to be detained in Nauru, have not been given a timeframe for their processing and remain unsure as to if and where they will eventually be resettled.

"We are here in very bad conditions. We are still being put through hardship", said CPCF.

As for his hopes for the future, CPCF said "Our lives are in the hands of Australia and its leaders. We still hope they will give us a secure future. I just want to live an ordinary life with my family in safety."

**Key legal issues**

The High Court will decide whether the detention of CPCF was lawful. In doing so, the Court will examine:

- Whether the decision to detain CPCF and take CPCF to India needed to be made through a fair process which properly considered his personal circumstances;
- Whether CPCF could legally be detained for the purpose of taking him to India despite there being no agreement in place with India to take him there; and
- Whether the power to detain him and take him to some other place was limited by Australia's obligations under international law to not directly or indirectly return people to risks of serious harm.

The High Court hearing this week is called a Special Case. A Special Case is a way of stating legal questions for the Full Court of the High Court to decide. The parties have agreed on the facts considered necessary for the High Court to decide those questions.

Full transcripts of hearings that have already occurred in this case (the application for an injunction and various administrative hearings) as well as the parties' submissions for this Special Case are available here: http://www.hcourt.gov.au/cases/case_s169-2014

**Chronology**

- 157 Sri Lankan Tamil asylum seekers, including 50 children, left India in mid-June 2014. The majority of the group are Christians.

- On 26/27 June, the boat contacted the Australian Maritime Safety Authority and requested assistance.
- On around 28 June, people on board the boat contacted refugee advocates in Australia via satellite phone and said they were approaching Christmas Island and had engine trouble.
- On 29 June, the boat was intercepted by Australian authorities around 16 nautical miles from Christmas Island in the contiguous zone. The group was subsequently transferred to and detained on the Australian Customs ship the Ocean Protector.
- On 1 July, the National Security Committee of Cabinet decided that the asylum seekers should be taken to India. There was no agreement with India in place to accept the asylum seekers. The decision to take them to India was made by applying a blanket policy that anyone seeking to come to Australia by boat without a visa would be intercepted and removed from Australian waters. The Government originally claimed public interest immunity over the details of the decision.
- There was no individualised consideration in the decision to return the group to India. None of the 157 members of the group were asked why they left Sri Lanka, why they left India or whether or not they had safety fears if they were returned to Sri Lanka or India. They were not told where they were being taken or for how long they would be detained. They were not provided with any opportunity to say anything about where they were being taken. The group spoke Tamil. The crew on board the Ocean Protector did not use professional Tamil interpreters to communicate with the group. They relied on three members of the group who spoke some English to communicate with the entire group (when lawyers were allowed to speak to several members of the group on board the boat via a phone link, we provided our own professional interpreters to communicate with them).
- The High Court case was commenced on 7 July. The initial hearing was the first time the Australian Government publicly acknowledged the boat's existence and confirmed that the 157 people on the boat were in Australian custody.
- The first time the Australian Government confirmed that it did not intend to take the group to Sri Lanka was on 18 July but it did not state where they were being taken, other than that it was outside of Australia.
- While detained on the Ocean Protector, the asylum seekers were locked in three separate windowless rooms. Families were separated – fathers were placed in separate rooms from women and children and were only able to see their family 3 or 4 times during the on-water detention. They were only allowed out of the rooms for meals and spent at least 22 hours day inside the rooms. On a number of days they were locked in the windowless rooms for the entire day because the weather was rough.
- Other than in connection with the lifeboat incident (see below), the group did not know where they were or where they were going.
- The Ocean Protector travelled to India arriving near India on 10 July. It stayed near India for 12 days.
- On around Monday 14 July, 9 adults and 2 children were removed from the rest of the 157 in the group. The 9 adults were taken to a number of orange lifeboats and told that

they would be put in them and would need to navigate them to India. They were instructed in English how to use the lifeboats despite most of them not speaking English. They were told that each boat would have 50-60 people on it. When they refused, saying they had no experience in operating or navigating a boat and couldn't take responsibility for ensuring the safety of the people on board, the officers told them it was an Australian Government decision and they had to obey. The 9 adults and 2 children were then separately detained from rest of the group for four or five days. Each day they were extremely fearful of what was going to happen to them. Then they were taken back into the three main rooms and reunited with the rest of the group. The entire group then feared that they would be forced onto the lifeboats and dropped in the ocean. The Government eventually decided not to proceed with the lifeboat plan but has not disclosed why.

- The Government subsequently decided to take the group to Australia. They arrived at the Cocos Islands on 27 July and were then taken to Curtin Immigration Detention Centre.
- On the evening of 1 August, without notice, the group was taken overnight to Nauru where they continue to be detained. The group's lawyers were urgently requesting access to meet the group in person when they were transferred.

## TPVs just the tip of the iceberg in sweeping package of regressive changes to migration laws

**25 September 2014**

There is plenty of devil in the detail of the Immigration Minister's latest reforms, introduced into Federal Parliament.

Human Rights Law Centre Director of Legal Advocacy, Daniel Webb, said as well as reintroducing Temporary Protection Visas, the 'Migration and Maritime Powers Bill' also impacts on operations at sea, children of maritime arrivals born in Australia and the processing of the 30,000 asylum seekers who are part of the so-called "legacy caseload".

"The Minister has trumpeted the TPV issue. But that's just the tip of the iceberg. Lurking beneath the surface, today's Bill contains a suite of appalling reforms which impact on the way asylum seekers will be treated both here and at sea," said Mr Webb.

***Actions at sea***

The Bill seeks to amend the *Maritime Powers Act* to effectively say that nothing the Government does under that Act is invalid just because it violates international law or is in breach of natural justice principles. These amendments would have significant implications for boat interceptions and turn-backs.

"The Government is trying to give itself the power to do whatever it wants at sea. It's seeking to ensure it is completely unconstrained by international law and basic principles of justice and fairness", said Mr Webb.

"The Immigration Minister and Prime Minister have repeatedly assured the Australian people that everything they do at sea is consistent with international law. But if they truly believed they were complying with international law they wouldn't be trying to give themselves a license to breach it," said Mr Webb.

***Children of boat arrivals***

With retrospective effect, the Bill would also classify the children of boat arrivals who are born in Australia as "Unauthorised Maritime Arrivals".

"These children were born right here in Australian hospitals, yet the Bill seeks to classify them as unauthorised maritime arrivals and leave them liable to transfer offshore. Not only is that cruel, it's patently absurd," said Mr Webb.

"If these changes go ahead, some babies born in this country will be subject to mandatory detention and mandatory removal to Nauru as soon as possible," Mr Webb explained.

***Processing of claims***

The Bill introduces "rapid processing" and "streamlined review arrangements" for asylum seekers coming by boat, who will be denied the right to appeal to the Refugee Review Tribunal.

"Assessing a refugee claim can quite literally be a life or death decision. Abolishing proper appeal rights and rushing people through a heavily abbreviated process increases the risk getting it wrong," said Mr Webb.

## Opinion: 'Cambodia deal' is not about burden-sharing, its destructive burden-shifting

**26 September 2014**

The Cambodian Government has announced that our Immigration Minister, Scott Morrison, is headed to Phnom Penh to sign a refugee transfer deal on Friday.

That the deal is being signed is bad news for refugees. That we heard it first from one of the least transparent and most corrupt regimes in the region is bad news for our democracy.

Cambodia is a country with its own serious challenges. Hun Sun's Government is ranked as one of the most corrupt and least democratic in the world – 166th out of 177 in Transparency International's Corruption Perceptions Index. There are widespread reports of politically motivated violence and attacks on human rights defenders and journalists. About 20 percent of the population live below the poverty line.

Our own Government is pretty familiar with the human rights situation in Cambodia having recently condemned it at the United Nations. In January, Australia's representatives told the UN they were "concerned about restrictions on freedom of peaceful assembly and of association in Cambodia" and rebuked the Hun Sen regime for its "violence against protestors and the detention without trial of some protestors".

Cambodia has signed the *Refugee Convention* but has a poor record of complying with its terms. For instance, in 2009 Cambodia forcibly sent 20 Uighur asylum seekers back to China. Four were reportedly condemned to execution and the rest sentenced to more than 10 years in prison. The very next day, China's vice president arrived in Phnom Penh and signed investment deals reportedly worth $1.2 billion.

Of course, Morrison will provide assurances that Australia will work with Cambodia and that all the refugees he sends there will be able to get on with their lives in peace and security. But the deal isn't about allowing them to move on with their lives. If that were really the goal it'd be easier, and infinitely cheaper, to resettle them here.

The motivation behind sending people to Cambodia is the same as the motivation behind detaining them in camps on Nauru and Manus, turning back boats and denying permanent visas to the 30,000 people already – deterrence.

Cambodia will be an incredibly difficult place for refugees. And that's precisely the point.

While it now seems inevitable that the deal will go ahead, Morrison still refuses to reveal any of its terms. How many refugees will be sent to there? Will it be voluntary? Will they have legal advice before being whisked away? Will they be detained? How much will it cost the Australian taxpayer?

These are all reasonable questions. After all, in addition to the human rights of refugees, it's our tax dollars and international reputation that's at stake. Australians have a right to assess the financial and reputational costs before our Government signs up our behalf.

The deal also comes at a time when there are more refugees in the world now than there has been at any time since the end of WW2. The Syrian crisis alone has produced more than 3 million.

At this time of unprecedented global need, wealthy developed nations like Australia need to step up to the plate and share responsibility for refugee protection. Instead, we're shifting it to poverty stricken countries with appalling human rights records.

Of course, Australia should absolutely be working with countries in our region to develop their capacity to process and resettle refugees. In particular, Australia should work with transit countries like Indonesia and Malaysia to improve their capacity to host, process and then resettle refugees. That's what a real 'regional solution' would look like – one where we work multilaterally to ensure people who need protection can access it safely.

But the cart can't come before the horse. Cambodia does not – and will not for the foreseeable future – have the capacity to meet the basic needs of refugees. So it is simply irresponsible, short-sighted and cruel to dump people there.

Doing so also takes us further from the genuine regional solution that's needed. We can hardly lobby regional leaders to share responsibility while we continue to prowl around the region paying off poorer nations to help us shift it.

While Morrison will seek to paint the Cambodia deal as being about constructive burden-sharing, it's really about destructive burden-shifting. The deal is bad for refugees. The secrecy surrounding it is bad for our democracy. And the shirking of responsibility at its core is bad for our region.

***Daniel Webb** is Director of Legal Advocacy at the Human Rights Law Centre. He tweets @DanielHRLC*

## PNG Supreme Court set to hear appeal against Manus human rights inquiry

**18 September 2014**

The Supreme Court of Papua New Guinea will consider whether an important PNG National Court inquiry examining the lawfulness of the Manus Island detention centre should be allowed to resume.

Amnesty International, assisted by the Human Rights Law Centre, will make submissions to the Court that the inquiry – halted by a legal challenge funded by the Australian Government alleging apprehended bias on the part of the presiding judge – should recommence as soon as possible.

Human Rights Law Centre Director of Legal Advocacy, Daniel Webb, said that it was important and appropriate that the National Court of PNG be allowed to assess the lawfulness of what was taking place on PNG's territory.

"It's been 22 months since the first asylum seeker was transferred to Manus under these so-called 'processing and resettlement' arrangements. In that time, two asylum seekers have died and about 70 have been seriously injured, but not one has actually been processed and resettled. Over 1000 men are just languishing indefinitely in conditions the UN have said are inhumane," said Mr Webb.

"There are serious questions about whether what's happening on Manus breaches PNG human rights laws. The PNG National Court should be allowed to answer them," said Mr Webb.

Amnesty International's Pacific Researcher, Kate Schuetze, also emphasised the importance and appropriateness of the National Court inquiry.

"Amnesty International is the only independent non-government organisation to have publicly reported on conditions on Manus. The National Court case is an important opportunity to address the key human rights concerns raised in our report last year. We will be asking the Supreme Court to allow the inquiry to resume as soon as possible," said Ms Schuetze.

In March Mr Webb and Ms Schuetze inspected Australia's detention centre on Manus Island as part of the PNG National Court's inquiry.

## Incoming UN High Commissioner for Human Rights to rebuke Australia in maiden speech

**7 September 2014**

In his maiden speech to the United Nations Human Rights Council, the new United Nations High Commissioner for Human Rights, Mr Zeid Ra'ad Al Hussein, condemned Australia for violating the human rights of asylum seekers.

The speech describes Australia's policies of mandatory offshore detention and boat turnbacks as producing "a chain of human rights violations, including arbitrary detention and possible torture on return following return to home countries."

The Human Rights Law Centre's Director of Legal Advocacy, Daniel Webb, said it was embarrassing Australia's inhumane policies were listed in the speech alongside global human rights challenges like the ongoing conflict and humanitarian crises in Syria, Iraq and the Ukraine and the spread of Ebola in West Africa.

"In what will be his very first speech in this role at the United Nations, addressing the most serious human rights issues in the world right now, the new High Commissioner condemned Australia's treatment of asylum seekers. The speech goes to show the seriousness with which Australia's flagrant breaches of international law are regarded on the world stage," said Mr Webb.

Mr Webb said that both the current and former Governments' unlawful treatment of asylum seekers had clearly damaged Australia's international reputation – at a time when there are more displaced people in the world than since the end of the Second World War.

"At a time of unprecedented global need, successive Australian Governments have violated international law in selfish, short-sighted and politically motivated efforts to shift the problem. All that the Government's cruel and unlawful deterrence policies have achieved is to give vulnerable people who lack options one less option and to denigrate Australia's international standing in the process," said Mr Webb.

Mr Webb said Australia should be focusing on providing safe, alternative pathways to protection.

A copy of the speech can be found here.

## Australia's hasty return of Sri Lankan asylum seekers puts them at risk of torture, rape and other mistreatment

**30 September 2014**

In its rush to expel – via a sub-standard screening process – Sri Lankans who arrive in Australia by boat, Australia places those people at risk of torture, rape and ill treatment in Sri Lankan custody.

The Human Rights Law Centre has prepared a background briefing paper ahead of the screening of an SBS Dateline investigation highlighting how some failed asylum seekers returned to Sri Lanka by Australia have been abducted and abused by Sri Lankan security forces on their return.

