Foreword

Since our inaugural Castan Centre Human Rights Report last April, it has felt as if the number of human rights issues facing people around the world is overwhelming.

The Castan Centre has found itself working on a number of fronts to promote and protect human rights. Some of those areas will be very familiar to our supporters, and some will be quite novel.

Indigenous Australians continue to face enormous obstacles to ‘closing the gap’ in the face of large budget cuts and entrenched bureaucratic barriers. For example, a multi-year research project by Castan Centre staff has revealed that unregistered births, which disproportionately affect Indigenous people, can increase imprisonment rates.

The assault on asylum seekers’ human rights continues unabated. In this report, two pieces look at the latest legislative and policy changes. Entrenched political opinion on this issue may make it seem futile to address refugee rights at this time. However, there will likely be consequences for the perpetration of such grave human rights abuses, as mentioned in my introductory piece.

Prisoners’ rights is another topic that rarely draws sympathy from the general public. As prisons are so far from the public eye and prisoners so susceptible to abuse, it is a vital human rights issue nonetheless. In this report, we look at how lawyers and judges often fail to use human rights laws to protect prisoners, while in other cases novel methods are being used to hold prison authorities to account.

The nexus between human rights here and overseas has never been greater – from commercial surrogacy to LGBT rights, land grabs and international criminal law to the death penalty, Australians are increasingly grappling with complex human rights issues.

This report – which covers just some of the many issues facing humanity today – reminds us that there has rarely been a more important time to stand up for human rights, both here and around the world. The report coincides with our annual appeal, and we hope that you will choose to support us at this crucial moment.

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 strong social media presence.
- **Student programs** including international and in-house internship programs, careers guidance and mooting competitions.
- **Teaching**, through the oldest human rights law masters degree in Australia, as well as a thriving undergraduate human rights program.
- **World-renowned research** on many of the most pressing human rights issues.
- **Human rights training** and consultancies aimed at educating Australian and international government officials about human rights.

**The Castan Centre is a jewel in the crown of Australian law**

The Hon. Michael Kirby AC CMG
former High Court judge

**About the Authors**
Torture and Refoulement: the Shame of Liberal Democracies

Gross human rights abuses happen all over the world. They are not confined to the barbaric acts of groups such as Islamic State. Indeed, even liberal democracies, such as the United States and Australia, have been all too readily prepared to sacrifice human rights principles for political expediency. Two recent examples show they have done so with impunity, partly because the media, which is crucial in shaping popular opinion, is a very fickle supporter of human rights principles.

Torture
In December 2014, the US Senate Intelligence Committee released an executive summary of its investigation of CIA interrogation techniques in the ‘war on terror’. This summary is one tenth of the full report, which remains classified.

Breaches of international human rights law have a habit of coming back to haunt their perpetrators. By the end of the Bush administration, US ‘soft power’ was seriously weakened on the international stage, with a change of government needed to (partially) restore its standing. Worse still, appalling tactics have provoked barbaric responses. It is no coincidence that the iconography of Guantanamo Bay, the orange jumpsuits, has been mimicked by IS in its sickening execution videos.

Indeed, the torture report’s publication is a major victory for human rights, given the CIA’s desire to keep its practices under wraps. While the perpetrators seem unlikely to face prosecution at home, they can be tried in any other country, as torture is an international crime. Dick Cheney, for example, may find it unwise to travel abroad. Domestic civil suits from victims are also a possibility, and the CIA has been exposed as an institution which harbours brutal liars.

Australia’s asylum seeker policy will attract more and more global opprobrium. It was singled out for criticism by Zeid Ra’ad al Hussein, the new UN High Commissioner for Human Rights, in his inaugural speech last September. Morale in the immigration department, and in the navy tasked with intercepting boats, is low. Future inquiries and lawsuits are inevitable, as the truth of cruelty inevitably seeps out. The government will suffer consequences from this.

The ‘popularity’ of certain gross human rights abuses is not a reason for human rights supporters and advocates to give up. Rather it is a reason to redouble efforts.

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

By Sarah Joseph

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Indigenous Rights 2014/5: Death by a Thousand Paper Cuts?

By Stephen Gray and Melissa Castan

In the past 12 months, Australian Indigenous affairs have witnessed three so-called ‘developments’: more weighty and bewildering government reports; more unsuccessful test cases brought by Indigenous Australians seeking recognition of their rights; and more disturbing statistics, particularly relating to incarceration and early death.

The reports
In February 2015, Prime Minister Tony Abbott released the 7th annual Closing the Gap report. Spin aside, the report largely confirmed information buried in a lengthy government paper, Overcoming Indigenous Disadvantage: Key Indicators 2014. At a cool 3,252 pages, the OID report was a door-stopping addition to what Jon Altman called the “evaluation fetishism” in Indigenous affairs – a white man’s dreaming that yielded a stack of reports half a metre high in just one month.

But what did the OID report reveal? Some good news, its authors claim. Indigenous child mortality is lower, and life expectancy has increased. Indeed, the ‘gap’ between Aboriginal and non-Aboriginal life expectancy has actually narrowed in the five years to 2010/12, from 11.4 years to 10.6 years for males, and from 9.6 years to 9.5 years for females. This gets the OID Report’s green tick of approval even though it is really a failure: on these figures, it would take women 495 years and men 66.5 years to ‘close the gap’.

But there are more disturbing issues. A recent report of the Parliamentary Joint Committee on Human Rights found that the Stronger Futures legislation (which replaced the Howard Government’s Northern Territory Emergency Response package of legislation) is not entirely compatible with human rights, and particularly the Racial Discrimination Act (RDA).

Measures in the new legislation relating to alcohol, land reform, income management, school attendance and more were specified by the former Labor Government in the Explanatory Memorandum as ‘special measures’, which are permitted by the RDA and international law. However, the Committee found no evidence that they fit this definition. For example, as the Committee pointed out, how can a measure criminalising conduct by some members of a group be a ‘special measure’ for the supposed benefit of the rest?

