DownUnderAllOver
Developments around the country

HUMAN RIGHTS

Australia rated in World Rule of Law Index

In December 2009 the World Justice Project released its World Rule of Law Index and preliminary findings for 2009. The Index is a 'quantitative assessment tool designed to offer a detailed and comprehensive picture of the extent to which countries around the world adhere to the rule of law'.

The Index consists of 16 factors and 68 sub-factors, organised under a set of four principles:

- the government and its officials and agents are accountable under the law
- the laws are clear, publicised, stable and fair, and protect fundamental rights, including the security of persons and property
- the process by which the laws are enacted, administered and enforced is accessible, fair and efficient, and
- access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

Australia is one of 35 countries indexed in 2009. Australia's *highest* scores in the Index were attained in relation to the adequacy of laws protecting security of the person, and the impartiality and accountability of Australia's judicial system.

Australia's *lowest* scores in the Index were received in relation to compliance with international law, including that persons are treated and protected according to international law, and the accountability of military, police and prison officials.

Extrapolating from these scores, the Index provides further evidence that Australia should enact a comprehensive Human Rights Act that promotes the accountability of government (in relation to which, in relative terms, Australia rated most weakly). The Act should provide for rights that are justiciable and enforceable (the independence, competence and effectiveness of the judiciary being one of the areas in which Australia rated the highest). As well, the Index provides further evidence that Australia should urgently ratify the Optional Protocol to the Convention against Torture, which provides for independent, effective monitoring of places of detention.

The Index is available at <worldjusticeproject.org/>

Australia elected to UN Peacebuilding Commission

On 18 December 2009, the Foreign Minister, the Hon Stephen Smith MP, announced that Australia has been elected to the UN Peacebuilding Commission for 2010.

The Commission was established jointly by the UN General Assembly and the UN Security Council in 2005. It is an intergovernmental advisory body that supports countries in post-conflict peace building, recovery, reconstruction and development. It coordinates donors, international financial institutions and national governments to provide strategic advice and harness finances and expertise from around the world to assist countries emerging from conflict.

Welcoming Australia's election, the Foreign Minister said 'Australia has a long tradition of assisting governments prevent conflict and promote peace in unstable environments in our region, including in the Solomon Islands and East Timor. Our peace building expertise and experience will be a valuable asset to the work of the Commission'.

According to Mr Smith, 'Australia's election further demonstrates our contribution to international peace and security and our commitment to the UN Charter and efforts to resolve disputes through the international system.'

UN Report: Indigenous Australians face extreme disadvantage

A major UN report on *The State of the World's Indigenous Peoples* has documented that throughout both the developed and developing world, Indigenous peoples suffer disproportionately from poverty, poor health, inadequate housing, illiteracy, dispossession of land and discrimination.

The report, which was prepared by seven independent experts in conjunction with the UN Permanent Forum on Indigenous Issues, stresses the importance of a human rights-based approach to alleviate disadvantage, founded on the rights to self-determination and substantive equality.

While the report acknowledges a range of positive developments in relation to Australian Aboriginal and Torres Strait Islander peoples — including Australia's endorsement of the UN Declaration on the Rights of Indigenous Peoples, the Apology to the Stolen Generations, the recognition of native title and the commitment to close the gap in Indigenous health and well-being — it also highlights the gross disadvantage and inequality to which Indigenous Australians are subject. For example, there is a far greater discrepancy on the UNDP Human Development Index between Indigenous and non-Indigenous peoples in Australia than in comparable countries including the United States, Canada and New Zealand, including in relation to life expectancy, health, employment, housing status and education.

The report emphasises the importance of access to and control over land and resources to Indigenous development and well-being.

Welcoming the report, which was launched in New York, the then Australian Aboriginal and Torres Strait Islander

Social Justice Commissioner, Tom Calma, stated 'in recent years, as a nation, we have taken some giant steps forward in relation to our Indigenous peoples.' He emphasised, however, that 'Aboriginal and Torres Strait Islander peoples remain marginalised in Australia and face entrenched poverty and ongoing discrimination on a daily basis'. According to Mr Calma, 'we will not have provided solutions to all the challenges we face until Indigenous people have true participation and are real partners in efforts to Close the Gap in health, education, housing and have access to the same human rights protections as other Australians'.

The report is available at <un.org/esa/socdev/unpfii/en/sowip.html>

Additional safeguards required for those with severe substance dependence

The Severe Substance Dependence Treatment Bill 2009 (Vic), currently before Victorian Parliament, proposes to introduce short-term involuntary detention and treatment for persons with severe substance dependence in circumstances when it is necessary as a matter of urgency to save a person's life or prevent serious damage to a person's health.

