DownUnderAllOver

Developments around the country

HUMAN RIGHTS

Australian Government announces new Human Rights Framework

On 21 April 2010, the Attorney-General launched the Federal Government's response to the National Human Rights Consultation, entitled 'Australia's Human Rights Framework'. According to the Attorney, the Framework is based on five key principles, and focuses on (original emphasis):

- **reaffirming** a commitment to our human rights obligations;
  the importance of human rights **education**;
- enhancing our domestic and international **engagement** on human rights issues;
  improving human rights **protections** including greater parliamentary scrutiny; and
  achieving greater **respect** for human rights principles within the community.

The Framework does not include a Human Rights Act or Charter, which was a key recommendation of the National Human Rights Consultation Report supported by over 87 per cent of a record 35 000 submissions. According to the Attorney:

> While there is overwhelming support for human rights in our community, many Australians remain concerned about the possible consequences of such an Act. The Government believes that the enhancement of human rights should be done in a way that as far as possible unites, rather than divides, our community. The Government is committed to positive and practical change to promote and protect human rights. Advancing the cause of human rights in Australia would not be served by an approach that is divisive or creates an atmosphere of uncertainty or suspicion in the community.

Notwithstanding the rejection of a Human Rights Act, the Government's Human Rights Framework does contain a number of significant commitments to strengthen the promotion and protection of human rights in Australia:

- establishing a new Parliamentary Joint Committee on Human Rights to provide greater scrutiny of legislation for compliance with Australia's international human rights obligations;
  requiring that each new Bill introduced into Federal Parliament is accompanied by a Statement of Compatibility with Australia's international human rights obligations;
  reviewing legislation, policies and practice for compliance with the seven core international human rights treaties to which Australia is party;
- investing more than $12 million over four years in various education initiatives to promote a greater understanding of human rights across the community;
- developing a new National Action Plan on Human Rights to 'outline future action for the promotion and protection of human rights';
- consolidating and harmonising federal anti-discrimination laws into a single Act; and
- creating a 'Human Rights Forum' to enable whole-of-government engagement with non-government organisations on an annual basis.

The Government has committed to review the Framework in 2014 to 'assess its effectiveness in the promotion and protection of human rights in Australia'.

A copy of the 'Human Rights Framework' is available at <ag.gov.au/humanrightsframework>.

Australia moves to prohibit torture and the death penalty

Consistently with recommendations by the UN Human Rights Committee and the UN Committee against Torture, Australia has recently moved to comprehensively prohibit torture and the death penalty.

The *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act* amends the *Criminal Code Act 1995* to replace the existing offence of torture in the *Crimes (Torture) Act 1988* with a new offence of torture in the Criminal Code to fulfill Australia's obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It also amends the *Death Penalty Abolition Act 1973* to, as Attorney-General Rob McClelland stated, 'ensure that the death penalty cannot be reintroduced anywhere in Australia in the future.'

Universal Periodic Review of Australia

Australia is scheduled to be reviewed under the UN Human Rights Council's Universal Periodic Review (UPR) in February 2011. The UPR is a mechanism which reviews the human rights records of all 192 United Nations Member States. It is intended to be a cooperative mechanism, based on interactive dialogue with the full involvement of the country concerned, together with other States, NGOs and national human rights institutions.

The Australian Government recently invited NGOs to submit initial views on information that they would like to see included in the Australian Government's report to the UPR. NGOs must limit their submission to 5 pages.

Experience in the review of other States has shown that the most effective way for NGOs to influence the UPR is to develop a single report that is developed and endorsed by a large coalition of NGOs. A working group of interested NGOs has been established to coordinate the preparation of

the 5 page NGO Report, comprising the Human Rights Law Resource Centre, the National Association of Community Legal Centres and Kingsford Legal Centre.

Further information, see <hrlrc.org.au>.

Calls for action on the rights of Australia's indigenous peoples

The United Nations Special Rapporteur on the Human Rights of Indigenous People has released major reports on the severe disadvantage suffered by Australia's Aboriginal and Torres Strait Islander peoples ('ATSI Report') and on the Northern Territory Emergency Response ('NTER Report').

The ATSI Report focuses on the need for the Australian Government to ensure that Aboriginal peoples are included in decision making about matters that affect them. The report highlights that Government laws and policies must advance the right of self determination and respect important aspects of Aboriginal culture and way of life. The Report makes 37 conclusions and recommendations, including areas relating to:

- legal and policy framework;
- lands, territories and resources;
- overcoming Aboriginal disadvantage, including in relation to health, education, employment and housing;
- the protection of Aboriginal women, children and families;
- the administration of justice; and
- Aboriginal organisations and management.

The NTER Report acknowledges Australia's efforts to address the conditions faced by many Aboriginal communities in the Northern Territory, but expresses serious concerns about several problematic aspects of the NTER that breach Australia's international legal obligations. The Report concludes that the NTER measures:

- are incompatible with Australia's human rights obligations, including the rights to non-discrimination and self-determination;
- cannot be viewed as proportional or necessary to achieve the stated objectives of the Emergency Response;
- limit the capacity of Aboriginal people to control or participate in decisions affecting them;
- have had the effect of generating or heightening racist attitudes among the public and the media against Aboriginal people;
- are not improving the lives of Aboriginal people in the Northern Territory; and
- have implications for the direction of the relationship between Australian Governments and Aboriginal people.

Both reports follow an official visit to Australia by the United Nations independent expert in August 2009 and will be tabled at the UN Human Rights Council in September this year.

Human rights safeguards in extradition and mutual assistance agreements

The Joint Standing Committee on Treaties has called for explicit human rights safeguards to be included in Australia's extradition arrangements with other countries. In a report on a proposed extradition treaty between Australia and India, the Committee recommended that:

> new and revised extradition agreements should explicitly provide a requirement that the requesting country provide annual information concerning the trial status and health of extradited persons and the conditions of the detention facilities in which they are held.

In making this recommendation, the Committee stated:

> Australia has a moral obligation to protect the human rights of extradited persons beyond simply accepting the undertakings of countries making extradition requests. Australia must never be a party, directly or indirectly, to any injustice or abuse of the human rights of persons it has extradited, and regardless of whether the persons concerned are Australian citizens or not. While the Committee acknowledges that the risk of such an occurrence may be small, Australia currently has no formal process to ensure that, following extradition, a person's human rights are protected.