While international law has limited sway in Australian domestic politics these days, one might expect it to have more influence in the rarefied atmosphere of the High Court. In the Maloney case, the Court held that the Queensland Government’s alcohol laws on Palm Island were ‘special measures’, even though the government had not consulted with the local population, and no international body had previously characterised such laws as a ‘special measure’. This argument could have absurd conclusions, such as harsh sentences for Aboriginal offenders being characterised as ‘special measures’ because they allow other law-abiding Aboriginal people to enjoy their human rights more fully.

The test cases
Two test “stolen” cases were recently rejected by the courts. In Collard, an Aboriginal couple whose children were removed by Native Welfare in Western Australia in the 1960s failed to satisfy a court that the State owed them a fiduciary duty, or that such a duty, if owed, had been breached. And in a case in the Queensland District Court, Yeatman, an Aboriginal elder, failed to establish a claim for ‘stolen wages’ which he alleged had been kept in trust for him and never returned. Both these cases raise familiar difficulties for Aboriginal plaintiffs – problems of proof, or establishing wrongs done many years ago to the exacting standards of a court.

In future, governments of all persuasions may have less bother with test cases. As last year’s report pointed out, Aboriginal legal services have been under attack with threats of over $42 million cut from the Indigenous Policy Reform Program, and funding cuts aimed at de-funding law reform and policy activities.

The statistics
There will, however, be more work for prisons and hospitals. As the OID Report revealed, the suicide death rate for Indigenous people is over twice the rate for non-Indigenous people, and hospitalisation for intentional self-harm rose by 48 per cent over the past seven years. Moreover, the adult imprisonment rate increased 57 per cent between 2000 and 2013. Juvenile detention rates are even higher, at around 24 times the rate for non-Indigenous people. Homicide rates are very high among Indigenous people – although, amazingly, there were no homicides where the victim and offender were strangers. Is it any wonder, amidst all this, that Indigenous people continue to push for an apparently stalled constitutional referendum, perhaps even one that recognises their human rights?

Stephen Gray and Melissa Castan are Senior Lecturers in the Monash Law Faculty. Melissa is a Deputy Director of the Castan Centre and Stephen is an Associate.
Going to Jail For Not Having a Birth Certificate? It Happens

By Paula Gerber and Melissa Castan

It is well known that millions of children around the world never have their births registered. UNICEF puts the total number of unregistered births at 230 million while the World Health Organization estimates that 40 million, or approximately one third, of births are not registered every year.

While the overwhelming majority of these unregistered births occur in developing countries, many people are surprised to learn that the issue is also a problem in Australia. Our three-year research project on this topic reveals that while birth registration rates in non-Indigenous communities are above 97 per cent, there is a significant problem of non-registration of births in Indigenous communities.

A person’s ability to participate in contemporary society is seriously affected if their birth was never registered, or if they can’t obtain their certificate because of the cost, their literacy levels, their remoteness or their inability to satisfy ID requirements.

Like I said to my kids, I’m somebody now, I’m not nobody anymore.

The problems faced by people who don’t have a birth certificate are not merely inconvenient or unfair, they are also an underlying cause of Indigenous overrepresentation in the criminal justice system. For example, those living in remote Western Australia have a very tangible need to drive, whether they hold a licence or not. The vast distances, harsh environment and lack of public transport or funds for taxis means people must use private cars for transport. Research out of WA highlights the extent to which Indigenous Australians are being imprisoned for driving related offences, including unlicensed driving.

License offences are one of the key reasons for Indigenous Australians being over-represented in the Roebourne Regional Prison, which manages prisoners from the Pilbara and Kimberley regions. In 2011, it was estimated that 90 per cent of the prisoners in Roebourne were Indigenous and 40-60 per cent were there for driving offences. It seems that if an Indigenous person’s ability to drive is under threat, it affects almost all aspects of their lives for granted, such as obtaining a driver’s licence and registering a fishing boat. The difficulty in obtaining a copy of his birth certificate was a constant stumbling block for Mr Hayes. After 10 years of struggle, with the help of a community legal centre, he finally obtained a birth certificate and became legally visible. He jubilantly stated: ‘Like I said to my kids, I’m somebody now, I’m not nobody anymore.’

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Getting a driver’s licence or tax file number, opening a bank account, enrolling in school or obtaining a passport can all be impossible without a birth certificate.

Not having a birth certificate leads to a form of legal invisibility, which is well illustrated by the experience of Bradley Hayes, an Indigenous man who grew up a ward of the state. For over 30 years, Mr Hayes could not obtain a birth certificate and, in the eyes of the authorities, he simply did not exist. Mr Hayes battled to enjoy what the legally visible take for granted, such as getting a driver’s license and registering a fishing boat. The difficulty in obtaining a copy of his birth certificate was a constant stumbling block for Mr Hayes. After 10 years of struggle, with the help of a community legal centre, he finally obtained a birth certificate and became legally visible. He jubilantly stated: ‘Like I said to my kids, I’m somebody now, I’m not nobody anymore.’

The problems of accessing critical government services such as obtaining a driver’s license because no birth certificate (particularly where they may not be in a position to pay the fee or satisfy strict ID requirements) and the lack of a birth certificate are not an insurmountable hurdle to legal driving. But more needs to be done all around the country to ensure that all births are registered, individuals can readily access a birth certificate (particularly where they may not be in a position to pay the fee or satisfy strict ID requirements) and the lack of a birth certificate is not an insurmountable hurdle to accessing critical government services such as obtaining a driver’s license. As part of our grant, we are working with government, civil society organisations, the legal profession and community groups to realise this goal.