Under international law, Australia cannot return a person to any place where they risk serious harm, including a risk of torture and cruel, inhuman and degrading treatment. Despite this, Australia uses a truncated, short-cut screening process for Sri Lankans that is designed to expedite the removal of asylum seekers and sidestep more rigorous processes for making refugee claims.

The HRLC's Director of Advocacy and Research, Emily Howie, said around 1250 Sri Lankans have been returned in the last two years.

"The Immigration Department should stop denying Sri Lankans the opportunity to use the proper processes to make claims for protection. By using a flimsy screening process, Australia is being extremely reckless and risks placing men, women and children directly in danger," said Ms Howie.'

The Background Briefing Paper details numerous reports of rape, torture and other serious ill-treatment of Sri Lankans who return home.

"The Sri Lankan security forces have a long and well-documented track record of torture and mistreatment in custody, including the rape of men and women. Australia is well aware of this track record, having raised it as a matter of concern at the UN in 2012," said Ms Howie.

Despite this, the Australian Government has no effective or open process for monitoring the wellbeing of Sri Lankans that are returned.

In a shocking case revealed through FOI documents, an AFP officer in Sri Lanka declined to interview a returnee who claimed he had been severely tortured.

"Australia cannot claim that no returnees have been harmed when it has no way of knowing whether that claim is true. If the government is serious about its protection obligations, firstly it should provide Sri Lankans with genuine, fair procedures to claim asylum and secondly, is should actively monitor and ensure the wellbeing of the people it returns," said Ms Howie.

The HRLC's background brief is available here.

Earlier this year, the HRLC published a comprehensive report on the human rights impacts of Australia's interception and return of Sri Lankan asylum seekers.

## Everyone should have the same right to appeal ASIO assessments

**1 September 2014**

Proposed amendments to the *ASIO Act* introduced into Federal Parliament would ensure that refugees indefinitely detained on the basis of ASIO security assessments would have the same right to appeal those assessments as everyone else.

The HRLC strongly supports the proposed changes, introduced by Andrew Wilkie MP, and a number of other groups including security chiefs, libertarians and the UN Human Rights Committee have also previously called for reform.

The HRLC's Director of Legal Advocacy, Daniel Webb, said that while Australian citizens and permanent residents can appeal ASIO decisions and have the right to a summary of the reasons for their negative assessment, refugees are currently denied both of those basic rights.

"There's no other context in Australian law where a person can be indefinitely detained on the basis of a secretive decision that's never explained to them and which they can't appeal," said Mr Webb.

While the appointment of an Independent Reviewer, retired Judge Margaret Stone, to review refugees' ASIO security assessments has provided some limited scrutiny and oversight, outcomes from the Stone review are not binding or enforceable. Further, it is a non-legislative process and refugees continue to be denied the legal right to information about the basis on which their negative assessment was made.

Mr Webb said the Stone review process was therefore inferior to the legally binding right of appeal open to non-refugees.

"We can appeal parking tickets and public transport fines in this country. Surely entire families who've been locked up for years should have the basic legal right to appeal the decision keeping them in detention."

There are currently 44 people indefinitely detained after being given adverse security assessments. The HRLC and leading law firm King & Wood Mallesons previously assisted a Sri Lankan man and his family who were detained for four years on the basis of an ASIO assessment that was subsequently reversed.

The man, a chicken farmer from the north of Sri Lanka, arrived in Australia in July 2009 after he and his family escaped the conflict in which both his father and brother were killed. They were quickly found to be refugees in need of protection, yet the family – including the man, his wife and their three young children – languished in detention for four years due to an adverse ASIO assessment.

Suddenly, on the eve of a High Court case testing the lawfulness of their treatment, ASIO revoked its negative assessment after a recommendation from the Stone review and the family was released.

"An entire family spent four years locked up on the basis of an ASIO decision that was subsequently reversed. If they had the same legal right to appeal ASIO assessments as everyone else in this country, perhaps they would have been released four years sooner and three young children wouldn't have spent their childhoods in immigration detention," said Mr Webb.

**Security chiefs, libertarians and the UN have all called for reform**

In 2007, the Inspector-General of Intelligence and Security, Ian Carnell, called for refugees to be given the same right to appeal ASIO assessments to the Administrative Appeals Tribunal (AAT) as everyone else.

In his 2006-2007 annual report, Mr Carnell wrote, "My predecessor had recommended that the legislation be changed to provide for AAT review for refugee applicants… This was not taken up at the time but I think it would be worthwhile revisiting the proposal. The number would be very small (hence cost should not be a barrier) and there would be greater public assurance that a sensitive group of cases have been carefully examined."

Chris Berg, Policy Director at the Institute of Public Affairs, has described indefinitely detaining refugees on the basis of secretive and non-reviewable decisions as "fundamentally and egregiously illiberal".

"The issue here is not simply about justice for the 50-odd refugees stuck in this administrative black hole. By not implementing a right for refugees (or their security-cleared advocates, or a tribunal) to question the merits of individual cases, we have, by accident, established a system where we literally lock people away forever just because somebody at ASIO 'reckons'. It's hard to imagine anything more illiberal," says Berg.

In August 2013, the UN Human Rights Committee delivered a decision in which it found Australia had committed 143 serious violations of international law by indefinitely detaining 46 refugees on the basis of secretive and non-reviewable ASIO assessments. The UN asked Australia to report back within 180 days on steps taken to ensure such injustices never happen again.

One year on, Australia still hasn't responded to the UN judgement.

Mr Webb said the Government could no longer ignore the clear need for reform and urged it to support the new Bill.

"Security chiefs, libertarians, the UN and human rights lawyers have all highlighted the urgent need for the law to be changed," said Mr Webb.

"This Bill doesn't require that anyone be released from detention. Nor does it limit the important role ASIO plays in protecting national security. It simply ensures all people have the same basic right to appeal ASIO security assessments and to a summary of the basis on which it was made," said Mr Webb.

"It is a simple but urgently needed reform."

## OPINION

### The flaw in Australia's deterrence-based asylum policies: they just give people who lack options one less

**This piece first appeared in The Guardian Australia – 14 October 2014**

In July this year 157 Tamil asylum seekers, including 50 children and a heavily pregnant woman, spent a month detained on an Australian customs ship. While the high court of Australia will this week consider the lawfulness of their treatment, the broader story of their attempt to reach Australia reveals much more about how our refugee policies are failing us.

The lead plaintiff in the case, who for legal and safety reasons can only be identified as CPCF, is a Sri Lankan Tamil who initially fled to India before trying to reach Australia.

While we shouldn't necessarily assume that everyone on the boat with CPCF genuinely needed Australia's protection, it was absolutely wrong for the government to assume they didn't and to seek to send them straight back. The only way to ever know for sure is to properly, fairly and individually assess claims.

CPCF fled Sri Lanka after receiving death threats from his involvement in politics. He was beaten inside his own home and told he would be shot, so he and his young family escaped to India.

India is not a signatory to the refugee convention. It does have a decent history over the last few decades of protecting Tamils fleeing Sri Lanka, but more recently others have been less fortunate. CPCF and his family were unable to obtain legal status in India, they did not have freedom of movement and they were unable to work. India did provide them with a short-term solution – a temporary reprieve from imminent danger – but it gave them no status, no future and no guarantee they wouldn't one day be returned to harm. So they boarded a boat and headed to Australia.

They were within sight of Christmas Island when their boat was intercepted. Those on board were transferred to an Australian customs ship, the Ocean Protector, where they were locked for at least 22 hours per day in windowless rooms. CPCF was held in a room with 80 other men, separated from his wife and children from 29 June to 27 July this year.

Meanwhile the immigration minister Scott Morrison headed to India, armed with autographed cricket bats, in an unsuccessful attempt to negotiate the group's return. A plan was also made to dump the entire group in orange lifeboats to make their own way back to India – a plan fundamentally at odds with the government's espoused concern for safety at sea.

After almost a month of not knowing where or when they'd be offloaded, the 157 were finally brought to Australia. Our legal team was arranging to go and visit them at Curtin detention centre when all 157 were suddenly and secretively taken to Nauru.

CPCF and his family remain detained in the Nauru camp. Their penalty for coming by boat is harsh and indeterminate. Ultimately, with no safety in Sri Lanka and no future or legal status in India, CPCF was trapped between a rock and a hard place.

Therein lies the fundamental flaw in Australia's deterrence-based asylum policies – they just give people who lack options one less. The real issue is that there are over 10 million refugees in the world, the overwhelming majority of whom lack a safe and viable pathway to protection. Boat arrivals and deaths at sea are the visible symptoms of this underlying problem.

It's an incredibly difficult problem to solve and Australia can't do it alone. But intercepting and returning those seeking to come, violating the basic rights of those who arrive and slashing our humanitarian intake by 6250 places doesn't help.

What would help is working with countries in our region to improve their capacity to host, process and resettle refugees. Not paying billions to warehouse asylum seekers in inhumane and unsafe conditions on Nauru and Manus Island. Not dumping refugees in Cambodia, a poverty-stricken nation with poor human rights record. But working with the United Nations refugee agency and transit countries like Indonesia, Malaysia and indeed India to improve local conditions for asylum seekers and develop their capacity to process and resettle them.

Australia also needs to shoulder a much greater share of the global protection burden. We currently host a tiny 0.3% of the world's refugees, ranking us 67th relative to our population and 74th relative to our wealth. We can and should take more.

Improving conditions in transit countries, increasing our own intake and urging those with the capacity to do the same will help to reduce the need for people like CPCF to get on boats. In the meantime, everyone arriving should have their claims properly, fairly and individually assessed.

Harsher deterrence measures don't help resolve the underlying predicament faced by people like CPCF and his family. What they really need is due process and a safe pathway to protection.

Australian policy is moving in the wrong direction on both fronts.

***Daniel Webb*** *is Director of Legal Advocacy at the Human Rights Law Centre. He tweets @DanielHRLC*

## COUNTER-TERRORISM LAWS

### Extraordinary changes to counter-terrorism laws encroach on fundamental human rights

**6 October 2014**

The most significant changes to Australia's counter-terrorism laws in over a decade proposed under the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 are extraordinary in nature and encroach on fundamental human rights, the Human Rights Law Centre has said in a submission to the Parliamentary Joint Committee on Intelligence and Security on its review of the Bill.

A major focus of the HRLC's submission is the proposed 10-year extension of the sunset clauses which currently apply to Australia's four main counter-terrorism regimes: control orders, preventative detention orders, stop, search and seizure powers, and ASIO's questioning and detention warrants.

The HRLC's Director of Advocacy and Research, Emily Howie, said that it is neither appropriate nor necessary for these regimes to be reviewed in a rushed manner.

"A proper public debate on the necessity of the existing counter-terrorism regimes and their restrictions on fundamental human rights is needed," Ms Howie said. "There is sufficient time under the existing sunset clauses for law enforcement officials to adequately address any potential threat to Australia's national security."

The HRLC's submission also expressed concern over potential violations to the right to a fair trial and the right to freedom of expression under new offences to be introduced under the Bill.

A new offence of travelling to a declared terrorist area without a legitimate purpose effectively reverses the onus of proof, thereby limiting the presumption of innocence. Another new offence for advocating terrorism is cast in very broad terms and threatens to restrict legitimate expressions of free speech.

The Bill also seeks to control the movement of people who are deemed by ASIO to be a potential security threat to Australia. Passports and other travel documents may be suspended or seized, and visas cancelled without notice.

"The proposed new powers with respect to passports and visas disproportionately restrict the right to freedom of movement in circumstances where ASIO requires very little evidence that a person poses a threat to Australia's national security," Ms Howie said.

The HRLC is concerned by the expedited timetable that the government is pursuing with respect to the new counter-terrorism laws, particularly given their extraordinary nature and encroachment on fundamental human rights.

The Bill was introduced into the Senate on 24 September 2014, with submissions to the Committee due less than ten days later on 3 October 2014.

A copy of the HRLC's submission is available here.

## 40 organisations urge Government to allow further scrutiny of Foreign Fighters Bill

**16 October 2014**

A broad coalition of Australia's leading academics, media, human rights, legal and migrant organisations have called on the Australian Government to delay the passage of its proposed anti-terror laws to allow more comprehensive scrutiny of the legislation.

In a joint statement coordinated by the Human Rights Law Centre and Amnesty International Australia and delivered to Attorney-General George Brandis, the 40-plus organisations highlighted major concerns with the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, which the Government is currently attempting to rush through Parliament. The diverse range of groups and individuals rejected the Government's claim that the Bill is compatible with Australia's human rights obligations.

The Human Rights Law Centre's Director of Advocacy and Research, Emily Howie, said the Bill was lacking in human rights protections.

"When protecting Australia's citizens from possible threats posed by groups such as the Islamic State, the Government should uphold the values and democratic traditions it's trying to defend. It needs to ensure that any protection measures are consistent with international human rights standards," said Ms Howie.

Professor George Williams, AO, University of New South Wales, said the Government had not demonstrated why it was so necessary to pass the Bill without allowing proper time for MPs and the public to debate the new laws.

"Given some aspects of the Bill are not associated with addressing the threat posed by foreign fighters, and can therefore not be deemed urgent, the Government needs to fully explain why all of these changes are necessary," Professor Williams said.

Amnesty International Australia Senior Legal Affairs spokesperson Katie Wood said the Government had allowed just eight business days for the public to comment on the proposed laws.

"We are calling for comprehensive public consultation to be carried out on the necessity of the laws and to ensure they comply with Australia's domestic and international human rights obligations," Ms Wood said.

All submissions on the Foreign Fighters Bill, including those from the Human Rights Law Centre, Amnesty International Australia and other signatories to the joint statement, can be viewed here.

A copy of the joint statement is available here.

## ABORIGINAL AND TORRES STRAIT ISLANDER INCARCERATION

### New stats reveal that Aboriginal and Torres Strait Islander women are one of the most incarcerated groups in the world

**16 September 2014**

The Australian Bureau of Statistics released figures showing that Australia now imprisons 18 per cent more Aboriginal and Torres Strait Islander women than it did 12 months ago.