Monitoring the conditions of extradited persons could also enhance public confidence in Australia's extradition framework. Public confidence in Australia's approach to extradition could be severely damaged if abuses of an extradited person's human rights were to occur and Australia was found to have done nothing to try to prevent it.

The Government is yet to respond to the recommendation. The report is at <aph.gov.au/house/committee/jsct/25november2009/report1/fullreport.pdf>.

PHIL LYNCH is Executive Director, and **BEN SCHOKMAN** is a Senior Lawyer, at the Human Rights Law Resource Centre.

FEDERAL

Aid/Watch to challenge tax ruling in High Court

On 12 March 2010, the High Court granted leave for Aid/Watch to appeal a decision of the Federal Court that stripped the small overseas aid monitoring group of its charitable status. The Federal Court upheld the Commissioner of Taxation's decision to revoke Aid/Watch's charitable status on the grounds that its political campaigning was not in furtherance of a charitable purpose but was an end in and of itself. The central issue for consideration by the High Court concerns the operation of the 'political purposes' limitation, a rule of charity law that disqualifies a body from charitable taxation status if its main purpose is political. The decision will have serious implications not only for Aid/Watch, but for hundreds of organisations in the Australian charitable and not-for-profit sectors.

Aid/Watch's objective is to promote Australian and multinational aid programs that are environmentally sound and effectively delivered. In particular, it monitors, researches, campaigns and undertakes activities relating to the delivery of overseas aid. The Commissioner of Taxation revoked Aid/Watch's charitable status saying that its purpose and activities were too political to be considered charitable. Aid/Watch appealed and the Administrative Appeals Tribunal overturned the Commissioner of Taxation's decision and held that Aid/Watch's purposes were charitable, notwithstanding the fact that it seeks to influence government delivery of overseas aid (*Aid/Watch Incorporated and Commissioner of Taxation* [2008] AATA 652). The full Federal Court unanimously allowed an appeal and set aside the AAT decision (*Commissioner of Taxation v Aid/Watch Incorporated* [2009] FCAFC 128).

The Federal Court held that while Aid/Watch did not itself distribute aid, its concern with the effectiveness of aid delivery was clearly aimed at the charitable purpose of the relief of poverty. Therefore, the fact that Aid/Watch was not directly involved in the distribution of aid did not preclude it from being characterised as a charitable organisation. But the central issue

in the case is whether Aid/Watch is disqualified from charitable status due to the political nature of its purposes and activities. The Federal Court held that it was not Aid/Watch's monitoring and researching activities which enable it to ensure that aid is delivered effectively: only its political campaigning can do so, through influencing public opinion.

In hearing Aid/Watch's application for special leave on 12 March 2010, Justice Gummow questioned what was offensive about a charity intending to influence government. In particular, he raised one of the fundamental problems with the 'political purposes' limitation, namely that contemporary governments have such an enlarged role in the traditionally charitable objectives of the relief of poverty, the advancement of education and the advancement of religion, that the pursuit of these objectives by charities will necessarily involve some interactions with government.

The ongoing litigation has brought to the fore the controversy surrounding the uncertain relationship between charity and political advocacy. Aid/Watch's spokesperson, James Goodman, has stated that:

> charities are involved in the broad array of social life and address the causes as well as symptoms of social problems. To do so they must be able to speak up without fear of penalty.

Similarly, St Vincent de Paul Society chief, John Falzon, asserts that 'a vital role for charities is to advocate on behalf of marginalised and oppressed people'. In contrast, Gary Johns and Don D'Cruz, of the Institute of Public Affairs, have claimed that a number of Australia's leading charities are 'essentially political campaigning organisations'.

The High Court will have to consider historical principles of charity law in light of contemporary practices. The ultimate decision will have ramifications well beyond the monitoring activities of Aid/Watch, and could significantly affect the operations of some 200 further organisations, whose eligibility for charitable taxation status is currently under review by the Australian Taxation Office.

GRAINNE MARSDEN is a law student at the ANU.

Call for entries for the resurrected Human Rights Register

The Australian Human Rights Register was launched in May this year — the exciting 'resurrection' of a project that collates stories about developments from around the country for the purposes of auditing the progress of the protection and promotion of human rights in Australia.

Stories have enormous potential to effect change. Stories about positive human rights developments can empower communities, while stories that highlight human rights concerns can be used to highlight to government that more needs to be done to protect fundamental human rights.

It is imperative that the stories of all members of our community, such as people with a disability, children, asylum seekers, people accessing health and housing services, the elderly, and Indigenous Australians, are all recorded. The Register will ensure the better protection and enhancement of human rights and raise awareness of the reality of human rights among members of our community.

In April 2010 the Attorney-General announced that the Federal government would not enact a Human Rights Act for Australia (see item above). Rather than enhanced protection of human rights, what the public has been left with is a 'Human Rights Framework' that focuses on enhanced parliamentary scrutiny and education on human rights. While positive, this does not respond adequately to the many submissions made to the National Human Rights Consultation which highlighted in graphic detail the shortcomings of the current system due to its failure to have a comprehensive human rights framework.

The Australian Human Rights Register was an audit of human rights conducted by NGOs around the country from 1997–2004, until the Catholic Commission for Justice, Development and Peace, which hosted the Register, was disbanded. The Register was a critical tool for informing discussion around human rights, identifying cases around the country where there had been a positive or negative human rights development. It provided a high profile, ongoing audit and an effective way of collecting and collating casework to inform systemic change. It informed major policy makers, and was sent to United Nations treaty bodies, and to Amnesty International to help in the preparation of their Annual Country reports.

The Human Rights Working Group of the Federation of Community Legal Centres is seeking entries for the Register from NGOs and community agencies, and asking readers of the *Alternative Law Journal* to encourage people and agencies Australia-wide to contribute to this very important audit of human rights.

It is much simpler now than in the old days of the fax machine: entries can be made online at <hrlrc.org.au/australian-human-rights-register>, which contains more information on the Register, an online form for submitting entries for the Register, examples of what an entry might look like, and information on how this information will be used to make a contribution to enhancing human rights in Australia.