Dr Paula Gerber is an Associate Professor and Melissa Castan is a Senior Lecturer in the Monash Law Faculty. Both Paula and Melissa are Deputy Directors of the Castan Centre.
The International Criminal Court’s Africa Problem

By Joanna Kyriakakis

In 2014, Andrew Wilkie MP proposed that the International Criminal Court (ICC) investigate our Prime Minister, Tony Abbott, and his cabinet for crimes against asylum seekers. Similar calls were made when Australia’s participation in deadly drone strikes against Pakistani civilians was revealed. Routinely echoed in Australian public discourse, these sentiments tend to demonstrate a few things. First, that many people are confused about the jurisdictional limits of the ICC. Second, that they believe that it is legitimate for an international criminal court to hold our political leaders to account when they blatantly and seriously breach human rights law.

While the prospect of our leaders appearing before the ICC is a mere hypothetical, in a number of African states it is very real. There was for many years an outstanding warrant against Sudan’s President, Omar al-Bashir, for allegations of genocide committed in Darfur. Frustrated by the Security Council’s failure to take real efforts to apprehend him, in late 2014 the ICC Chief Prosecutor ceased investigations into the Darfur case. Until recently, Kenyan Prime Minister, Uhuru Kenyatta, was undergoing a trial at the ICC for his role in post-2007 election violence that targeted supporters of his political opponents. The charges were withdrawn in 2014 due to evidential challenges, including the death of key witnesses and the Kenyan Government’s lack of cooperation.

The case against Kenya’s Deputy President, William Ruto, continues. These cases demonstrate the Prosecutor’s commitment to a fundamental principle of international justice: there is no immunity for the political elite. They simultaneously remind us how challenging it is to rely on a State’s cooperation when trying to prosecute its leaders.

To date, the ICC has only launched prosecutions for crimes committed in Africa. This has led to claims from Kenya, among others, that the Court is an instrument of neo-colonial power wielded by the West to manipulate domestic African politics. ICC Prosecutors have consistently rebuked such claims, arguing that the worst atrocities since the ICC came into force have been in Africa. Indeed, the Prosecutor has recently shown serious interest in events in other parts of the world. For instance, she is re-examining UK officials for systematic detainees abuse in Iraq from 2003 - 2008. When Palestine joined the ICC in January 2015, it referred to the Court all events occurring in Palestinian territory since 13 June 2014 so as to cover the 2014 Israel-Gaza hostilities. The Prosecutor is now examining whether there is a reasonable basis to open an investigation. If either investigation is pursued, they will generate political opposition, though of a different form to that currently expressed by some African states.

Nonetheless, the focus to date on Africa has put the ICC on a collision course with the African Union (AU). In 2013, Kenya fell short of convincing the AU to decide that state members withdraw from the Court. It did, however, convince the AU to request that the Security Council stop the ICC from prosecuting incumbent heads of state. In a remarkable step, in June 2014 the AU adopted a Protocol to establish the African Court of Justice and Human and People’s Rights, a regional court that would cover the same field as the ICC. The Court will come into existence once 15 member states ratify the Protocol.

The prospect of cases coming before a regional court instead of the ICC should be welcomed, given that it will have much closer links to victim communities. Also welcome are some progressive features of the proposed court. For example, in addition to dealing with the same crimes as the ICC (genocide, crimes against humanity and war crimes), the Court will be able to hear cases against private corporations as well as cases involving unconstitutional change of government, terrorism, corruption, trafficking, illicit exploitation of resources, and piracy. But the Protocol also contains regressive features. Unsurprisingly, it provides immunity for sitting heads of state. It is also unclear what the relationship between the AU Court and the ICC will look like.

In the meantime, what of international courts for addressing human rights breaches in our own backyard? Unlike every other part of the world, the Asia-Pacific has no regional human rights court. Australia should pursue the establishment of such a court as they play a crucial role in enforcing human rights compliance by governments. There is also no talk of a criminal court for our region, though in that respect we are not exceptional. Should it become operational, the AU court will be the first of its kind. That leaves Australians to make rhetorical calls to the ICC, which require the ICC Prosecutor to decide that a situation here is of a similar gravity to the atrocities she is confronted by elsewhere. We should be grateful, at least, that we can’t compete for that attention.

Dr Joanna Kyriakakis is a Senior Lecturer in the Monash Law Faculty and an Associate of the Castan Centre.
Land Grabs in Cambodia: Brought to you by Western Consumers

By Adam McBeth

The story of what happened to Boeung Kak, a lake once crucial to Phnom Penh in preventing flooding from rivers during monsoon season, illustrates the problem of corruption and human rights abuses when land becomes valuable in developing countries. Boeung Kak housed several thousand families around its shore and in houses built over water. But by the mid-2000s land values were increasing and developers were on the lookout for big profits. A consortium, chaired by a senator from the ruling party and backed by Chinese investors, signed a 99-year lease with the government for the lake and the surrounding land. The plan was to fill in the lake and build a speculative residential and office development.

Human rights and forced evictions
International human rights law acknowledges that in some cases it might be necessary to require people to relocate against their will if a project will benefit the broader community and eviction cannot be avoided. However, when eviction occurs, international law specifies that affected communities must be protected. They must be consulted about the relocation and included in negotiations about appropriate compensation. They must also be left in a position no worse than their pre-eviction situation in terms of standard of housing and access to other essentials, such as water, electricity and nearby schools and health services, as well as their capacity to earn a living. Some form of retraining or income replacement may also be needed to ensure that their livelihood is protected beyond the short term.

All too often in developing countries, people who exercise their right to protest peacefully against these developments are accused of criminal behaviour, harassed, arrested and ultimately imprisoned for these alleged crimes, potentially violating the right to a fair trial and freedom from arbitrary detention.

Cambodia’s land grab problem
Cambodia has seen an explosion in land grabs in recent years. Powerful business people, usually well connected politically, are hungry for agricultural land, particularly to grow cash crops such as sugar and rubber for export, and for speculative urban developments amid steeply rising property prices. To satisfy this hunger, the developers must remove the inhabitants of the targeted land.

