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Rights Agenda

Monthly Bulletin of the Human Rights Law Centre

OPINION

Anna Brown outlines how Australia must lift its human rights game to secure a seat on the UN Human Rights Council.

Cathy Branson reflects on justice in the workplace for women.

Rachel Ball discusses the perpetual task of defending civil society space.

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70 years of the United Nations: Why Australia must lift its game on human rights

Last weekend the United Nations celebrated its 70th birthday.

The UN system arose in the devastating aftermath of World War II. While the horror of the holocaust that shocked the world into action could be said to represent the worst of humanity, the system of rules and standards subsequently developed to uphold human dignity – the international human rights law system – could be said to represent the best.

The UN Charter was created through unprecedented consensus among world leaders, driven by a desire to prevent future atrocities and protect the inherent humanity and dignity of all people.

Despite some flaws and limitations, the UN has undoubtedly helped to make the world a better place. International human rights law sets the minimum standards and UN mechanisms to hold nations to account for abuses as well as proactively progress the realisation of rights around the globe.

Earlier this week, as Foreign Minister Julie Bishop launched Australia's campaign for a seat on the UN's Human Rights Council, she said that the UN values of human rights, freedom and democracy have always been part of the fabric of Australia.

Certainly, Australia is a vibrant democracy with a strong, if uneven, history of respecting human rights. Australia played a vital role in the development of the UN system, with Australia's "Doc" Evatt overseeing the adoption of the Universal Declaration of Human Rights in 1948. In the decades since, Australia as a country and many Australians individually, have contributed constructively to the promotion of human rights globally through their work with and within the UN system.

At the launch Minister Bishop said that membership of the Council came with a responsibility to "address international human rights violations, to stand up for universal values, and to advance Australia's own domestic human rights agenda".

She is right, but Australia needs to lift its game at home and abroad if it is to exercise true leadership.

Australia is approaching a major review by the UN Human Rights Council, the same body it is seeking election to, and its deteriorating human rights record represents a significant challenge to its credibility as a human rights leader.

Increasingly punitive asylum seeker policies, the over-imprisonment of Aboriginal people and the erosion of basic democratic freedoms at both the state and federal level will all come under the international scrutiny during this process known as the Universal Periodic Review.

Minister Bishop said that Australia does not shy away from difficult issues. However, this statement does not sit comfortably with her Government's willingness to turn a blind eye to human rights abuses in nations Australia relies on for cooperation in its punitive refugee deterrence and resettlement policies – war crimes in Sri Lanka, curtailing of democratic freedoms in Cambodia, and the crumbling rule of law in Nauru all come to mind.

Whist Australia would benefit from constructively responding to criticism and addressing important issues in the upcoming review, this would require a dramatic change to what we've seen in recent months.

Last month, one of the UN's senior investigators had to cancel a visit to Australia when the Government refused to provide reassurances that people who spoke to him about conditions in Australia's immigration detention centres would not face jail time under the excessive Border Force Act. Australia's failure to provide the necessary assurances marked an outrageous new low in our relationship with the UN.

Earlier in the year, the UN's expert on torture and ill-treatment expressed serious concerns about the conditions at Australia's detention centre on Manus Island. Our Prime Minister at the time, Tony Abbott, responded by saying that Australian were "sick of being lectured by the UN" while the Immigration Minister, Peter Dutton, dismissed the concerns as "absolute rubbish" .

Such examples are not becoming of nation committed to upholding and furthering the UN system of international law.

Another alarming trend is the widening gulf between our Government's domestic actions and the statements it makes to the international community. In Geneva, Australia has been at the forefront of discussions about the importance of ensuring the independence of human rights institutions, yet at home the Government has significantly cut funding to the Australian Human Rights Commission, and publicly attacked the credibility, and sought the resignation, of its President, Professor Gillian Triggs.

There is no doubt that Australia's relationship with the UN was damaged by the Abbott Government and whilst the new PM, Malcolm Turnbull, might be able to hit the reset button when it comes to the tone of the language used to engage with the UN, action will always speak louder than words. We are yet to see a shift in Australia's most troubling policies.

It took seven decades to build up our rules based world order to what it is today, but it can take just a few years to undermine it. This weekend as we reflect on the success of the last 70 years of the UN – and Australia's involvement in that success – we must also confront the current weakness of Australia's leadership on human rights internationally and back home.

Anna Brown *is the Director of Advocacy and Litigation at the Human Rights Law Centre. You can follow her on Twitter @AnnaHRLC*

REFUGEES & ASYLUM SEEKERS

UN issues urgent call for decent solution to be found for Abyan

27 October 2015

The United Nations Office of the High Commissioner for Human Rights (OHCHR) has issued an urgent call to the governments of Australia and Nauru to find a decent solution for 'Abyan' – a refugee being held on Nauru who is 15 weeks pregnant after reportedly being raped on Nauru in July.

The UN has spoken directly with Abyan.

The Human Rights Law Centre's Director of Legal Advocacy, Daniel Webb, said the UN's statement reflected the urgency and abhorrence of Abyan's situation.

"Abyan came here seeking safety but has suffered great harm in our care. It's clear the only decent thing to do is bring her to Australia for the sensitive, professional medical treatment she needs. It's not about politics, it's a matter of basic human dignity," said Mr Webb.

The UN also says it is “disturbed” by the growing number of sexual assaults against refugee women on Nauru, the failure to hold perpetrators to account and the fact that women who have been assaulted are left in unsafe conditions.

“People who have escaped danger should be able to rebuild their lives somewhere safe. It is increasingly clear that Nauru is not a safe place for the women we’ve sent there,” said Mr Webb.

Daniel Webb, Human Rights Law Centre Director of Legal Advocacy on 0437 278 961 or daniel.webb@hrlc.org.au

This is the statement issued by the Office of the High Commissioner for Human Rights and can be found online here.

Spokesperson for the UN High Commissioner for Human Rights: Rupert Colville

We call upon Australia and Nauru to urgently provide a decent option for ‘Abyan,’ (the pseudonym of a Somali refugee) to obtain adequate mental and physical care and to terminate her pregnancy if she desires. Abyan was allegedly raped in Nauru in July, and is now 15 weeks pregnant as a result. She was returned 11 days ago from Australia to Nauru, without a termination having taken place.

OHCHR has been in direct contact with her. Abyan is in a very fragile mental and physical condition and is deeply traumatised by her experiences since the day of the alleged rape. She has refused to give information to the Nauru police about her attacker because she is understandably afraid of reprisals. She does not feel safe, given that her alleged attacker lives on Nauru, which is a very small island State with a population of around 10,000. OHCHR is concerned about reports that the Nauru police have failed to take action against alleged perpetrators of violence against women, particularly when the victims have been asylum seekers and refugees.

We are aware of a growing number of sexual assault and rape allegations since Australia restarted its policy of transferring asylum seekers to Nauru for processing in 2012. For instance, one Iranian asylum seeker was allegedly sexually assaulted last May. She was subsequently evacuated to Australia where she is still receiving medical treatment for both mental and physical consequences of the ordeal. Her brother and mother, however, have been left behind on Nauru and do not know when they will be able to reunite with her. Another Somali refugee has claimed that she was raped in August. The police report, which included the name of the alleged victim and details about the rape allegation, was inappropriately given to the media. No one has been arrested in any of these cases.

OHCHR is very disturbed by this trend, since impunity for such serious crimes increases the risk they will be repeated. It is a matter of particular concern that asylum-seeker and refugee women who have allegedly been raped or sexually assaulted are left in unsafe conditions, given their own vulnerable status and the close proximity of their attackers, and tend to be stigmatized by the population and by members of the Nauru police force. Women are also less likely to speak out if they fear reprisals and see little-to-no chance of justice being done.

High Court hears challenge to offshore detention as Nauru announces transition to 'open centre

6 October 2015

In early October, the full bench of the High Court heard a challenge to the lawfulness of the Australian Government's role in offshore detention on Nauru. The hearing proceeded despite an eleventh hour announcement that the facility on Nauru is set to become an 'open centre'.

The Human Rights Law Centre's Director of Legal Advocacy, Daniel Webb, said the lead case is being run on behalf of a woman from Bangladesh who was brought to Australia due to a serious deterioration in her health during the late stages of pregnancy, but is now facing imminent return to Nauru with her ten month old baby.

"Australia should not be indefinitely warehousing people on remote islands, especially babies. The family is absolutely terrified of being forced back to an environment that we know is harmful and that we know is unsafe, particularly for women and children," said Mr Webb.

This is the lead case linked to a series of challenges being run on behalf of more than 200 people in similar situations who have been brought to Australia from Nauru and Manus for various reasons including urgent medical attention.

Transition to an 'open centre'

Just days before the case, it was announced that the Nauru detention facility would become an 'open centre'. The proposed changes are set to commence more than three years after the re-opening of the detention centre but just two days before the High Court examines Australia's role in it.

Mr Webb said allowing people increased freedom of movement would be a welcome development but the fundamental problems with the offshore arrangements remain.

