Foreword

This report, now in its third year, reflects the state of human rights in our areas of work. The Castan Centre is fortunate to have the expertise of so many Monash Law academics who cover a broad range of topics, all of them on a voluntary basis.

The report takes a slightly different approach this year – for each topic, we’ve answered three questions: What’s got better? What’s got worse? And what needs to change.

We open with our views on women’s rights, which have been particularly prominent in Australia over the past year with Victoria’s Royal Commission into Family Violence and Rosie Batty’s term as Australian of the year.

LGBTI rights have again been prominent and, of course, this report comes soon after the tragic massacre in Orlando. The National Disability Insurance Scheme has also commenced in recent weeks - our report looks at the uncertainty surrounding the NDIS and reminds the reader of how it will not address many problems faced by people with a disability.

International issues have fared prominently in our work, and this report includes reflections on international criminal law, foreign aid and the death penalty plus business and human rights. This last area is a big focus of our work at the moment, with the second edition of our plain English handbook Human Rights Translated: A Business Reference Guide, to be launched in Geneva this November.

This report would not be complete without entries on Indigenous rights and asylum seekers. Unfortunately we have not seen many positive shifts in these areas over the past 12 months. A February 2016 report by our Associate, Dr Stephen Gray, showed that the much-discussed Northern Territory Intervention has had little effect in closing the gap between Indigenous and non-Indigenous Australians.

I’d like to thank our 2016 In-House Interns, who undertook valuable research for this report. They were Audria Hu, Mushda Huda, Frances Hao Qi, April Scarlett and Fia Hamid-Walker.

Finally, we would like to acknowledge Roslyn Guy, who passed away in March. Ros, a former Associate Editor of the Age, was a member of our Advisory Board between 2010 and 2015. Ros played a huge role in editing earlier versions of this report and made a wonderful contribution to our Board. We will miss her.

Professor Sarah Joseph
Castan Centre Director

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

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

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

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

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

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

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

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

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Women’s human rights

By Heli Askola and Deborah Whitehall

The advancement of women’s human rights in Australia continues to pose challenges, in particular regarding economic issues, equal participation, gender-based violence and insufficient protection for vulnerable groups of women. This report focuses on two key problem areas: inequality in the workplace and business, and violence against women.

What’s got better?
Modest improvements have taken place in the workplace sphere. The gender pay gap narrowed slightly to 17.3% in 2015 (from 18.5% in 2014). The proportion of organisations with a domestic violence policy or strategy has increased to 34.9% (from 32.2% in 2014) and the percentage of women managers has grown to 36.5% (from 35.9% in 2014). In 2015, 60.2% of employers have a flexible working policy, up from 57.5% last year.

Victorian employment lawyer and advocate for wage equality, Kate Jenkins, was appointed as Commonwealth Sex Discrimination Commissioner in 2016. She used one of her first public appearances to promote wage equality, which still lags despite women’s increased educational levels.

Domestic violence survivor and activist Rosie Batty was recognised as the 2015 Australian of the Year. New funding ($30.0 million over three years) was announced in March 2015 for the National Awareness Campaign to Reduce Violence against Women and their Children. A further $100 million in federal government funding to tackle domestic violence was announced by Malcolm Turnbull in September 2015. The Department of Human Services released the Family and Domestic Violence Strategy 2016 - 2019 in April 2016.

The Victorian Royal Commission into Family Violence concluded its 13-month inquiry into how to improve responses to family violence in March 2016. In the wake of the final report, the Victorian government committed $572m towards housing, support and services. Victoria, along with NSW, Queensland and Tasmania, will include respectful relationships education components in their school curricula and address domestic violence prevention.

What’s got worse?
Despite some progress towards reducing the gender pay gap, the gap is higher now than it was 10 years ago. The persistent gap not only impacts on women’s earnings in employment but also has repercussions in later life when women retire with about half the savings of men.

Women continue to be significantly under-represented in management and at board level across the public, private and community sectors and in government. Twenty boards in the ASX 200 still do not have any women. Despite more women being appointed in recent years, the percentage of women on ASX All Ordinaries boards is still only at 17.1% (as at February 2016).

The government’s planned cuts to entitlements under the Commonwealth Paid Parental Leave scheme are still on the agenda, though unlikely to be passed soon. Policy developments in this area are unclear, leaving expectant mothers uncertain of future government policy.

The promised $100 million in federal government funding for domestic violence fails to undo the damage caused by the earlier $300 million worth of cuts made to family violence services as well as homelessness and crisis accommodation services by the Abbott government. Despite lots of apparent support for stopping domestic violence, many refuges and legal services are set to close down after the 2016 budget did not reverse the earlier cuts.

Though an increasing number of employers support paid domestic violence leave, the Minister for Women, Michaelia Cash, said in 2016 that she does not support including domestic violence leave provisions in public service workplace agreements, as it would discourage employers from hiring women.

What needs to change
Australia’s commitment to women’s human rights needs to be backed up with sustained action and sufficient funding. Lifelong employment and career inequality, together with responsibility for unpaid caring, leaves many women vulnerable to poverty. The government must address unequal pay by requiring better reporting by employers on pay and opportunities, systematically evaluating gender equality indicators and promoting effective workplace policies. It must also support workforce participation and the better sharing of unpaid caring responsibilities by promoting flexible work arrangements, strengthening paid parental leave laws and guaranteeing flexible and affordable childcare. Employers must address obstacles to women’s career progression, including sexual harassment and sexism through evidence-based policies and complaints procedures that can be trusted.

In terms of violence against women, well-funded infrastructure to deal with family violence is essential to back up the message sent by awareness campaigns. The Victorian government has set an excellent example by committing to fund coordinated services (such as crisis accommodation and legal assistance) to support women and children who wish to leave domestic violence situations. Other states must follow this example, and the federal government must reverse the Abbott-era cuts mentioned above.

All Australian governments must also ensure a responsive legal system that is able to deal with the specific needs of victims, together with prevention and rehabilitation strategies. Tailored services for indigenous or culturally diverse communities are also needed.

Dr Heli Askola and Dr Deborah Whitehall are both Associates of the Castan Centre. Heli is a Senior Lecturer and Deborah is a Lecturer in the Monash Law Faculty.
Disability rights

By Marius Smith and Colin Campbell

A United Nations review of Australia’s human rights record in late 2015 revealed widespread global concern over its treatment of people with disability, with 19 recommendations focusing on issues ranging from discrimination and access to employment to indefinite detention and abuse. There has been a number of positive developments in recent years, but generally Australia’s record on disability is well below par for such a wealthy country.