In a typical land grab, as happened in Boeung Kak, the legal status of the land is manipulated by the authorities to make it easier to force people out. However, even if the inhabitants are not the legal owners, international human rights law requires protection from forced evictions that would deprive them of their home and other human rights. Despite this, the people of Boeung Kak who refused to move without adequate compensation were subjected to violence and intimidation. Their houses were deliberately flooded by construction workers. Protesters were convicted on charges such as obstructing traffic and resisting arrest in highly dubious trials, resulting in prison terms of up to a year.

Variations of this story are occurring throughout Cambodia. In one case, a developer obtained a lease over land previously classified as national park to build a casino, resort and condominium development, requiring involuntary resettlement of 1200 families. Land has been grabbed for rubber plantations by Vietnamese consortiums, and for sugar plantations by a Thai-controlled company. Local communities have faced violence and intimidation and had their houses bulldozed, burned or flooded. Many resettled people have struggled for livelihood at their new locations. People have been arrested and imprisoned on trumped-up charges.

The expansion of agribusiness has been encouraged and in some cases financed by the World Bank and Asian Development Bank.

While the complicity of Western companies and institutions in these abuses raises questions about their accountability for human rights violations, it also presents opportunities for activism. NGOs such as Equitable Cambodia, Oxfam and Inclusive Development International have effectively used the involvement of these companies and institutions as leverage, advocating for the customers and financiers of the land grabbers to conduct closer checks of their business to ensure that human rights are being protected, to refrain from doing business with those who abuse human rights, and to use their position to urge their business partners to adopt better practices. While there have been some great successes in that advocacy, there is an awfully long way to go in protecting human rights in Cambodian land grabs.

Adam McBeth is part of a research project funded by the Oxfam-Monash University Partnership looking at community approaches to accountability in Cambodia.

Dr Adam McBeth is an Associate Professor in the Monash Law Faculty and a Deputy Director of the Castan Centre.
Prisoners’ Rights: a Missed Opportunity for the Victorian Charter

By Julie Debeljak

The Charter of Human Rights and Responsibilities Act (The Charter) allows people to complain to the courts about human rights abuses. Unfortunately, judges and lawyers have often failed to use this opportunity to better protect human rights. In 2014, Chief Justice Marilyn Warren and Justice Pamela Tate lamented that ‘despite the encouragement of courts, and the support of individual judges, we continue to see reluctance on the part of practitioners to raise arguments under The Charter.’ This reluctance extends to the courts themselves. The current eight-year review of The Charter (due by November 2015) is an opportunity to address this reluctance.

Prisoners have much to gain from asserting their rights

My research shows that this problem is particularly acute for prisoners, who are especially vulnerable to rights abuse – they are detained in a security-focussed environment, where a significant power imbalance exists between prisoners and those they interact with. These vulnerabilities are exacerbated by unsustainable growth in the prison population, leading to overcrowded facilities and poor treatment of detainees. Prisoners have much to gain from asserting their rights, but surprisingly both judges and prisoners’ lawyers have not seized this opportunity.

In some cases, courts have taken a very narrow view of rights, even in the much-lauded Castles decision. Ms Castles was a female prisoner who wished to resume in vitro fertilisation (IVF) treatment she had commenced before her imprisonment. Due to her age, she would not be eligible for treatment upon her release. Focussing on the Section 10 right to humane treatment when deprived of liberty, Justice Emerton decided that Ms Castles’ statutory right to the preservation of her health extended to the continuation of IVF treatment, but ruled that Ms Castles could not choose her clinic or doctor, and authorities could refuse any particular visit(s) if they did not have sufficient resources to accompany her.

Although this was certainly a ‘win’ for Ms Castles, the judge took a narrow view of The Charter. For instance, rather than adopting the usual approach of broadly interpreting the right to humane treatment while detained, and then balancing Ms Castles’ rights with the needs of all other prisoners and the safety of society, Justice Emerton simply read down the scope of Ms Castles’ right due to her incarceration.

Another example is the Review of Derek Ernst Percy. In 1970, Percy was found not guilty of murder on the grounds of insanity, and was detained in prison at the Governor’s pleasure. During a review of Percy’s incarceration required by a 1998 law, Percy argued that his continued detention in prison violated his Section 22(2) right to be segregated from convicted prisoners, and that he should be detained in a non-prison therapeutic setting.

When reviewing supervision orders, the relevant law requires restrictions on a person’s freedom and personal autonomy to be kept to the minimum consistent with the safety of the community – a balancing exercise similar to Castles. Justice Coghlan accepted this as the appropriate balancing tool, even though it focussed on the wrong rights – Percy was concerned with his right to be segregated from convicted prisoners, whereas the judge focused on Percy’s right to freedom and autonomy. In addition, when performing the balancing exercise, he did not consider the importance of the right to segregation, the purpose, nature and extent of the limitation, and the relationship between the limitation and its purpose.

The relevant law also provided that a person should not be detained in prison unless there is no practicable alternative. This was the essence of Percy’s claim, yet it was not explored in Charter-terms. Ultimately Justice Coghlan decided that detention in a non-prison therapeutic environment would not be less restrictive than prison. A deeper analysis of The Charter may have led the judge to identify questions and use legal tests more favourable to Percy.

In other cases, prisoner’s lawyers do not raise relevant Charter issues, or the judge avoids, minimises or misunderstands the issue.

In Foster, Judge Guchiardo reduced a prisoner’s sentence because he had been held in solitary confinement for 22 to 23 hours per day. The judge had serious concerns about solitary confinement and noted that it was intended to ‘punish and degrade, an intent which after a period of time borders on the cruel and inhuman’, yet he did not mention The Charter. By not exploring the prohibition of cruel, inhuman and degrading treatment or punishment, and the right to be treated humanely and with dignity when deprived of liberty, the Judge missed an opportunity to create precedent to guide judges in subsequent cases. Similar facts presented in Collins and, although the judges sought submissions on The Charter, Collins declined to rely on it.

Litigants, lawyers and judges have consistently under-utilised The Charter in prisoners litigation despite the many apparent breaches of rights. It is vital that we better understand the reasons for this failure and address them as part of the current review of The Charter.