"A transition to an open centre would be an important and hard-won improvement, but letting people go for a walk does not resolve the fundamental problems caused by indefinitely warehousing them on a tiny remote island. The men, women and children on Nauru need a real solution – settlement in a safe place where they can rebuild their lives. Instead they're being left languishing in an environment that is clearly unsafe for women and children," said Mr Webb.

Retrospective legal changes

When the HRLC commenced the case on 14 May this year, it contended that there was no Australian law which gave the government the necessary power to fund and facilitate the current offshore detention arrangements.

The government responded by hastily introducing one. With the support of the Opposition, the government enacted legislation which sought to retrospectively authorise three years of offshore detention and the expenditure of several billion dollars for that purpose. The law passed through the Parliament in June within two days of it being announced.

"The Government repeatedly assures the Australian people that it is acting legally, but a Government confident its actions are lawful doesn't suddenly and retrospectively change the law when its actions are challenged in court," said Mr Webb.

Key legal issues

Despite the changes to the law, Mr Webb said that serious Constitutional questions remain about the Commonwealth's involvement in offshore detention and the validity of the laws attempting to authorise it.

"We know the government has some power to detain people in Australia and some power to remove people from Australia. But it's another thing altogether to then spend billions of dollars funding and facilitating the detention of innocent people in other countries. It's that spending and that detention that this case challenges," said Mr Webb.

"We sometimes lose sight of just how extraordinary it is for Australia to be underwriting and actively participating in the detention of people in other countries. We know it's harmful and we know it's expensive. This case will test whether it is legal," said Mr Webb.

The people at risk of removal

Related cases to the one being heard have now been commenced on behalf of over 200 men, women and children returned to Australia for medical treatment but now facing forcible return to offshore detention.

"There are now over 200 people involved in these cases. They include men subjected to serious violence on Manus, women who've been sexually assaulted on Nauru and over 50 children, including 23 babies less than a year old. These are incredibly vulnerable people. They should not be returned to an environment that has already caused them a great deal of harm," said Mr Webb.

A case raising similar legal issues in respect of the Manus detention arrangements is also underway and has been adjourned pending the outcome of the Nauru challenge. Ruth Hudson, Practice Group Leader at Stacks Goudkamp lawyers, is representing several of the men involved in the Manus case including the lead plaintiff.

"Many of the men experienced torture and trauma in their countries of origin. They report that they have witnessed and been subjected to extreme violence inside the Manus detention centre, as well as being required to live in conditions that have only served to further compromise their already fragile mental and physical wellbeing. They are suffering serious physical and psychological injuries and illnesses, each of which demand our attention and assistance and they should not be sent back to Manus Island," said Ms Hudson.

Temporary agreement not to remove without notice

The men, women and children involved in the case are covered by legal undertakings from the Australian Government that they will not be returned to Nauru or Manus Island without notice.

In the months since the case was filed, the HRLC has worked closely with the Refugee Advice and Casework Service in Sydney, the Darwin Asylum Seeker Support and Advocacy Network in Darwin and support agencies and private commercial lawyers around the country to ensure people at risk of deportation offshore have received legal advice about the case.

Katie Wrigley, Principal Solicitor at RACS, said many of the people involved in the case had been terrified that they would be sent back to Nauru without notice.

"It shouldn't have taken a case in the highest court in this country for the government to promise not to deport vulnerable people – including babies – without any notice and without any opportunity for those families to speak with their lawyers, but at least for now, they can go to sleep at night without the fear of being suddenly woken up and secretly whisked away to offshore detention," said Ms Wrigley.

The legal team running the case includes barristers Ron Merkel QC, Craig Lenehan, David Hume, Rachel Mansted, Emma Bathurst and Stacks Goudkamp Lawyers. Assistance has also been provided by the Refugee Advice and Casework Service and Darwin Asylum Seeker Support and Advocacy Network.

Related media coverage:

- **Fran Kelly,** High Court to hear asylum seeker abuse claims, ABC Radio National October 7, 2015
- **Daniel Hurst,** Return asylum seekers to offshore detention 'as soon as possible', officials urged, The Guardian, October 6, 2015
- **Anna Henderson and Stephanie Anderson,** Nauru to process all asylum seekers in offshore detention centre 'within the next week'; refugees among those to assess applications, ABC News, October 5, 2015
- **Helen Davidson and Daniel Hurst,** Nauru says it will process remaining 600 refugee claims within a week, The Guardian, October 5, 2015
- **Patricia Karvelas,** Nauru to process 600 asylum claims in a week, ABC Radio National Drive**,** October 5, 2015

OPINION

Will women ever be able to have it all?

If we want justice for women in the workplace we need to see work-life balance as an important issue for men as well as women, Catherine Branson QC recently said during her *2015 Law and Justice Address.*

It will soon be 50 years since I started studying at the Adelaide Law School. I was one of ten female students in a cohort of 110. The number of female legal practitioners in Adelaide at the time would not have reached double digits. Indeed, my parents thought that the best way for me to ensure I got a job in a good legal firm post-graduation would be to obtain secretarial qualifications. This was probably not surprising at a time when the employment pages of the local papers had 'Men & Boys' sections and 'Women & Girls' sections.

After my graduation, and after I had taught at the Adelaide Law School for two years, I found that attitudes had not changed much. As an articled law clerk, I was introduced to the senior partner of one of Adelaide's oldest law firms. This led to his discovering that I was a graduate in law and arts. His spontaneous response: 'Good heavens, someone has wasted a lot of money on your education!'

These stories date from a time before Australia had sex discrimination legislation. South Australia passed Australia's first Sex Discrimination Act in 1975. The passage of that, and subsequent legislation, helped change attitudes but change didn't come quickly and even today it is far from complete.

The Workplace Gender Equality Agency reports that the representation of women steadily declines when moving up the management levels with women comprising only 26% of key management personnel; one third of employers have no women who are key management personnel; and the gender pay gap for full-time base remuneration is 19.9%, and 24.7% if full-time total remuneration is measured. The former Sex Discrimination Commissioner has recently pointed out that more big Australian companies are run by men called Peter than by women.

Over 60% of law graduates are women but only 28% of the total Australian judiciary are female. More than half of academic staff in Australia's universities are female but just over a third of staff above the level of senior lecturer are female.

Unsurprisingly there is a significant gender gap in retirement savings with many women living their final years in poverty. The average superannuation payout for women is approximately a third of that for men.

These are the outcomes after we have removed formal barriers to women entering paid work, after we have enacted laws proscribing sex discrimination and laws providing for maternity leave and subsidised childcare, and as we are starting to attend to the workplace consequences of domestic violence.

Working women are now recognised as a national productivity imperative. They should not face serious financial and other penalties for also undertaking the caring work that is vital to our society.

So what is to be done?

We tend to think of the fight against discrimination as a fight for equality. In one sense of course it is, but more fundamentally it is a fight for justice.

We accept in many areas that the national interest is advanced by laws that impact differently on those whose circumstances are not the same. Few object to the rich and the poor paying income tax calculated at different rates; few complain that veterans and their dependents enjoy favourable medical and social security benefits when compared with the general population; few argue against businesses being required to make reasonable adjustments to employ persons with disability. We see the justice of these measures even though they depart from strict equality.

We need to be alert to the need for other departures from strict equality in the interests of justice. Such departures might include things like compensating women, perhaps through special payments into their superannuation accounts, for their time away from full-time work, and targeted mentoring programs for women that keep them in touch with their workplaces while they are on maternity leave. Others will be better equipped than me to think of the full range of possible initiatives.

We need also to remember that as society changes what constitutes justice will also change.

One important change in our society is the increasing involvement of men in their children's upbringing. Some are becoming primary caregivers, but more are truly sharing responsibility with their partners or former partners. Some, perhaps many, men would be happy to play a larger role. My hope is that this significant contemporary dynamic will prove to be a powerful force towards the achievement of improved work-life balance for everyone.

If we really want gender equality we must stop thinking of work-life balance as a women's issue. We must stop thinking of family responsibilities as women's responsibilities. We need to learn to value workplace leadership and caring equally, to think that managing a business or practice and managing a household full of other human beings are equally valid and valuable occupations.

The time will come when women can have it all. If we want justice for women in the workplace what we need is significant numbers of men making the case that justice for them requires that they be able to spend time caring for their families without significant cost to their careers and to their long-term financial security. Once work-life balance is seen as a men's issue then, and I suspect only then, will we see the sorts of changes that will ensure justice – for both men and for women.

The Hon. Catherine Branson QC is on the board of the Human Rights Law Centre. She is the former President of the Australian Human Rights Commission and former judge of the Federal Court of Australia. This is an edited version of a speech delivered at the 2015 Law and Justice Address.

UNITED NATIONS

Australia should stop weakening UN efforts to defend human rights in Cambodia

1 October 2015

Australia has been accused of seeking to weaken criticism of Cambodia's appalling human rights record during negotiations on an important resolution at the United Nation's Human Rights Council in Geneva.

The Human Rights Law Centre's Director of Advocacy and Research, Emily Howie, said it was deeply disappointing that Australia was putting its political interests ahead of the important human rights work of the UN.