What’s got better?
The federal government recently appointed Alastair McEwin as the new full-time Disability Discrimination Commissioner in a move welcomed by disability groups. Since the end of former Commissioner Graeme Innes’ term in 2014, the role had been taken on by Susan Ryan in addition to her primary role as Age Discrimination Commissioner. The McEwin appointment reaffirms the importance of the role.

The National Disability Insurance Scheme commenced in most states and territories on 1 July 2016, having been championed by both sides of politics. The NDIS has been largely welcomed by disability groups as a positive step towards better services for people with disability, and a limited roll-out over the previous three years has enabled small-scale trials to iron out potential problems. Nevertheless, there is uncertainty about many aspects of the scheme. Potential issues include cost blowouts due to unexpectedly high demand, lack of certainty over who is covered and to what extent, the lack of housing assistance and whether mental health issues are sufficiently covered. There are also concerns about certain groups, including how the NDIS will be implemented in remote Indigenous communities and how ex-prisoners will access services.

The NDIS is not the panacea to all problems facing people with disability, who still face enormous obstacles regarding education, employment, discrimination and more. Nevertheless, a recent news headline summed up attitudes towards the NDIS as its rollout begins: ‘not perfect, but at least it’s here’.

What’s got worse?
Two senate reports over the past year have shone the spotlight on violence, abuse and the poor state of education for people with disability. Together, they paint a distressing picture of how vulnerable people are treated.

The 2015 report, entitled Violence, abuse and neglect against people with disability in institutional and residential settings (the violence report) summed up the prevailing view succinctly:

Throughout this inquiry, the evidence presented from people with disability, their families and advocates, showed that a root cause of violence, abuse and neglect of people with disability begins with the de-valuing of people with disability… This inquiry heard highly distressing personal accounts from many people with disability. The inquiry also heard from dedicated family members and advocates speaking on behalf of loved ones, some of whom died as a result of violence or neglect.

The 2016 report, entitled Access to real learning: the impact of policy, funding and culture on students with a disability (the education report) revealed “difficulties enrolling, failure of schools to provide the reasonable adjustments required by students, exclusion from school activities, a shortage of services in rural and remote areas of Australia and low expectations of students with disability from school staff and others, leading to a failure to take seriously the educational needs of students”.

The problems were illustrated by recent media reports of students locked up by their educators in Victoria, Queensland and the ACT. Locking up vulnerable children, instead of addressing their needs, is unacceptable, yet the recent Senate reports have illustrated that this approach is far too common. The “cage” in the ACT is one of the few times that a government has condemned student seclusion and removed the responsible employee from the school.

What needs to change
The two Senate reports provided many recommendations which must be implemented by federal and state governments. However, to date there has been no commitment to do so.

The violence report recommendations included establishing a Royal Commission into violence, abuse and neglect of people with disability; creating a national system for reporting and investigating violence and neglect; and implementing supported decision-making models for people with disabilities.

The education report recommendations included funding all students with disability on the basis of need, in accordance with the Gonski Review; training all new teachers in best-practice skills for educating students with disability; and developing a national strategy to improve education for students with disability.

Both reports recommended ending the use of restrictive practices such as restraint and seclusion in all settings. This recommendation must be a priority for all Australian governments.

As the NDIS commences, state and federal governments will have to monitor and evaluate that program very closely and amend it as necessary to meet the needs of Australians with disability.

Dr Colin Campbell is a Senior Lecturer in the Monash Law Faculty and an Associate of the Castan Centre and Marius Smith is the Centre Manager.
The massacre of 49 people at a LGBTI night club in Orlando, in June 2016, brought into stark focus the horrific violence and persecution that LGBTI people are still subjected to.

Newton’s theory, that for every action, there is an equal and opposite reaction, is a useful prism through which to view LGBTI rights, although reactions to advances in LGBTI rights are often extreme rather than equal.

What’s got better?
The number of countries that criminalise homosexual conduct is heading in the right direction. It recently fell from 77 to 75, as first the Seychelles decriminalised homosexual conduct, closely followed by Nauru.
The number of countries where same-sex couples can marry is also heading in the right direction, with Colombia becoming the latest country to achieve marriage equality following a court ruling that same-sex couples have a constitutional right to marry.

In late June 2016, the UN appointed the first ever Independent Expert on violence and discrimination based on sexual orientation and gender identity. This landmark development was a sign that the UN is finally prioritizing LGBTI rights appropriately, having been urged to take this step by six Latin American nations and hundreds of civil society organisations.

In Australia, there was much cause for celebration as Victoria became the first jurisdiction in the world to offer the LGBTI community a formal apology for having ever criminalised homosexual conduct. Premier Daniel Andrews described the laws, which were repealed in December 1980, as “profoundly and unimaginably wrong”.

The Castan Centre has written to the Attorney-Generals of other Australian states and territories urging them to set up a mechanism to expunge convictions relating to consensual gay sex that many men still carry around, and to accompany such reform with a formal apology, which Victoria has shown is a powerful step in healing past wrongs.

What’s got worse?
Violent attacks on LGBTI people are unfortunately increasing, both in intensity and frequency. While the massacre in Orlando was the largest attack on LGBTI people since the Holocaust, it is not an isolated incident. In August 2015, an orthodox Jew brutally stabbed participants in the Jerusalem Pride March, killing a 16-year-old girl and wounding six others.

Australia is not immune from gay bashings and homophobic insults. And this is one of the reasons why the LGBTI community is opposed to having a plebiscite on whether they should be allowed to marry, which is seen as a license for groups such as the Australian Christian Lobby to engage in vitriolic attacks that will potentially harm vulnerable LGBTI youth and children in same-sex families.

The situation for trans and gender-diverse persons in the US has been worsening. North Carolina recently passed a law that forces trans and gender-diverse persons to use the bathroom that corresponds to the sex recorded on their birth certificate, rather than the gender with which they identify. It is turning into a lawyers’ picnic with multiple lawsuits ensuing. Hopefully, common sense will prevail and people will begin to understand that trans and gender-diverse individuals themselves should decide which bathrooms are most appropriate for them to use.

All these attacks suggest that homophobia and transphobia is indeed one of the last “socially acceptable prejudices to have”.

What needs to change
There is a saying that the biggest room is the room for improvement, and this is certainly true when it comes to LGBTI rights.

In Australia, there are still many areas in need of reform. Achieving marriage equality (without a divisive plebiscite) is obviously a priority, but should not be seen as an end in itself. After all, the attack on LGBTI people in Orlando occurred in a jurisdiction where it is legal for same-sex couples to marry.

There is an urgent need to significantly amplify our efforts to combat homophobia, transphobia and biphobia. The government should take the lead in funding campaigns to increase respect for LGBTI persons, rather than leaving it to not-for-profit organisations such as No to Homophobia and the National Institute for Challenging Homophobia. To adopt the language of our Prime Minister, “there has never been a better time” to show leadership in promoting a rights respecting culture that values all people regardless of their sexual orientation, gender identity or intersex status.