The Register will initially run from May until 30 October 2010, with a launch on Human Rights Day on 10 December 2010.

LIZ CURRAN is Director of the West Heidelberg Community Legal Service and **BEN SCHOKMAN** is Director of International Human Rights Advocacy at the Human Rights Law Resource Centre.

'Act of state' doctrine does not apply

On 25 February 2010, the Full Court of the Federal Court delivered a significant judgment that will allow the Court to consider Mamdouh Habib's claims against the Commonwealth for torts of misfeasance in public office, and for intentional but indirect infliction of harm in respect of his detention and treatment in Guantanamo Bay

In *Habib v Commonwealth of Australia* [2010] FCAFC 12, the Court held that the Commonwealth could not rely on the common law 'act of state' doctrine to have the applicant's claims dismissed. Chief Justice Black and Jagot J held that the doctrine does not apply where grave violations of international human rights law are alleged. Justice Perram found the application of the doctrine in this case to be inconsistent with Constitutional norms.

PHIL LYNCH is Director of the Human Rights Law Resource Centre.

'De-regulation' of federal anti-discrimination laws

When the federal Attorney-General announced a Human Rights Framework (see item above) he announced, with

the Minister for Finance and Deregulation, the Hon. Lindsay Tanner, a review of the four federal anti-discrimination laws (race, sex, disability and age) 'with a view to streamlining this legislation into a single, comprehensive Act'.

In a separate media release, the Attorney and Minister Tanner announced that 'the project [will] be delivered through a Better Regulation Ministerial Partnership ... a key part of the Government's deregulation agenda [to] ensure a disciplined and coordinated approach to delivering regulatory reform across government'.

It is disconcerting that a much-needed review of anti-discrimination law in Australia will take place ostensibly as an exercise in de-regulation. Mr Tanner's take on the review is that the consolidation exercise 'will reduce the regulatory burden and drive greater efficiencies and improved productivity outcomes by reducing compliance costs for individuals and business, particularly small business'. There is no mention of the considerable burden on victims of discrimination to prove their claims.

The thought might occur to Mr Tanner at some stage that the most direct way to reduce an anti-discrimination compliance would be simply to repeal the legislation. Mr McClelland's take on the review, however, is that 'there will be no diminution of existing protections currently available at the federal level'.

This observation is important because that it promises that a consolidation will not adopt a lowest common denominator when a reconciling the different levels of protection across the four Acts. Whether this actually eventuates remains to be seen.

The process for reform is simple: 'The Government intends to develop exposure draft legislation as the basis for consultation with stakeholders and the public'. The risk with this approach is that the die will have been cast with the 'exposure draft', precluding any real opportunity to explore reforms that go beyond mere mechanical streamlining of existing provisions.

The 'individual complaints' model of anti-discrimination law in Australia is old and ineffective. We must hope that those in 'The Government' who are drafting the exposure draft are looking well beyond putting old wine into a new bottle, and will invite consultation on contemporary ideas of equality and new ways of achieving it, informed by the recent Victorian report (see item below) and extensive overseas experience.

SIMON RICE teaches law at the ANU.

ACT

Prison protest causes trouble

A recent protest by prisoners regarding lock-downs and staffing issues at the Alexander Maconochie Centre, Australia's first 'human rights compliant' prison, has caused trouble for the ACT Government. Thirteen prisoners at the Centre held a twenty three hour protest, climbing onto the roof of the Centre on Saturday 10 April 2010.

The protest drew a quick response from ACT Corrections Minister, Simon Corbell, who stated the protest was '... just [an] opportunity for prisoners to get a bit of drama and excitement in their life', and that 'lockdowns are a fact of life'. Such a response has been heavily criticised by the ACT Liberal Party Opposition, who say the protest was the result of Labor's mismanagement, and belies Labor's claim of a 'human right's compliant' gaol.

The Centre is named after Scottish penal reformer Alexander Maconochie (1787–1860) who sought to reform Australia's penal system. It was both an ambitious and expensive project for the ACT Government. It cost $130 million to build and has been criticised for costing over $500 per prisoner per day, more than double the amount NSW previously charged the ACT to house prisoners before the Centre was built. The ACT Government has been quick to defend the extra cost on the basis of its human rights obligations, arguing that the Centre aims to rehabilitate prisoners and ensure their smooth transition back into the community.

Recently Justice Richard Refshauge of the ACT Supreme Court has criticised ACT Corrective Services for not ensuring the safety of a detainee on remand who, during a bail application, claimed he had been beaten, raped and 'used as an ashtray' by other prisoners at the Centre. The apparent failure of ACT Corrective Services to ensure the proper treatment of prisoners has reflected badly on the Labor Government's insistence that the Centre is running as a human rights compliant facility.

The recent protest and criticisms indicate the challenge the government faces in defending the cost of the gaol and ensuring respect for prisoners' rights: budget blow-outs and a 'soft' approach to prisons are easy targets for both the media and a restless Liberal opposition.

ANNABELLE CRAFT is an Arts/Law student at the ANU.

Removing 'risk' from the *Mental Health Act*

Government review of the ACT *Mental Health (Treatment and Care) Act 1994* is finally underway, with community consultations on reform options ranging from minor tinkering with the Act's current coercive powers, to replacing all substituted mental health and guardianship decision-making with a united 'capacity-based law'.

Under the proposed reform, personal capacity test for involuntary treatment of mental illness would replace 'risk of harm' and 'dysfunction' (a catch-all term for other mental 'impairment', including dementia). By replacing 'harm' with 'capacity', the reform would remove the state's ability to impose involuntary treatment on people who retain insight and decision-making capacity on their condition and treatment options.

The capacity option has attracted support from ACT stakeholders, with the notable exception of the ACT Public Advocate who suggests that 'the current arrangement of law has been working quite well for some time'. Support for the new approach flows partly from need to conform with the ACT's *Human Rights Act* which protects against torture and cruel, inhuman or degrading treatment. Particular attention has been paid to the incompatibility of the current focus on 'danger to self and society' with a person's human right not to be 'subjected to medical ... treatment without his or her free consent'. The ACT Mental Health Consumer Network ('MHCN') and the ACT Mental Health Community Coalition ('MHCC') also support the greater scope under the capacity criterion for early intervention by the state *before* a person incapacitated by psychosis becomes *dangerously* unwell.