"During the very same week that Julie Bishop has confirmed Australia is seeking a spot on the UN Human Rights Council claiming it wants to defend democratic freedoms and institutions around the world, we see Australia completely undermining its reputation at the UN as a potential defender of human rights," said Ms Howie.

The Human Rights Council is currently negotiating a resolution criticising various anti-democratic measures in Cambodia. Among Western European and Other Group States, Australia has distinguished itself by seeking to weaken or exclude language calling for the repeal of Cambodia's controversial NGO and Associations laws.

"Australia's statements on Cambodia are out of touch with reality on the ground and risk undercutting the work of the council to protect and promote human rights in Cambodia. Let's face it, Australia has a vested interest in Cambodia as a country that Australia is paying to resettle refugees it detains on Nauru and it's clearly letting that interest cloud its judgement," said Ms Howie.

Australia has paid Cambodia $55 million to resettle refugees but since the resettlement detail was announced only 4 refugees have been resettled.

In late September the Human Rights Law Centre and Human Rights Watch released a report calling on Australia to improve its leadership on human rights at home and abroad ahead of the UN Human Rights Council bid.

"If Australia wants a seat on the council, it needs to step up to these kind of opportunities and start taking a more consistent and principled approach to defending human rights," said Ms Howie.

DETAINEE RIGHTS

UN's new 'Mandela Rules' shine a light on sub-standard Australian prison conditions and practices

14 October 2015

Australia's treatment of prisoners falls short of new international standards adopted by the United Nations General Assembly last week.

The Nelson Mandela Rules – named in honour of Mr Mandela and the many years he spent in prison – are recognition of the need to protect prisoner's human rights around the world.

The Human Rights Law Centre's Senior Lawyer, Ruth Barson, said the Revised Standard Minimum Rules for the Treatment of Prisoners are a reminder that Australia needs to change its practices to meet contemporary and accepted standards.

"Unfortunately conditions in Australian prisons are generally getting worse. Given our prison population is growing exponentially, these revised standards are a timely opportunity for Australia to improve because it's clear that a number of our practices are outdated and risk being inhumane," said Ms Barson.

The Mandela Rules provide detailed guidance in relation to a wide variety of prison practices and shows that Australia's treatment of prisoners is falling short in three principle areas: the inappropriate use of solitary confinement; the over use of strip searches; and inadequate access to healthcare.

"Solitary confinement is an inherently dangerous and damaging practice, and undermines prisoner rehabilitation, yet prisons around Australia continue to use solitary confinement as a management tool, including on women and young people. The Mandela rules are clear that Australia should be unequivocally moving away from such an inhumane practice," says Ms Barson.

The Rules define solitary confinement as confinement for 22 hours or more a day without meaningful human contact. The rules say that women and young people (under 18 years old) should never be subject to solitary confinement, and prohibit the use of prolonged solitary confinement, defined as confinement in excess of 15 days.

The Rules explain that use of force against prisoners is only appropriate in very exceptional circumstances. Ms Barson said that a number of practices in Australia's poor performing jurisdictions, namely the Northern Territory and Western Australia, clearly fall short of the Rules.

"The tear gassing of young people in the Northern Territory's youth detention facility late last year, as well as holding young people in solitary confinement for 17 consecutive days, clearly breach the Mandela Rules," said Ms Barson.

The Rules are also clear that strip searching should only be used where absolutely necessary, and that countries should develop alternatives.

"Prisons routinely strip search prisoners. The Mandela Rules urge countries to move away from strip searching because such invasive searches risk being degrading and have adverse impacts, particularly on more vulnerable prisoners such as young people and women, many of whom have a history of sexual assault," said Ms Barson.

The Rules clarify that prisoners should be provided with health care services of the same standard as available in the community – which in many Australian prisons is not the case with prisoners denied access to mental health treatment, drug treatment and dental care.

"We have a long way to go when it comes to implementing human rights compliant prison practices, but these new Mandela Rules provide a contemporary blueprint to guide prison management in a way which is both safe and humane. The primary purpose of prison must be rehabilitation and it's clear that this will ensure the community is safer in the long run," said Ms Barson.

Ms Barson said another key gap in Australia's practice that the new Rules highlight is the lack of independent prison oversight mechanisms.

The Human Rights Law Centre has called on all states and territories to commit to implement the new Rules.

"A loss of liberty should not result in a loss of dignity. Australia should move to fully implement the Mandela Rules because it's clear that a number of our prison practices are outdated and in breach of Australia's human rights obligations," said Ms Barson.

A full copy of the Mandela Rules can be found online here.

Related note: The HRLC recently sought urgent UN intervention regarding the mistreatment of young people in the Northern Territory's Don Dale youth justice facility.

LGBTI RIGHTS

Victorian Government's same-sex adoption laws welcomed by community and legal groups

6 October 2015

The announcement by Victorian Minister for Equality Martin Foley that the Government will introduce laws in October to remove discrimination faced by same-sex couples in the area of adoption has been welcomed by community and legal groups.

Representing Victoria's LGBTIQ families, Rainbow Families Council welcomed the reforms and the positive impact the changes, if passed by Parliament, would have on hundreds of Victorian families headed by LGBTIQ parents.

"We are really pleased to see the state government introduce this long-awaited adoption law reform. For many children, these adoption reforms will finally allow the law to catch up with the reality of their lives and ensure that the parents who love and nurture them are legally recognised," said Rainbow Families Council Co-Convenor Amelia Bassett.

"The impact these reforms will have on the day-to-day lives of these families can not be underestimated – from enrolling at school, accessing health care, travelling overseas. Here's hoping these families receive an early Christmas present."

The Victorian Gay & Lesbian Rights Lobby welcomed the Government's move to implement its election commitment to deliver equality in adoption for same-sex couples and noted these changes would address the final recommendations of the 2007 Victorian Law Reform Commission's report and the 2015 Adoption Act Review by Eamonn Moran QC.

"After over a decade of campaigning and multiple inquiries and reviews, we congratulate the Andrews Government for announcing their bill will be introduced this week and thank them for

removing the last piece of Victorian legislation that discriminates against same-sex couples," said VGLRL Co-Convenor Sean Mulcahy.

The amendments to the Adoption Act 1984 and the Equal Opportunity Act 2010 will ensure that two people, regardless of their sex or gender identity, may apply to adopt a child and to have their application assessed where it is in the best interests of the child for that adoption to occur. The Government's announcement will also ensure that both faith-based and secular adoption agencies provide the same service to prospective parents.

The Human Rights Law Centre welcomed the announcement that all service providers would deliver adoption services, regardless of whether they were faith based or secular and noted that it would consider the legislation when released.

"These amendments to the Equal Opportunity Act 2010 will ensure that each individual adoption case will now consider all options available and determine the best interest of that specific child, no matter which agency is handling the adoption case. It's important that best interest of the child continues to be the paramount concern," said HRLC Director of Advocacy Anna Brown.

HRLC's Anna Brown announced as finalist for the 2016 Australian of the Year Award

9 October 2015

The Human Rights Law Centre is thrilled that our very own Director of Advocacy and Litigation, Anna Brown, has been nominated as one of Victoria's finalists for the 2016 Australian of the Year Award for her work tackling important human rights issues.

Anna has led much of our work on LGBTI rights, police accountability, protester rights, and equality law reform.

As the Australian of the Year Awards website explains, Anna fingerprints are on almost every recent legal and political win for Australia's lesbian, gay, bisexual, transgender and intersex (LGBTI) community – from the successful bid to erase unjust historical criminal records for homosexual conduct to the fight for legal recognition of gender diversity and securing federal discrimination laws to protect LGBTI people. Anna also spearheaded the No to Homophobia campaign, and work closely with the Australian Football League and other sporting codes in efforts to stamp out prejudice.

The nomination comes after Anna was declared the 2014 Victorian LGBTI Person of the Year in 2014 and further recognises Anna's tireless effort in campaigning for LGBTI rights and in September this year, Anna was announced as a member of the Victorian Government's LGBTI taskforce that aims to get equality for LGBTI Victorians back in the spotlight and on the political agenda.

Anna joins nominees Julian McMahon, barrister and human rights activist, Professor George Jelinek, medical professional, and David McNamara, food relief champion, as a Victorian Finalist for the 2016 Australian of the year award.

OPINION

Tackling violence against LGBTI people and defenders

Anna Brown - 6 October, 2015

The recent strong stand taken by UN agencies for LGBTI people should be matched with renewed efforts by States to tackle the violence they suffer, writes Anna Brown.

Recently I learned that a friend of mine, a transgender activist in Malaysia, had been attacked with an iron rod by two men while she was on her way to work. Nisha sustained serious physical injuries and now lives with psychological scars that run much deeper. The attack was a crime of intimidation against a well known and fearless advocate for the rights of transgender women, preventing her from traveling to Geneva to advocate at the UN Human Rights Council as planned. Nisha Ayub lives in a country where cross-dressing is unlawful and where discrimination against lesbian, gay, bisexual, transgender and intersex (LGBTI) people is pervasive. Her very existence is a threat to those who wield political power and her advocacy and support for trans women and sex workers challenges conservative social views.