At both a global and local level, we need to significantly increase our efforts to end the persecution of LGBTI people. We must rapidly move to a situation where advances in LGBTI rights in one country are not closely followed by violent retaliations against sexual and gender diverse minorities in another.

Paula Gerber is a Professor in the Monash Law Faculty and a Deputy Director of the Castan Centre.
Twelve months ago, we focused on the massive cuts to foreign aid in the 2014 federal budget, carried through into 2015, and the shift towards private enterprise in Australia’s aid programme. That shift is based on the theory that private enterprise is the best way to promote economic growth, which in turn is the best way to reduce poverty and more fully realise human rights. The fact that substantial parts of the shrinking foreign aid budget were used to pay for Australia’s offshore processing of asylum seekers in Nauru and Papua New Guinea was also cause for concern.

What’s got better?
In short, not much, at least in Australia. Globally, 2015 was the end date for the Millennium Development Goals. The MDGs were the mechanism the global community agreed on to achieve measurable targets for human development, such as halving the number of people living in absolute poverty and achieving significant improvement in the lives of over 100 million slum dwellers. As the MDG target deadline passed, the outcomes were mixed. Some goals were achieved, others were missed, and there was a significant regional disparity in many areas. However, there was clear progress against all goals, and international consensus is that aid and international co-operation should continue to be targeted towards improving human development.

With the passing of the MDGs, all 193 UN member states agreed to replace them with the Sustainable Development Goals as part of the “2030 Agenda”. There are 17 SDGs (up from 8) and 189 measurable targets, most of which have an end date of 2030. There is a strong human rights focus in the SDGs, such as freedom from hunger, improved standards of health, access to water and sanitation and decent work and livelihood. Australia’s spin on the SDGs, however, mimics the economic growth priorities of its aid programme: “The 2030 Agenda helps Australia in advocating for a strong focus on economic growth and development in the Indo-Pacific region, and in promoting investment priorities including gender equality, governance and strengthening tax systems.”

What’s got worse?
The international community has agreed since the 1970s that the level of official development assistance (or foreign aid) necessary to make a substantial difference in poverty eradication in the developing world was 0.7% of gross national income (GNI). Most countries, excepting the usual suspects from northern Europe, miss that target, but the consensus has been to strive towards it. The UK’s Conservative government, for instance, managed to budget for the magic 0.7% even while it was in the throes of austerity cuts in 2013, and has since entrenched the target in law. After the massive aid cuts in 2014 and 2015, Australia was supposed to have frozen its aid budget. That would have meant a steady amount in dollar terms (around $5 billion) but a shrinking amount as a proportion of GNI. Most countries, excepting the usual suspects from northern Europe, miss that target, but the consensus has been to strive towards it. The UK’s Conservative government, for instance, managed to budget for the magic 0.7% even while it was in the throes of austerity cuts in 2013, and has since entrenched the target in law. After the massive aid cuts in 2014 and 2015, Australia was supposed to have frozen its aid budget. That would have meant a steady amount in dollar terms (around $5 billion) but a shrinking amount as a proportion of GNI. However, the 2016-17 budget delivered yet more swingeing aid cuts for the next two years. As a result, Australia’s aid contribution will sink to just 0.22% GNI in 2017-18 – the lowest level ever, and less than a third of the global consensus target. There is also concern about how the shrinking pie is divided. Whether you think allocating aid money to private enterprise in the name of job creation and economic growth is a wise investment and an effective method of alleviating poverty will depend on your belief or scepticism in the so-called economic growth model. However, the focus on private enterprise is very clearly a reality of Australia’s aid programme at the moment.

It is not clear from the budget papers whether any of the costs of offshore processing of asylum seekers have again been counted in the aid budget. Regardless, aid is definitely being used as an inducement to other countries participating in Australia’s offshore processing.

What needs to change
The obvious answer is that Australia should reverse its diminishing aid spending and reaffirm its commitment to the international target of 0.7% GNI, even as a medium-term aspiration. The level of spending is only half the story though. If the aid programme is to effectively improve human rights, aid needs to be better targeted to those purposes. Embedding the SDG targets in the aid program is a necessary starting point. Australia also needs to take responsibility for actions done abroad by government agencies, as well as actions funded by Australian aid money. This is more important than ever now that so much of Australia’s aid is channelled through private companies. If human rights violations occur in Australian-funded projects, such as forced relocation of local communities or poisoning a water supply, Australia must change its culture of denying any responsibility for human rights violations that occur in other countries. Australia’s human rights obligations do not stop at its borders.

Dr Adam McBeth is an Associate Professor in the Monash Law Faculty and a Deputy Director of the Castan Centre.
International initiatives on business and human rights have gathered pace this century, from the 2003 business and human rights norms, through to the 2011 Guiding Principles on Business and Human Rights, and now the burgeoning debate over a business and human rights treaty.

To paraphrase Milton Friedman, the business of business is to make money. But more must be done.

What’s got better?

In 2014, the UN Human Rights Council established an open-ended intergovernmental working group to draft a binding treaty on business and human rights. That group’s first report in February 2016 discussed myriad issues, and it is likely to be a long road to working out what a treaty would do, and the entities, rights violations and liabilities it would cover.

The 2015 report of the UN Working Group on Business and Human Rights (yes, UN bodies have frustratingly similar names) focused on the need for better tools to measure implementation of the UN Guiding Principles on Business and Human Rights. The UN also launched a Guiding Principles Reporting Framework, the “world’s first comprehensive guidance for companies to report on how they respect human rights.” The Framework is made up of 31 questions on corporations’ human rights performance. Notable companies that have adopted the framework include Unilever, Nestle, H&M and Ericsson.

At a national level, in 2015 the UK enacted the Modern Slavery Act. This law requires companies with an annual global turnover exceeding £36 million to publish an annual statement detailing how they have combatted slavery and human trafficking. The French National Assembly has endorsed a draft law on human rights due diligence for companies. Furthermore, eight countries have developed National Action Plans (NAPs) on business and human rights and 26 are in the process of developing NAPs. For example, Australia has begun a national consultation which may lead to the adoption of a NAP.

Finally, in late 2016, the Corporate Human Rights Benchmark will release the results of its pilot project ranking major public companies according to their human rights record in various industries. Widespread acceptance of this Benchmark should generate competition among companies to rise in the rankings.

What’s got worse?

It is difficult to know if human rights violations in business are “better” or “worse”, but they certainly continue. The lack of obvious improvement is disappointing, given the burst of activity in the last decade.