The Human Rights Law Resource Centre has made a submission to the Scrutiny of Acts and Regulations expressing concern that aspects of the Bill are incompatible with the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The Centre makes a series of recommendations aimed at ensuring that the limitations on human rights imposed by the Bill are reasonable and proportionate should be amended to guarantee that persons made subject to a detention and treatment order can access voluntary treatment services once the order has expired.

The Centre's submission is available at hrlrc.org.au > Our Work > Domestic submissions.

Parole Boards exempt from Victorian Charter

In December 2009 the Victorian Government passed Regulations that declare the Adult Parole Board, the Youth Residential Board, and the Youth Parole Board (the 'Parole Boards') not to be 'public authorities' for the purposes of the *Charter of Human Rights and Responsibilities*. The effect of the Regulations is to allow the Parole Boards to continue to operate outside the regulation of human rights protections afforded by the Victorian *Charter* for a further four-year period until 27 December 2013. Previously, the Parole Boards had been exempted from the Victorian Charter by the operation of the *Charter of Human Rights and Responsibilities (Public Authorities) Interim Regulations 2007*, which are due to expire in December 2009.

The Regulatory Impact Statement ('RIS') for the Regulations outlines the underlying rationale for the continued exemption to be applied to the Boards, being that compliance with the Victorian *Charter* would require changes to the Parole Boards' current practices and that these changes would have a potential negative impact on the operation of the Boards. Essentially, the RIS asserts that compliance with procedural fairness obligations will impose on the Parole Boards a more stringent decision making process, inhibit the flexibility of the Boards' decision making and, consequently, undermine the effectiveness of the Boards in meeting their objectives.

In November 2009 the HRLRC made a submission that the Parole Boards should not continue to be exempt from compliance with the Victorian *Charter*. In the Centre's view, the human rights analysis contained in the RIS and rationale for continuing to maintain the Boards exempt from the Victorian Charter is misguided. Instead, compliance with the Victorian *Charter* would improve the decision making processes of the Boards, enhance the confidence in the Boards' decision making and thereby lead to an improved parole system, and result in improved outcomes and better opportunities for the rehabilitation of offenders and their reintegration into society.

The Centre's submission is available at hrlrc.org.au > Our Work > Domestic submissions.

Reports by: **PHIL LYNCH**, **BEN SCHOKMAN** and **RACHEL BALL** of the Human Rights Law Resource Centre.

FEDERAL

Developments in defamation increase pressure for national harmonisation

The NSW Supreme Court verdict in favour of Nationwide News Corp in the defamation trial of former Serbian parliamentary commander 'Captain' Dragan Vasilijkovic has been hailed as a major victory for the media.

Since the introduction of reforms in defamation law, this case is one of a handful of defamation cases that have been defended in front of a judge without a jury, (another recent case being Islamic spokesperson Keysar Trad, who failed in his defamation action against radio station 2GB). These cases are an interesting development in defamation law, as media organisations previously felt they would receive a positive verdict with a jury trial as opposed to a judge alone.

In *Vasilijkovic*, Justice Latham accepted evidence of a journalist that Vasilijkovic used the words attributed to him. The results in *Vasilijkovic* and *Trad* wins are thought to result largely from recent reform to defamation law making the 'truth defence' uniform across all states. The object of a defamation suit is to clear the name of the plaintiff. The success of using the 'truth defence' in these recent cases indicates that the 'truth' does not lower the plaintiff's reputation, it merely brings it down to its proper level.

Nonetheless, these cases suggest the need for further reform in defamation law. In an age where defamatory claims on the Internet are rampant, mainstream media has the burden of proof when defamation is alleged, and an easier option is to settle rather than fight the claims. *The Australian* is quoted as being 'substantially out of pocket' as a result of the *Vasilijkovic* case, and the *Trad* case reportedly cost over $400 000.

To reduce such costs, it was proposed at the 2020 Summit in April 2008 to reverse the burden of proof, requiring the person who sues to prove the falsity of the allegations, as is the case in North America. The Rudd government has dismissed this suggestion however, saying that defamation law is primarily the responsibility of states and territories and hinting that the suggestion had come too soon after significant reform in defamation law. 'Substantial reform to streamline and harmonise defamation laws has been implemented in recent times,' said the government in its written response to the Summit proposals.