The Human Rights Law Centre's Senior Lawyer, Ruth Barson, said the increase was particularly concerning given Aboriginal and Torres Strait Islander women are already the fastest growing prisoner demographic in Australia.

"Aboriginal and Torres Strait Islander women comprise just two per cent of the general population, yet over one third of the prison population. Clearly, our criminal justice systems are having a disproportionate impact on Aboriginal women and we need to address why the system is producing such discriminatory results when it comes to race and gender," said Ms Barson.

Aboriginal and Torres Strait Islander women have specific rights under the UN Convention on the Elimination of Discrimination Against Women and also under the UN Declaration on the Rights of Indigenous Peoples. Australia should be doing as much as it can to provide for the rights of Aboriginal and Torres Strait women – including rights to non-discrimination, to equality before the law, and to self-determination – not ignoring them.

Ms Barson said that most imprisoned women are victims of sexual or physical violence themselves, and as a consequence might also have drug and alcohol problems, experience homelessness or have mental health issues.

"We should not be penalising vulnerability. Prison isn't a solution to these problems and shouldn't be our default option. Vulnerable and marginalised Aboriginal and Torres Strait Islander women need culturally and gender specific support in the community so they don't get caught up in the criminal justice system," said Ms Barson.

The Deputy Chair of the National Aboriginal and Torres Strait Islander Legal Services, Priscilla Collins, said in addition to being far more expensive than early intervention programs, incarcerating women is also more likely to have long-lasting, negative flow-on effects for Aboriginal and Torres Strait Islander families and communities, given many women are also the primary carers of young children.

"The current system clearly isn't working. Australia needs a smarter approach that acknowledges the unique socio-economic reasons that these women come into contact with the criminal justice system in the first instance. Investing in early intervention strategies and tackling the root problems will yield better and fairer results, and these statistics are a wakeup call to governments at all levels to get serious about such programs," said Ms Collins.

The Convenor of the National Aboriginal Family Violence Prevention and Legal Services (FVPLS) Forum, Antoinette Braybrook, said that despite increasing need, the services had recently been hit by significant Government funding cuts.

"In comparison with other Australian women, Aboriginal and Torres Strait Islander women are 31 times more likely to be hospitalised and 10 times more likely to die as a result of violent assault. A recent NSW study found that more than 80% of Aboriginal women prisoners surveyed reported abuse and family violence as a direct contributor to their criminal offending."

"Family violence is the key root cause of Aboriginal women's imprisonment and the removal of Aboriginal children from their families. Governments want to be tough on crime but they fail to invest in early intervention and prevention and access to legal representation for victim-survivors of family violence – things that we know reduce the vulnerability of Aboriginal women," said Ms Braybrook.

Ms Barson said the Australian Government has slashed funding across the board for Aboriginal and Torres Strait Islander legal services at a time of increasing need.

"We cannot ignore the specific needs and situations of Aboriginal and Torres Strait Islander women. We should be building the capacity of culturally specific women's organisations, not dismantling them," said Ms Barson.

## Complaint UN alerted to Australia's over-imprisonment of Aboriginal and Torres Strait Islander peoples

**18 September 2014**

The United Nation's Human Rights Council – the world's peak human rights body – has been alerted to Australia's rapidly increasing imprisonment rates of Aboriginal and Torres Strait Islander peoples.

The Human Rights Law Centre has lodged a statement to the 27th session of the Human Rights Council currently underway in Geneva calling on the Council to urge Australia to take effective steps to address the social crisis of Aboriginal and Torres Strait Islander peoples' high imprisonment rates.

The HRLC's Senior Lawyer, Ruth Barson, said successive Australian governments have failed to address the socio-economic reasons that lead to a disproportionate number of Aboriginal and Torres Strait Islander people being caught up in the criminal justice system.

"Aboriginal and Torres Strait Islander people are one of the most incarcerated groups in the world and statistics released just last week highlight, not just the depth of the problem, but that it is getting worse," said Ms Barson.

Statistics released by the Australian Bureau of Statistics last week show that Aboriginal and Torres Strait Islander peoples' imprisonment increased 10% in just one year, contributing to an 86% rise across the last decade. Figures from 2013 show that Aboriginal and Torres Strait Islander peoples are 15 times more like to be in prison than other Australians.

"Successive Federal, state and territory governments have failed to tackle the underlying problems, such as over-crowded housing; high rates of family violence; unemployment; and lack of education opportunities. Fixing these problems will make communities safer and cut imprisonment rates. Unfortunately, governments seem keener to chase quick fixes and harsher punishment policies that are often costly, harmful and ineffective," said Ms Barson.

Australia is due to be reviewed by the Human Rights Council next year as part of a four yearly process known as the Universal Periodic Review. Australia is also preparing to campaign for a seat on the Human Rights Council in 2018.

"Given Australia wants to join the Human Rights Council, it should work to improve its own human rights record by funding and implementing what we know will work to make communities safer and reduce the appalling number of Aboriginal and Torres Strait Islander people being locked up and removed from family, community and culture," said Ms Barson.

The statement also raises the ongoing issue of Aboriginal deaths in custody, and the failure of governments to fully implement the recommendations made in 1991 by the Royal Commission into Aboriginal Deaths in Custody.

“That a 22 year old West Australian Aboriginal woman recently died in a police watch house after being detained for unpaid fines is a tragedy that was surely avoidable, and it is right that Australia be scrutinized at the UN for allowing things like this to happen. Our system isn’t working and it needs to be fixed,” said Ms Barson.

The statement asks the Human Rights Council to urge Australia to commit to ongoing funding for essential, culturally relevant services; and to develop ‘justice targets’ to reduce the over-imprisonment of Aboriginal and Torres Strait Islander peoples.

Ms Barson also said that ‘justice reinvestment’ approaches to tackling crime – which redirect prison spending to community-based initiatives that reduce crime and strengthen communities – are producing encouraging results in the USA and should be adopted in Australia.

## Joint Statement: Berrimah Prison is not good enough for Territory’s most vulnerable kids

**5 October 2014**

*The HRLC is one of twelve organisations to sign a joint statement calling on the Northern Territory Government to rethink their proposal to lock up young people in a run-down jail, deemed unfit for adults. The Northern Territory is one of the only jurisdictions in Australia to have increasing youth detention rates. Almost all of the young people in detention in the Northern Territory are Aboriginal, and many come from disadvantaged backgrounds including being exposed to drug and alcohol misuse, violence, and neglect.*

*The Human Rights Law Centre’s Senior Lawyer, Ruth Barson, said that vulnerable Aboriginal young people should be diverted from the criminal justice system.*

*“If they are detained as a matter of last resort, then the detention facility they are housed in should be age-appropriate and culturally relevant. The current proposal is to transfer young people to the most run-down areas of the Berrimah prison – a 30 year old prison deemed ‘only fit for a bulldozer’ by the Northern Territory Corrections Commissioner. No number of coats of paint can bring Berrimah up to scratch as it is totally inappropriate to house young people. The NT Government should properly invest in early intervention and diversion programs, and purpose-built youth justice facilities,” said Ms Barson.*

**Statement:**

We call for urgent action from the Northern Territory Government to improve youth detention facilities and commission a purpose-built youth detention facility.

We are extremely concerned that children and young people in the Northern Territory are being subjected to unsafe, developmentally inappropriate detention that contravenes National and International protocols.

In August 2014, six youths allegedly involved in a ‘riot’ were subjected to tear gas, then removed from Darwin’s Don Dale Youth Detention Centre to the punishment unit of Darwin Correctional Centre (‘Berrimah’).

The boys are aged between 14 and 16. Amnesty International called for an independent investigation into the incident and there have been indications that the Northern Territory's Children's Commissioner, Dr Howard Bath is investigating.

Since that time, the Northern Territory Government announced that the Don Dale centre would be immediately closed and all youths in detention moved first to the Complex Behaviours Unit at the new Darwin Correctional Precinct, and when adult prisoners were moved to the new prison, to Berrimah Prison.

On 13 and 14 September 2014, five youths allegedly damaged cells in the new Complex Behaviours Unit, with some also getting onto the roof of the facility. These youths were then transferred to the maximum security unit until the damaged areas were repaired.

***Berrimah Prison***

At a coronial inquest in 2011, the Commissioner of Northern Territory Correctional Services, Ken Middlebrook said that Berrimah prison was so run down that it should be bulldozed.[1]

Amnesty International's Rodney Dillon urged that Berrimah Prison not be used as a youth detention centre: "Berrimah's not child-appropriate. If we're genuinely interested in helping kids with repeat offending, putting them in an old run-down jail, no matter what the refurbishment, won't solve any problems".

The move to Berrimah Prison will only exacerbate the current problems in youth detention.

The Northern Territory Government has committed to spend $800,000 to upgrade the Berrimah Prison facility.

At the same time, the Northern Territory Government recently announced that it will spend $5 million to refurbish the Living Skills section of Berrimah Prison to be fit for purpose for adults undertaking mandatory alcohol rehabilitation (NT News, 18 September 2014).

Spending $800,000 to refurbish Berrimah will include painting, installation of CCTV and some additional internal fencing, and removal of grills and bars to 'soften' the buildings.

These refits will not change the fact that Berrimah was a place no longer acceptable to house adults – so how can it be considered acceptable to house our most vulnerable young people?

Berrimah was formerly known for overcrowding, oppressive conditions and cultural inappropriateness. We therefore question its suitability as a site to safely and adequately meet the emotional and mental wellbeing of young people.

The Australasian Juvenile Justice Standards (AJJA) sets out national juvenile justice standards. These standards are linked to state and territory legislation and take into account the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, the United Nations Standard Minimum Rules for Non-Custodial measures and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

The Standards include infrastructure guidelines to ensure age-appropriate youth justice services and resources that support safe, secure and positive environments for staff and young people, that promote rehabilitation and ensure that critical incidents are managed using the least intrusive developmentally appropriate options.

An adult prison 'fit for a bulldozer' is just not good enough for the Territory's most vulnerable kids.

We call upon the Northern Territory Government to urgently:

- establish purpose-built detention facilities in Darwin and Alice Springs for the Northern Territory's most vulnerable children and young people, or, alternatively, properly invest to upgrade existing youth detention centres to acceptable contemporary standards;
- reduce the number of Aboriginal young people exposed to youth detention by: improving the availability of diversionary and non-custodial options for dealing with young offenders, and reviewing punitive bail laws and increasing supported bail accommodation;
- establish an Independent Custodial Inspector (such as exists in Western Australia) who has unfettered access to youth detention centres to ensure national and International standards are being complied with.

**Signatories:**

- Aboriginal Medical Services Alliance Northern Territory (AMSANT)
- Amnesty International
- Anglicare NT
- Balunu Foundation
- Central Australian Aboriginal Legal Aid Service (CAALAS)
- Criminal Lawyers Association of the Northern Territory (CLANT)
- Danila Dilba Health Service
- Human Rights Law Centre
- North Australian Aboriginal Justice Agency (NAAJA)
- Northern Territory Council of Social Services (NTCOSS)
- Secretariat of National Aboriginal and Islander Child Care (SNAICC)
- YWCA of Darwin

## OPINION

### Punishing disadvantage will only exacerbate Indigenous over-imprisonment

*What will it take for Aboriginal and Torres Strait Islander peoples' over-imprisonment trajectory to change, asks the HRLC's Ruth Barson.*

Aboriginal and Torres Strait Islander women are the fastest growing prisoner demographic in Australia. Last month, the Australian Bureau of Statistics showed us that in the past 12 months alone, Aboriginal and Torres Strait Islander women's imprisonment rates have gone up 18 per cent. While Aboriginal and Torres Strait Islander women comprise just two per cent of the general population, they now make up around one third of the women's prison population.

We've known for a long time that this is a problem. We've also known for a long time that Aboriginal and Torres Strait Islander women are more likely to be victims of sexual and physical violence and family violence. They are also less likely to have access to education or employment, are more likely to have their children removed, and are more likely to live in over-crowded housing.

Like imprisonment rates, these problems are largely getting worse. This is unsurprising given there is a cycle of poverty related to imprisonment. By removing women from their families, communities and culture, prison is likely to compound these factors.

Last month the Prime Minister spent time in Yirrkala, a Yolngu community in the North East of the Northern Territory. The Northern Territory locks up more people per capita than any other state or territory: their incarceration rates more closely resemble the United States and are among the highest in the world. Around 85 per cent of the Northern Territory's adult, and around 95 per cent of the youth prison populations are Aboriginal. Shockingly, the Northern Territory Government recently announced plans to detain young people in the worst parts of Berrimah Prison – a prison built around 30 years ago; considered unsuitable for adults; and deemed only fit for a bulldozer by the Northern Territory Corrections Commissioner. During his time on community, the Prime Minister no doubt heard about the detriment caused to community and culture by high imprisonment rates and poor prison facilities.

Likewise, last month the United Nations Human Rights Council in Geneva – the world's peak human rights forum – heard about Australia's appalling record when it comes to the over-imprisonment of Aboriginal and Torres Strait Islander peoples. Indeed, the UN and its member states have condemned Australia before, in no uncertain terms, for the poor rights protections afforded to Aboriginal and Torres Strait Islander peoples.

Clearly, Australia's current system isn't working and hasn't done so for a long time.

Despite this, the Federal Government has recently announced significant funding cuts to the Aboriginal Legal Services, and to the Aboriginal Family Violence Prevention Legal Services. The former is the only nationwide culturally specific legal service providing criminal, civil and family law representation, and legal education services; and the latter is the only nationwide culturally and gender specific legal service providing family law and family violence related legal assistance, in addition to community legal education. Both play different yet critically important roles in ensuring Aboriginal and Torres Strait Islander people have equal access to justice.

Funding cuts will mean less services for the most marginalised of communities; less time with the most vulnerable of people; and less opportunities to address the underlying reasons many Aboriginal and Torres Strait Islander peoples get caught up in the criminal justice system in the first place.

While these services alone are not enough to address over-imprisonment, they are a critical component of the solution. Importantly, the philosophy upon which they are based: self-determination; Aboriginal community ownership and inclusion in service provision; strong community support; and high levels of cultural competence, should inform all other responses to the social crisis of over-imprisonment. In other words, we should be building the capacity of culturally specific services, not dismantling them.