Sadly, the vicious attack against Nisha is but one example of the vulnerability of LGBTI people to violence and abuse - particularly those who dare to speak out for the marginalized. All people have an equal right to live free from violence, persecution, discrimination and stigma. Yet, there continue to be disturbing trends of systematic, ongoing and widespread violence and discrimination against LGBTI people throughout the world and against those who advocate for their rights - including murder, assault, kidnapping, rape, sexual violence, torture and ill-treatment.

This trend is confirmed by the report of the UN Special Rapporteur on the situation of human rights defenders (UN Doc A/70/217), to be presented to the UN General Assembly in October, in which he concludes that LGBTI defenders are among those most exposed and at risk of all defenders. Because of their work and because of their identities and characteristics, LGBTI human rights defenders are exposed to heightened levels of violence, stigmatisation, discrimination, attacks and other human rights violations.

It is critical for states to ensure effective protection and real accountability for attacks against LGBTI persons and defenders, such as Nisha and their associations.

Last week a joint statement to the UN Human Rights Council by international and national NGOs urging such action by States coincided with an unprecedented joint initiative by 12 UN agencies calling on governments around the world to take action to end violence and discrimination against LGBTI people. The statement from UN agencies represents a landmark collaboration and expression of commitment across the institutional diversity of the United Nations. The joint initiative by the UN agencies is a powerful call for States to take action to fulfil their duty to protect LGBTI persons, and those advocating for them.

States have a duty to promote and protect all human rights and fundamental freedoms. States should repeal restrictive laws which are incompatible with international human rights standards, including anti-cross-dressing legislation in Malaysia and legislation criminalising homosexuality in Uganda, and enact legislation to promote and protect equal rights for LGBTI persons and organisations and to ensure respect for their rights to freedom of expression, association and assembly.

Governments must also take steps to curb violence and protect individuals from discrimination. This should include measures to improve the investigation and reporting of hate crimes, torture

and ill-treatment, to prohibit discrimination, and to review and repeal all laws used to arrest, punish or discriminate against people on the basis of their sexual orientation, gender identity or gender expression, just to name a few. All too frequently, authorities fail to properly investigate crimes such as those against Nisha, even if victims have the confidence to make a complaint. As the statement by the UN agencies makes clear, this leads to widespread impunity and lack of justice, remedies and support for victims.

However, we can take heart from the positive progress in many parts of the world. In Australia there has been legislation introduced to a number of states to erase or 'expunge' historic convictions for consensual homosexual conduct. Recently in Ireland reforms have ensured that transgender people have access to birth certificates on the basis of their own declaration rather than requiring stigmatising and invasive medical procedures. Improved responses to LGBTI hate crime, including training of law enforcement officials and specific specialist taskforces or prosecuting teams dedicated to tackling bias-motivated violence have been introduced in countries such as in Spain, Honduras and South Africa.

And last month also saw a first ever gathering of experts and intersex activists to identify steps that States and others can take to end abuses against intersex people, such as forced sterilisation and other unnecessary and irreversible surgery. These abuses occur, in the words of UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein in his opening address to the 30th session of the Human Rights Council, simply because 'their bodies don't comply with typical definitions of male or female'. The increased attention to and awareness of intersex rights at an international level will hopefully spur greater action by States, such as the steps taken by Malta to regulate surgeries and medical treatment on intersex infants and children.

It is deplorable that, 22 years on from the adoption of the Vienna Declaration affirming the universality of human rights, people continue to suffer systemic discrimination, violence and persecution simply as a result of their sexual orientation, gender identity or intersex status, or because of their work to stand up and speak out for equal rights. Building on the words of former High Commissioner for Human Rights and ISHR Board member, Navi Pillay, in a vision statement at Vienna+20 'a huge amount of work remains to be done at the international level to transform human rights from abstract promises to genuine improvement in the daily lives of all people, especially those who are currently marginalized or excluded'. The lives of LGBTI defenders, those most exposed and at risk, need to be protected.

Following her attack, Nisha said that her work as an advocate will never stop until her last breath. We must continue to work so that LGBTI defenders around the world, those most exposed and at risk, can continue their life's work without fear from harm and reprisals.

DISCRIMINATION LAW

Utilising 'special measures' provisions in discrimination laws the key to increasing employment of Aboriginal and Torres Strait Islander peoples

According to the most recent statistics from the Australian Bureau of Statistics, Aboriginal and Torres Strait Islander people aged 15–64 years are around half as likely to be employed as non-Indigenous people. The Prime Minister's *Closing the Gap* report for 2015 revealed that since 2008, no progress has been made in reducing the employment gap between Aboriginal and Torres Strait Islander peoples and non-Indigenous people – in fact the gap has widened.

Employers are increasingly seeking to address the discrimination Aboriginal and Torres Strait Islander people face in securing work opportunities by conducting targeted recruitment strategies, such as reserving certain positions for Aboriginal and Torres Strait Islander applicants.

There is unfortunately some misunderstanding amongst employers that discrimination laws are an obstacle for those wishing to undertake such recruitment strategies for the benefit of Aboriginal and Torres Strait Islander people. Some employers are concerned that implementing such strategies may breach these laws, and therefore believe that they need to apply for exemptions in order to conduct targeted recruitment.

However, in all jurisdictions other than New South Wales, this is not the case. Laws which prohibit racial discrimination in Australia recognise that some racial groups have suffered historical disadvantage and do not have equal access to opportunities to others in the community. These laws permit employers to take positive actions to address the inequality experienced by Aboriginal and Torres Strait Islander people in employment.

The various discrimination laws give these types of positive actions different labels: they are referred to as 'special measures' in the *Racial Discrimination Act 1975* (Cth) (RDA), the Northern Territory and Victorian laws; 'measures intended to achieve equality' in the ACT and Western Australian laws; 'projects for benefit of persons of a particular race' in the South Australian law; 'equal opportunity measures' in the Queensland law, and either 'schemes for the benefit of disadvantaged groups' or a 'program, plan or arrangement designed to promote equal opportunity' in the Tasmanian law.

Due to a lack of awareness or understanding, the 'special measure' provisions in these discrimination laws appear to be underutilised, and therefore are not fulfilling their function of advancing the right of disadvantaged groups to substantive equality. For example, one of the objectives of the Victorian *Equal Opportunity Act 2010* (which contains a special measures provision in s 12) is to promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that—

- discrimination can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society;
- equal application of a rule to different groups can have unequal results or outcomes;
- the achievement of substantive equality may require…the taking of special measures.

To help employers use the 'special measure' provisions in the RDA and state and territory discrimination laws to target Aboriginal and Torres Strait Islander people for recruitment, the Australian Human Rights Commission has developed *Targeted recruitment of Aboriginal and Torres Strait Islander people: A guideline for employers* (available online at https://www.humanrights.gov.au/targetedrecruitment). The guideline has been endorsed by all the state and territory discrimination authorities.

As the guideline explains, the core elements of a 'special measure' are essentially the same under the RDA and state and territory discrimination laws. To effectively meet the test for a 'special measure' in all jurisdictions an employer must be able to show that a targeted recruitment strategy:

- is necessary because members of a racial group are disadvantaged because of their race
- will promote equal opportunity for members of that racial group
- has the sole purpose of promoting equal opportunity (and will be done in good faith)

- is reasonable and proportionate (including reasonably likely, appropriate and adapted to achieve its purpose), and
- will stop once its purpose has been achieved.

As long as a targeted recruitment strategy for Aboriginal and Torres Strait Islander peoples meets the requirements of a 'special measure', it is lawful under racial discrimination laws, except in New South Wales. As the *Anti-Discrimination Act 1977* (NSW) does not include a clear 'special measures' type provision, in NSW employers need to apply for an exemption from that Act to conduct targeted recruitment.

Sarah Dillon *is Policy Officer at the Australian Human Rights Commission.*

OPINION

Civil society space and whacking moles

There's a game that you sometimes find at amusement arcades called whack-a-mole. Toy moles rise out of their holes at random and the player uses a large mallet to whack the moles on the head and force them back into their holes. A successful player needs vigilance, composure and a quick eye.

For human rights defenders, the protection of civil society space is a lot like a game of whack-a-mole. Threats arise without warning and valuable time, resources and energy are spent opposing them.

Almost one year ago, the Human Rights Council passed a resolution urging States to 'create and maintain, in law and in practice, a safe and enabling environment in which civil society can operate free from hindrance and insecurity'. In too many cases the Human Rights Council's resolution has not translated into domestic action and last week in Geneva ISHR convened a group of expert whackers from around the world to share their experiences of threats to civil society space and strategies to counter those threats.

Participants discussed anti-protest laws, restrictions on the establishment and funding of civil society organisations, constraints on the work of journalists, and national security and counter-terrorism laws that unduly restrict freedom of association and assembly. Each of these restrictive practices constitutes a current threat to civil society space in my country, Australia, and it was both troubling to see the regularity with which these laws and policies arise around the world, and encouraging to be exposed to the skill and dedication of human rights defenders working to defeat them.