However, the ACT Human Rights Commission's submission notes that 'while there are issues with the status quo, any potential reform may raise new human rights and other

issues'. MHCN and MHCC, for example, have observed that infrequent or inattentive capacity assessments may 'widen the net in regard to interventions', leaving people under state control long after their decision-making capacity has returned. Civil Liberties Australia has rejected the reform option on similar grounds, warning that 'true appreciation' or 'insight' is a rare feature in a person with serious mental illness such as schizophrenia even when they are well.

There is limited knowledge on the operation of capacity-based interventions. No other Australian jurisdiction operates under a capacity-based law, although the Tasmanian Legislature looks set to review a similar scheme in 2010. Despite the promise of capacity-based law for human rights and early intervention, the ACT Government must also hear stakeholders' practical concerns and provide a more detailed outline of just *how* the critical question of capacity will be assessed.

HOLLIE KERWIN is a law student at the ANU.

NSW

Mental health laws review

In March 2010, the New South Wales Law Reform Commission ('LRC') released four consultation papers dealing with how the criminal justice system should respond to and manage offenders with mental health and cognitive impairments: *Background and Definitions*; *Criminal Responsibility and Consequences*; *Diversion*; and *Forensic Samples*. The papers are the first publications released as part of the LRC's general review of this particularly difficult area of criminal law and procedure. A further paper dealing with young people with cognitive and mental health impairments who come into contact with the criminal justice system is yet to be released.

As the Preface to the first consultation paper acknowledges, the question of what should happen to people with mental illness, intellectual disabilities and other cognitive impairments who commit crimes, is one of the most challenging problems facing law makers and those whose task it is to carry out those laws. It demands a solution that achieves justice for the victims of what can be heinous and violent crime, balanced against the desire for a fair and lenient response to people whose criminal responsibility is diminished by their mental state.

Even the task of determining what is meant by a cognitive or mental health impairment can be problematic, with the medical definitions often at odds with the desirable operation of the law. The current law lacks a consistent approach to defining concepts of mental illness and impairment, making it possible for different legal outcomes to attach to the same conduct depending on how an offender's mental state is interpreted and classified, and there is long-standing doubt as to whether the current terminology used in the relevant statutes and at common law effectively captures people with intellectual disabilities as opposed to mental illness.

In New South Wales, people who are found unfit to stand trial, or who have been tried before a court or a special hearing and been found not guilty by reason of mental illness, are housed in prison despite not being convicted of any crime. They generally languish in prison for far longer than convicted offenders who do not have such impairments. Perversely, people who are found to be unfit for trial by reason of mental illness are presumed to have pleaded not guilty, and so are ineligible for a sentencing discount, and people who successfully plead the complete defence of mental illness are confined indefinitely.

Convicted inmates with cognitive and mental health impairments are often less attractive candidates for parole due to the greater difficulty of reintegrating them into society. This problem is compounded by the fact that there is no system in place to ensure that their treatment needs are identified or met while in prison.

The establishment of a 135-bed forensic hospital just outside the Long Bay complex at Malabar is a welcome development (see <justicehealth.nsw.gov.au/forensic-hospital>), but more needs to be done to coordinate the law, policy and service delivery regarding forensic patients and other inmates with cognitive and mental health impairments.

Far from being a narrowly construed question in a discrete area of criminal law, the LRC review raises far-reaching issues of social justice and human rights, reflecting wider social concerns about public safety, and provides a commentary on the type of values we hold as community.

The LRC acknowledges that its review cannot possibly address all of the problems associated with offenders with cognitive and mental health impairments. However, the consultation papers are an important contribution to the public debate. The LRC plans to consult widely on the reforms suggested in the consultation papers. The deadline for written submissions closed on 28 May 2010. A final report encompassing recommendations for reform is expected before the end of the year.

For the LRC's terms of reference and call for submissions, see <lawlink.nsw.gov.au/lrc> ® Current Projects.

DONNA HAYWARD was previously the Coordinating Legal Officer on the mental health reference, NSW Law Reform Commission.

Rethinking freedom of information in NSW

NSW is about to embark on a new system to make information held by government more easily accessible by the public.

The *Government Information (Public Access) Act 2009* (NSW) ('GIPA Act') was passed in July 2009 with a commencement date expected to be announced in mid-2010. The new GIPA Act will replace the current *Freedom of Information Act*.

The Office of the Information Commissioner was established in late 2009, and Deirdre O'Donnell has been nominated as the inaugural Information Commissioner, but her appointment is awaiting endorsement by a joint parliamentary committee.

The defining characteristic of the new legislation is that it creates a presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure. The GIPA Act strictly limits the public interest considerations against disclosure that may be taken into account in deciding whether or not to release information.

The new system requires all state government agencies, as well as ministers, officers, local government authorities, state owned corporations and universities, to release information that they hold. In other words, it is a 'push out' system, rather than the old 'pull-out' extraction required under the Freedom of Information legislation. This is designed to make government more open and accountable, and will require some significant culture change within government.

Under the GIPA Act there will be four ways to access information held by government. The first is the mandatory disclosure of information classed as 'open access information' which each agency is required to make freely publicly available, with a focus on access via the agency website. This mandatory disclosure will include information about the agency and its functions; any documents tabled in parliament about or on behalf of the agency; policy documents; a register of government contracts over $150 000; and a disclosure log of granted access applications whose subject matter is deemed to be of wider public interest.

Secondly, agencies will be encouraged to proactively release information that it holds which may be of public interest but which is outside the 'open access information'. Of course, this will require that agencies develop and maintain information management systems that allow them to know what information or data they hold, make it searchable, and make it accessible to the public. The third mechanism to access government information is by an informal request for information that may well be proactively released, but which has not yet been made accessible, and for information that is simply personal to the individual making the request.

The fourth mechanism is a formal application for information that will take significant time and resources to process, or that might include information about a third party, who will need to be consulted before any information is released. The GIPA Act sets out a very specific process for dealing with formal applications, including the time within which they must be dealt with.