Equally, just as the reasons for growing imprisonment rates are complex, so too are the solutions. While it would be misguided to suggest that there is a silver bullet, we do know that some things work. Koori Courts in Victoria, for example, have had numerous positive evaluations, whilst specialist, therapeutic courts like drug courts have worked in many jurisdictions across Australia.

Using restorative justice conferencing – a mediated, structured conference between the victim and the offender – has proven so effective in New Zealand, that it is due to be introduced as an option in most courts across the country. Similarly, in the United States, justice reinvestment – which involves channeling funds from prisons to community based services aimed at addressing

the underlying causes of offending – has a proven track record at significantly reducing imprisonment rates in notoriously punitive states such as Texas.

Although none of these solutions can be applied to Aboriginal and Torres Strait Islander communities in a cookie-cutter fashion, and while all will require substantial community consultation and buy-in to ensure cultural compatibility, they do provide a strong foundation from which over-imprisonment and the associated social issues can begin to be addressed. Indeed, the evidence suggests that such tools will work to both keep communities safe and reduce imprisonment rates – numerous Government reports have even said as much.

So given we know what works, and given there is international pressure and growing Australian public concern for respecting the rights of Aboriginal and Torres Strait Islander peoples, what will it take for this imprisonment trajectory to change course?

Shane Duffy, the Chair of the National Aboriginal and Torres Strait Islander Legal Services, says that all Australian governments must seize the opportunity to provide the necessary leadership that it will take to address the complex issues at play. In developing effective responses Governments must demonstrate respect for Aboriginal and Torres Strait Islander communities and organisations, and proper commitment to investment in early intervention strategies that tackle the root causes of peoples' contact with the criminal justice system.

In short, we need a significant policy shift within all Australian governments that looks to stop imprisoning, and to start addressing, disadvantage.

***Ruth Barson** is a Senior Lawyer at the Human Rights Law Centre. She's on twitter @RuthHRLC*

## SEXUAL MINORITIES

### Top UN human rights body condemns violence and discrimination on the basis of sexual orientation and gender identity

**September 26, 2014**

The United Nations Human Rights Council has adopted a landmark resolution on combating violence and discrimination based on sexual orientation and gender identity. The HRLC's Directory of Advocacy, Anna Brown, was present in Geneva and worked together with advocates on the passage of resolution.

"This is a modest but crucially important step towards building an international consensus on the rights of lesbian, gay, bisexual, transgender and intersex people and ensuring sustained and systematic attention on these issues," said Ms Brown.

"In the same way that the Council's work on other areas has developed, this resolution can be built on in the future and hopefully eventually we will achieve a stronger mechanism to report on and investigate violations on the basis of sexual orientation and gender identity on an ongoing basis."

In June 2011 a resolution co-sponsored by South Africa and Brazil was the first resolution of the Council to address SOGI issues. Over three years later, Brazil, Chile, Colombia, Uruguay, and 42 additional co-sponsors introduced this follow up resolution. In its presentation to the Council, Chile stated that "this resolution does not seek to create new rights…there are some whose rights are more violated and need more protection." Colombia added "the report that we request is part of existing international law." The resolution survived a total of seven hostile amendments,

introduced by Egypt on behalf of ten States, seeking to strip the resolution of all references to sexual orientation and gender identity. Brazil stated that the proposed amendments would "seek to radically change the purpose and focus of the resolution and changes its substance."

Ultimately, the resolution was passed by a vote of 25 in favour, 14 against, and 7 abstentions, with support from all regions and an increased base of support since 2011.

"The leadership of these Latin American states reflects strong commitment to human rights for all and follows the significant progress that is being made by governments and lesbian, gay, bisexual, transgender, transsexual, travesti, and intersex activists in the region, " said Andres Rivera Duarte from the Observatorio Derechos Humanos y Legislación, Chile.

The resolution asks the High Commissioner for Human Rights to update a 2012 study on violence and discrimination on the basis of sexual orientation and gender identity (A/HRC/19/41), with a view to sharing good practices and ways to overcome violence and discrimination.
The resolution expresses grave concern at acts of violence and discrimination in all regions of the world committed against individuals because of their sexual orientation and gender identity. This resolution demonstrates that this issue remains on the agenda of the Human Rights Council and sends a message of support to people around the world who experience this type of violence and discrimination, said the 25 groups.

"While we would have preferred to see an institutionalized reporting mechanism, the council has still sent a strong message of support to human rights defenders working on these issues. We look forward to States implementing the outcomes of these reports," said Jonas Bagas, of TLF Share in the Philippines.

Advocates welcomed supportive remarks made by the newly appointed UN High Commissioner for Human Rights earlier in the Council session. "There is no justification ever, for the degrading, the debasing or the exploitation of other human beings – on whatever basis: nationality, race, ethnicity, religion, gender, sexual orientation, disability, age or caste," said Zeid Ra'ad Al Hussein. These comments follow on ground-breaking work by his predecessor, Navi Pillay, and UN Secretary General, Ban Ki-Moon, on issues of sexual orientation and gender identity.

"This pattern of human rights violations is global in nature, and therefore requires a global response. In all regions of the world, including in Europe, discrimination and violence on the grounds of sexual orientation and gender identity are a daily reality for many," said Nori Spauwen from COC Netherlands. "The Human Rights Council resolution is a significant moment for global LGBTI movements, and for people around the world who have worked tirelessly for human rights for everyone," said Monica Tabengwa, LGBT rights researcher and an ILGA Board Member, Kenya. "We intend to press the Council to keep these concerns atop its agenda, and ensure sustained attention and action."

Ms Brown welcomed the constructive role that Australia was playing in relation to the resolution. "We're pleased to see Australia co-sponsoring this resolution and taking an active role to assist its passage through the council. We strongly encourage the Government to continue its promotion of LGBTI rights internationally," said Ms Brown.

Ms Brown said the efforts of the UN Human Rights Council would help LGBTI people everywhere across the globe, including Australia.

"In Australia, sexual minorities experience significantly poorer mental health outcomes and face high levels of discrimination, harassment, abuse and hate crime. The time has come for lesbian, gay, bisexual, transgender and intersex people to be afforded the dignity and rights that we are entitled to as human beings," said Ms Brown.

For a copy of the resolution please click here.

For a copy of a statement delivered by Anna Brown to the Human Rights Council please click here.

## The time has come

*The HRLC's Anna Brown reports on her recent advocacy work in Geneva and the passage of the cruciall-important resolution on sexual orientation and gender identity by the UN Human Rights Council.*

"Expressing grave concern at acts of violence and discrimination committed on the basis of sexual orientation and gender identity". Such concern would hardly be controversial in Australia but to states such as Egypt, Saudi Arabia, Pakistan and Russia these words spell the beginning of the end, a slippery slope towards creating "special rights" that pose a threat to their cultural, religious and political values.

Hence the reason I found myself in sunny Geneva at a meeting of the world's human rights parliament this September, with a bunch of other lesbian, gay, bisexual, transgender and intersex activists from around the world. It was crunch time. A number of resolutions were to be put to the vote, including an all-important resolution entitled "Human Rights, Sexual Orientation and Gender Identity (SOGI)".

This was only the second time a resolution on sexual orientation and gender identity had been presented to the UN Human Rights Council. The first resolution in 2011 was, in some respects, a fortunate accident of history. Since that time, supporters of LGBTI rights have been working to get these issues on the Council agenda for sustained and systemic attention, in the same way that racism, women's rights and other issues are reported on, debated and discussed on an ongoing basis.

The leadership of any initiative on SOGI issues is very important, to avoid the risk of these issues somehow being viewed as part of a purely Global North agenda. Finally, more than three years after the 2011 resolution, Latin America provided the answer. Brazil, Chile, Columbia and Uruguay stood up to the plate and presented this second SOGI resolution, with help and support from many other like-minded countries around the world, including Australia.

By the time I arrived in Geneva there had been a steady stream of LGBTI activists treading the floorboards of the Palais des Nations in the two weeks prior. In Aussie rules football terms we were flooding the forward fifty. Our job? Convincing a majority of the 47 member states of the Council to vote in favour of the resolution. Led by our expert colleagues in Geneva-based NGOs that specialize in HRC advocacy, we worked closely with friendly states in Geneva and activists on the ground in capital cities to lobby and influence states. We worked to stave off hostile amendments to the wording of the resolution and ultimately to secure a majority of votes in favour of its adoption. A conversation in a hall way, a well-timed email to an embassy office, an article appearing in papers back home – any of these could mean the difference in shifting a "no" vote to an abstention or an abstention to a "yes". We also made formal written and oral statements to the Council, reminding states that the world was watching and they had a duty to act and help those around the world suffering persecution simply because of who they love or who they are.

It was both inspiring and humbling for me to work with incredible activists from around the world – from gay men in the Philippines and Thailand, to lesbians from Kenya and South Africa, to trans men from Chile. Our level of collaboration and camaraderie was matched only by the depth of our shared commitment. And the hard work paid off. When a record majority of states voted in favour

of the resolution, you could feel the emotion in the room. We cried with happiness, we hugged (each other and every friendly diplomat in sight) and, naturally, danced up an international storm until we got on our planes back home. For those of us lucky enough to be part of this moment of history it was an unforgettable experience, but just one step towards achieving equality for our communities globally. In other words, watch this space.

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

## TORTURE AND CRUEL TREATMENT

### 77 organisations tell UN of Australia's slipping standards

Seventy seven organisations have united to warn that Australia's standards are sliding when it comes to the prevention of torture and cruel treatment.

In a detailed joint report, a coalition of non-government organisations has assessed Australia's track record against the UN's Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which Australia signed up to in 1985. The report – endorsed by organisations such as People with Disability Australia, Save the Children and the Refugee Council of Australia – finds that overall, Australia's standards are declining.

The Human Right Law Centre's Director of Advocacy, Rachel Ball, who coordinated the report, said cruel and degrading treatment has no place in Australia.

"In a number of areas Australia is failing to ensure people are not subjected to cruel treatment, whilst in other areas the Government is directly responsible. A country like Australia really has no excuse for failing to eradicate all forms of torture and cruel treatment" said Ms Ball.

The report examines Government policies and practices in a wide range of areas such as: refugee law and policy; prison conditions; over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system; violence against women; treatment of people with disability; rape and sexual violence against children; counter-terrorism measures; and Australia's military and security cooperation with foreign governments.

"The Government's willingness to return asylum seekers to danger in their countries of origin is obviously an area where we are falling well short of our obligations under the Convention," said Ms Ball.

Examples of violations in the report include: the prolonged detention of a six-year-old girl with post traumatic stress disorder in immigration detention on Christmas Island; the death of a man who was Tasered 14 times by police officers; and the experience of a woman with disability who faced significant barriers escaping violence perpetrated by her live-in carer because no suitable alternative accommodation was available.

Ms Ball said in addition to not committing human rights violations, Governments also had obligations to actively protect people from having their rights violated by others.

"Violence against women is a prime example of the Australian Government failing to address one of the most serious and widespread human right problems faced by Australians. The Convention Against Torture requires governments to do more to prevent, investigate, punish and redress violence against women. Providing adequate frontline services for women in need would be a great starting point," said Ms Ball.

The report was prepared for the UN's Committee Against Torture ahead of its review of Australia's compliance with the Convention schedule to take place in November. The Committee, made up of independent international experts, will consider Australia's track record and make a series of findings and recommendations.

A copy of the NGO Report can be found here.

## OPINION

### Safeguarding our democracy by standing with civil society

*When people are free to speak their minds and hold their leaders accountable, governments are more responsive and more effective…If you want strong, successful countries, you need strong, vibrant civil societies*: President Obama, remarks at the Clinton Global Initiative 23 September 2014, New York.

Across the globe, civil society advocacy is increasingly being threatened by laws and practices that criminalise protest, prevent association, threaten funding and curtail independence. While the most extreme conduct is occurring in nations like Russia, China and Egypt, the trend isn't limited to repressive states or transitioning democracies.

In September, Hungarian authorities raided the offices and staff homes of an NGO that distributes Norwegian aid money against the backdrop of government claims of foreign political interference. In Canada, there are fears of politically motivated audits of environmental NGOs, and late last year, the Spanish Government sought to introduce anti-protest laws creating massive fines for minor offences.

Here in Australia, the past two years have seen a range of federal and state laws, policies and statements that signal a clear undemocratic trend towards stifling criticism and protest and restricting NGO advocacy.

Anti-protest laws have been introduced or passed in Queensland, Victoria and Tasmania. The NSW and federal Governments cut funding to Environment Defenders Offices after a campaign by the Minerals Council. Other community legal centres and Aboriginal legal services have had funding cut for law reform and policy advocacy. In 2012, the Queensland Government imposed gag clauses on NGOs.

In this environment, many government-funded NGOs are avoiding or watering down criticism of governments for fear of having their funding cut in retribution (highlighting the importance of non-government funding for organisations like ours).

Globally, the fight back is happening. Initiatives like the Community of Democracies, the Open Government Partnership, resolutions from UN Human Rights Council and the establishment and work of the UN Special Rapporteur on freedom of peaceful assembly and association, are all seeking to reverse this trend.

Organisations like the Human Rights Law Centre across the globe are fighting for the core human rights that are vital to enable civil society and democracy to operate; freedom of speech, freedoms of assembly and association and voting rights.

In September, I was invited to join 28 other civil society leaders from around the world in a two week US Government "Standing with civil society" program that explored the importance of civil society freedom and that built the capacity of the participants to advance it. The program culminated in addresses by President Obama at the Clinton Global Initiative and the Open Government Partnership in New York.

President Obama recognised that criticism by NGOs can make governments uncomfortable but noted that "open and honest collaboration with citizens and civil society over the long term – no matter how uncomfortable it is – makes countries stronger and it makes countries more successful, and it creates more prosperous economies, and more just societies, and more opportunity for citizens".

As I write this, my colleague Anna Brown, along with 16 other human rights advocates, is attending a workshop in Kenya on litigating rights to peaceful assembly and association with Maina Kiai, the UN Special Rapporteur on freedom of peaceful assembly and association.