We discussed and debated strategies for protecting civil society space, including building and maintaining strong coalitions, engaging with UN human rights mechanisms and other international actors, working with Governments and legislatures, strategic litigation, monitoring and reporting and working with the media and social media. We shared stories of success as well as failure.

What was abundantly clear during the ISHR convening was that human rights defenders should not be spending their time whacking moles. Beyond our work protecting civil society space, we are engaged in issues like persecution on the basis of sexual orientation and gender identity, militarisation, sustainable development, climate change and refugee rights, to name a few.

The contribution of civil society actors to human rights challenges like these is vital. As the UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, told the Human Rights Council at

the opening of its 30th session last week, 'When ordinary people can share ideas to overcome common problems, the result is better, more healthy, more secure and more sustainable States. It is not treachery to identify gaps, and spotlight ugly truths that hold a country back from being more just and more inclusive. When States limit public freedoms and the independent voices of civic activity, they deny themselves the benefits of public engagement, and undermine national security, national prosperity and our collective progress. Civil society - enabled by the freedoms of expression, association and peaceful assembly - is a valuable partner, not a threat.'

In addition to enabling civil society through the proper protection of freedom of expression, assembly and association, States should make public commitments to support civil society and protect civil society space. Those commitments should be backed up by legal and institutional protection against intimidation and reprisals, support for the establishment and operation of non-government organisations and mechanisms to ensure transparency and accountability.

Human rights defenders will return home from ISHR's consultation, training and advocacy program with their mallets at the ready, but really it would better if we didn't have to use them at all.

Rachel Ball *is Director of Advocacy at the Human Rights Law Centre in Australia. You can follow Rachel on Twitter at @RachelHRLC.*

UN ENGAGEMENT

Update on Australia's Human Rights Scorecard

In the lead up to Australia's review by the UN Human Rights Council, the HRLC and other NGOs along with the Australian Human Rights Commission visited Geneva to brief UN member states on the human rights situation in Australia and key issues that should be considered as part of the review.

The Universal Periodic Review is an important peer review process where UN member states have the opportunity to scrutinise Australia's human rights record and make recommendations for change. Australia was last reviewed under the UPR in January 2011 and faces its second review this year.

The Australian Government submitted its report for the UPR in August and is appearing before the Council in Geneva on 9 November. You can watch Australia's appearance live via webcast and follow the appearance on twitter using the hashtag #AusUPR.

Progress since the last UPR

While Australia accepted 90% of recommendations made in 2011 (in whole or in part) and a number of positive steps have been taken, progress has stalled on many recommendations and worse, there's actually been regression in key areas.

The vehicle introduced to drive and monitor the implementation of UPR recommendations, Australia's National Human Rights Action Plan, has not advanced, which has meant the status of many recommendations remains unclear. Australia is likely to be criticised for its failure to implement a large number of recommendations accepted in the last review as well as emerging human rights challenges. Overall, the Australian Human Rights Commission has reported that only 11% of recommendations have been fully implemented.

Briefings in Geneva

A coalition of Australian NGOs has been working hard to ensure that UN member states are provided with credible and accurate information about key human rights issues in Australia.

Last month a delegation of NGO representatives travelled to Geneva to brief UN member states in Geneva. We had a spread of representatives advocating on refugee, disability, Indigenous and LGBTI issues as well as NACLC's Amanda Alford and the HRLC's Anna Brown who have been co-ordinating the Australian NGO Coalition. We were armed with the Joint NGO Submission and Fact Sheets on 18 thematic areas to provide background on key issues as well as our suggested recommendations.

NGOs worked closely with the Australian Human Rights Commission to meet bilaterally with diplomats and brief missions on key issues. We also participated in a briefing session convened by UPR-Info attending by large number of mission representatives. Overall, we estimate that we reached around 100 states through the briefing session and bilateral meetings throughout the week.

There was a high level of interest in the human rights situation in Australia. There was particular interest and concern in Australia's asylum seeker and refugee policies and the erosion of democratic rights and freedoms since the last review. The grave human rights concerns for Aboriginal and Torres Strait Islander peoples were raised in the 2011 review and continue to be a significant concern.

The team in Geneva put together some video updates throughout the week you can watch them here:

Video update 1, Video update 2, Video update 3

What happens next?

The Australia Government will be represented by senior officials in Geneva on 9 November for its appearance before the Council. An "interactive dialogue" will take place where Australia will address the Council and representatives from other countries will make comments and recommendations to Australia about key issues of concern. It will be an opportunity to comment on positive progress but where states made recommendations at Australia's last UPR and these have not be implemented then we can expect criticism of the lack of progress.

The Australian Government will then formally respond to the recommendations made by states early in 2016 after consultation and dialogue with state and territory governments and NGOs in Australia.

Stay tuned for more updates and follow the hashtag #AusUPR on twitter as we get closer to the big day of Australia's appearance on 9 November.

FUNDRAISING

The Katering Show – HRLC Apron Sale

During the month of October the hilarious ladies at The Katering Show are generously donating all proceeds from the sale of their aprons to the HRLC. Check out their video message featuring one hell of a suspicious looking baby. Watch it here.

VIDEOS

Watch: HRLC's Emily Howie on #QandA

Our Director of Advocacy and Research, Emily Howie, recently appeared on the foreign policy special of the ABC's QandA program to discuss the need for Australia to take a more principled and consistent approach to human rights in foreign policy. You can watch here answers here or the full episode here.

NEW STAFF MEMBER

Introducing new staff member Amy Frew

The Human Rights Law Centre is excited to welcome new staff member Amy! Amy joins the team with experience in social policy, having worked at Victorian Government departments and interned with Victorian Legal Aid and a number of Community Legal Centres. She has also worked on important policy reform projects regarding prisoner rehabilitation. Amy will focus on the standing up for the rights of refugees and asylum seekers at the HRLC.

AUSTRALIAN HUMAN RIGHTS CASE NOTES

High Court upholds validity of ban on developer donations to political campaigns

7 October 2015

McCloy v New South Wales [2015] HCA 34

On 7 October 2015, the High Court upheld the constitutional validity of NSW laws which imposed caps on political donations, banned donations from property developers and prohibited indirect campaign contributions. The Court held that the laws did not impermissibly burden the implied freedom of political communication.

Facts

Property developer and former Newcastle mayor Jeff McCloy challenged the validity of three related sets of provisions in the *Election Funding, Expenditure and Disclosures Act 1981* (EFED Act). The relevant provisions:

- imposed caps on political donations;
- banned donations from property developers; and
- banned indirect campaign contributions (for example, providing office accommodation or vehicles for election campaigning).

The High Court challenge was mounted by Mr McCloy and two corporations of which he was a director. Mr McCloy had contributed money to political campaigns during the 2011 state election. Under the EFED Act's definition of 'property developer', however, Mr McCloy was banned from making political donations as a 'close associate' of the corporations he controlled.

The plaintiffs challenged the validity of the three sets of provisions on the same ground — that they impermissibly burdened the Constitution's implied freedom of political communication.

NSW accepted that the EFED Act indirectly burdened political communication by restricting funding available for political communication. The critical question was whether that burden was justified.

Decision

The High Court unanimously upheld the validity of the donation caps and the ban on indirect campaign contributions. Six judges (French CJ, Kiefel, Bell, Keane, Gageler and Gordon JJ) also upheld the validity of the ban on property developer donations.

Donation caps

In relation to the general donation caps — which apply to all donors, not just developers — the plaintiffs argued that donors were entitled to 'build and assert political power' by paying for access to politicians.

The joint judgment (French CJ, Kiefel, Bell and Keane JJ) rejected this argument. They emphasised the difference between an individual right, like that enshrined in the First Amendment of the US Constitution, and the implied freedom, which is a 'constitutional restriction on legislative power'.

The plaintiffs also argued that the caps lacked a legitimate purpose. They argued that their aim was not to prevent corruption, but simply to limit an individual's ability to make large donations in pursuit of political power. According to the plaintiffs, this purpose was incompatible with a system of representative government.

Again, the joint judgment disagreed. Their Honours emphasised the importance of creating a 'level playing field for those who wish to engage in electoral discourse'. Not only are donation caps compatible with a system of representative government — they 'preserve and enhance it'.

The ban on indirect campaign contributions was essentially an anti-avoidance provision, and was held valid for the same reasons as the donation caps.

Property developer donations

The plaintiffs argued that the developer ban was based on the fear that property developers were more likely to make corrupt payments than others. They argued there was 'nothing special about property developers' justifying that concern.

In rejecting that submission, the joint judgment highlighted NSW's recent history of corruption in the land development sector. They noted that watchdog bodies including the state's Independent Commission against Corruption had published eight adverse reports concerning developers since 1990.

The joint judgment emphasised that, while a proportionality assessment does not entitle the court to substitute their views for those of Parliament, it necessarily involves a value judgment. When considering the impact of legislation on the implied freedom, courts must examine the Act's 'public benefits'.