Among the worst recent incidents are:

- Hundreds of thousands of Syrian refugees are allegedly being exploited in supply chains, particularly in Turkey.
- The Samarco dam in Brazil failed in November 2015, releasing 60 million cubic meters of iron waste into the local river. Toxic mud flooded the town of Bento Rodrigueza. At least 19 people were killed, and there is enormous damage to the local environment, livelihoods, homes and food supplies. Samarco is a joint venture between BHP and Brazilian iron ore miner, Vale. The cause of the failure is still being investigated though, in February, 4 Corners reported that Brazilian police claim the dam failed due to a sharp increase in production caused by falling iron ore prices. Samarco had reached a deal with the Brazilian government to pay $3 billion compensation. However, that deal was struck down by a Brazilian court in June 2016, enabling an $8 billion claim to proceed against Samarco, Vale and BHP.
- 7-eleven has been caught exploiting its workers in Australia, particularly foreign students, by underpaying them and making them work long hours. Employers withheld passports and threatened to expose employees’ breaches of visa conditions to deter complaints. 7-eleven now faces back pay claims of around $100 million, the largest in Australian history.
- Globally, human rights defenders against major infrastructure projects continue to be targeted. For example, Indigenous leader Berta Cáceres was murdered in Honduras.

What needs to change

There is increased commitment among corporations and governments to address human rights abuses by business. It is great that companies are learning best practices from each other, that governments are working to adopting National Action Plans, that the UN Working Group wants to develop measurement tools, and that the UN open-ended intergovernmental working group is planning a second meeting.

But there is too much conversation and not enough action. There is an overemphasis on process rather than substance. In particular, the international community, including the Australian government, is overly concerned to ensure that businesses are happy with ongoing developments. Yet the debate cannot be exclusively framed around realEconomik; that is what business is willing to put up with. That creates an unequal playing field, where human rights fit in around business exigencies rather than vice versa. Meanwhile, real abuses continue with real victims whose voices, when heard, give a reality check to illusions of serious progress.

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

By Joanna Kyriakakis

In my piece for last year’s report, I wrote of the International Criminal Court’s (ICC) ‘Africa Problem’: the perception of an ICC anti-African bias, illustrated by the preponderance of cases addressing African conflicts and accused. Even then, however, there were counter-indicators showing the ICC maintains an open eye to the rest of the world.

What’s got better?
As anticipated, in late 2015 the ICC Office of the Prosecutor (OTP) officially requested to open a situation into alleged crimes committed during the 2008 separatist war in Georgia, involving Georgian, South Ossetian and Russian armed forces. The request was authorised in January 2016, making this the first advanced OTP investigation of events outside of Africa that could lead to individual prosecutions in due course. Furthermore, the OTP continues preliminary investigations into events elsewhere that suggest it may, in time, function as a truly global court.

These investigations include a re-opened look at alleged systematic detainee abuse by UK services personnel in UK-controlled facilities during the Iraq occupation. The OTP is also considering whether international crimes were committed by government security forces and associated groups in Ukraine following political protests in 2013 and by Palestinian armed groups and Israel Defense Forces in Gaza in mid-2014. The latter investigations were both prompted by the ad-hoc acceptance of ICC jurisdiction by Ukraine and Palestine respectively. These developments illustrate that the ICC is a crucial institution for many states in securing accountability. That the OTP is tackling politically charged contexts that implicate internationally powerful states is also laudable.

Crucial, too, are the ongoing international criminal justice efforts of states and institutions beyond the ICC, as the goal to end impunity for international crimes will only be achieved if multiple states take up the effort in multiple sites. Of this ilk is the landmark verdict against Hissene Habre last month by the Extraordinary African Chambers in Senegal, which saw the former Chadian President sentenced to life for crimes against humanity committed during his brutal reign.

A second example is the September 2015 agreement between the Colombian government and FARC rebels to establish a ‘Special Jurisdiction for Peace’ that will prosecute conflict-related grave crimes committed by all sides during Colombia’s long standing civil war. The agreement constitutes the justice arm of a complex and protracted effort to bring peace to a country beset with over 50 years of civil conflict. While not above criticism, the plan goes a significant way toward integrating truth and justice outcomes in a difficult transitional process towards peace.

What’s got worse?
The path to a comprehensive and effective international criminal justice system will, however, inevitably be beset with challenges.

A recent setback was the final collapse of the ICC Kenyan cases. Post 2007 election violence in Kenya claimed the lives of more than 1,000 people and displaced many others. In April 2016, the ICC vacated the remaining charges related to those events, against Kenya’s Vice President, William Ruto, and a Kenyan radio presenter. The outcome is linked to witness interference and politicisation of the judicial process by Kenyan authorities. The OTP had already withdrawn charges against President Kenyatta, citing a lack of cooperation by the Kenyan government as one of its key challenges. The cases demonstrate the challenges of prosecuting sitting heads of state and how harmful a lack of state support or, as in this case, overt state hostility can be. All experiences are lessons, however, with the OTP committed to reviewing and improving its work practices.

Meanwhile, as long as conflicts persist around the world, there is more to be done. Not least, the Syrian conflict continues, with ongoing reports of mass violence against civilians in Aleppo and enormous human costs of communities under siege. Peace, justice and accountability efforts in respect of that ongoing human tragedy have so far failed.

What needs to change
Above all, states need to re-affirm and substantiate their commitments to international criminal justice. South Africa’s 2015 failure to arrest Sudanese President Omar Al Bashir while visiting its territory, despite a long-standing ICC warrant for his arrest, was a failure in its cooperation obligations as a party to the ICC. Without enforcement capabilities of their own, international criminal institutions will always be beholden to the genuine commitment of states to fulfil their justice mandates. Apart from cooperating in a practical sense, financial support for international criminal courts should also be improved. In addition to increased state finance, the Security Council should provide additional funding when it refers a situation to the ICC. Better funding is not only crucial to enabling prosecutions but will help finance the growing reparatory efforts of institutions like the ICC that can help to materially restore victim communities.

Dr Joanna Kyriakakis is a Lecturer in the Monash Law Faculty and a Deputy Director of the Castan Centre.
Indigenous rights

By Melissa Castan and Stephen Gray

Our nation’s efforts to improve Indigenous peoples’ human rights continue to be beset by controversy and a lack of improvement in many key areas such as health, education and incarceration.

What’s got better?
The South Australian government set up an $11 million fund to compensate members of the Stolen Generations, and signed a deal with the federal government to secure the future of remote Indigenous communities. Unfortunately, Western Australian indigenous communities remained in limbo following the announcement that a number of them would be de-funded and therefore effectively closed.