Notably, the new GIPA Act provides protection for those who act in good faith to release information in any of the four ways described, for the purpose of executing the Act, and provides for a range of offences for attempting to interfere or influence a decision to disclose information, or concealing or destroying information for the purpose of preventing its disclosure.

The website of the new Office of the Information Commissioner provides some more details on the new legislation: <oic.nsw.gov.au>

SHIRLEY SOUTHGATE is Manager, Policy & Good Practice, Office of the Information Commissioner.

DIY in court

LawAccess NSW is a free government telephone service that provides legal information, referrals and, in some cases, advice for people who have a legal problem in NSW. It has developed a new online feature called LawAssist, a website for people representing themselves in a range of NSW state legal matters. It provides information about court procedure, and practical tools including checklists, sample letters and forms, instructions for completing forms, guides for preparing a case, and guides to behaviour and protocol in court. In later stages it is expected that video clips will be added showing parties appearing in court, and material will be translated into community languages.

The first LawAssist topic is 'small claims', and in the coming months resources will be added to the site on car accident property damage claims, apprehended violence orders and fines. LawAssist is at <lawaccess.nsw.gov.au/lawassist>. For more information contact <Natalie_Ross@agd.nsw.gov.au>.

NATALIE ROSS is Team Leader, LawAssist at LawAccess NSW.

Corrective Services audit of serious offenders

In April 2010 the New South Wales Premier announced a Corrective Services audit of 750 prisoners classified as serious offenders, to inform the current legislative review of the *Crimes (Serious Sex Offenders) Act 2006* (NSW) ('CSSO Act'). The review is a three year review, required by s 32 of the Act, and is being conducted by the Attorney-General. In May 2009 the NSW Sentencing Council report *Penalties Relating to Sexual Assault Offences in New South Wales,* Volume 3, made a number of recommendations in relation to the CSSO Act.

The Premier's media release is explicit about the intention of the audit and its focus on identifying offenders who refuse, or 'show no signs' of, rehabilitation, stating that the audit will:

> identify which violent criminals are not taking responsibility for their actions; identify which criminals are participating in rehabilitation programs; and help determine whether stricter orders should be implemented to keep offenders behind bars.

This last point relates to a key impetus behind the CSSO Act: provisions enabling the extended supervision or continuing detention of serious sex offenders who are deemed likely to commit a further serious sex offence if not kept under supervision. The NSW Government has announced it will consider the Violent Offender Orders introduced in the United Kingdom in August 2009 which target offenders deemed to pose a current risk of 'serious violent harm'.

Public debate following the announcement of the NSW Corrective Services audit reveals a range of issues related imprisonment. These include opportunities for and funding of rehabilitation programs, availability of programs for offenders, post-release support, the issue of predicting re-offending, and whether extending supervision and detention powers in respect of serious offenders would provide an incentive to offenders to rehabilitate, or would deter them.

The Attorney General's review of the CSSO Act is due for completion in late 2010, and the review findings will include the results of the audit. The NSW Sentencing Council's 2009 report is at <lawlink.nsw.gov.au/sentencingcouncil> à Publications.

REBECCA SCOTT BRAY teaches socio-legal studies at Sydney University.

NORTHERN TERRITORY

Defiance of 'no-smoking' laws

On 1 July 2009 the then Chief Executive of the NT Department of Health and Families rolled out a new 'smoke free' policy which stated that Departmental staff, along with patients and visitors, were no longer permitted to smoke anywhere on Departmental premises. Departmental premises include not only administrative sites but also hospitals and medical clinics.

The impetus behind the policy was to protect staff, patients, visitors and particularly children from environmental tobacco smoke. Information was made available for staff or patients to learn more about the harms of smoking, and support provided for those who wished to quit smoking.

Under the *Medical Services Act*, the general manager of each NT hospital is able to enforce the policy with respect to patients and visitors in or around hospitals. Alice Springs and

Katherine hospitals were set up with designated outdoor smoking areas, away from main entrances, air conditioning ducts and enclosed areas. Food and drink are not permitted to be consumed in these areas. Gove, Tennant Creek and Royal Darwin Hospital managers elected not to establish a designated outdoor smoking area.

In compliance with the *Tobacco Control Act* and the *Work Place Health and Safety Act*, signs were erected around hospital entrances and other enclosed areas advising that it was an offence to smoke in those areas. Employees can no longer smoke on workplace property, and are only permitted to smoke during unpaid award rest breaks. Smoking breaks to enable staff to travel off site were not permitted. Free cessation programs were made available to staff who wished to stop smoking. Breaches of the Smoke-Free policy were made liable to disciplinary proceedings under the *Public Service Employment and Management Act*, and under the *Tobacco Control Act*, a person found to be smoking in a 'smoke free' area could be fined $1600.

In defiance of the new enforcement procedures instigated by the Department, patients, visitors and even staff continue to light up around hospitals and medical clinics. Persons have been observed smoking directly in front of 'no smoking' signs where penalty notices are clearly visible. In response, private security staff have been recruited by Royal Darwin Hospital to monitor compliance. Although the emphasis is reportedly on informing people about the harms of tobacco smoke, fines are now being handed out, with local media reporting that during April 2010, up to 80 people a day were being caught smoking outside Royal Darwin Hospital.

One hypothesis for the continued and blatant breaches of the 'no smoking' policy is that it is only security guards handing out fines, not uniformed NT Police members. It also appears that a strong body of resistance to the policy has established itself among workers and patients. From the hospital to the road is several hundred metres, too far for a work break, and too difficult for an immobilised patient to negotiate. Even if a designated smoking area were to be established, it would only be for patient use, not employees.

Laws which restrict smoking in shopping centres, restaurants and office buildings have been in place since 2003. It was only on 2 January 2010 that it became an offence to smoke in an enclosed area of licensed premises. As it is still lawful to smoke in an outdoor area of a hotel or club, and given the NT's climate, smoking is still a regular feature in licensed premises. It appears the general acceptance of a smoking culture continues to permeate into other areas of Territory life.

RUTH BREBNER is a member of the NT Editorial Committee.