In this case, public interest in removing the risk and perception of corruption justified the restriction on communication.

Justice Nettle dissented in relation to the property developer donations. His Honour held that the ban arbitrarily discriminated against property developers and deprived them of the ability to participate in the political system.

Commentary

The High Court emphatically concluded that donation caps, far from being an impermissible burden on political communication, enhance representative democracy by creating a level playing field. In doing so, the joint judgment reiterated that the equality of opportunity to participate in political life — regardless of wealth or influence — is part of the democratic system guaranteed by the Constitution.

It is also interesting to note the significant role NSW's recent history of corruption had on the outcome. The High Court appears to have effectively taken judicial notice of corruption in land development, at least in NSW.

More broadly, this case is a useful reminder that a Constitutional implied right is not akin to an individual right, but rather a 'constitutional restriction on legislative power'.

The full judgment can be found here.

Louis Andrews *is a legal researcher for the Human Rights Law Centre.*

INTERNATIONAL HUMAN RIGHTS CASE NOTES

Right to peaceful assembly upheld by European Court of Human Rights

Case of Gafgaz Mammadov v Azerbaijan **(Application no. 60259/11)**

Strasbourg 15 October 2015

The European Court of Human Rights found that the arrest and conviction of peaceful pro-democracy protesters was in bad faith and breached the right to freedom of peaceful assembly.

Facts

On 19 June 2011, a protest was held by the opposition group *Ictimai Palata* in a central area of Baku, Azerbaijan. The group was refused permission to demonstrate in a central square by the relevant Baku City Executive Authority. Nevertheless, the group held the protest in another central location. The applicant, an Azerbaijani national Mr Gafgaz Suleyman oglu Mammadov who attended the demonstration, alleged that it was a peaceful protest, and that participants were demanding free and fair elections, democratic reforms, freedom of assembly and the release of persons arrested during previous demonstrations. The applicant was arrested at the demonstration and not given a lawyer while he was in police custody. On 20 June 2011, a domestic court found him guilty of an 'administrative offence' under the 'Code of Administrative Offences' and sentenced him to five days of detention. He unsuccessfully appealed to the Baku Court of Appeal.

An application was then lodged against the Republic of Azerbaijan under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms on 10 September 2011.

The applicant alleged that the dispersal of the demonstration and his subsequent arrest and conviction violated his right to freedom of peaceful assembly. He further complained that the administrative proceedings against him had fallen short of guarantees of a fair hearing, and that his arrest and conviction had been contrary to guarantees of the right to liberty.

The complaints concerned Articles 5, 6 and 11 of the Convention which respectively deal with the right to liberty and security, the right to a fair trial and freedom of assembly and association.

Decision

Article 11 of the Convention

The Court found that there was a violation of the applicant's right to freedom of peaceful assembly and freedom of association. The Court held that there was interference with the exercise of freedom of peaceful assembly. An interference can equate to a measure of the authorities other than an outright ban. Accordingly, actions taken before, during and after an assembly can constitute interferences. The dispersal of the protesters and the arrest of the applicant was therefore one such interference. The government argued that the applicant was not punished for his participation in the demonstration. He was punished for deliberately disobeying a lawful order of police officers. However, the Court ruled that the police and domestic courts both described the impugned behaviour as a failure to stop participating in an unauthorized demonstration.

The interference with the demonstration was lawful under Azerbaijani domestic law. The Court noted its concern that peaceful protesters have effectively been banned from central Baku since 2006, despite complying with giving the authorities advanced notice - the only Constitutional requirement under Art 49. However, the Court did not limit its examination solely to the lawfulness of the interference. It also considered whether the interference pursued a legitimate aim and was necessary in a democratic society. Requiring that demonstrations need prior authorization is not *per se* an infringement of freedom of assembly. In the present case, the dispersal was not necessary. The authorities did not explain why, instead of taking actions to minimize the disruption to traffic and putting in place safety measures, they dispersed the demonstration. There was no evidence that the demonstration would have been hard to police or difficult to protect public safety. The authorities made no effort to balance the applicant's right to participate in the demonstration against possible damage this could cause to public or private interests.

Further, the Court found that the authorities did not have sufficient evidence to justify the applicant's arrest and conviction. Despite being formally charged with failure to comply with a lawful order of a police officer, the applicant in fact was arrested and convicted for his participation in an unauthorised peaceful demonstration. Accordingly, the Court found that the sanction imposed on him was unwarranted and disproportionate.

Article 6 of the Convention

There was a violation of Article 6 and the accused's right to a fair hearing. Despite the local court characterising proceedings against the applicant as 'administrative', the Court considered them to be akin to criminal charges.

In this case, the applicant was arrested at 6.10pm on 19 June and was in court for a trial hearing at 12pm on 20 June. He was not allowed access to a lawyer while in custody, and was only allowed a government lawyer – not one of his own choosing - for the trial. The applicant was furthermore not provided with a copy of the report, evidence or charges against him. The Court held that even in a less complex matter than this, the circumstances in which the trial was conducted were not conducive to giving the applicant a fair hearing. The applicant was not given adequate time and facilities to conduct his defence.

The Court stressed that Article 6 usually requires that the accused be allowed to see a lawyer during the initial stages of police questioning. Even if there are reasons to restrict access to a lawyer, that restriction must not unduly prejudice the accused's rights under Article 6.

Article 5 of the Convention

The Court held that there had been a breach of Article 5 – the right to liberty and security of person.

The applicant argued that his arrest and detention for failing to comply with a lawful order of a police officer was arbitrary. He said that it was arbitrary because he had not disobeyed an order of a police officer.

More broadly, the Court has not formulated a global definition of what arbitrary conduct is. There have been, however, some principles developed on a case-by-case basis. Detention will be arbitrary when, despite it complying with national law, the detention has an element of bad faith, deception, or a neglect to correctly apply relevant legislation.

In the present case, the applicant's arrest and detention contained an element of bad faith. The applicant was formally charged with failure to comply with a lawful order of a police officer, however he was in fact detained for his participation in an unauthorized peaceful demonstration. Moreover, the domestic Appellate Court acted arbitrarily. It failed to examine whether the police had invoked the correct legal basis for the applicant's detention and they did not review the lawfulness of the police's interference with the demonstration. Therefore, there was a breach of Article 5.

Commentary

The United Nations has reported a trend of Azerbaijani legislation that considerably narrows the space in which civil society and human rights defenders can act.

This decision of the ECHR comes in the context of Azerbaijan's severe crackdown on demonstrations. According to Human Rights Watch, the authorities have routinely broken up unsanctioned protests and arrested and imprisoned peaceful protesters. The Constitution permits peaceful assembly of groups after simply notifying the authorities, however in practice, authorities require that groups acquire permits from local municipalities. This has increased the Government's control over which protests and assemblies it allows.

As in this case, the Azerbaijani authorities regularly use administrative charges to imprison people for participating in unsanctioned rallies. This case is an important decision for recognising that these charges can be arbitrary and made in bad faith.

The full decision can be found here.

Beatrice Paull *is a legal researcher at the Human Rights Legal Centre.*

Minister found liable for wrongful conduct of police towards domestic violence victim

Charmaine Naidoo v Minister of Police (20431/2014) [2015] ZASCA152 (2 October 2015)

In the recent decision of *Charmaine Naidoo v Minister of Police*, the Supreme Court of Appeal of South Africa overturned a decision of the High Court of Johannesburg to hold that the Minister of Police ("Minister") was vicariously liable for the wrongful conduct of certain members of the South African Police Service ("SAPS") towards a domestic violence victim.

Facts

In 2010, Charmaine Naidoo (the "Appellant") was assaulted and seriously injured by her former husband, Charlton Naidoo ("Naidoo"). Following the incident, the Appellant went to her local police station to lay a charge against Naidoo under the *Domestic Violence Act 116 of 1998* ("Act"). The SAPS member that attended to the Appellant furnished her with incorrect advice (by telling her she was required to obtain a protection order from the Magistrates' Court before SAPS could assist her).

After visiting the Magistrates' Court and learning that this was not the case, the Appellant returned to the police station. However, SAPS refused to assist her until Naidoo had been consulted. Naidoo was called to the station and the relevant SAPS members attempted to convince the Appellant that she should resolve the dispute amicably. They also advised that if she insisted on pursuing the charge, Naidoo would lay a counter charge, and they would both be arrested. The Appellant and Naidoo were accordingly detained overnight.

While being detained, the Appellant was violently assaulted by another SAPS member causing her to suffer shock, soft tissue injuries and severe swelling. She also suffered psychological harm as a result of the assault.

The primary issue on appeal was whether the Minister should be held liable for the conduct of the relevant SAPS members and ordered to pay compensation to the Appellant on the grounds that:

- the SAPS members had wrongfully and negligently failed to comply with the requirements under the Act (and the Regulations and National Instructions promulgated under the Act), which comprehensively detail the manner in which victims of domestic violence must be treated;
- the Appellant had been unlawfully arrested and detained; and
- the Appellant was assaulted by a SAPS member.