In December 2015, the Prime Minister and Leader of the Opposition appointed a Referendum Council to lead the process for Constitutional recognition of Indigenous people, and The Prime Minister flagged a 2017 date as “achievable”. The Victorian government has commenced talks with Indigenous groups on a possible treaty.

After extensive public consultation, the Australian Law Reform Commission completed its inquiry into the native title system, tabling its report in June 2015. The government has yet to respond.

What’s got worse?
When 22-year old Yamatji woman Ms Dhu was taken by police to a Port Headland hospital in 2014, the officers told staff that she was “faking it”. An inquest in late 2015 revealed that she had acquired an infection while in jail for unpaid fines. She died later that day.

Distressingly, aboriginal deaths while incarcerated are more frequent now than at the time of the landmark 1991 deaths in custody report. Over 340 Indigenous people have died in custody since then.

A key finding of the 1991 report was that Indigenous people are more likely to die in custody because they are more likely to be in custody. The number of Indigenous prisoners rose 7% in 2015, and 80% over the past decade. Indigenous prisoners account for 27% of all prisoners despite Indigenous people being just 3% of the total population. The fastest growing prison population is Indigenous women.

A big factor in this systemic failure is ‘tough on crime’ policies, which are a poor substitute for addressing underlying social problems. In Queensland, the principle that detention should be the last resort for children has been removed from legislation. In Western Australia, mandatory sentencing and jail now apply for fine defaulters.

In the Northern Territory, “paperless” arrest laws allow police to detain a person for up to four hours (or longer if drunk) if they suspect that the person has committed or is going to commit an offence that would usually result in a fine. Almost 80% of those arrested under the law are Indigenous.

Suicide among Indigenous Australians is a national crisis. In 2014, suicide was the second leading cause of death for Indigenous children under 15 and the leading cause of death for those aged 15-35.

The annual Closing the Gap report showed that the gap between Indigenous and non-Indigenous Australians is failing to close in many areas. There has been no progress in raising life expectancy, the target to halve Indigenous employment is not on track, while literacy and numeracy goals have had chequered results. In better news, the targets to halve the gap in child mortality and year 12 completion rates are on track to be met. A Castan Centre report revealed that the Northern Territory Intervention had had little effect in closing the gap for Indigenous people there.

Concerns continue to increase about the prospect of another Stolen Generation. There are now about 15,000 Aboriginal children in out-of-home care, compared to about 2,400 in 1997, when the Bringing them Home report on the Stolen Generations was released.

Finally, the 2016 Budget confirmed that Aboriginal legal services will be subject to 8 percent funding cuts resulting in less services being offered to vulnerable people. The cuts are likely to result in more unrepresented litigants in court leading to concerns about the administration of justice.

What needs to change
The incarceration rate for Indigenous Australians is a national shame. The first step in tackling this problem is to add a new Closing the Gap target for the overrepresentation of Indigenous Australians in prison. This development must then be translated into a number of actions, from increased legal aid funding and amended sentencing laws to better social programs to address root causes of offending.

Greater effort must be made to achieve each of the current Closing the Gap targets by working to improve existing programs and especially by engaging in better consultation with Indigenous communities.

The government must continue to build momentum towards a referendum on Indigenous recognition. The reform process should engage properly with Indigenous Australians, with the aim of introducing substantive protections and self-determination while complying with the UN Declaration on the Rights of Indigenous Peoples.

Both Dr Stephen Gray and Melissa Castan are Senior Lecturers in the Monash Law Faculty. Stephen is an Associate of the Castan Centre and Melissa is a Deputy Director.
People held in places of detention are always at risk of abusive treatment. Whether the facility is a prison, juvenile detention, psychiatric facility or immigration detention, it is a “total” institution with significant power imbalances, security-focused agendas and vulnerable detainees.

People in detention are protected from torture and other cruel, inhuman or degrading treatment or punishment and they have the right to humane treatment. These protections exist in international law, and also under the Victorian Charter of Human Rights and Responsibilities Act and the ACT’s Human Rights Act.

One valuable way to protect the rights of people in detention is to have regular and robust monitoring by an independent external body. This monitor should act as the community’s ‘eyes’ into these otherwise closed environments to discover any cases of abuse. But more importantly external monitoring should prevent abuses occurring in the first place, by regularly reviewing protocols and practices and deterring inappropriate behaviour.

The international ‘gold standard’ for this form of monitoring is the framework established under the Optional Protocol to the Convention against Torture (OPCAT), which covers all places where a person is deprived of liberty. Australia has signed, but not ratified, the OPCAT.

What’s got better?

Since the beginning of 2015, four countries have ratified OPCAT, bringing the total to 81. Ratifying countries agree to set up effective and robust independent monitoring bodies (known as National Preventive Mechanisms, or NPMs) to visit places of detention and investigate and report on the treatment and conditions there. They also agree to provide unrestricted access to closed environments, for announced and unannounced visits from the UN Subcommittee for the Prevention of Torture (SPT).

In late 2015, Australia was strongly criticised during its Universal Periodic Review at the United Nations for failing to ratify OPCAT. However, the federal government responded positively, stating that it was “actively considering” ratification.

What’s got worse?

Internationally, some countries have reported a failure to fully resource monitoring bodies that have taken on an NPM role, requiring subsequent lobbying and negotiation with governments. Badging existing monitoring bodies as NPMs can mean additional work to ensure they are genuinely independent, properly resourced, with the requisite expertise and access.

In Australia, despite OPCAT ratification being on the government’s agenda, it has made no concrete decisions or announcements about its intention since March 2016.

What needs to change

Internationally, over 100 countries still need to ratify OPCAT, including Canada and the US. Australia should now move to finalise ratification itself. The federal government’s 2012 National Interest Analysis (NIA) stated that legislation for the SPT visits would need to be in place before ratification, and that the government should declare that establishing the NPM would be delayed by three years to accommodate the many logistical issues.

Assuming Australia adopts the approach taken in New Zealand and the UK (and most other states), of designating existing bodies as NPMs, a mixed hybrid model will be required to incorporate federal and state bodies, probably across the various sectors of detention, and with head or chief NPMs liaising with a national co-ordinating NPM, most likely the Australian Human Rights Commission or the Commonwealth Ombudsman as the co-ordinating body.

As most detention occurs under state authority, there are currently different monitoring practices across Australia which will need to be brought into line under the OPCAT process.

A preliminary overview of Australia’s current monitoring regimes conducted with the Castan Centre suggests that some sectors and oversight agencies are closer to compliance with the OPCAT criteria than others. That is, they are genuinely independent of government, well resourced, with power to access relevant places of detention, to have dialogue with relevant departments, and to report on findings. For example, prison monitoring in some states already ticks many of the ‘OPCAT boxes’, with independent Prisons Inspectorates and proactive Ombudsman offices. The detention of children in welfare and correctional facilities is more inconsistently monitored, although there are some strong regimes, and monitoring of psychiatric facilities may not meet OPCAT criteria.