This global experience puts Australia's democratic success in context. Australia has strong and stable democratic institutions and practices and a strong and vibrant civil society. But we can't take our success for granted. The struggle for basic democratic rights in other nations reinforces not only the importance of what we have and its universality, but also the vital need to resist attempts to wind back what we have achieved over many years.

The HRLC has a long and successful history of impact in this area and will be expanding our work in coming months to defend democracy and civil society independence.

***Hugh de Kretser*** *is Executive Director of the Human Rights Law Centre.*

## Dawn of the Joko era brings opportunities for Australia

**This piece was first published in The Australian – 20 October 2014**

Indonesia's incoming president presents a promising opportunity for Australia to recast both its military and human rights relationship with our northern neighbour.

Joko Widodo, referred to almost universally within Indonesia as Jokowi, will be sworn in as the Republic's seventh president today. The sense of hope and expectation he carries with him is significant, but so are the challenges that his reform agenda faces.

External voices, including those of Australian public figures, will be important in bolstering the case for much-needed change.

Until now, successive Australian governments have held firm to the position of unwavering cheer-squad for some of the more retrograde elements of Indonesia's political class. However, there are indications that Foreign Minister Julie Bishop is aware that Australia needs to change its tune when it comes to the human rights problems in Indonesia.

Australian Greens senator Richard Di Natale has persistently tried to focus attention on Indonesia's troubled Papuan provinces by introducing numerous Senate motions on the various human rights problems there — most of which have been instantly voted down by the major parties. This month was different. News came through that the Foreign Minister's office was throwing its support behind his latest motion calling for the release of two French journalists detained in West Papua.

In contrast to Australia's last foreign minister, Bob Carr, who merely sneered that such motions were "cruel", "deceitful" and "self-indulgent", Bishop apparently provided constructive input on the wording of the motion before supporting it.

This may not sound like much, but it's a significant departure from Australia's longstanding approach to the persistently troublesome topic of West Papua. It's quite a different tone to the comments Prime Minister Tony Abbott made in Indonesia last year that he would not tolerate anyone being given a "platform to grandstand against Indonesia" after West Papuan students had entered the Australian consulate in Bali.

This subtle, but pivotal change is likely down to one thing: Jokowi.

For decades Australian political leadership has turned a blind eye to the human rights abuses occurring on our doorstep in West Papua and successive Australian governments have failed to challenge what is effectively Indonesia's ban on journalists travelling to and reporting from West Papua. But such a position is hardly sustainable, when the new president himself has flagged these as issues he wants to tackle.

During the election campaign this year, Jokowi was the first presidential candidate to ever campaign in the Papuan provinces and he made very promising comments about ending the media ban.

He has since indicated that he will spend Christmas in Papua — a symbolically laden move for a Muslim president given Christianity is the dominant faith among the Melanesian Papuans — and wants to build a presidential residence in Papua.

Whether Jokowi can overcome the political old guard, which is likely to be well represented in his cabinet, remains to be seen. Or from a more cynical viewpoint, perhaps this is all merely manoeuvring from a populist politician.

Either way, the election of Jokowi presents Australia with a prime opportunity to revisit its relationship with Indonesia when it comes to human rights.

Jokowi has presented himself as a cleanskin, as someone who wants to do things differently. Bishop should jump at this chance and ensure Australia does things differently.

In addition to calling for the release of the two French journalists, Bishop should do more to support media freedom in West Papua in general and insist that human rights monitors and NGOs also be allowed in. Until this occurs, the world can only continue to assume the worst about why and how activists continue to die — like Marthinus Yowame who was found dead in a sack floating in the ocean in August.

Bishop and Defence Minister David Johnston should also review Australia's relationship with the Indonesian military.

When parliament's Joint Standing Committee on Treaties reviewed the Lombok treaty Australia signed with Indonesia in 2006, its bipartisan findings recommended the government "increase transparency in defence co-operation agreements to provide assurance that Australian resources do not directly or indirectly support human rights abuses in Indonesia".

It is simply unacceptable that adequate safeguards are not in place to ensure Australian money and resources are not supporting the worst human rights abusers.

Reports that Australia supports Indonesia's counter-terrorism unit, Detachment 88, should be of particular concern given the unit's alleged involvement in a number of human rights abuses — including the murder of West Papuan activists.

Australia has obligations under international law to conduct due diligence to identify the "risks and potential extraterritorial impacts of their laws, policies and practices on the enjoyment of human rights".

In the US, the Leahy Law attempts to ensure recipients of military aid are vetted by the State Department and Department of Defence. Australian legislators should explore how a similar mechanism might work here.

There's obviously no magic-wand solution, but Australia can and should do more to reduce the risk of supporting people or units that commit gross violations of human rights.

It's time to start a serious discussion about what isn't currently working and to look at ways to avoid repeating the unprincipled mistakes of the past. Jokowi represents the best chance to date for such dialogue.

***Tom Clarke*** *is director of communications at the Human Rights Law Centre.*

## HRLC EVENTS

### Tackling crime the smart way

Incarceration costs money, fragments families and makes it harder than ever for those who are locked up to be active, cohesive members of our community when they return. There has to be a better way.

In partnership with the Wheeler Centre and Smart Justice, we hosted a public event to explore how we can cut crime, reduce prison spending and strengthen communities.

Our panel, including former Attorney-General Rob Hulls, former Commissioner Queensland Corrections Marlene Morison and Magistrate Pauline Spencer, took an approach that's both pragmatic and compassionate, looking for options that go beyond prison – and get better results.

The event was broadcasted on Radio National's Law Report and can be listened to here.

## AUSTRALIAN HUMAN RIGHTS CASE NOTES

### High Court invalidates Minister's decision to grant visa that prevented the granting of a protection visa to asylum seeker

*Plaintiff S4/2014 v Minister for Immigration and Border Protection* [2014] HCA 34 (11 September 2014)

**Summary**

The High Court unanimously held invalid the grant by the Minister for Immigration and Border Protection of a temporary safe haven visa to the plaintiff – a stateless asylum seeker – which had the effect of precluding the plaintiff from making a valid application for a protection visa, in

circumstances where the plaintiff's detention had been prolonged for the purpose of the Minister considering the exercise of power to allow the plaintiff to make a valid application for a visa of his choice.

**Facts**

In December 2011, the plaintiff arrived in Australia by boat without a valid visa permitting him to enter or remain in Australia. Pursuant to the *Migration Act 1958* (Cth) (the 'Act'), the plaintiff was taken into immigration detention as an 'unlawful non-citizen' and 'offshore entry person' (now termed an 'unauthorised maritime arrival'). Section 46A(1) of the Act prevented the plaintiff from making a valid application for any visa unless the Minister decided to consider whether to exercise his power under s 46A(2) to permit the plaintiff to apply for a visa (ie 'lift the bar').

The Minister decided to consider whether to exercise his power under s 46A(2), and the plaintiff remained in detention for more than two years while the Minister's department inquired into the plaintiff's eligibility for a protection visa. The department determined that the plaintiff was a refugee (within the meaning of article 1 of the Refugees Convention) and satisfied relevant health and character requirements for the grant of a protection visa.

However, the Minister made no decision to permit or refuse the making of a valid visa application. Instead, the Minister, acting of his own motion under s 195A(2) of the Act – which gives the Minister power to grant a visa to a person in immigration detention if the Minister thinks it is in the public interest to do so – granted the plaintiff two visas: a temporary safe haven visa (valid for 7 days) and a temporary humanitarian concern visa (valid for 3 years). Although the prohibition in s 46A(1) no longer applied once the plaintiff became a lawful non-citizen by reason of the grant of the visas, the grant of the temporary safe haven visa engaged s 91K of the Act which prohibited the plaintiff applying for any visa other than a temporary safe haven visa.

The key question before the Court was whether the grant of the two temporary visas – which the Court accepted as a single Ministerial decision – was lawful.

**Decision**

First, the Court considered the purpose of the plaintiff's detention. Relying on the principles set out in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, the Court held that detention under and for the purposes of the Act is limited by the purposes for which the detention is being effected: at [26]. The primary purpose of detaining unauthorised maritime arrivals is to effect their removal from Australia. However, if the Minister decides to consider whether to exercise his power to permit a detainee to make a valid visa application – as in the case of the plaintiff – the purpose of the detention is twofold: for determining whether to permit a valid application for a visa and, thereafter, either for processing the application or deporting the applicant.

The Court also held that, because detention under the Act can only be for the purposes specified under the Act, the purposes must be pursued and carried into effect as soon as reasonably practicable: at [28]. This conclusion follows from the purposive nature of detention under the Act, and the text and structure of the Act when read as a whole. Accordingly, the decision to exercise the power under s 46A(2), any necessary inquiry, and the decision itself, must all be made as soon as reasonably practicable. Departure from this requirement would entail a departure from the purpose of the plaintiff's detention, rendering such detention unlawful.

Second, the Court considered the Minister's exercise of power under s 195A(2) of the Act to grant the plaintiff the two temporary visas. As a starting point, the Court emphasised the proposition that an Act must be read as a whole on the prima facie basis that its provisions are intended to

give effect to harmonious goals (per *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355). Sections 46A and 195A are not wholly independent of each other and must be construed in a way that permits harmonious operation of the two sections in a coherent scheme for detention of unlawful non-citizens.

The determinative question is whether, the Minister having decided to *consider* the exercise of the s 46A(2) power but not having decided *how* the power will be exercised, s 195A(2) gives the Minister power to grant a visa which forbids the very thing which was the subject of the uncompleted consideration (ie making a valid application for a visa). The Court found that where, as here, an unlawful non-citizen is detained for the purpose of considering the exercise of power under s 46A(2), thereby prolonging detention, other powers given by the Act are to be construed as not permitting the Minister to grant a visa which forecloses the exercise of the power under s 46A(2) before a decision is made, thus depriving the prolongation of detention of its purpose: at [41]. The generality of the power given by s 195A(2) must be read as being subject to the prior exercise of power under s 46A(2). Accordingly, the granting of the two visas under s 195A(2) was invalid.

The Court noted that the restriction imposed by the operation of s 46A(2) on the s 195A(2) power is only relevant in this case because the granting of the temporary safe haven visa engaged the prohibition, under s 91K, against the plaintiff making a valid application for any other class of visa. Otherwise, there would be no intersection between the two powers and, in the present case, s 195A(2) could have been used by the Minister to lawfully end the plaintiff's detention.

Finally, relying on its judgment in the Offshore Processing Case (*Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319) which held that the Minister could not be compelled to exercise his power under s 46A(2), the Court refused to determine whether the Minister was now required to decide whether to permit the plaintiff to make a valid application for a protection visa. However, the Court did note that it is not open to the Minister to detain the plaintiff for any purpose other than the determination, as soon as reasonably practicable, of whether to permit the plaintiff to make a valid application for a protection visa: at [58].

**Commentary**

A significant portion of the judgment focused on the limited purposes for which a person may be detained under the *Migration Act 1958* (Cth), and the requirement for those purposes to be exercised or pursued as soon as reasonably practicable by the Minister. This highlights the Act's inherent safeguards against indefinite or arbitrary detention of unauthorised maritime arrivals by the Executive, and the importance of processing visa applications in a timely manner.

The Court also recognised that the Minister's two powers under the Act only intersected by reason of s 91K being engaged on the granting of the temporary safe haven visa. This suggests that, if faced with a similar factual situation, it may be possible for the Minister to simply grant a temporary humanitarian concern visa to an unauthorised maritime arrival, and not a temporary safe haven visa. This exercise of the s 195A(2) power would end the unauthorised maritime arrival's detention, presumably without foreclosing the making of a decision as to whether a valid application for any type of visa can be made by that person.

This case can be found at http://www.austlii.edu.au/au/cases/cth/HCA/2014/34.html

***Rhys Ryan*** *is a solicitor with King & Wood Mallesons on secondment with the Human Rights Law Centre.*

## Appeal to Occupy Melbourne decision dismissed

*Kerrison v Melbourne City Council* [2014] FCAFC 130

Full Federal Court dismisses Occupy Melbourne Protest constitutional and human rights challenge

### Summary

The Full Court of the Federal Court has dismissed an appeal against a decision in favour of the City of Melbourne regarding the Occupy Melbourne protests in 2011

The decision has implications for how the *Charter of Human Rights and Responsibilities Act 2006* applies to public authorities as the Court confirmed the primary decision that the Charter's obligation 'to act' compatibly with human rights does not apply to the making of local laws by a council. In relation to the removal of Ms Kerrison's "tent dress" at the protest, which was not considered in the primary decision, the Court found the council officers did not breach the right to freedom of expression.

### Facts

In 2011, the Occupy Melbourne protest occupied Melbourne's Treasury Gardens and Flagstaff Gardens as part of the worldwide Occupy movement where protesters maintained a continuous presence in public space in protest against economic inequality and government structures.

Public use of the gardens is regulated by the *Melbourne City Council Activities Local Law 2009* ('Local Law') and the *Melbourne Parks and Gardens (Joint Trustee Reserves) Regulations 1994* ('Regulations'), which restrict camping and advertising without a permit or consent and set out enforcement mechanisms.

The Council relied on the Local Law to issue 'notices to comply' to protesters and, when the protest moved to Flagstaff Gardens, relied on the Regulations to issue directions and seize items. Victoria Police arrested some protesters.

Mr Muldoon (later joined by Ms Kerrison) brought a representative action in the Federal Court challenging the constitutional validity and human rights compatibility of the Council and Victoria response on behalf of all Occupy Melbourne protesters.

The applicants argued that the Local Law and Regulations infringed the implied freedom of political communication under the Constitution and were incompatible with the human rights to freedom of expression (s 15) and peaceful assembly and association (s 16) in the Charter.

Victoria's Attorney-General intervened in relation to the constitutional and Charter issues.

#### *Federal Court decision*

In *Muldoon v Melbourne City Council*, North J found the applicants had no individual or representative standing to challenge the action taken against other protesters, however they could challenge the action relating to them.

While North J accepted some of the notices issued to Ms Kerrison were not validly issued, he otherwise rejected the challenge, finding that the police arrests were lawful and that the Local Law and Regulations and their enforcement by the Council did not infringe the implied constitutional freedom and were not incompatible with the Charter rights.