QUEENSLAND

A wild (rivers) time for the Queensland Government

Queensland was one of the fastest states to sign up for the Prime Minister's health plan but has been much slower to sign up for daylight saving. Recently there has been a shift in thinking as the Premier has returned the vexed issue to the political agenda.

Cynics claim that the renewed interest in daylight saving is a ploy to shift attention away from problems with health which have seen thousands of employees underpaid, and from daily media scrutiny of the trial of Dr Patel following systemic problems at Bundaberg Hospital which led to serious injury and even the death of patients. It seems that the troubled government cannot escape controversy, with the issue of deaths in custody continuing to play out with the fresh inquest into the death of Cameron Doomadgee. And if that wasn't enough, the government's *Wild Rivers Act 2005* (Qld) is also attracting criticism, this time from new quarters.

The Anglican Church has joined the critics claiming the Queensland government did not adequately consult with Indigenous groups. It also claims in a report by Dr Peter Catt that the legislation will hurt Indigenous employment and property rights by preventing new developments such as banana and fish farming. The Department responsible for administering the legislation has responded with a claim that since the *Wild Rivers Act* has been in place, hundreds of new developments have been approved and none has been rejected.

Prior to the intervention of the Anglican Church in this issue, both the government and Wilderness Society were able to assert that critics of the *Wild Rivers Act* were confined to mining interests and a few Indigenous communities swayed by the views of Noel Pearson. They had maintained that critics of the legislation were simply proponents of the types of development projects and practices that had destroyed the natural quality of the Murray-Darling basin. Now that the Anglican Church has joined the critics, things are not so clear cut. For support, both the government and the Wilderness Society could rely on Indigenous communities, and experts of the ilk of Murandoo Yanner and Gina Castelain who, together with the Uniting Church, had claimed that the legislation might not have gone far enough to protect the catchments of the great northern rivers.

Earlier this year the Opposition Leader Tony Abbott introduced a Private Member's Bill to over-rule the *Wild Rivers Act*. With Abbott entering the fray, new life has been breathed into the campaign to water down legislation which is aimed at restricting destructive development projects. The thrust of the Abbott/Pearson view is that poverty in Indigenous communities cannot be addressed unless Indigenous people have the same opportunities afforded to those who developed the Murray Darling basin. However other Indigenous groups regard the protections as a vehicle for industries such as eco-tourism and heritage tourism.

Ultimately the debate hinges on consultation, what can count as sustainable development, and whether sustainable development can provide enough employment to sustain Indigenous communities.

ALLAN ARDILL teaches law at Griffith Law School and is a member of the Wilderness Society.

SOUTH AUSTRALIA

SA sues Victoria for water

In December 2009, the South Australian government brought proceedings against the Victorian government in the High Court, arguing that Victoria's regulation of trade in the waters of the River Murray was discriminatory and unconstitutional. In addition to the significant drought being faced by all Basin States, SA is reliant on the River Murray for critical needs water supply, including drinking water, and has additional needs for environmental water for the health of the river system

throughout the state, including the plight of the Coorong, Lower Lakes and Murray Mouth.

SA Water, the government agency responsible for the state's water supply, entered into agreements to purchase water entitlements from a number of Victorian irrigators, but when it sought the transfer of the water entitlements from the Victorian government those applications were refused. The reason Victoria gave for its refusals was that in any one water year, Victoria only allows 4 per cent of water rights to be transferred out of Victorian irrigation areas and that the SA Water applications exceeded this amount.

Agreements between the states about sharing the Murray-Darling basin's water resources date back to 1915, but it was not until the Murray-Darling Basin Agreement in 1987 that environmental issues like water quality and land salinity were addressed. However, that agreement's implementation relied on the jurisdictions' cooperation.

In 1994, the Council of Australian Governments ('COAG') agreed to a framework allowing governments to specifically allocate water for environmental use. In 2003 and 2004, COAG signed the Intergovernmental Agreement on a National Water Initiative ('NWI'), which sought to manage water resources through planning and regulation, aiming to optimise economic, social and environmental outcomes. The NWI was largely overtaken by the states' referral of powers to the Commonwealth and consequent the *Water Act 2007* (Cth), which was followed by the Murray-Darling Basin Reform Agreement 2008 signed by Murray-Darling Basin jurisdictions.

SA is arguing that Victoria's restrictions on water trading are unconstitutional because they impose a discriminatory burden on interstate trade contrary to section 92 of the Constitution.

It is well-accepted that there is now a 'trade' in basin waters. Unlike many commodity markets, the water market requires that trade be approved by regulators before the transactions can proceed. Once a cap like the Victorian cap is reached, no further entitlement of sales can be made from that water district.

Under the NWI there is a cap of 4 per cent on the level of permanent trade out of all water irrigation areas. While jurisdictions cannot set a more restrictive limit, there is discretion to set a less restrictive one, or have no limit at all. In the current water year, limits were reached in five districts in Victoria within the first quarter. Government reports estimate that the Victorian cap prevented more than $80 million worth of water trade in the current water year.

While other states have a notional 4 per cent limit, the issue in Victoria is problematic for a few reasons. The limit applies to relatively small areas, meaning that a high proportion of trades are inter-area trades; disassociating an entitlement from land is counted as trade out of an area, even though the owner and location of use of the water may not change as a result of disassociation; and the limit is generally enforced in Victoria, but not so in other states. Victoria had agreed to phase out the 4 per cent cap from 2011 to 2014, but the SA government has noted that Victoria is under no legal obligation to do so.

From SA's perspective, water should be able to move where it is most needed and valued, and SA argues that its requirement for water for critical needs represents the most need. It should be noted that water consumption for households throughout the Murray-Darling basin is relatively small, about 2 per cent of all use. (Mining is responsible for 0.2 per cent and other industries about 1.6 per cent).

Victoria argues that capping the amount of water that can be transferred outside of an irrigation area protects local industry and the local community. However, evidence of this protection is weak. In fact, the Australian Bankers' Association says that the cap has stopped farmers from settling debts, leaving the land or investing more money in their land. The Victorian Farmers Federation has recently argued for exemptions to the limit to address hardship and equity issues. The Australian Competition and Consumer Commission found that the 4 per cent cap was 'poorly targeted' in its efforts to protect rural communities and local industry. Environment Victoria argued that 'there is no evidence to suggest that the cap has succeeded in its original intent to protect irrigation communities from overly rapid change.' Both the National Water Commission and the Productivity Commission have also criticised Victoria's 4 per cent cap.