Decision

Statutory duty to provide assistance

The Court held that the Act, the Regulations and the National Instructions imposed a statutory duty on SAPS to render assistance to the Appellant (as a victim of domestic violence). In the Court's view, section 2 of the Act and paragraph 7 of the National instructions made it clear that upon discovering an incident of domestic violence, SAPS must provide *real assistance* to the victim rather than merely 'referring them to counselling or conciliation services.'

Having established the existence of a statutory duty, the Court then went on to consider the question of whether it had been negligently breached. The question to be answered was therefore whether a reasonable person in the position of the members of SAPS would have taken precautions to guard against the harm suffered by the Appellant. In determining this issue, particular regard was given to:

- the nature of the Appellant's complaint;
- the wide ranging remedies accorded to the victim under the Act; and
- the comprehensive and explicit directives given to members of SAPS under the Regulations and the National Instructions.

The Court held that the relevant SAPS members had breached their statutory duty because:

- they sought to "shirk [their] responsibility by directing the Appellant to seek assistance by other means", namely by obtaining a protection order at the Magistrates' Court;
- they provided the Appellant with incorrect information (by telling her that a protection order was a prerequisite for SAPS assistance);
- even when the Appellant returned to the police station from the Magistrates' Court, the relevant SAPS members did not assist her *immediately* (they waited until Naidoo arrived at the police station);
- they suggested that the Appellant should resolve the dispute with Naidoo amicably; and
- they encouraged Naidoo to lay a counter charge against the Appellant.

Unlawful arrest and detention

Additionally, the Court held that SAPS had unlawfully arrested and detained the Appellant. In doing so, it rejected the Respondent's argument that the arrest was lawfully executed under section 40(1)(b) and (q) of the *Criminal Procedure Act 51 of 1977* on the basis that the relevant SAPS member reasonably suspected the Appellant had *herself* committed an act of domestic violence.

The Court emphasised that the evidence of one of the investigating SAPS members was critical. Under cross-examination, he stated that he had arrested the Appellant simply because 'he could not allow [the Appellant and Naidoo] to go back under the same roof again' and that 'the decision as to who should be allowed to go back to the house should be made by the Court'. This piece of evidence ineluctably lead to the conclusion that the SAPS member had either exercised his discretion to arrest arbitrarily or for an improper purpose, namely to separate the Appellant from Naidoo until she was brought to Court the next day.

It was also significant that the relevant SAPS members had encouraged Naidoo to lay a counter charge against the Appellant and that contrary to the Act, the Regulations and the National Instructions, they had insidiously advised her to settle the matter with Naidoo under threat that she would be arrested if the matter did not settle.

Assault

Finally, the Court held that the Respondent was vicariously liable for the assault committed against the Appellant while being transported to Court by another SAPS member. The Court was not persuaded by the Respondent's arguments that the Appellant's claim was not entitled to succeed because:

- the member of SAPS responsible for the assault had passed away by the time that the matter had come to trial, and she had failed to join his estate; and
- she had signed a statement withdrawing the charges against Naidoo which amounted to a waiver of her claim against the respondent.

Accordingly, the Minister was ordered to pay an amount of R 280,000 to the Appellant.

Commentary

The decision provides important clarity surrounding the obligations of police when dealing with victims of domestic violence. Importantly, the decision makes it clear that police have a positive duty to provide *real assistance* to victims of domestic violence to ensure that they are afforded the maximum protection from domestic abuse that the law can provide. In carrying out that duty, at the very least, police must provide victims with accurate information and respond to their complaints in a timely manner.

The full text of the decision can be found here.

***Madeleine McIntosh** is a Law Graduate at King & Wood Mallesons.*

Prospect of indefinite detention halts extradition

The Government of the United States of America v Giese [2015] EWHC 2733 (Admin) (07 October 2015)

On 7 October 2015 the UK High Court found that a District Court judge was correct in refusing to extradite Mr Alan Giese to the United States, where he faced serious charges of sexually assaulting a teenage boy. The appeal was pursuant to *section 105* of the *Extradition Act 2003* (UK) and was lodged by the United States' Government. The relevant question hinged on the

application of Article 5 of the *European Convention on Human Rights* (ECHR) and whether the civil commitment for serious sex offenders laws in California breached this provision.

Facts

Mr Giese was charged with numerous serious sexual offences in the US from May 1998 to May 2002 against a young boy. Mr Giese was charged and bailed to a US court, however he failed to answer his bail and a warrant was issued for his arrest. Following this, he fled to the UK and remained undetected until 12 February 2014, when US authorities requested that Mr Giese be extradited for trial to California. Mr Giese was arrested on 4 June 2014 to face a UK court for extradition proceedings.

If extradited, Mr Giese would likely to be subject to an order for civil commitment in California. Civil commitment involves the indefinite detention of serious sexual offenders, with annual reviews. Accordingly, the District Court judge called expert witnesses to provide evidence on the following questions:

- Is there a "real risk" that Mr Giese would be subject to civil commitment?
- If Mr Giese is subject to civil commitment, would this constitute a "flagrant breach" of his rights under *Article 5(1)* of the ECHR?

The District Court judge found that Mr Giese would be subject to a real risk of civil commitment and this confinement would be in breach of his rights under *Article 5(1)* of the ECHR. The US Government appealed the decision not to extradite.

The decision

The High Court upheld the District Judge's decision. In doing so, the court was required to consider two issues:

- Was the District Judge wrong to conclude that there is a real risk that Mr Giese would be subject to a civil commitment order?
- Was the District Judge wrong to conclude that the extradition of Mr Giese would be incompatible with his Article 5 ECHR rights for the purposes of section 87(2) of the *Extradition Act*?

The US Government challenged the findings that Mr Giese would be at a real risk of being subject to an order of civil commitment, and argued that it was "wrong in law". The US Government agreed that that if Mr Giese was convicted of the sexual assault charges, civil commitment may be a "likely" conclusion. Accordingly, the US Government argued that there was "no certainty" of Mr Giese being subject to an order of civil commitment and that any assessment at this stage, prior to extradition, is "purely speculative". The Court did not accept this submission, and instead concluded that:

Because of the nature of these serious charges…the age of the victim…the degree of grooming and breach of trust said to have been involved, because of the length of time over which the offending is said to have been perpetrated, [it] makes it a near certainty that Mr Giese will be referred…for evaluation (for a civil commitment order).

The US Government also argued that these civil commitment laws are analogous to the UK's laws which allow for indeterminate detention of an individual when they are "of unsound mind" (permissible under Article 5(1) of the ECHR, as interpreted by European Court of Human Rights (ECtHR)). The High Court rejected this claim.

The Court found that the District Judge was correct in her conclusion that there was a "real risk" of Mr Giese facing civil commitment if found guilty of the sexual assault charges. It also found that such civil commitment would breach Mr Giese's rights under Article 5(1) of the ECHR and extradition would be "inconsistent" with his ECHR rights. Accordingly, the Court found that he should be discharged unless assurance is provided that there will be no case of civil commitment brought against Mr Giese in the event that he is charged. The US Government failed to give this assurance, despite being given ample opportunity.

Commentary

This is clearly a vexed decision: the Court was required to weigh up an individual's human rights with the broader justice imperative of criminal accountability for serious offences. Importantly, the Court provided a way to ensure Mr Giese was brought to justice, which would have been for the US Government to provide an assurance that Mr Giese would not be indefinitely detained pursuant to a civil commitment order. The US Government was unable to provide this assurance – and therefore would not guarantee that Mr Giese's ECHR rights would be upheld.

On the one hand, this decision could be seen as inadvertently condoning absconding behaviour. Mr Giese absconded from a jurisdiction which is not subject to the ECHR, and in doing so and arriving in the UK, he ensured he had greater human rights protections than he would have had available to him in the US. The result is that he has been able to avoid criminal prosecution for serious offences.

On the other hand, the Court's decision could be understand is applying the ECHR is an un-bias way – all people, irrespective of who they are and what they are (alleged) to have done, are deserving of human rights protection. The high level of human rights protection provided by the ECHR should be upheld, rather than undermined through extradition proceedings to a jurisdiction with a lesser human rights regime.

Given how political extradition decisions are, it would be unsurprising if this decision of the High Court was appealed.

The full case can be found here.

Isaac Johanson-Blok *is a researcher at the Human Rights Law Centre*

Victims of family violence entitled to state protection

Djanwa v Minister of Safety and Security [2015] ZASCA 147 (1 October 2015)

Summary

The Supreme Court of Appeal of South Africa (SCASA) found that the Plaintiff, who was shot by her husband in her family home, was entitled to damages against the Minister of Safety Security (Minister) and the Station Commander of Ngangelizwe Police Station (Mthantha) for their failure to properly investigate and act on the Plaintiff's complaints that her husband was abusing her and owned a gun that he had repeatedly used to threaten her with violence and death.

Facts

The case was an appeal from the full court of the Eastern Cape Local Division (Full Court). The Plaintiff brought the action as a result of serious injuries she sustained on 19 April 2006 when her deceased husband, a local police officer (the Deceased) beat and shot her and then himself in their family home.