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War crimes prosecutions

Former war crimes prosecutors are lobbing the Australian government to introduce retrospective war crimes legislation similar to that recently introduced in Britain in order to prosecute accused Rwandan war criminals living there. Such laws would enable the government to try Australian residents who have committed atrocities overseas.

This request comes on the heels of the recent civil defamation win by Nationwide News against Serbian parliamentary commander 'Captain' Dragan Vasiljkovic where he was found, on the balance of probabilities, to have committed war crimes (see item above).

While the government can commence a war crimes prosecution under the *Geneva Conventions Act 1957*, it would involve proving that the conflict was classified as an international armed conflict. It has been suggested instead that the government make *the International Criminal Court Act 2002* operate retrospectively in order to be able to prosecute those involved in 'domestic' war crimes situations.

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ACT

Homicide reform

In DUAO 34(2), 2009, we reported on an inquiry into a Bill on murder reform. The *Crimes (Murder) Amendment Act 2009* (ACT) was passed by the ACT Legislative Assembly in September 2009, coming into force on 14 December 2009. The amending legislation re-defines murder in a way that more closely resembles the definitions found in criminal legislation in other States and the Northern Territory.

In the move to self-government in the 1990s, the *Crimes Act 1900* (ACT), which had previously mirrored the provisions of the corresponding *Crimes Act 1900* (NSW) from which it derived, was modified so that the definition of murder appeared without reference to 'intent to inflict grievous bodily harm' or any form of constructive murder. The only possible fault elements for murder were thus intent to kill, and recklessness as to the probability of death. As a result, over the last two decades, charges of murder have been significantly harder to prove in the ACT than elsewhere, contributing to the fact that no contested murder prosecution had succeeded and survived appellate challenge since 1997.

Public disquiet and criticism from some legal and community groups, including victims of crime advocates, led to the ACT Attorney-General proposing reform and referring the matter to a Legislative Assembly inquiry in February 2009, which accepted the need for a new definition of murder though preferring the wording found in Western Australian Criminal Code. The Attorney-General stood by his proposed inclusion of the words 'intending to inflict serious harm', in part because the *Criminal Code 2002* (ACT) already contains a statutory definition of 'serious harm', and this third alternative fault element is now legislated in s 12 of the Crimes Act. However, a version of constructive murder, by which liability can be founded on the commission of a serious crime such as armed robbery where death results, has not been added to the ACT offence.

Noting widespread public disquiet over the ACT's lenient sentencing history, not only in relation to homicide, the Legislative Assembly Committee also recommended a review of sentencing in the ACT generally, and specifically increasing the maximum penalty for manslaughter from the current 20 years to 25 years imprisonment, and from 26 years to 31 years for aggravated manslaughter offences against pregnant women. The penalty for murder would remain unchanged, being punishable by life imprisonment, though with discretion to impose a fixed term of years on conviction. These reform proposals await further consideration by the Legislative Assembly.

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NEW SOUTH WALES

New *Coroners Act 2009*

In DUAO in Volume 34(3), 2009, we reported on the new Victorian *Coroners Act 2008* which attempts to modernise the coronial system and galvanise the preventive role of coroners in that State. Indeed, there has been a wave of contemporary coronial law reform in Australia in recent years which has sought to more effectively prescribe this role and its valuable function in the aftermath of death. Queensland overhauled its coronial legislation with the *Coroners Act 2003* (Qld), and since then revitalised coronial legislation has continued to emerge around Australia. Now it is the turn of NSW with the *Coroners Act 2009* which commenced on 1 January 2010.

The NSW Act aims to provide a more coherent legislative coronial framework, and the reforms focus on issues of governance, jurisdiction regarding categories of death, post mortem examinations, case management and coronial recommendations. Some reforms streamline the legislation and modify, clarify or remove outdated provisions to enable efficiency and effectiveness, such as defining who can be appointed as a coroner, limiting the use of juries, extending the protection against self-incrimination, allowing the State Coroner to issue practice notes and guidance to coroners, and defining 'coronial proceedings' to enable coroners to hold preliminary hearings in open court.

Reforms relating to categories of death bring NSW into line with other States and Territories. In the previous Act, deaths under the jurisdiction of the coroner were defined across various provisions, but the new Act categorises these deaths under one provision, 'reportable deaths'. As well, there have been changes within this category to better reflect medical practice and the contemporary context of deaths than was the case under the previous more specific provisions. For example, a more general category of 'health-related deaths' replaces the earlier provisions regarding deaths occurring during or within 24 hours of an anaesthetic. Relevantly for medical practitioners treating patients for known chronic health issues, the new Act provides that the death becomes reportable if a medical practitioner has not attended the person during the previous 6 months, revised upwards from 3 months.