Dr Julie Debeljak is an Associate Professor in the Monash Law Faculty and a Deputy Director of the Castan Centre.
When Prison Authorities Should be Charged with Contempt

By Gideon Boas

Prison overcrowding is a serious issue for the Victorian justice system with implications for the fundamental human rights of prisoners, especially in situations where they are prevented from attending their own court hearings — notably contested hearings, mentions and bail applications — because there is insufficient space for them in custody centres or police cells. At issue here is not only the responsibility prison governors have to inmates but their obligation to comply with orders requiring a prisoner to be produced in court. By late 2013, amid a climate of fear about law and order, not only were increasing numbers of prisoners on remand being refused bail but greater restrictions were being placed on the granting of parole for those serving sentences. Persistent problems with prisoners not being brought to court exacerbated the situation, potentially violating the right to a fair hearing of their cases.

The situation at the Melbourne Magistrates’ Court has been particularly troubling. When police who had been absorbing the overcrowding started to push back and refuse large numbers, up to a third of prisoners listed on a given day were not being transported to court and the Department of Corrections was bearing tens of thousands of dollars in costs.

In late October 2013, following weeks of case delays and adjournments, Magistrate Michelle Ehrlich described the effects of the crisis as beyond her level of tolerance. After a prisoner for whom I was acting was denied the opportunity to have his bail application heard, Magistrate Ehrlich was denied the opportunity to have his bail application heard, Magistrate Ehrlich was denied the opportunity to have his bail application heard, Magistrate Ehrlich was denied the opportunity to have his bail application heard, Magistrate Ehrlich was denied the opportunity to have his bail application heard. By late 2013, amid a climate of fear about law and order, not only were increasing numbers of prisoners on remand being refused bail but greater restrictions were being placed on the granting of parole for those serving sentences. Persistent problems with prisoners not being brought to court exacerbated the situation, potentially violating the right to a fair hearing of their cases.

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In late October 2013, following weeks of case delays and adjournments, Magistrate Michelle Ehrlich described the effects of the crisis as beyond her level of tolerance. After a prisoner for whom I was acting was denied the opportunity to have his bail application heard, Magistrate Ehrlich agreed to consider charging the Governor of the Metropolitan Remand Centre with contempt of court, under Section 133 of the Magistrates’ Court Act, for disobeying an order directing him to produce that witness.

The main purposes of the Magistrates’ Court Act include to provide for the fair and efficient operation of the Court (s 1(c)), and to enable the management of the Court to ensure fairness to parties and the prompt resolution of court proceedings (s 1(e), (i)–(iii)). These purposes should be taken into account when construing Section 133. They correlate with the fact that the Magistrates’ Court is the highest volume court in this State: during 2011-12 more than 170,000 criminal cases were initiated there.

Charging a prison governor may seem a drastic development but it is perfectly legitimate and potentially a way of ensuring fairer processes in future. Simply put, a contempt of court will be made out where the defendant has knowledge of the order; the terms of the order are clear, unambiguous, and capable of compliance; the order is served on the defendant or service is excused; the defendant has knowledge of the terms of the order; and, the defendant breaches the terms of the order.

And disobedience to the terms of a jail order constitutes a serious threat to the course of justice in the Court, and the fulfilment of its essential purposes. Therefore, a purposive reading of Section 133 gives the Court broad powers to invoke its jurisdiction to hold persons in contempt when the conduct in question interferes with the Court’s operations and administration of justice.

In a situation such as this – where a jail order directs that a prisoner be brought before the Court, and where such an order is disobeyed – the Court’s power to punish for contempt in face of the Court may be exercised. Whilst not without contention, particularly with respect to what constitutes contempt ‘in the face of the court’, it is my view that the Magistrates’ Court has personal jurisdiction to hold the Governor of the MRC in contempt as a legally proper way of ensuring that the human rights of prisoners are not infringed.

The administration of justice, in an efficient and fair manner, lies at the very foundations of this Court’s existence – and disobedience to the terms of a jail order constitutes a serious threat to the course of justice in the Court, and the fulfilment of its essential purposes.

It is worth recalling this observation from Morris v Crown Office “The phrase “contempt in the face of the court” has a quaint old-fashioned ring about it; but the importance of it is this: of all the places where law and order must be maintained, it is in these courts. The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of our society”.

Dr Gideon Boas is an Associate Professor in the Monash Law Faculty and an Associate of the Castan Centre.
Why Commercial Surrogacy Should be Legalised

By Ronli Sifris

In August 2014, the story of Baby Gammy hit the headlines nationwide. Baby Gammy was born with Down Syndrome as part of a surrogacy arrangement between his biological parents (the Farnells) and a Thai surrogate (Pattharamon Chanbua). Ms Chanbua was paid almost A$12,000 to bear a child for the Farnells. When testing during the pregnancy revealed that Ms Chanbua was carrying twins, one of which would be born with Down Syndrome, the Farnells requested that she abort the affected twin but she refused. After the twins’ birth, the Farnells took the healthy child back to Australia and left the other child in Thailand. Ms Chanbua named the remaining twin Gammy and now cares for him as his mother.

In Australia, surrogacy is regulated differently by each State, although commercial (also known as compensated) surrogacy is banned nationwide. In Victoria, the law allows women to be surrogates, as long as they are not compensated for it. Some other States, for example New South Wales, go further by expressly prohibiting people from travelling overseas to enter into commercial surrogacy arrangements in countries where it is legal, such as the United States and India. Yet it was not until the Baby Gammy saga that the public at large began to debate seriously whether it should remain prohibited in Australia.

The issue of commercial surrogacy is vexed and complex; giving rise to passionate arguments relating to the rights of the child conceived through surrogacy, the rights of the intended parent(s) and the rights of the surrogate. When an arrangement is between a surrogate in the developing world and intended parents in the developed world, many people argue that such arrangements are a breach of human rights because they constitute ‘exploitation’. Rather than identify specific human rights infringed by the practice, they argue that poor women in developing countries bear children because they have few other ways of raising themselves out of poverty. Others do point to specific human rights;

... preventing a woman from making a free and fully informed decision to be a surrogate impinges on her right to autonomy.