Section 92 guarantees free trade among the states, and High Court rulings have clearly indicated that states cannot engage in industry protection contrary to that section. The proceedings have now been remitted to the Federal Court for trial on factual and legal matters before the High Court deals with issues arising. It is expected to be listed for trial in April.

SUZANNE CARLTON is a member of the SA Editorial Committee.

New domestic violence laws

The Rann government's *Intervention Orders (Prevention of Abuse) Act 2009* (SA) was passed during the final session of parliament last year, and is likely to commence some time later this year after South Australian police, courts and public sector agencies have prepared for the new procedures. The law enhances the capacity of SA's police and courts to apply protection orders to prevent family and personal violence.

The Act was drafted following the report of Maureen Pyke, QC, who reviewed SA's ageing protection order law, the *Domestic Violence Act 1994* (SA). Cleverly, the South Australians have waited until new protection order laws were passed in other States and Territories (most notably Victoria, Northern Territory and Tasmania), enabling a 'cherry picking' of the features which seemed worthy of replication in the South Australian environment. In addition to adopting some of the best elements introduced in other jurisdictions and retaining the best of its own pioneering provisions, SA has also introduced some unique provisions — in many of these, SA is now leading the way nationally in protecting victims of domestic and family violence from future abuse.

Because the Act combines previous laws for both domestic and non-domestic violence restraining orders, the new 'intervention orders' are not limited to any particular relationship. However, the relationships in which domestic abuse is said to occur are now defined much more broadly, which affects the speed with which they are dealt with by the courts. As with the 1994 Act, orders are ongoing; they cannot be made for a specified period.

Included in the new Act is an expanded definition of domestic and family violence, which will incorporate a more extensive range of abuses. The breadth of the SA definition is unparalleled in protection order law, and expands the capacity of such laws to protect victims of domestic violence, especially in the absence of discrete 'criminal' incidents. This

aligns with the experiences of victims of domestic violence who often fear, or are controlled by, constellations of behaviours which, outside the context of an abusive relationship, seem less ominous. Section 8 of the new Act provides a detailed list of acts of abuse, which includes acts which result in or are intended to result in:

(a) physical injury; or

(b) emotional or psychological harm; or

(c) an unreasonable and non-consensual denial of financial, social or personal autonomy; or

(d) damage to property.

Examples of emotional/psychological harm and denial of autonomy are given, and include sexual assault, animal abuse, posting of offensive material on the Internet, threatening to withdraw care on which a person is dependant, withholding the financial support necessary for meeting reasonable living expenses and exercising an unreasonable level of control over the person's daily life.

The new test for orders is also unique. It rests on establishing that it is reasonable to suspect that, without intervention, the defendant will commit an act of abuse, and that an order is appropriate in the circumstances. It will not be necessary to establish that the victim holds fears, or that the defendant has already committed an act of violence.

The Act provides that courts, when making an 'exclusion order', may assign the lease for residential premises from the defendant to the victim, a simpler version of similar provisions in Tasmanian and Northern Territory law. The Act also creates an offence if landlords provide defendants with access to premises from which they have been excluded, and gives victims the right to change the locks.

Speedier policing responses to urgent situations will also be possible through new police-issued Interim protection orders, available where the defendant is present or in custody. Police also have enhanced powers in relation to detention of suspects in breach matters and can require public sector agencies to provide information to them in order to locate a defendant.

Domestic violence proceedings often provide further opportunities for victimisation when victims are directly questioned by their unrepresented abuser. The new Act restricts cross-examination of victims by unrepresented defendants, providing an alternative court-mediated process for questioning. This process also has the advantage of addressing concerns which have been raised on other occasions by defence lawyers, anxious to protect the rights of defendants where they do not have the financial capacity to engage legal representation (see Alt L J 33:3 at 180). In addition, victims, children exposed to violence and other vulnerable witnesses may provide their evidence using safer processes, such as cctv, audio taping, screens, or closed court.

The impact of the new laws on victim safety will now rest with the South Australian police: whether they implement the Act in the context of proactive policing to ensure victim safety, so that responses are not 'victim-led'. New police policies and procedures will be enthusiastically anticipated by the domestic violence sector.

KAREN WILCOX, Australian Domestic and Family Violence Clearinghouse.

TASMANIA

Gunns abandons its litigation

A civil case brought by Gunns Ltd, one of Australia's largest forest products companies, against 20 opponents involved in the protection of Tasmania's old-growth forests has finally been settled, with Gunns Ltd abandoning the claims against the final four defendants.

The long-running battle began in December 2004 with the lodgement by Gunns Ltd of a writ suing 20 activists including Australian Greens Senator Bob Brown and the Wilderness Society for more than $6 million. The defendants were accused of trespass, damaging property and harming the company's reputation. Since the lodgement of the original writ, claims against 16 of the defendants were settled or the actions dropped. But only a week before the case against the final four defendants was due to begin in the Victorian Supreme Court, Gunns Ltd announced that it was dropping the lawsuit for commercial reasons.

The dropping of the actions against the final four saw Gunns Ltd paying a total of $155 088 towards the legal costs of the defendants, and leaves the defendants free to continue their campaigning for the protection of Tasmania's old-growth forests. According to one of the final defendants, Adam Burling, in a report published in *The Mercury* on 30 January 2010, the case 'consumed a massive amount of our time so it's vindicated me and freed me up to concentrate on the real work, which is protecting Tasmania's forests'.

NOELLE RATTRAY is a solicitor at the Launceston Community Legal Service.

VICTORIA

Provocative damages

The defence of provocation has been an inflammatory issue in Victoria for many years. The Victorian Law Reform Commission's recommendation to abolish the defence was publicly debated at the same time as the case of James Ramage came to trial. In 2004 Ramage was tried for the murder of his estranged wife. He was convicted of manslaughter on the grounds of provocation, making the not-uncommon claim that his wife had rejected him and boasted of her happiness with her new lover. The Ramage case is often cited as driving public support for the abolition of the defence.