The main limitation on even the most well-resourced monitoring bodies is that they cannot enforce their recommendations; the most they can do is ‘name and shame’, reporting publicly on their findings. Their effectiveness depends on the politics of the day, and on the perceived legitimacy of the office.

The National Children’s Commissioner is currently undertaking a major inquiry into the monitoring of youth justice centres around Australia, with an explicit focus on exploring how OPCAT might be implemented in this sector.

A country’s participation in the OPCAT process is a significant statement of support for rights protections for all people held in detention, and we look forward to an announcement from the federal government soon.

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In last year’s Human Rights Report, Castan Centre Director Sarah Joseph wrote that the pending executions of Andrew Chan and Myuran Sukumaran were ‘the most likely outcome at this point in time.’ Tragically, she was correct, notwithstanding Australia’s impassioned advocacy on its citizens’ behalf.

The executions did, at least, help spark a Senate Committee review into Australia’s advocacy for death penalty abolition, but, around the world, the deadly march continues.

What’s got worse?
In 2015, Amnesty recorded at least 1634 executions globally, the highest number since 1989, and an increase of 54% on 2014.

Pakistan, Saudi Arabia and Iran were responsible for 89% of these executions. In Pakistan, 326 people were executed after authorities lifted a six-year moratorium. In Saudi Arabia, at least 158 people were executed, a 76% increase on 2014. As for Iran, at least 977 people were executed, mainly for drug-related crimes, which do not meet the ‘most serious’ threshold still arguably permissible under Article 6 of the International Covenant on Civil and Political Rights.

In Iraq, around 26 executions were carried out in 2015. However, in early 2016, 92 death sentences were imposed in just six weeks, including 40 in one day for men accused of a massacre at a military camp near Tikrit.

Easily at the top of the grisly table, however, was China. As China classifies death penalty figures as state secrets, it is not possible to say how many people were executed. However, Amnesty believes that the number for 2015 was in the thousands. Partly this is because China imposes the death penalty for such a wide range of crimes, from embezzlement to the usual suspects such as drug trafficking. Also, China continues to use the sanction as part of its armoury against minority groups and dissidents, including the Uighurs and (allegedly) members of Falun Gong.

Closer to home, three countries – Bangladesh, India and Indonesia – resumed using the death penalty in 2015. In Indonesia, fourteen people were executed under President Joko Widodo, all of them for drug trafficking. Indonesia is now said to be preparing for more executions for drug-related crimes, and its Minister for Law and Human Rights, Yasonna Laoly, has called for the death penalty for rape and murder.

What’s got better?
There are some signs of improvement around the world, including in China. The government there has raised the threshold for officials to face the firing squad for corruption from 100,000 to three million yuan. It has also reduced the number of crimes punishable by death from 55 to 46, removing smuggling, counterfeiting and ‘fabrication of rumours’ from the list.

Proposed legislation would also allow defence lawyers greater access to clients during police investigation, and permit free legal representation in death penalty cases.

Elsewhere, Mongolia joined Madagascar, Fiji, Suriname and the Congo in abolishing the death penalty. The Japan Federation of Bar Associations condemned its country’s use of capital punishment and called for a review of the policy.

In Malaysia, law minister Nancy Shukri proposed abolishing mandatory death sentences for certain crimes, including drug trafficking.

Vietnam’s parliament approved abolishing the death penalty for seven crimes, including low level drug offences. However, like China, it keeps the numbers of executions a state secret.

In the United States, use of the death penalty has dropped steadily since 2000, with just five states carrying out ‘only’ 27 executions in 2015, the smallest figure since 1998. Several states, including Delaware, Alabama, and Florida, are examining the constitutionality of their death penalty provisions.

What needs to change
Australia’s recent Senate Committee report presents compelling recommendations for Australia’s future policy on this issue, and it is vital that they be implemented.

It recommends review of Australia’s extradition and mutual assistance arrangements to ensure these comply with human rights principles. Federal police guidelines should be amended to prevent exposure of all people (not just Australian citizens) to the risk of the death penalty in those countries that retain it. In particular, the AFP should withhold information about drug crimes from retentionist countries except where they obtain guarantees that prosecutors will not seek the death penalty.

More broadly, the review recommends that Australia’s advocacy for death penalty abolition should be based on human rights principles. This should include particular condemnation of its use on juveniles, pregnant women, and people with mental or intellectual disabilities.

Australia’s approach should be long-term, as opposed to knee-jerk responses to particular cases. Above all, it needs to be consistent, or it will be ineffective. As numerous submissions to the review pointed out, there was a clear inconsistency between Australia’s opposition to the death penalty for Australian citizens and its support for the penalty where (as with the Bali bombings) Australians were the victims. This may have passed relatively unnoticed in Australia, but it did not escape attention overseas.

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Asylum seekers feature so regularly in the Australian media that it would be easy to assume that asylum seeker law and policy are constantly changing. However, this assumption would only be partially accurate. While changes have occurred, the fundamental aspects of Australia’s asylum seeker regime remain intractable and enjoy bipartisan support.

Australian law distinguishes between asylum seekers who arrive without a valid visa (usually by boat) and those who arrive with a valid visa (usually by plane). Those in the latter group are entitled to access Australia’s refugee status determination process and to be granted protection if they establish refugee status. Those who arrive without a valid visa are not.

Since July 2013, asylum seekers who arrive (or attempt to arrive) in Australia by boat are subject to offshore processing and most have been transferred to regional processing centres in Nauru and on Manus Island in Papua New Guinea (PNG). The federal government has gone to extraordinary lengths to avoid resettling them in Australia, even concluding a $55 million agreement with Cambodia allowing refugees processed in Nauru or PNG to be resettled there. Each of the four refugees transferred to Cambodia under these untenable arrangements has now returned to their home country.

What’s got worse?

The Nauru and Manus Island centres have been sites of great human suffering. Beyond the harsh conditions under which transferees are detained, processing has been agonisingly slow, giving rise to a pervasive sense of uncertainty and hopelessness. Self-harm is a feature of life in these centres and, in recent months, two asylum seekers have set themselves on fire. 23 year old Iranian asylum seeker Ormid Masjoumal died as a result of his injuries while Hodan Yasin, a young Somali refugee, suffered horrific injuries. The deaths of Reza Barati and Hamid Kehazaei at Manus Island in 2014 revealed serious deficiencies in security and health services, centre management, staff training and supervision. Allegations of sexual abuse of women and children have been made, notwithstanding the government’s efforts to entrench a climate of secrecy. Under the Australian Border Force Act 2015, workers may be prosecuted for disclosing information obtained in the course of their work.