**Decision**

Justices Flick, Jagot and Mortimer dismissed Ms Kerrison's appeal (the sole appellant after Mr Muldoon withdrew) and confirmed North J's approach to the constitutional and Charter issues.

***Obligation to act compatibly with rights does not apply to making local laws***

The Court rejected the Appellant's claim that the Council acted incompatibly with human rights in *making* the enforcement provisions in the Local Law.

The Court found that the requirement on public authorities in s 38(1) of the Charter not 'to act' in a way that is incompatible with a human right is focused on conduct and does not apply to making by-laws under the *Local Government Act 1989*. As such, the Local Laws could not be challenged on the ground that their *making* was incompatible with rights.

The Court reasoned that s 38(2) – which is an exception to s 38(1) where a public authority could not reasonably have acted differently *because of a statutory provision* – suggests s 38(1) is concerned with conduct under a provision and not the making of a provision itself. The Court also considered it would be inconsistent to extend s 38(1) to making subordinate instruments when the Charter otherwise preserves the ability to make incompatible laws.

***Compatibility with human rights and reasonable limits***

During the appeal, the Appellant argued that the phrase 'incompatible with a human right' in s 38(1) of the Charter should be assessed with reference to the Charter right alone and not with reference to whether it is a reasonable limit in accordance with s 7(2) of the Charter.

The Court did not allow the appellant to rely on this new construction and the appeal proceeded on the basis that the term 'incompatible' in s 38(1) is where a human right is limited otherwise than in accordance with s 7(2) (which the parties had previously agreed on).

The Court also refused to resolve which party bears the onus of demonstrating whether limits on human rights are reasonable and demonstrably justified under s 7(2). The Court observed that both these significant questions are currently reserved before the Victorian Court of Appeal in the appeal of *Bare v Small*.

***Removing the tent dress did not breach Charter***

The Court found that North J should have dealt with claims that council officers had contravened s 38 of the Charter in removing the tent worn by the Appellant and an Occupy Melbourne banner she had affixed in the gardens.

The Court accepted that the "tent dress" imparted expression (about how the protests were being constrained) protected under s 15(2) of the Charter and that its removal limited the right.

However, while it was critical of the Council and Victoria Police over how the tent dress was removed, the Court found that the officers did not act incompatibly with the right because the action was proportionate. The Court identified the clear relationship between the purpose of the Regulations (to preserve the gardens and their equitable use) and removing the tent. An important factor was that the tent was used as shelter to sleep in as well as a costume. The Court also considered that there were no less restrictive means reasonably available that day to enforce the Regulations. An important factor was that the Appellant had been given ample notice of the risk and an opportunity to comply or dress in more than underwear underneath the tent.

The removal of the Occupy Melbourne banner was found not to limit any rights.

**Commentary**

It is disappointing that the decision, in finding that limits on the right to freedom of expression were justified, does not include a more detailed examination of the importance of protest rights and their balancing with competing public interests in a free and democratic society.

Although the Court found that s 38(1) of the Charter does not apply to the making of local laws, it is important not to forget that the requirement to act compatibly with human rights applies to other council acts and decisions. The Court's reasoning on s 38(1) is confined to the making of 'statutory provisions' and not, for example, to the making of policies, guidelines and directions. The obligations to act compatibly with human rights and properly consider human rights continue to apply to such acts and decisions.

The decision does not fully explore the impacts of s 32 on subordinate instruments. For example, while the Charter is clear that primary legislation that cannot be interpreted compatibly with human rights remains valid (s 32(3)(a)), it treats subordinate instruments such as local laws differently. Section 32(3)(b) states: 'This section does not affect the validity of a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right *and is empowered to be so by the Act under which it is made*.' This suggests that a subordinate instrument may be invalid where it is incompatible with human rights and not empowered to be so by primary legislation. It would arguably be rare for a provision to empower a subordinate instrument to be incompatible with human rights, particularly given that s 32 would require that provision to be interpreted compatibly with human rights so far as it is possible to do so.

Ultimately, the decision highlights that many complex questions about the Charter's operation remain to be resolved by the Courts. Some of those, including the relationship between s 38 and s 7(2) and who bears the onus of proof for s 7(2) matters, may be determined by the Victorian Court of Appeal in the appeal in *Bare v Small* (decision reserved).

The full decision can be found online here

***Gudrun Dewey*** *is Senior Legal Adviser Human Rights at the Victorian Equal Opportunity and Human Rights Commission.*

## INTERNATIONAL HUMAN RIGHTS CASE NOTES

### France bans the burqa in public

*S.A.S. v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014)

**Summary**

On 1 July 2014, the European Court of Human Rights held that a French law prohibiting the concealment of one's face in public places does not breach the European Convention for the Protection of Human Rights and Fundamental Freedoms. Whilst it was held that the prohibition impinges on the freedom of thought, conscience and religion, and the right to respect for private and family life, the government was entitled to impose the prohibition on the grounds that the ban protects the rights and freedoms of others.

**Facts**

*The law*

In July 2010, a law was passed in France prohibiting anyone from wearing clothing designed to conceal their face in public places. The prohibition does not apply to certain clothing, such as clothing worn for sports, festivities or health or occupational reasons. Breaches attract minor penalties.

Both houses of Parliament overwhelmingly supported the law. Other bodies were also in support, including the Parliamentary 'Delegation on the rights of women and equal opportunities'.

The explanatory memorandum stated, *inter alia*, that concealment of the face is 'incompatible with the fundamental requirements of "living together" in French society', 'contravenes the principle of respect for the dignity of the person', is a 'public manifestation of a conspicuous denial of equality between men and women' and could 'represent a danger for public safety in certain situations'.

*The application*

The applicant, a French Muslim woman, claimed the law violated the following provisions of the Convention: Article 8, the right to respect for private and family life; Article 9, the freedom of thought, conscience and religion; Article 10, freedom of expression; Article 3, the prohibition of torture; Article 11, freedom of assembly and association; Article 14, which provides the Convention's rights must apply without discrimination.

She explained she covers her face in public and private in accordance with her religious faith, culture and personal convictions.

**Decision**

***Did the ban interfere with rights and freedoms?***

The Court held that, because the applicant must either comply with the ban and refrain from dressing in accordance with her approach to religion, or refuse to comply and face criminal sanctions, the ban interferes with her freedom of religion.

The Court also stated that the ban restricts the choices a person can make about their appearance and therefore relates to the expression of a person's personality. On that basis, it also interferes with the right to respect for private life.

The Court held that Article 14 was not violated, and dismissed the application insofar as it related to articles 3 and 11 of the Convention.

***Was the ban permissible?***

The Court considered whether the ban, though limiting the freedom of religion and right to respect for private life, was nevertheless permissible under the Convention. The Convention permits limitations on these rights if the limitation is prescribed by law, and is necessary in a democratic society for one of a number of 'legitimate aims'. These aims include public safety and protecting the rights and freedoms of others.

The limitation in question was clearly prescribed by law.

*Public safety*

The Court did not accept that the ban was necessary in a democratic society in the interests of public safety. Public safety could be attained by imposing a mere requirement for people to show their face where circumstances so require.

*Protecting the rights and freedoms of others*

France argued that the ban aimed to protect the rights and freedoms of others as it aimed to ensure respect for gender equality, human dignity and the 'minimum requirements of life in society'.

The Court rejected the gender equality argument, primarily because some women defend the practice of facial concealment. It also rejected the human dignity argument for various reasons, including because the full-face veil is an expression of cultural identity, and thus contributes to the pluralism that is inherent in democracy.

Conversely, the Court accepted that respect for the 'minimum requirements of life in society', and the 'living together' aim set out in the explanatory memorandum, can be linked to the 'legitimate aim' of protecting the rights and freedoms of others. Accordingly, the prohibition can be justified on this basis.

The Court also held that the ban is proportionate to that aim given the ban applies only to clothing that covers the face and is not expressly based on the religious connotation of clothing, and the sanctions for non-compliance are light. This was despite:

- the small number of women in France who wear a full-face veil;
- the ban having a significant adverse effect on women like the applicant; and
- the risk that States, in considering such a ban, exacerbate stereotypes imposed on certain groups and encourage intolerance.

The Court emphasised that it is open to a State to 'secure the conditions whereby individuals can live together in diversity', and stressed its duty to 'exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question'.

***Dissenting opinion***

Judges Nussberger and Jäderblom concluded that the blanket prohibition violated Articles 8 and 9 of the Convention. They expressed doubt that the blanket prohibition on the full-face veil pursues a legitimate aim because the concept of 'living together' seems 'far-fetched and vague' and does not fall squarely within any of the rights and freedoms guaranteed by the Convention. They also held that, '[i]n any event, such a far-reaching prohibition…is not necessary in a democratic society'.

**Commentary**

The relevant rights set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) are very similar to those in the Convention (see sections 8, 10, 13, 14 and 16). Accordingly, the Court's comments may be useful in interpreting the Charter rights.

However, the Court's reasoning regarding the permissible limitation of rights may have limited application, particularly where a limitation imposed by legislation passes through Parliament without near-unanimous support. This is for the following reasons.

- The 'limitation' provision in the Charter (see section 7) is worded differently to the limitation provisions in the Convention.
- It is difficult to reconcile a plain reading of the Convention's text (which required the full-face veil prohibition to be *necessary* in a democratic society for the protection of the rights and freedoms of others) with the Court's ultimate conclusion.

- The Court was influenced by its previous decisions. A Victorian court or body would not be influenced in the same way.
- The Court may have been influenced by the fact that the French prohibition received almost unanimous support by democratically-elected Parliamentarians (and, indeed, the Court expressed its reluctance to interfere with France's democratic decision-making processes).

***Angela Gibbs*** *is a Lawyer at Allens.*

## Court upholds a prisoner's ability to hunger strike and refuse treatment.

*Chief Executive of the Department of Corrections v All Means All* [2014] NZHC 1433 (25 June 2014)

**Summary**

This case concerns the rights a duties of the Canterbury District Health Board (DHB) and the Departments of Corrections (Corrections) concerning the level of medical treatment they must provide a serving prisoner on a hunger strike.

**Facts**

Mr All Means All was 57 years old. On May 28 2014 he was sentenced to four months imprisonment for six counts of threatening to kill. On entering the prison after his sentencing, he declared that he would begin a hunger strike immediately. He refused to eat or drink anything. His reason for doing so what that he believed that a detective lied in giving evidence at his trial, and he aimed to 'encourage the truth to finally surface' via the hunger strike.

On June 5 2014, the DHB filed an application to the court seeking a declaration to clarify its legal obligation in relation to Mr All Means All's treatment or the non-provision of medical services to him. The judge appointed a counsel to assist the court and advocate on Mr All Means All's behalf. On the basis of psychiatric examination, Mr All Means All was judged not to have a mental impairment or condition.

Two forms of declaration were sought by Corrections and the DHB.

The first, sought by Corrections, was a declaration that Mr All Means All may receive medical treatment by way of artificial hydration and nutrition when:

- his health or life is in peril in the judgement of a clinician, and
- he no longer is able to indicate whether he consents to treatment.

Alternatively, both the Department and the DHB sought a declaration that they have a lawful excuse for not providing medical treatment, so long as Mr All Means All continues to refuse consent to treatment.

**Decision**

The judgment was delivered by Panckhurst J, a single judge of the New Zealand High Court.

*Declaration that the prisoner be given treatment against his will*

The court accepted that the duties imposed upon Corrections personnel are primarily to ensure that sentences are served in a 'safe, secure, humane and effective manner' (Corrections Act 2004 s5(1)(a)). The court also accepted that prisoners are in a special situation where their fundamental rights are curtailed to some extent. They are reliance on others for the necessaries

of life, sustenance and medical care, so the day-to-day welfare of Mr All Means All is the responsibility of the prison manager and staff.

Despite this, the court did not find any sufficient justifications for limiting the s11 right in the New Zealand Bill of Rights Act 1990 (NZBORA) and authorising medical treatment against Mr All Means All's consent.

S11 states that 'everyone has the right to refuse to undergo any medical treatment'. "Everyone", however, is not to be read entirely literally. A person must have capacity and the competence to make an informed and rational decision.

The court refused to limit the s11 right in this instance for several main reasons.

- An adult patient, sound of mind, is entitled to refuse to undergo treatment for whatever reason, even if the result of doing so means that the patient will die. Reference was made to the House of Lords decision in *Airedale NHS Trust v Bland.* Here, the principle of the sanctity of human life must yield to the principle of self-determination.
- This is not akin to suicide – it is simply the patient declining to consent to treatment which might prolong his life. Death was not the intended end result of what he intended as a protest pressuring a person he considered guilty of misconduct.
- NZ had plotted its own course in introducing the right to refuse consent to medical treatment in NZBORA.
- The judge did not consider the reasoning in the various cases from other jurisdictions persuasive, much less demonstrative in justifying recognition of a common law limit upon the right to forgo medical treatment.

The court did issue a declaration that Corrections and DHB have a "lawful excuse" not to provide medical treatment without the consent of Mr All Means All.

The judge considered that a joint declaration in the following terms was appropriate:

"Persons owing a duty of care to Mr All Means All will have lawful excuse for not providing medical treatment to him while he continues not to give informed consent to such treatment, or an advance directive refusing consent is in place."

**Commentary**

This decision has interesting implications for the rights of prisoners to refuse medical treatment and continue hunger strike protests. NZBORA s11 is similar to the right to not be subjected to medical treatment without full, free and informed consent in s10(c) of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic). Accordingly, this New Zealand decision may be persuasive in interpreting Victorian rights.

However, the applicability of the decision may be questioned. Firstly, it is closely tied to its New Zealand context. The Cartwright Inquiry Report of 1988, The NZBORA and the Health and Disability Commissioner Act all emphasise patient rights and the perhaps paramount requirement for consent to medical services. Secondly, different courts may be more persuaded by US cases and European Court of Human Rights cases that supported state intervention and medical treatment in hunger strike cases. These cases favour the state's interest in the preservation of life and the orderly administration of the prison system above the prisoners' right to self-determination and privacy.

The effect of this New Zealand decision in other jurisdictions waits to be determined.