For example, some people argue that paying a woman to bear a child may be viewed as a breach of her right to be free from degrading treatment. Others argue that commercial surrogacy arrangements constitute a form of discrimination against women as they may represent a form of control over women’s bodies and reduce women to their reproductive capacity.

In contrast, it may be argued that an outright prohibition on commercial surrogacy is itself an infringement of a woman’s right to enter into such an arrangement. International human rights law entitles the right to autonomy, also referred to as the right to privacy, which includes a person’s right to make choices regarding her own life and body; preventing a woman from making a free and fully informed decision to be a surrogate impinges on her right to autonomy. By claiming that surrogacy exploits the surrogate, critics are taking a paternalistic approach to the issue, and assuming that women who become surrogates cannot make decisions for themselves. In the case of Ms Chanbua, for example, her refusal to terminate the pregnancy when requested to do so would appear to refute the notion that she was not making her own decisions.

That said, there are situations which reek of exploitation and the line is often blurred; in some circumstances a woman may in fact feel that she has no other means of raising herself out of abject poverty than by becoming a surrogate. Or a woman may feel pressured by her husband or other family members to enter into such an arrangement for the good of the family.

So what is the solution? I believe that a regulated form of commercial surrogacy should be permitted in Australia. The current legal situation, which allows fertility clinics to charge thousands of dollars for the provision of assisted reproductive services but which prohibits a woman who acts as a surrogate from accepting compensation, is incoherent and inconsistent. Further, allowing some form of compensated surrogacy in Australia would go a long way towards stopping any exploitation of surrogates which may occur abroad. It is unrealistic to think that Australians would stop entering into overseas surrogacy arrangements if commercial surrogacy is legalised in Australia. It may, however, be anticipated that the majority of Australians would prefer to enter into such an arrangement at home if given the choice. It would seem therefore that allowing a regulated form of commercial surrogacy in Australia would enable a legal framework to be put in place which respects the rights of the intended parent(s), the rights of the surrogate and the rights of the child resulting from an arrangement, while also reducing the amount of exploitation which may occur overseas.

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Is the Pacific a Tropical Paradise? Not if you are LGBT

By Paula Gerber

Most of us know that lesbian, gay, bisexual and transgender (LGBT) people face dire threats in countries like Russia, Uganda, Nigeria and Iran. The media is filled with stories of persecution, imprisonment and even death for people who dare to engage in same-sex conduct or identify as a gender different to the one they were assigned at birth. Yet right on our doorstep we have countries that still criminalise homosexual conduct.

Many people are surprised that some of our most idyllic holiday destinations consider gays to be criminals. In all, eight Pacific nations still have laws relating to ‘crimes’ such as sodomy, buggery and offences against the order of nature, including:

- Cook Islands;
- Kiribati;
- Nauru;
- Papua New Guinea;
- Samoa;
- Solomon Islands;
- Tonga; and
- Tuvalu.

Most of these nations are members of the Commonwealth and their laws can be traced back to the British Empire. In many of these countries, the laws are historic relics that have not been enforced for years, or even decades. So do we need to worry about these laws if no one is actually being prosecuted? The answer is a resounding ‘Yes’!

Laws send a message to society about what conduct is acceptable and what will not be tolerated. Classifying homosexuality as a crime, even if it is not enforced, has a chilling effect on LGBT communities. It is a grey cloud hanging over them and they live with the knowledge that they can be arrested at any time.

The United Nations Human Rights Committee made it very clear in *Toonen v Australia* that laws criminalising homosexual conduct violate human rights, regardless of whether anyone is actually arrested or convicted.

When homosexuality is a crime, some people feel that it is legitimate to discriminate against LGBT people, because the state does. Furthermore, in some countries, it is not simply a case of old disused laws that no one has got around to repealing. The existence of these laws in 2015 is due to a conscious decision to retain them. Samoa enacted a new Crimes Act in 2013, and while the new Act did away with offences relating to cross-dressing, following effective lobbying by the Samoan Fa’afafine Association (Fa’afafine are third gendered people, usually men, who live as women), the offence of sodomy was retained.

In 2008, the Solomon Islands Law Reform Commission recommended repealing criminal laws prohibiting homosexual conduct but had to back away from the plan after vehement public objection. One opponent of the reform stated that ‘Legalising gay and lesbian in the country would only encourage the breed of more,’ and the Solomon Islands is a ‘long time Christian country’ that should never think of legalizing gay sex.

These homophobic laws even have negative health impacts. One reason why Papua New Guinea may have one of the highest rates of HIV infections in the world, with 2% of the adult population being HIV positive, is that the ongoing criminalisation of homosexuality drives same-sex acts ‘underground’ and encourages risky behavior. Those seeking repeal of these odious laws should consider advocating for change not on the grounds of equality and non-discrimination, but rather to improve health by reducing HIV rates, which would benefit all of society.

It is not all doom and gloom when it comes to LGBT rights in the Pacific. Palau decriminalised homosexuality in 2014, and Nauru and the Cook Islands both indicated to the UN Human Rights Council, at their Universal Periodic Reviews in 2011, that they are willing to repeal their anti-gay laws.

Furthermore, although homosexuality is not tolerated in many Pacific nations, third genders are often well respected members of the community. In Samoa, Fa’afafines are viewed as a traditional part of Samoan culture, and the same is true of Leitis in Tonga.

So while these countries are very open and accepting of diverse gender identities, they have some way to go when it comes to diverse sexual orientations (as does Australia, for although it decriminalised homosexual conduct, it still steadfastly refuses to recognise the right of same-sex couples to marry).

Australia should be playing a key role in improving LGBT rights in our region. Our government is the largest donor to many Pacific nations and our voice carries considerable weight. Although the Government has worked with some countries to help them modernise their criminal laws, it must do more to protect the rights of LGBT people in the Pacific.