For those asylum seekers processed in Australia, a number of recent changes to domestic policy have made it even more difficult to access protection. These include reduced access to legal assistance and the reintroduction of temporary protection visas.

What’s got better?

The treatment of asylum seekers has been subject to the vagaries of populist sentiment. A shift in public sympathies therefore holds significant promise. After evolving over time, public opinion shifted notably after the High Court determined that the federal government’s arrangements for offshore processing in Nauru were within its constitutional power. The decision authorised the return of 267 asylum seekers to Nauru, including women and children who had been transported to Australia to receive medical treatment. The prospect of their imminent return generated public outrage and spawned the LetThemStay campaign, with nationwide protests and principled civil disobedience from churches which offered to provide sanctuary to the asylum seekers. Leaders, including the Victorian and New South Wales Premiers, offered to assist in accommodating the asylum seekers and called on the federal government to allow them to stay. Community detention in Australia was ultimately granted to more than half of the group.

While the Nauru arrangements remain in place, the future of the Manus Island centre is uncertain following a recent judgment of the PNG Supreme Court. The Court held unanimously that detaining refugees and asylum seekers in the centre breached the right to personal liberty and was therefore unconstitutional. After indicating that the centre would be closed, the PNG government has announced that the men living there are no longer detained because they are free to move around the island. While the future of the processing centre remains unclear, the Australian government has maintained the position that asylum seekers who arrive in Australia by boat will not be resettled here.

What needs to change

Australia’s refugee policy requires fundamental change, starting with an end to the differential treatment of asylum seekers based on their mode of arrival. Such change must begin with recognition that the treatment of those who have travelled by boat is inconsistent with Australia’s obligations under the Refugee Convention and core human rights instruments. Recognition must be followed by a commitment to comply with these obligations in good faith. What such compliance might entail is no mystery. Australia’s policy has been scrutinised by numerous bodies, including the Office of the High Commissioner for Refugees and the Australian Human Rights Commission. Expert advice has not been hard to come by. What is needed is the political resolve to act on the advice.

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Children’s rights

By Paula Gerber

The UN Convention on the Rights of the Child (CRC) is the most ratified of all human rights treaties. However, around the world children’s rights continue to be violated with impunity, highlighting the stark gap between ratification and compliance. In Australia, we frequently see human rights breaches perpetrated against Indigenous children, children seeking asylum and LGBTI youth, and we need to do much more to protect the rights of children from these vulnerable groups.

What’s got better?

After sustained protests, the federal government, in April 2016, granted community detention to the 37 babies born in Australia to asylum seekers and another 54 children who were in Australia for various reasons, including medical care. This means that for the first time in almost a decade, there are no children being held in immigration detention centres in Australia.

We have seen some improvements in health and education for Indigenous children. For example, The Closing the Gap Prime Minister’s Report 2016 identified improved child mortality rates (we are on track to halve the child mortality gap between Indigenous and non-Indigenous people by 2018) and Year 12 attainment rates have improved, although the number of Indigenous students finishing secondary school is still relatively low (about 60%).

Civil society is playing a vocal and vital role in supporting LGBTI youth. For example, in May 2016, Minus 18 organised the first LGBTI Diverse Formal in Melbourne which was attended by more than 600 LGBTI youth who are prevented by their school from wearing what they want or taking who they want to their Formal.

What’s got worse?

Just days after the release of the last child from Australian immigration detention centres, the Immigration Minister announced that 90 children in Australia would be sent to Nauru, following a February 2016 High Court decision. In that case, the Court held that the government’s policy of funding and operating detention centres in a third country was unlawful.

Indigenous children in our justice system continue to be a source of major concern. There are 24 times more Indigenous children in juvenile detention than non-Indigenous children, and in Western Australia, the incarceration rate for Indigenous children is 52 times higher than the rate for non-Indigenous children. Notwithstanding these shocking statistics, the government has not committed to including any targets for reducing Indigenous imprisonment rates, as part of the Closing the Gap initiative.

A low point in children’s rights in 2016 was the government’s vicious attacks on the Safe Schools program, an initiative designed to create a safe and inclusive environment for LGBTI students. Following Cory Bernardi’s allegations that the program is ‘indoctrinating’ children, Malcolm Turnbull ordered a review of the Program. This resulted in the Program being severely curtailed, including: only being offered in secondary schools; some of the gender diversity role-playing activities being removed; and certain materials restricted to one-on-one discussion between students and qualified staff.

The review of the Safe Schools program did not use the CRC as the basis for assessing the program. In particular, the best interests of children does not appear to have been a primary consideration and children were not given the opportunity to participate and express their views about the program.

What needs to change

First and foremost, Australia needs to apply the CRC to all its decisions affecting children by incorporating the CRC into domestic law. Australia has enacted legislation to give domestic effect to other human rights treaties, including the Convention on the Elimination of All Forms of Discrimination Against Women through the Sex Discrimination Act 1984 (Cth), the International Convention on the Elimination of All Forms of Racial Discrimination through the Race Discrimination Act 1975 (Cth) and the Convention on the Rights of Persons with Disabilities through the Disability Discrimination Act 1992 (Cth). Without similar enabling legislation, the CRC can be readily ignored, since there is no means of enforcing its provisions through the Australian courts.

It has been over twenty-five years since Australia ratified the CRC, yet there appears to be little political and public will to give effect to this treaty. A Child Rights Act in Australia is long overdue and would be a significant step towards increased respect for children’s rights in this country.

A further positive step would be for Australia to ratify the Third Optional Protocol to the CRC which creates a mechanism for children to bring individual complaints to the Committee on the Rights of the Child. This Optional protocol was developed following the CRC Committee’s concern that “for rights to have meaning, effective remedies must be available to redress violations.” There is an urgent need for Australia to provide children with access to domestic and international remedies for breaches of their human rights.

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Australia is the only western democracy without a comprehensive human rights act, relying instead on an inadequate patchwork of constitutional rights, anti-discrimination laws and general law. At the state level, only Victoria and the ACT have human rights laws, and even they are not as effective as they could be.

What’s got better?
In 2015, Victoria conducted a thorough review of its Charter of Human Rights and Responsibilities Act. As well as providing many important recommendations for strengthening the Charter (see below), the eight-year review praised the Charter for integrating human rights into many aspects of Victoria’s legal and political framework. The government will respond to this review shortly.

In June 2016, Queensland’s Legal Affairs and Community Safety Committee released its report on whether the state should adopt human rights legislation. The Committee split along party lines, with government members recommending a Human Rights Act and the other members taking the opposite view. The government must respond shortly, however based on the recommendations of the Committee’s government members, it is hoped that it will proceed and introduce legislation.