Phil Cleary, a former footballer and Victorian MP, had campaigned against the provocation defence ever since his sister was killed by her ex-boyfriend, who successfully used the defence. In 2005 Cleary published a book about the Ramage case, *Getting Away with Murder*. Melbourne barrister Dyson Hore-Lacy sued Cleary and his publisher Allen & Unwin for defamation, and in March 2010 Cleary and his publisher lost, to the tune of $630 000 including $30 000 exemplary damages.

Ramage was a friend of Hore-Lacy, and had contacted the barrister for advice after killing his wife and before handing himself in to the police. The jury in the defamation case apparently concluded that Cleary's book suggested that, in the hours he spent at the pub near or with James Ramage, the barrister helped Ramage concoct a provocation defence. At the trial, Cleary was not permitted to raise the defence of fair comment. Unfortunately for Phil Cleary, the book had been

published just before the passage of the Victorian *Defamation Act 2005*, which limits damages for defamation to $250 000 and prohibits the award of exemplary damages. The publisher may be considering an appeal.

BRONWYN NAYLOR teaches law at Monash University

Court of Appeal makes Declaration of Incompatibility

In a landmark decision, *R v Momcilovic,* the Victorian Court of Appeal has issued a Declaration of Inconsistent Interpretation and clarified the operation of key provisions of the Victorian *Charter of Human Rights*.

Vera Momcilovic was convicted of one count of drug trafficking in the County Court. The drugs were found in an apartment that Ms Momcilovic shared with her partner, but she denied any knowledge of them. However, s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ('DPCS Act'), imposes on a defendant the legal burden of *dis*proving possession when a drug of dependence is found on land or premises they occupy, so Ms Momcilovic was deemed to be in possession of the drugs unless she 'satisfie[d] the court to the contrary'.

Ms Momcilovic appealed against conviction on the ground, among others, that s 32 of the *Charter* requires that s 5 of the DPCS Act be interpreted as placing only an evidentiary burden on an accused. The Human Rights Law Resource Centre ('HRLRC') was given leave to appear as amicus curiae and to make written and oral submissions on the application of the *Charter*. The Attorney-General and the Victorian Equal Opportunity and Human Rights Commission also intervened in the proceeding, pursuant to ss 34 and 40 of the *Charter*.

In a groundbreaking judgment, the Court of Appeal decided:

- although s 32(1) of the *Charter* is not a 'special' rule of statutory interpretation, it is a statutory directive that requires all persons engaged in the task of statutory interpretation to 'explore all possible interpretations of the provision(s) in question, and adopt that interpretation which least infringes *Charter* rights';
- the issue of 'justification' pursuant to s 7(2) arises only if it is not 'possible' to interpret legislation compatibly with human rights;
- any infringement of human rights should be 'demonstrably justified' by clear, cogent and persuasive evidence; and
- where an infringement can not be demonstrably justified, the Court should grant a Declaration of Inconsistent Interpretation, such declarations being 'central' to and 'exemplifying the dialogue model of human rights legislation'.

The decision is also significant in being the first case in which a Victorian Court has found legislation to be incompatible with the *Charter* and issued a declaration to that effect.

PHIL LYNCH is Director of the Human Rights Law Resource Centre.

A new equality law in Victoria

In April 2010 the *Equal Opportunity Act 2010* (Vic) was passed by the Victorian Parliament and is due to commence on or before August 2011. The legislative reforms include the establishment of new mechanisms designed to respond to systemic discrimination and promote substantive equality.

The reforms respond to a major review of the *Equal Opportunity Act 1995* conducted by Julian Gardner in 2007–2008 which found that Victoria's anti-discrimination legislation is ineffective in addressing the systemic discrimination that is entrenched in our institutions and social structures. As the Attorney-General recognised in the Bill's second reading speech, 'Victorians are competing on uneven ground … we need to level the playing field'.

In order to respond to this problem, the Act introduces an express positive duty to eliminate discrimination, strengthens the Victorian Equal Opportunity and Human Rights Commission's role in issuing guidelines and action plans, and provides new powers for the Commission to conduct investigations and public inquiries into serious instances of systemic discrimination.

Disappointingly — and contrary to the recommendations contained in the Gardner Report — the Bill fails to provide protection from discrimination on the basis of homelessness and irrelevant criminal record.

The Act also retains many of the permanent exceptions in the *Equal Opportunity Act 1995*, (including those for religious groups and same-sex clubs). The HRLRC has consistently argued that permanent, blanket exceptions to the operation of equal opportunity legislation perpetuate harmful discriminatory practices and are inconsistent with the *Charter* and international human rights law.

RACHEL BALL is a lawyer with the Human Rights Law Resource Centre.

WESTERN AUSTRALIA

Review of Coronial Practice

In DUAO Volume 35(1) 2010 and Volume 34(3) 2009, we reported on coronial reform that seeks to more effectively define coronial practice in both Victoria and New South Wales. Further reform is afoot in other States and Territories, including Western Australia. In 2008 the Law Reform Commission of Western Australia began its review of the jurisdiction and practices of the coronial system in that State, including the operation of the *Coroners Act 1996* (WA).

The focus of the Commission's review clearly resonates with the broader themes of coronial reform around Australia, reflecting a recognition of the important role of the coroner in terms of support for families, community needs, and core issues of autopsies, cultural and spiritual beliefs, and specialist services in aid of the coroner.

Specifically, the terms of reference ask the Commission to consider any areas where the WA *Coroners Act 1996* 'can be improved, any desirable changes to jurisdiction, practices and procedures of the Coroner and the office that would better serve the needs of the community; any improvements to be made in the provision of support for the families, friends and others associated with a deceased person who is the subject of a coronial inquiry, including but not limited to, issues regarding autopsies, cultural and spiritual beliefs and practices, and counselling services; the provision of investigative, forensic and other services in support of the coronial function; and any other related matter'.

The Commission is currently drafting its Discussion Paper, which is expected to be released later this year. The website for the reference is <lrc.justice.wa.gov.au/3_coronial.html>.

REBECCA SCOTT BRAY teaches socio-legal studies at Sydney University.