The Castan Centre has encouraged the Government to be more proactive in this area.

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In 2011, Palau and Nauru both indicated to the UN Human Rights Council that they would consider repealing their anti-gay laws.

Dr Paula Gerber is an Associate Professor in the Monash Law Faculty and a Deputy Director of the Castan Centre.
The Abbott Government has declared that it will no longer process and resettle asylum seekers arriving by boat. These irregular maritime arrivals are sent to ‘regional processing centres’ in Nauru and on Manus Island in Papua New Guinea (PNG). These centres were first used as part of the Howard Government’s Pacific Solution and were re-opened by the Gillard Government in 2012.

The Abbott Government has maintained that those processed at Manus Island and granted refugee status will be resettled in PNG despite high levels of local animosity and the extraordinary level of violence directed at detainees, largely by PNG police and locals employed at the facility during the February 2014 riots (see below).

Some refugees have been processed and then permanently resettled in Nauru, where they are reportedly isolated, suicidal, living in fear of violent attack by locals and unable to access basic necessities such as food and water. Since a September 2014 agreement between Australia and Cambodia, refugees on Nauru have had the option of resettling in Cambodia but so far none have taken up the offer. PNG, Nauru and Cambodia each face significant socio-economic challenges, raising concerns about refugees’ ability to integrate and find employment.

**High rates of depression and self-harm have been reported**

In Nauru ‘are suffering from extreme levels of physical, emotional, psychological and developmental distress’. Further concerns have arisen about hygiene, infection control and access to medical services. In October 2014, 24 year old Iranian asylum seeker Hamid Kehazaei died from a heart attack after contracting an infection on Manus Island which remained untreated for several days.

Allegations have been raised of sexual abuse of detainees at both regional processing centres, including children in Nauru. Protests have become a feature of life in offshore detention. In February 2014, protests and rioting on Manus Island led to two days of mayhem and brutality during which more than 60 detainees sustained serious injuries, including bullet wounds, broken bones and machete wounds to the head and neck. Twenty-three year old Iranian asylum seeker, Reza Barati, died from severe brain injuries sustained when a number of centre staff punched and kicked him, beat him with a nail-embedded wood plank and struck him repeatedly in the head with a large rock. Tensions have persisted in both centres. In December 2014 and January 2015, up to 700 men detained at Manus Island participated in hunger strikes with some sewing their lips together.

**Tow-backs and detention at sea**

A key element of Operation Sovereign Borders is the interception and towing back of boats to the edge of Indonesian territorial waters.

When tow-backs were used under the Howard Government, they raised serious concerns about Australia’s compliance with its human rights obligations and its obligations concerning safety of life at sea. Under the current government, boats have been intercepted and their passengers discharged onto small orange life boats and moved beyond Australian waters. Due to government secrecy, few details of its tow-back operations have been released.

In June 2014, Australian Maritime Officers in the Indian Ocean intercepted a boat from India carrying 157 Tamil asylum seekers and detained them on an Australian customs vessel for almost a month following the Australian Government’s decision to return them to India. In January 2015, the High Court decided (by a 4:3 majority) that detaining them at sea for the purpose of taking them to a place outside Australia was lawful and that there was no obligation to afford them procedural fairness. In reaching its decision, the court interpreted the relevant domestic laws. Australia’s international obligations, including those arising under the Refugee Convention, had no bearing on the final outcome.

**Conclusion**

Because of its determination to send a clear message of deterrence to asylum seekers arriving by boat, the Australian Government has used extraordinarily harsh measures which are fundamentally inconsistent with human rights.

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The Latest Refugee Laws Weaken Protection for the Vulnerable

By Maria O’Sullivan

Refugee law in Australia is the subject of political controversy and rapid change. This was illustrated in the last hours of the final sitting of the Senate on 5 December 2014, when a very important piece of legislation was passed through Parliament: the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act.

The legislation makes a raft of significant changes to Australian migration legislation, but two amendments in particular are likely to change the future practice of refugee protection. Firstly, the Act re-introduces the controversial Temporary Protection Visas (TPV) and creates a new category: Safe Haven Enterprise Visa (SHEV). The TPVs are a further aspect of the government’s policy that boat arrival refugees will never be settled permanently in Australia. The SHEVs are the class of visas introduced at the behest of the Palmer United Party and are designed to allow certain refugees (those who have been on a TPV without seeking social security) to apply for a permanent visa ‘pathway’ in Australia. Mental health problems associated with TPVs are well documented. Less is known about the extent to which the new SHEVs will be a pathway to permanent residency. While there is a long list of visas for which TPV holders can apply, the criteria for these are stringent and will not necessarily apply to many refugees. For instance, refugees can apply for one of the Aged Parent visas but this requires the child to be an Australian citizen or permanent resident — and it has a 30 year waiting time. Similarly, refugees can apply for a Schools Sector visa but they must be enrolled in school. The Distinguished Talent Visa requires an ‘internationally recognised record of exceptional and outstanding achievement’. Given the limited educational and work opportunities available to most refugees, it is highly unlikely that this class of visa will be open to them.

Secondly, the Act grants the Minister of Immigration wide and largely unfettered powers to detain people on the seas and to transfer them to any country (or a vessel of another country) that the Minister chooses. Due to the way the legislation is worded, this will not allow proper scrutiny by Parliament and offers limited possibilities for judicial review by the courts. The only constraint on the Minister’s power is that he or she considers it is in the ‘national interest’. Of particular concern is that the Act states that any failure to consider Australia’s international obligations will not affect the validity of an interdiction and detention decision.

The use of enforced turn backs is a central part of the Coalition’s policy dubbed Operation Sovereign Borders. Indeed, in the Parliamentary debates on the new legislation then Minister for Immigration Scott Morrison emphasised that the Act would further the government’s ‘key election commitments to stop the boats’. This ignores the fact that the interception and transfer of asylum seekers on the high seas is a serious measure. Australia does not have jurisdiction outside its own maritime territory and so any operations must be properly constrained by statute.