What’s got worse?
A 2014 review of the ACT’s Human Rights Act drew criticism for being conducted in-house rather than via an independent process. In particular, the review was seen as being carried out without proper mechanisms, public debate or consultation as required by the Act. The review failed to recommend expanding the Act to cover economic, social and cultural (ESC) rights, such as the right to health and the right to food, clothing and housing.

This stagnation was disappointing because the ACT was the first jurisdiction to pass human rights legislation and the first to extend it to include an ESC right – the right to education. Its failure to build on this successful experiment therefore represents something of a step backwards.

Things appear to have gone further backwards in Tasmania and Western Australia. Both states conducted reviews in 2007 that recommended enacting human rights legislation and, for some years afterwards, there was a prospect of change in both states. However, Tasmania’s government eventually decided it would cost too much to implement an Act, while Western Australia’s government responded to its review by stating it wanted further consultation with the federal government before progressing further. Subsequent changes of government in both states have resulted in the issue largely disappearing from public debate.

At the federal level, the Parliamentary Joint Committee on Human Rights has largely failed to ensure that new federal laws don’t infringe on human rights. The Committee reviews all federal Bills and legislative instruments, which are accompanied by a statement as to their compatibility with a number of international human rights conventions. It then determines the extent to which the proposed law is compatible with human rights, and reports its findings to Parliament.

According to a review by George Williams and Daniel Reynolds, on 73% of occasions when the Committee has expressed the view that the legislation may be incompatible with human rights, it had no effect on whether the Bill was enacted or its content. The remaining 27% comprised some legislation which was amended, but also legislation that failed to pass, lapsed or was replaced. Williams and Reynolds found the Committee’s contribution to even these modest outcomes ‘elusive’.

What needs to change
First, all Australian states and territories, together with the federal government, must join Victoria and the ACT in adopting human rights legislation. Such a law is part of Federal Labor’s policy platform. At state level, change is most likely in Queensland, which needs to ensure its inquiry leads quickly to a comprehensive human rights law – experience from Tasmania and Western Australia shows that governments must grasp the opportunity when it arrives.

Second, the recommendations from Victoria’s recent review need to be implemented. Despite the Victorian Charter increasing the presence of human rights in the legal and political conscience, a rights culture needs to be embedded and fostered across government and the broader community. Some of the vital recommendations include introducing a free standing cause of action (so plaintiffs don’t have to “piggy back” their claim on another non-Charter compliant), allowing the Victorian Equal Opportunity and Human Rights Commission to offer dispute resolution for Charter disputes like it already does under anti-discrimination laws, and clarifying some of the Charter’s most important sections. These recommendations, in conjunction with more effective parliamentary scrutiny, will make for a stronger Charter.

The lack of strong human rights laws profoundly affects our most vulnerable community members (including children, people with a disability, the elderly and Indigenous Australians), and allows for the imperceptible erosion of everyone’s rights and freedoms. Strengthening our human rights laws is essential for creating a more just and equitable society.

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Despite ever-increasing threats to our privacy in the digital age, there has been little evidence of urgency among our elected officials to improve our protection from those threats. However, in recent times, there have been small signs of progress.

**What’s got better?**

In November, the Attorney-General’s Department published an Exposure Draft of the Privacy Amendment (Notification of Serious Data Breaches) Bill 2015, and an accompanying Discussion Paper. The bill would require that Australians be notified of certain breaches of their personal data held by government agencies and large corporations. The bill, and the 45 submissions the government received in response to it, are signs that privacy law reform is alive in Canberra. So far the final bill has not been introduced, but consensus between the major parties on the need for action (if not the exact means of implementation) means that it has relatively good prospects for the next term of Parliament.

The Australian courts have been more active in dealing with privacy breaches. In the absence of a full tort of privacy invasion (see below), some have followed the UK’s lead and turned to the tort of breach of confidence, which is somewhat narrower. The 2015 WA Supreme Court case of Wilson v Ferguson revitalised breach of confidence in this context, finding that there was an equitable obligation of confidentiality between the parties, who were in an intimate relationship, and that publication of private data by one party was a breach of confidence. However, such an obligation will not exist in every instance of an invasion of privacy, so this is only a partial gap filler.

**What’s got worse?**

We learned in April that government IT infrastructure, including at the Bureau of Meteorology and the Department of Parliamentary Services, has suffered significant intrusions. Agencies which store large amounts of sensitive personal data, such as the ATO and Centrelink, are likely to be just as vulnerable to hacking, raising significant privacy concerns. Meanwhile, Australia is slipping further behind Europe. Since 1995, the EU has had a Data Protection Directive requiring member countries to establish Data Protection Agencies and implement tight controls on stores of citizens’ personal information. In December 2015, the EU implemented a major data protection reform package to give Europeans more control over, and better access to, their personal data. It includes a controversial ‘right to be forgotten’ online and stringent data handling requirements.

In February 2016, the European Commission and the US entered into an agreement called the ‘EU-US Privacy Shield’ to protect Europeans’ human right to privacy when their data is transferred to the US. US companies handling the data must commit to strict processing and storage requirements, and government access to personal data for law enforcement and national security will be subject to clear limitations, safeguards and oversight mechanisms (including a new Ombudsman). Compared with these strongly rights-protective and technologically aware initiatives, Australia’s data protection regime is looking decidedly outdated.

**What needs to change**

There still has been only a partial response to two relevant Australian Law Reform Commission (ALRC) reports. The 2008 For Your Information: Privacy Law and Practice report recommended a restructure of the Privacy Act 1988 to ‘achieve significantly greater consistency, clarity and simplicity.’ The most important recommendations, including consistent rules across jurisdictions, stronger penalties for contraventions and notifications of breaches, have not been implemented eight years down the track. The 2014 Serious Invasions of Privacy in the Digital Era report recommended a statutory right of action for serious privacy breaches, as well as significant updates to outdated surveillance laws. So far, the government has shown little appetite for these reforms (other than the surveillance powers updates). So, apart from passing the data breach notification legislation, what should be done to address privacy breaches? In the highly relevant and useful 2008 book Emerging Challenges in Privacy Law, Professor Michael Tilbury recommends that since privacy is a human right, privacy law should be treated as a part of human rights law and is best recognised, protected and developed through a special statutory cause of action. He observes there is a need to recognise the force of competing interests on the weight to be attached to the interest in privacy in any particular case, and to define the relationship between the cause of action and other statutes including those relating to data protection and surveillance.

However it is framed, a statutory cause of action for serious privacy breaches is needed in Australia. The government should also create a stronger privacy framework to protect us from online exploitation along similar lines to Europe’s framework.

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