The Plaintiff had previously reported incidents of violence against her by the Deceased to the local police station in February and March 2006. The Plaintiff said she also reported that the Deceased possessed a handgun that belonged to the local police station, and that he had repeatedly pointed the gun at her and threatened to kill her and himself.

After the second incident in March the Plaintiff obtained a Protection Order against the Deceased, on the advice of the police and with the assistance of the local Magistrate's office. The Plaintiff provided evidence that at the time she wanted to protect the Deceased from being arrested, and simply wanted the police to confiscate his weapon. There was a brief lull in the violence that was then broken by the shooting incident that gave rise to this case.

The Defendants argued that the police were not informed about the gun; the Deceased's death threats to the Plaintiff; or of the level of violence involved in the February and March assaults. They argued that the Plaintiff's evidence was not credible, on the basis of her confusion about dates and certain details relating to the earlier incidents. The Defendants said that the Plaintiff's statement that she had reported the gun was inconsistent with her evidence that she wanted to protect the Deceased.

The trial judge at first instance found in favour of the Plaintiff. The trial judge considered that the Plaintiff's evidence, although contradictory on some details, was generally credible and provided a probable account of the events leading to the shooting. The trial judge considered the Defendant's account to be unsupported by documentary evidence. The trial judge found that the Police had failed to take requisite steps to protect the Plaintiff despite their knowledge of her situation and the Protection Order she obtained.

The Full Court reversed the trial judge's decision and found that the Plaintiff had not provided a credible account of the events leading to the shooting, and that in fact she had not reported to the police the Deceased's possession of a gun, or his threats to kill her. In particular, the Plaintiff's evidence that she had reported the gun was found to be inconsistent with her stated desire to "protect" the Deceased from being arrested.

The Full Court also ruled that the Plaintiff would not have accepted the police's failure to disarm the Deceased and would have followed it up with more "senior authorities". Her failure to do so indicated that she had not in fact reported the gun. Finally the Full Court found that the Plaintiff had not filled in the relevant section of the Protection Order application referring to weapons, which again indicated that she did not intend to report the weapon.

Decision

The SCASA overturned the Full Court's decision and restored the decision of the trial judge. It found that the contradictions in the Plaintiff's evidence were "more apparent than real", were largely related to the timing of certain incidents and became apparent after very gruelling cross-examination. These contradictions were considered "understandable" in the circumstances. The SCASA also concluded that the Plaintiff's failure to follow up her complaint with more senior authorities should not be held against her, as this is the proper role of the police, not the Plaintiff.

The SCASA also concluded that the Plaintiff's desire to "protect" the Deceased from arrest was consistent with her reporting of the abuse, particularly in the context of her seeking a Protection Order. The Full Court's reliance on the Plaintiff's failure to fill out the "weapons" section of the Protection Order was criticised as the evidence clearly showed that the application was filled out by the Magistrate's office, so the failure to fill it out properly could not be used as the basis for an inference against the Plaintiff.

The SCASA found that the Full Court had overlooked flaws in the Defendant's account of events. In particular, the police who provided evidence were doing so many years after the event, and had failed to keep any supporting written documentation. One policeman was simply relying on a colleague's recollection of events, and his evidence was therefore entirely hearsay. The evidence that the Plaintiff had not reported the gun and the threats was implausible, particularly as the police had provided her an escort home and had encouraged her to seek a Protection Order.

Ultimately SCASA determined that the Plaintiff's account, although not without flaws, provided the more plausible explanation of events. SCASA therefore concluded that the Police had failed to adequately protect the Plaintiff from the Deceased, despite knowing the risk she faced. This failure had a causal connection to the Plaintiff's injuries.

Importantly the SCASA found that the right to freedom and security of the person in the Constitution of South Africa and the South African Police Service Act "impose a positive obligation on the police to ensure the safety and security and protect the members of the public in general and women and children in particular from violent crime." This obligation founded the duty the Defendants owed to the Plaintiff, and also indicated that the Full Court was mistaken in imposing the onus on the Plaintiff to ensure her own protection.

Commentary

The SCASA's decision clearly establishes that under South African Law a victim of family violence is entitled to protection by the State. This right imposes an obligation on the police and other protective services to properly record and investigate allegations of family violence. The SCASA also suggests that confusion or inability to recall details should not necessarily be taken as evidence of a lack of credibility from a witness, especially if the witness has undergone a traumatic experience.

The Plaintiff's experiences, and the differences in treatment of this case between the Full Court and the SCASA, could provide some useful guidance as Australia seeks to address its problems with family violence and how to ensure victims are protected.

The full text of the decision can be found here.

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NOTICEBOARD

Movie double passes: Freeheld

Our friends at Entertainment One have 5 double passes to give to Rights Agenda readers for the new movie *Freeheld* starring Julianne Moore and Ellen Page. Click here for your chance to win: http://digi-tix.com/FHhrlc/

Opening in cinemas November 5, *Freeheld* is based on an inspiring true story and stars Julianne Moore and Ellen Page as a couple who, in their darkest hour, take on the biggest fight of their lives. When police detective Laurel Hester (Moore) is diagnosed with cancer, she is determined to battle discrimination after government officials refuse to allow her to leave her pension, earned over 23 years of service, to her life partner, Stacie Andree (Page). As the campaign for marriage equality gains momentum worldwide, *Freeheld* is a poignant reminder of the personal struggles at the heart of the movement and a stirring tribute to two ordinary women whose love and integrity compelled them to demand equal rights in an extraordinary act of courage. www.freeheld.com.au

Jobs: Assistant Legal Officer

The Office of the Prosecutor in The Hague, NL is seeking applicants for the position of **Assistant Legal Officer** to provide legal support and work with the Prosecutions Team.

Jobs: Justice Connect

A number of positions have become available at Justice Connect, an organisation that works with the legal sector to give those experience disadvantage greater access to justice. The following positions are now hiring: Lawyer, MOSAIC in Sydney; Receptionist in Melbourne; and Principal Lawyer and Manager, Self Representation Service in Sydney. Click here for more information.

University of Melbourne to offer Masters of Human Rights Law

The University of Melbourne has just announced that it plans to offer a standalone Masters of Human Rights Law from next year, due to increased demand from students. Read more about the program here.

RECENT HRLC MEDIA HIGHLIGHTS

High Court to hear asylum seeker abuse claims

Daniel Webb on Radio National Breakfast with Fran Kelly, discussing the Human Rights Law Centre's recent challenge to the lawfulness of Australia's role in offshore detention on Nauru. Listen here

Nauru to process 600 asylum claims in a week on RN Drive

Daniel Webb talks with Patricia Karvelas on ABC Radio National Drive about the impact of the Nauruan government's decision to process the claims of 600 asylum seekers and open its offshore detention centre. Listen here

Lawyers pledge to back elderly gay couple who were ordered to take down gay flag in Port Melbourne

Anna Brown provides comment to the Age about the legality of a property corporation's demand that elderly gay couple Maurice Sheldrick and James Bellia remove a rainbow flag from their apartment balcony. Read here

Australia's human rights record under the microscope as Canberra pitches for UN Human Rights Council seat

In The Age, Anna Brown discusses how Australia's treatment of refugees will affect Australia's bid for a seat on the UN Human Rights Council. Read here

Other media coverage included:

- Anna Henderson and Stephanie Anderson, Nauru to process all asylum seekers in offshore detention centre 'within the next week'; refugees among those to assess applications, ABC News, October 5, 2015

- Helen Davidson and Daniel Hurst, Nauru says it will process remaining 600 refugee claims within a week, The Guardian, October 5, 2015
- Daniel Hurst, Return asylum seekers to offshore detention 'as soon as possible', officials urged, The Guardian, October 6, 2015
- Matthew Wade, Finalists for the Victorian Australian of the Year Awards include an equality champion and a trans* activist, Star Observer, October 9, 2015
- Dean Beck, Just Landed – Super Woman Anna Brown, JOY 94.9, October 15, 2015
- Michael Jlailaty, Thousands sign petition as lawyers pledge to support elderly Melbourne gay couple ordered to remove rainbow flag, Star Observer, October 16, 2015
- Liv Grady, Lawyers back elderly gay couple who were ordered to take down their pride flag, Gay Times UK, October 16, 2015
- David McCarthy, Anna Brown from the Human Rights Law Centre talks to JOY Melbourne about LGBTI human rights issues, JOY 94.9, 17 October, 2015
- Matthew Wade, Closet case: Anna Brown, Star Observer, 19 October, 2015
- Kaitlin Thals, 'Australia should not be involved in Syria conflict': Bob Carr, The New Daily, 19 October, 2015
- Megan Drapalski, Q&A: Focus on foreign policy, The Australian, 20 October, 2015
- Paul Farrell, Bob Carr tells Q&A Dutton's sea levels joke put Australia's reputation at risk, The Guardian, 20 October, 201

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The Human Rights Law Centre protects and promotes human rights in Australia and in Australian activities abroad. We do this through a strategic combination of legal action, advocacy, research and capacity building.

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