The decision can be found here - http://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZHC/2014/1433.html?query=%22Bill%20of%20rights

***Beatrice Paull*** *is a law student volunteer with the Human Rights Law Centre.*

## Extradition a violation of the prohibition against inhuman or degrading treatment

*Trabelsi v Belgium* [2014] ECHR, Application no. 140/10

The European Court of Human Rights (ECHR) has found that the extradition by the Belgian Government of a Tunisian national, Mr Trabelsi, from Belgium to the United States (US), where he was to be prosecuted on charges of terrorist offences and liable to be sentenced to life in prison, was a violation of Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Convention). Article 3 prohibits inhuman or degrading treatment. His right to individual petition under Article 34 of the Convention was also found to have been breached.

**Facts**

Mr Trabelsi is a convicted criminal in both Belgium and Tunisia, having been found guilty of crimes relating to an attempt to blow up a Belgian army base; forgery; conspiracy; and belonging to a terrorist organisation.

In April 2008, while Mr Trabelsi was part-way through serving a prison sentence in Belgium, US authorities requested that the Belgian authorities extradite Mr Trabelsi, in accordance with an extradition treaty in place between the countries. The request was based on an indictment and arrest warrant issued against Mr Trabelsi on 16 November 2007 by the US District Court for the District Court of Columbia, charging him with four separate offences relating to acts of terrorism; the first two of which carried maximum sentences of life imprisonment.

On 19 November 2008, a Belgian court declared the arrest warrant issued by the US Court enforceable to the extent that the charges did not overlap with the charges for which Mr Trabelsi had been convicted in Belgium. Subsequent appeals on points of law by Mr Trabelsi were dismissed.

Concurrently with the Belgian proceedings, on 23 December 2009 Mr Trabelsi lodged an application with the ECHR against Belgium. In his application, Mr Trabelsi alleged, among other things, that his extradition to the US exposed him to a risk of inhumane or degrading treatment contrary to Article 3 of the Convention.

Once the US indictment was declared operative, the proceedings relating to the response to the extradition request were commenced. On 10 June 2010, the Brussels Court of Appeal upheld Mr Trabelsi's extradition subject to a number of conditions, including that:

- the death penalty not be imposed or, failing that, not be enforced;
- any life sentence be accompanied by the possibility of commutation of sentence; and
- any request for Mr Trabelsi's re-extradition to a third country must be approved by Belgium.

The US authorities confirmed that Mr Trabelsi was not liable to the death penalty and assured the Belgian authorities that he would not be extradited to any third country without the agreement of the Belgian Government. The US also confirmed that the maximum sentence of life imprisonment was not mandatory, that the US court had discretion to impose a lighter sentence and that US

legislation provided a number of means of reducing a life sentence, including through the exercise of executive clemency by way of a Presidential pardon or sentence commutation. On the basis of these assurances, on 23 November 2011, the Belgian Minister for Justice granted Mr Trabelsi's extradition to the US.

Subsequently, on 6 December 2011, Mr Trabelsi lodged a request with the ECHR for the indication of an interim measure under Rule 39 of the Rules of Court to suspend his extradition, pending a decision in relation to his previous application. The ECHR granted Mr Trabelsi's request on the same day and indicated to the Belgian Government that it should not extradite Mr Trabelsi to the US.

Notwithstanding the interim measure indicated by the ECHR, on 3 October 2013, Mr Trabelsi was extradited to the US, where he was immediately placed in custody and now remains detained in the Rappahannock regional prison in Stafford, Virginia.

**Arguments**

In his application to the ECHR, Mr Trabelsi alleged that his extradition to the US by the Belgian authorities was:

- in breach of Article 3 of the Convention, prohibiting torture or inhuman or degrading treatment or punishment;
- in breach of the interim measure indicated by the ECHR and therefore a violation of his right of individual petition under Article 34 of the Convention;
- in breach of Article 6.1 of the Convention, providing entitlement to a fair trial for all civil and criminal matters;
- in breach of Article 4 of Protocol No.7 to the Convention, prohibiting criminal trial or punishment for an offence which a person has already acquitted or convicted in the same state; and
- in breach of Article 8, the right to respect for private and family life, home and correspondence.

**Decision**

*Article 3 of the Convention*

Mr Trabelsi's claim that his extradition to the US breached Article 3 of the Convention was primarily founded on his contention that two of the offences for which his extradition had been granted carried an irreducible maximum life prison sentence, and that if he were convicted he would have no prospect of ever being released. Mr Trabelsi submitted that the possibility of a Presidential pardon or sentence commutation for offences relating to terrorism was *de facto* non-existent "post 9/11", and that this avenue of relief, which lay solely in the hands of the executive, without judicial supervision, bore no resemblance to a guarantee and was totally non-juridical.

In assessing the allegations in relation to Article 3, the majority decision by the ECHR emphasised that a sentence of life imprisonment was not in itself prohibited by the Convention but that a life sentence that was irreducible *de jure* and *de facto* was. The relevant question in this respect was whether a prisoner sentenced for life in the relevant jurisdiction could be said to have any prospect of release. Based on previous cases, this was held to require the determination of whether the applicable national law afforded the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner. A further requirement was identified that the prisoner in question had to be entitled to

know, at the outset of the sentence, what must be done to be considered for release and under what conditions.

In assessing these matters, the ECHR noted that, despite the explicit request from the Belgian authorities, the US authorities had at no time provided an assurance that Mr Trabelsi would be spared a life sentence or that, should such a sentence be imposed, a reduction or commutation of sentence would be available. The ECHR also noted that, although US legislation provided the possibility of reduction of a life sentence (including the system for Presidential pardons and commutations), none of the provisions amounted to a mechanism for reviewing the sentence based on objective, pre-established criteria of which the prisoner knew about at the time of imposition of the life sentence.

On these bases the ECHR found that the life sentence was not reducible for the purposes of Article 3 and that therefore Belgium's extradition of Mr Trabelsi exposed him to the real possibility of being subjected to prohibited ill-treatment and was therefore a violation of Article 3 of the Convention.

*Article 34 of the Convention*

In relation to Article 34 of the Convention, Mr Trabelsi alleged that his extradition to the US had been a breach of the interim measure indicated by the ECHR. Unreceptive to the Belgian Government's arguments that any breach of the interim measure had been justified by the need to mitigate the risk that Mr Trabelsi might escape or be released, the ECHR found that the Belgian Government had deliberately and irreversibly lowered the level of protection of the right set out in Article 3 of the Convention and had failed to honour its obligations under Article 34.

*Other Articles*

The ECHR dismissed the allegation under Article 6.1 as being incompatible with the provisions of the Convention, as well as the allegations under Article 4 of Protocol 7 and Article 8, as being manifestly ill-founded.

*Damages*

The applicant claimed EUR 1,000,000 in respect of pecuniary and non-pecuniary damage which he had suffered as a result of his extradition in breach of the Convention. The ECHR dismissed the claim in respect of pecuniary damage for lack of evidence but granted EUR 60,000 in respect of non-pecuniary damage and EUR 30,000 in respect of costs and expenses.

**Commentary**

Although this case represents a vindication of Mr Trabelsi's formal rights under the Convention, it also demonstrates the extent to which such rights may be rendered effectively nugatory by a state party to the Convention that is unwilling to compromise political expediency in the face of limited or minimal consequences. It was apparent from the judgment that the Belgian Government considered itself to be in an awkward position with respect to the demands of the US authorities; a factor that was clearly considered in their ultimate decision to extradite Mr Trabelsi, despite the interim measure imposed by the ECHR requesting them not to do so. In this respect an award of damages of EUR 60,000 provides little comfort to a person extradited to a jurisdiction where their Article 3 rights to protection from torture or inhuman or degrading treatment or punishment cannot be guaranteed. Similarly, such a scale of damages provides little disincentive on states to take seriously their commitments under the Convention.

The decision is available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146372#{"itemid":["001-146372"]}

***Daniel Wiseman*** *is a lawyer at Lander & Rogers.*

## Court proposes to fund unrepresented litigants to ensure fair hearing

*Q v Q*; *Re B (A Child)*; *Re C (A Child)* [2014] EWFC 31 (6 August 2014)

### Summary

The England and Wales Family Court has determined that unrepresented litigants should be funded by the Court where no other public funding is available and the hearing will otherwise contravene the litigant's right to a just and fair hearing.

### Facts

This judgment is concerned with three unrelated family law proceedings in the UK that each raised similar concerns regarding the Applicants' rights to a just and fair hearing. In each proceeding, the Applicant was a father who sought orders for contact with his child. The mother in each case had publicly funded representation and the father did not. The proceedings were further complicated because each Applicant had an allegation or a charge of a serious sex offence made against him.

In the case of *Q v Q*, the Applicant was a convicted sex offender, for sexual offences against young male children. His legal aid funding had been terminated and he could not otherwise afford a lawyer. He spoke little English and also relied on the services of a translator. On 21 May 2014, the President of the England and Wales Family Court adjourned these proceedings for contact orders. The earlier decision is summarised in this case note http://hrlc.org.au/publicly-funded-legal-representation-vital-to-fair-hearing/. The President's invitation to the Ministry of Justice to make submissions on the appropriate solution was rejected on 25 June 2014.

In both *Re B* and *Re C*, the child's mother alleged that she was raped by the Applicant. Under the relevant law, the perpetrator of alleged rape or other sexual offence was prohibited by statute from cross-examining the alleged victim in person. This meant that without publicly funded representation, the Applicants were denied the chance to cross-examine the mothers.

Each Applicant had unsuccessfully applied for "exceptional" legal aid funding under the *Legal Aid, Sentencing and Punishment of Offenders Act 2012 (UK)* (**the LASPO Act**). At the time of the judgment, only the Applicant in *Re B* had successfully accessed publicly funded representation through the Legal Aid Agency.

### Decision

The President was concerned that without representation or other legal advice, each proceeding could contravene the relevant Applicant's basic rights to a just and fair hearing as guaranteed by the *Family Procedure Rules 2010* (UK) (**the Rules**) and the European Convention on Human Rights (**the Convention**).

In particular, the President was concerned that the proceedings would be contrary to rule 1.1 of the Rules, which provides that the court's "overriding objective" is to "deal with cases justly, having regard to any welfare issues involved". This involves ensuring that each case is dealt with fairly. The President was also concerned that the Court would be unable to act in a way that is compatible with Articles 6 (right to a fair trial) and 8 (right to respect for private and family life) of the Convention.

The President expanded on his comments in the earlier case of *Q v Q* [2014] EWFC 7 (21 May 2014) and concluded that the lack of representation threatened to undermine the Applicant's rights in each case. The President stated:

> "The absence of public funding for those too impoverished to pay for their own representation potentially creates at least three major problems: first, the denial of legal advice and of assistance in drafting documents; second, and most obvious, the denial of professional advocacy in the court room; third, the denial of the ability to bring to court a professional witness whose fees for attending are beyond the ability of the litigant to pay."

In *Q v Q*, these problems were exacerbated by the Applicant's need for a translator. In *Re B* and *Re C*, the problems arose because of the complicated legal issues regarding the relationship between evidence in criminal and private proceedings.

The President concluded that in cases such as this, if all avenues of public funding were exhausted, the costs should be borne by the Court where it is necessary to avoid a violation of the Applicant's basic rights to a just and fair hearing. This included the costs of a translator, of expert witnesses attending court, and the cost of representation in court. The President suggested that the cost of providing legal advice may also need to be borne by the Court, but did not express a concluded view on this point. The President emphasised that this was an order of last resort.

The President invited the Ministry of Justice and the Legal Aid Agency to comment on the implications of this judgment.

**Commentary**

The President in this case adopted a progressive approach to ensuring a right to a fair and just hearing. The judgment highlights the relationship between publicly funded legal aid and a fair and just hearing, emphasising that the concept is broader than just representation in court.

As noted by the President, amendments to the LASPO Act mean that there is limited public funding in private law cases. The LASPO Act does allow funding on an "exceptional" basis under s 10(3) where the failure to provide such funding would be a breach of a person's rights under the Convention. However, the legislature has set a higher threshold for this test than exists under the Convention, meaning that as little as 9 applications per year are successful. This raises serious concerns that violations of Convention rights are not being picked up by the LASPO Act.

In Australia, there are a number of common law decisions, including recent Victorian decisions, where criminal law proceedings have been stayed because legal aid funding was unavailable or inadequate. This case goes well beyond the Australian common law position in particular for its application in a family law context. It is also significant for the fact that the court found that it should fund the representation and related costs itself as an order of last resort when legal aid funding is unavailable.

The decision is available at: http://www.bailii.org/ew/cases/EWFC/HCJ/2014/31.html

***Lauren Enright*** *is a Law Graduate at King & Wood Mallesons.*

## OTHER HUMAN RIGHTS DEVELOPMENTS

### States must protect and safeguard independence of national human rights institutions

**25 September 2014**

States should safeguard the independence of national human rights institutions, ensure that they are not subjected to unreasonable budgetary limitations, and are protected from all forms of pressure or reprisal in connection with their work to promote and protect human rights, the UN Human Rights Council has pronounced.

Adopting an Australian-led resolution by consensus, the Council also called on States to 'promptly and thoroughly investigate' all 'cases of alleged reprisal or intimidation against national human rights institutions and their respective members and staff or against individuals who cooperate or seek to cooperate with national human rights institutions', ensuring that 'perpetrators are brought to justice'.

'This resolution is important and timely, coming at a time when members of the Maldives Human Rights Commission have been subject to spurious criminal charges for submitting a report to the UN,' said ISHR Director Phil Lynch. Members of the Commission were charged earlier this week in connection with a report they submitted to the Universal Periodic Review which was critical of the undermining of the rule of law and the independence of the judiciary in the country.

'This is the first time that the Human Rights Council has adopted a resolution which recognises the role of NHRIs in preventing and addressing cases of reprisals, and which condemns and calls for prompt and thorough investigation and accountability for any cases of reprisals against NHRIs or those who cooperate with them,' Mr Lynch said.

'We congratulate Australia for its leadership on this resolution and acknowledge the vital role played by States including Norway, Ireland, Germany and Hungary in supporting the language on reprisals, despite significant pressure from Russia and South Africa to delete or dilute it.'