The return of asylum seeker boats — whether to their country of origin or to another place — is a dangerous practice which risks the breach of several rules of international law. A major problem with the new legislation is that there does not have to be any agreement in place for transfer of the asylum seekers before they are intercepted and detained. That is, the Act permits asylum seekers to be detained on the high seas while the Minister is making a decision on the transfers. This approach is in line with the decision of the majority of the High Court in CPCF v Minister for Immigration, which addressed by Tania Penovic’s piece in this report. The net effect of these changes is that they will permit Australian officials to detain asylum seekers on boats on the high seas for an indefinite period and, in all likelihood, in conditions which may be inhumane. Its open-ended nature puts it clearly at odds with the international legal prohibition on arbitrary detention.

Although other countries (such as the US and some in Europe) engage in push backs of asylum seeker boats, none has legislation in place which permits the breadth of action given to the Minister for Immigration in Australia to intercept and detain asylum seekers at sea. It is for this reason that the public and media must be vigilant in maintaining oversight over these practices, despite the efforts of the government to keep their actions hidden from view.

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Australia’s Horrible Re-acquaintance with the Death Penalty

By Sarah Joseph

As I write, Andrew Chan and Myuran Sukumaran sit in isolation cells on the island of Nusa Kambangan off Java, Indonesia’s ‘Alcatraz’. They were transferred under armed guard from their prison home for most of the last decade, Kerobakan in Bali, in early March.

They await execution by firing squad on a beach. As they sit alone in spartan cells, it is difficult to imagine that they are pondering anything more than their imminent demise. By the time you read this, it may have happened. Sadly, that appears the most likely outcome at this point in time.

The death penalty globally

The death penalty is in fact allowed under international human rights law. Article 6(2) of the International Covenant on Civil and Political Rights (ICCPR) specifies that capital punishment is an exception to the right to life in heavily circumscribed circumstances. This permissibility of the death penalty may seem surprising, but one must remember the ICCPR was adopted in 1966, a time when the majority of the world, including Australia, subscribed to that form of punishment.

Article 6(6) of the ICCPR contemplates the death penalty’s eventual abolition, and now only about one quarter of the world’s countries retain it in law and practice. Of those, a handful of countries carry out the vast majority of the world’s executions. China is the runaway leader, executing more people than all other countries combined. Iran, Iraq, Saudi Arabia and North Korea also execute large numbers of people. Indonesia sits very low in the tally, though it will rocket up these repellent ‘charts’ if it proceeds with current plans to execute over 60 drug traffickers this year, including Chan and Sukumaran.

Breaches of International Law by Indonesia

Despite the death penalty exception, the execution of Chan and Sukumaran will breach their human rights. Indeed, their rights have already been breached.

First, Article 6(2) of the ICCPR only permits the death penalty for the “most serious crimes”, which basically means intentional homicide, not drug trafficking.

Second, all are entitled to seek and receive a pardon under Article 6(4). It is clear that Indonesia’s President, Joko Widodo, has not considered the individual clemency petitions from Chan, Sukumaran, or any of the convicted drug criminals on death row. The clemency process must entail genuine consideration of individual circumstances (including, for example, remorse and genuine efforts at rehabilitation) rather than blanket rejection. Indeed, Chan and Sukumaran are taking court action over the flawed clemency process.

Third, the judges in Chan and Sukumaran’s case allegedly sought bribes to deliver a lighter sentence to the two men: their lawyers have written to Indonesian authorities requesting an investigation. Any such judicial corruption would be a breach of Article 6(4). It is clear that Indonesia’s Attorney General asserted that any execution pursuant to such a sentence would be a gross breach of the right to life. The execution must be postponed to allow an investigation into the allegations, if they are credible.

Fourth, their removal to Nusa Kambangan involved the degrading over-the-top use of paramilitary force, which was not deemed necessary in removing others to the island.

Fifth, the stop-start execution process has played cruelly with the minds of Chan and Sukumaran, and their distraught families. Certainly, any wait on death row for a prisoner will cause intense anguish. As the execution date approaches, that anguish becomes unbearable. In that respect, constant speculation over the actual execution is extraordinarily callous.

However, in recent months the Indonesian authorities have continually commented on the case, reiterating over and over that the execution is imminent, despite ongoing legal proceedings. At one stage, Indonesia’s Attorney General asserted that the executions would take place in February – they did not. Such speculation must stop.

Finally, the method of execution, by firing squad with bullets to the heart, constitutes cruel and inhuman treatment. Witness reports have detailed how previous condemned people in Indonesia have taken several minutes to die. A coup de grace is delivered if needed after ten minutes, an agonisingly long time.

Conclusion

Indonesia faces extreme pressure over its determination to proceed with the executions. Alongside Australia, other countries are also lobbying fiercely for their nationals, such as Brazil and France. While Widodo wrongly calls such pressure ‘interference’, Indonesia’s diplomatic relations and world standing will be battered if it continues along this deadly path.

Indeed, in the UN Human Rights Council in early March, its representatives apparently spoke of a possible moratorium. It would be a sickening travesty if a moratorium took place after the deaths of Chan, Sukumaran, and the nine others currently slated for death.

This year Indonesia has already, wrongly, executed six drug criminals in January. Let it be no more.

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Associate Professor Gideon Boas is currently completing a book on International Criminal Justice to be published by Edward Elgar, and is working on collaborative research with La Trobe Law School concerning war criminals in Australia. Gideon researches and teaches on criminal law and procedure, evidence, international law and international human rights law, and is a Barrister.

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Associate Professor Paula Gerber’s research focuses on a number of interrelated areas including LGBTI rights, children’s rights and surrogacy. She is currently leading a team undertaking an ARC Linkage grant project that investigates barriers to Indigenous people accessing the birth registration system and the disadvantages that flow from not having a birth certificate. She is also editing a three volume research collection entitled Worldwide Perspectives on Lesbian, Gays and Bisexuals: History, Culture and Law to be published by Praeger Press in the US in 2016.

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