In addition to focusing on the role of NHRIs in combatting reprisals, the resolution also calls on States to ensure that NHRIs are fully independent, with Commissioners appointed in accordance with the Paris Principles, and are adequately resourced and financed. It also encourages NHRIs to strengthen engagement with the UN human rights mechanisms, recognising the crucial role they can play in promoting and monitoring the implementation of international human rights obligations at the national level.

Source: International Service for Human Rights

### Police apology for Corinna Horvath

**22 September 2014**

Corinna Horvath, who was brutally assaulted by a group of Victoria police in 1996, has received an ex-gratia compensation payment from the State of Victoria with an accompanying written apology from Chief Commissioner of Victoria Police Ken Lay.

The compensation payment figure is confidential at the request of Ms Horvath.

The apology from Chief Commissioner Lay reads, in part:

*Dear Ms Horvath,*

*I have recently had the opportunity to read and reflect on the views of the United Nations Human Rights Committee concerning the events of 9 March 1996.*

*I deeply regret what occurred and sincerely apologise for the injuries you suffered as a result.*

*……..*

*I wish you all the best for the future.*

*Yours faithfully*

Ken D. Lay

Chief Commissioner

This is a welcome and a significant outcome for Corinna Horvath. Eighteen years on, Corinna is very appreciative of the apology and the compensation.

The actions taken by the State of Victoria and the Chief Commissioner of Police should now set the agenda for change to ensure our laws better protect victims of police violence.

We, at the Police Accountability Project, have long stressed the Victorian Government must go beyond individual remedy and implement systemic changes to ensure victims of police misconduct have access to adequate remedies.

The provision of compensation and an apology to Ms Horvath, do not, by themselves, satisfy the concerns outlined by the United Nations Human Rights Committee in their direction to Australia and, by necessity, the State of Victoria, to remedy its breaches of the International Covenant on Civil and Political Rights ('ICCPR'), as articulated on 27 March 2014.

Incidents like those experienced by Corinna Horvath are still occurring and before the courts.

While much has been trumpeted about the new Victorian Police Act (2013) if the assaults experienced by Ms Horvath occurred today, she would still face a similar, lengthy, exhaustive and expensive process in order to seek justice. The State should take responsibility for the tortious conduct of its officers.

***"When it comes to police violence and misconduct Victoria's laws protect police, not its citizens."*** - Sophie Ellis, Law Insitute Journal

To this day, the officers who assaulted Corinna have not been disciplined. Sadly, this scenario remains a likely outcome for today's victims of police violence.

In *Horvath v Australia (2014)*, the Committee found that the State party was obligated to ensure that police perpetrators of human rights violations are disciplined through an independent, effective and impartial complaints body.

As a party to the ICCPR, it is up to the Australian Government to ensure effective remedies and non-repetition measures are implemented. The State is obliged to ensure victims of human rights abuses *'shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity'* (ICCPR art 2).

Furthermore, it is obliged to *'adopt such legislative or other measures as may be necessary'* to ensure conformity with the ICCPR (ICCPR art 2).

The ex-gratia payment of compensation and written apology to Ms Horvath is significant first step, and provides a strong foundation for change.

In July, thirteen community, church and legal bodies and organisations urged the Victorian Parliament to hold a review of both the new *Victoria Police Act 2013* (Vic) and the *Independent*

*Broad-Based Anti-Corruption Commission Act 2011* (Vic) to ensure conformity with the ICCPR in light of the Horvath decision.

It is our hope that the Chief Commissioner and the State's acknowledgment of the wrongs suffered by Ms Horvath will now galvanise the Victorian Parliament to ensure such wrongs do not occur again.

*Source: Flemington Kensington Community Legal Centre*

### Universal Periodic Review Update

Australia's human rights record is scheduled to be reviewed under the UN's Universal Periodic Review (UPR) process in 2015. Non-government organisations (NGOs) across Australia have an opportunity to prepare a joint NGO submission to the UPR. Workshops will be held in Melbourne and Sydney for NGOs interesting in being involved. More info here.

## NOTICE BOARD

### Workshop on litigation under Equal Opportunity Act

The Victorian Equal Opportunity and Human Rights Commission, with the assistance of members of the Victorian Bar, is hosting a continuing legal education workshop on litigation in the Victorian Civil and Administrative Tribunal (**VCAT**) under the *Equal Opportunity Act 2010* (Vic).

The workshop is open to civil litigation lawyers, community lawyers and advocates who work in the field of discrimination law. It is free, but places are limited!

**When: Friday 7 November 2014, 8.45am (for a 9am start) to 5pm**

**Where: Lionel Murphy Centre, 360 Queen Street, Melbourne**

Members of the Victorian Bar will facilitate workshops covering the following topics across the day:

- drafting particulars of complaint and defence
- drafting witness statements
- the best ways to utilise documentary evidence
- common rules of evidence which might apply in VCAT
- formulating a claim for remedies under the Act
- approaching strike out applications
- considering how the *Charter of Human Rights and Responsibilities 2006* (Vic) may be used in litigation

Please register your interest with legal@veohrc.vic.gov.au or contact Jennifer Jones, Senior Legal Adviser, on 9032 3421 for more information. Presenter information and a workshop schedule will be available shortly.

### Video resources for NFP about incorporation, legal duties etc

Justice Connect's Not-for-profit Law is using multimedia resources to reach not-for-profits and charities across Victoria and New South Wales. The online resources are designed to make

understanding the law and problem-solving easier for organisations, especially those in rural and regional areas.

Not-for-profit Law's new animated video series provides introductions to key legal concepts like incorporation, tax concessions, and legal duties of board members in a friendly format. The videos are an introductory point to help prepare those new to the ideas for the more detailed written resources on the Not-for-profit Law Information Hub.

Watch the videos here.

### 'No Fixed Address' – exhibition celebrates ten years of free homeless legal service

The Public Interest Advocacy Centre is using art to highlight the legal and human rights issues faced by people experiencing homelessness, in an exhibition of works by artists who have first hand experience of life on the streets.

'No fixed address,' will mark the 10th anniversary of the Homeless Persons' Legal Service, which provides free legal advice to people experiencing, or at risk of homelessness, at eleven welfare agencies across Sydney.

For more information visit: www.piac.asn.au

## BOOK REVIEW

### UN Security Council in the age of human rights

**Jared Genser and Bruno Stagno Ugarte (eds), *The United Nations Security Council in the Age of Human Rights*, Cambridge University Press, 2014 reviewed by the HRLC's Emily Howie**

During her first speech to the United Nations Security Council in September 2013, Australia's Foreign Minister, Julie Bishop, spoke in favour of the Council's resolution to regulate the sale of small arms and light weapons to conflict zones. In doing so, she emphasized the importance of the Security Council's role in protecting human rights. The Minister said: "the resolution demonstrates the fundamental importance this Council places on protecting civilians, and for full respect for international humanitarian law and human rights."

Although the Minister's support for the Council's position on human rights was welcome, her statement overlooked the complexities inherent in the Security Council's ability and willingness to engage with human rights crises and its inconsistent, and at times poor, track record in providing protection.

In a new book *The United Nations Security Council in the Age of Human Rights,* edited by Jared Genser and Bruno Stagno Ugarte, the Security Council's mandate and track record for protecting human rights is explored and critiqued in great detail.

The book covers the evolution of the Security Council's work on human rights, the legal and political constraints in which it operates and the institutional progress that has nonetheless been made towards protecting human rights.

The book provides a realistic view of the limits of the Council's ability to effect change on the ground. However, it also considers in depth some of the notorious instances where the Council failed to act to prevent mass atrocities. Chapters on Rwanda, the Former Yugoslavia and Syria

are among the eight case studies in the book. There are also critiques of the Security Council's thematic work. Janet Benschoof's chapter on the Council's Women, Peace and Security agenda is extremely critical of the failure of the Security Council to properly use all the tools at its disposal to stop sexual violence in conflict.

The strength of the book is in the breadth of experience and perspectives provided by its contributors – academics, practitioners, NGO advocates, former senior UN diplomats and the leaders of countries that experienced human rights crises first hand (such as Jose Ramos Horta's chapter discussing Timor-Leste). The chapters provide legal and political analysis, personal reflection and strong critiques of how the Security Council has at times failed and could do things better.

Genser and Ugarte's book is a welcome addition to the literature that sheds some light on the inner-workings of the Security Council. It can also provide some guidance on how the Council might become a place that acts consistently with its belief in the fundamental importance of human rights.

## HRLC MEDIA COVERAGE

The HRLC has featured in the following media coverage since the last edition of *Rights Agenda*:

- Tom Clarke, Dawn of Joko era brings opportunities for Australia, The Australian, 20 October 2014
- Sabra Lane, Asylum seeker advocates claim Government has hidden 'retrograde' laws, 730, 16 October 2014
- David Wroe, Opposition grows to storage of photo and biometric data, The Age, 15 October 2014
- Waleed Aly, The Future of asylum seeker policy in Australia, Radio National Drive, 15 October 2014
- Zara Zaher, High Court to rule on holding asylum seekers at sea, SBS Radio 14 October 2014
- Daniel Webb, The flaw in Australia's deterrence-based asylum policies: they just give people who lack options one less, The Guardian Australia, 14 October 2014
- Stephanie Anderson, Asylum seeker turn backs to be challenged in High Court, *SBS,* 14 October 2014
- Reuters, UN to give evidence in Australian asylum seeker test case, *Daily Mail Australia,* 14 October 2014
- Ben Doherty, Tamil asylum seekers detained at sea for four weeks get court hearing, *The Guardian,* 14 October 2014
- Elizabeth Byrne, 157 Tamil asylum seekers detained illegally and denied procedural fairness, lawyers tell High Court, *ABC News,* 14 October 2014
- Fran Kelly, 'Detention at sea' issue returns to the High Court, *ABC Radio National,* 14 October 2014

- Max Chalmers, Lawyers Say New Immigration Law Targets 10-month Old Oz-Born Asylum Seeker Baby, *New Matilda,* 30 September 2014
- Upholding human rights, *Outrage Magazine,* 27 September 2014
- Emma Griffiths, Government to reintroduce temporary protection visas in deal with PUP to ensure Senate success, *ABC News,* 26 September 2014
- Cec Busby, UN to debate resolution on protections for LGBTI people, *Gay News Network,* 25 September 2014
- Tracey Holmes, HRLC says the Migration and Maritime Powers Bill enables the Commonwealth to breach international law, *ABC News Radio,* 25 September 2014
- Lateline, TPVs resurrected, *ABC,* 25 September 2014
- Lisa Martin, New visas to clear asylum seeker backlog, *AAP,* 25 September 2014
- Koro Vaka'uta, Attempt to hold G4S accountable for alleged PNG violations, *Radio NZ,* 25 September 2014
- Max Chalmers, Palmer United Party Deal Revives Uncertainty For Asylum Seekers, *New Matilda,* 25 September 2014
- AAP, Manus Island security contractor G4S breached human rights, say lawyers, *The Australian,* 23 September 2014
- AAP, No Manus Is human rights breach: G4S, *Yahoo! 7 News,* 23 September 2014
- Stephanie Anderson, Human rights complaint lodged against former Manus Island security team, *SBS,* 23 September 2014
- Melissa Davey, Manus security firm, G4S, responsible for February violence, says law centre, *The Guardian,* 23 September 2014
- Sarah Whyte, Human rights complaint issued against G4S over Manus asylum seeker treatment, *Sydney Morning Herald,* 23 September 2014
- HRLC's Daniel Webb on RRR Breakfasters, *RRR,* 22 September 2014
- Zara Zaher, PNG Supreme Court to rule on Manus appeal, *SBS,* 19 September 2014
- Sarah Whyte, Manus Island: PNG court to decide whether detention centre inquiry can continue, *Sydney Morning Herald,* 19 September 2014
- James Findlay, Expungement bill expected to pass through Government, *Gay News Network,* 18 September 2014
- Victoria to erase historic consensual gay sex convictions, *SBS,* 17 September 2014
- Elias Jahshan, Bill to expunge historical gay sex convictions introduced in Victorian Parliament, *Star Observer,* 17 September 2014
- Loretta Florance, Victorian men charged with gay sex crimes will have their convictions expunged, *ABC News,* 17 September 2014
- Bridie Jabour, Jail rates for Indigenous women soar as legal funding cuts loom, *The Guardian,* 16 September 2014
- Mark Colvin, Incarceration of Indigenous women spikes in past year, *ABC PM,* 16 September 2014

- AAP, Historic gay sex laws in NSW could be abolished under new proposal, *9 News,* 16 September 2014
- AAP, NSW to follow Vic on gay sex convictions, *Yahoo! 7 News,* 16 September 2014
- Darren Wee, Australia state introduces bill to clear historical gay sex convictions, *Gay Star News,* 16 September 2014
- Benjamin Riley, Victorian Government to introduce historical gay sex convictions bill today, *Star Observer,* 16 September 2014
- AFP, Australia rejects UN criticism of 'human rights violations', *Yahoo! News,* 9 September 2014
- Glen Bartholomew, Offshore detainment of asylum seekers causing a 'chain of human rights violations' according to incoming UNHCR Chief, *ABC News Radio,* 9 September 2014
- Oliver Milman, UN human rights chief to accuse Australia on asylum seeker policy, *The Guardian,* 8 September 2014
- AAP, UN official slams Australia's boat policy, *SBS News,* 8 September 2014
- Mark Colvin, New UN High Commissioner for Human Rights slams Australia's asylum seeker policy, *ABC PM,* 8 September 2014
- Oliver Milman, UN human rights chief to accuse Australia on asylum seeker policy, *The Guardian,* 8 September 2014
- Michael Gordon, New UN human rights chief attacks Australia over asylum seeker rights 'violations', *The Age,* 7 September 2014
- The World from Below, Interview with HRLC's Daniel Webb, *Channel 31,* 5 September 2014
- Athena Yenko, UNHCR To Appear In A High Court Challenge Against Abbott Government, *International Business Times,* 22 August 2014

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

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

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.

Human Rights Law Centre Ltd
Level 17, 461 Bourke Street
Melbourne, Vic, 3000, Australia
www.hrlc.org.au
www.twitter.com/rightsagenda
ABN: 31 117 719 267