Other reforms acknowledge both the contemporary role of the coroner in relation to the needs of families of the deceased, and death prevention principles. This echoes the Victorian reforms, but with different expression. In relation to the needs of families, the key NSW reforms relate to post mortem examinations restating the importance of dignity, requiring persons performing post mortem examinations to use the least invasive procedure appropriate in the circumstances (listing examples), and enabling a coroner to dispense with a post mortem examination or an inquest if the deceased's family

does not wish it to be conducted and the coroner is satisfied that the person died of natural causes. The Act also allows families to object to whole organ retention and to seek an order to that effect from the Supreme Court.

As with the Victorian reforms, the NSW *Coroners Act 2009* signifies an impetus to more effectively tailor the jurisdiction to public needs, and respect for the diversity of families is clearly a core part of the newly articulated coronial agenda. The other emphasis in contemporary reform is on enshrining preventive principles, which socio-legal commentary has stated is fundamental to the making of coronial recommendations. Victoria declared the principle of prevention at the heart of its recent reforms, and matched this with numerous reforms aimed at greater visibility of coronial decisions, mandatory responses to recommendations, and a policy initiative to enhance coronial expertise to ensure that recommendations are relevant.

NSW has been more reserved on the issue of recommendations, providing for the communication of coronial recommendations to the State Coroner, any person or body to which a recommendation is directed, and relevant Ministers. Although enabling a coroner to make recommendations in connection with an inquest or inquiry is an objective of the Act, mandating responses to recommendations is instead a policy initiative in a memorandum from the NSW Premier to Ministers and agencies on 4 June 2009. This memorandum details the process of forwarding and responding to recommendations, with the Attorney General to maintain a record of all recommendations made and responses received, and to summarise this information in a report to be posted on the Attorney General's website in June and December of each year.

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The good and the bad of the draft Residential Tenancies Bill 2009

Many years in the making, the draft Residential Tenancies Bill (NSW) 2009 was released for comment in late October 2009. A revised Bill is likely to be introduced to Parliament some time in February or March this year.

The Good

Residential tenancy databases. The draft Bill catches up with 2003 amendments in Queensland, and longstanding calls for reform in NSW, by proposing regulation of the use of residential tenant databases by landlords, agents and database operators. The Bill prescribes how listings occur and how to find out about a listing, and provides for the resolution of disputes.

Co-tenants. Under current laws, a departing co-tenant cannot end their liability for rent and other costs if other co-tenants remain. The draft Bill will allow the termination of a co-tenancy, and the severance of liabilities, by giving notice to the landlord and remaining co-tenants.

Domestic violence. When a final Apprehended Violence Order excludes a violent co-tenant from their premises, the draft Bill will automatically terminate their tenancy. The tenancies of other co-tenants will remain on foot. This proposal will enable the rental liabilities of victims of domestic violence to be severed from those of perpetrators.

Rent arrears. While landlords will be able to commence termination proceedings more quickly, tenants will be assured that if they pay their arrears their tenancy will be saved, even if the Tribunal has already ordered termination. Tenants facing eviction for arrears will not, as they are now, be tempted to keep their money for a new bond, and landlords will be better able to recover arrears.

Break fees. Tenants who move out during the fixed term of a tenancy will be liable to compensate the landlord with a pre-determined 'break fee'. This is much less complicated than the current 'breach/loss/mitigation' model. The proposal is controversial – the draft Bill seems to create a statutory right for tenants to unilaterally end a fixed term tenancy. It should simply seek to codify the manner in which appropriate compensation is calculated. It will be unfortunate if this reform is abandoned on account of this controversy.

Terminations by tenants. Tenants will be able to end a tenancy with no penalty if they are offered a social housing tenancy, or take up residence in an aged-care facility, during their fixed term.

The Bad

Access to premises for sale. The Bill envisages landlords and tenants making agreements about days and times to show a property to prospective purchasers. But these agreements will be undermined by provisions that give landlords access on 24 hours' notice without limiting the number of visits, and impose fines of up $2200 for tenants who refuse to give 'reasonable' access. Agreements can only be expected to happen when landlords' rights of access are restricted and they have a reason to negotiate; these proposals are a step backwards, and will lead to more disputes between landlords and tenants.

Uncollected goods. The time allowed for collecting goods at the end of a tenancy will be decreased to just 14 days, after which a landlord can dispose of them. The draft Bill will give a former tenant a right to compensation only if the landlord disposes of goods unlawfully — a very limited right, and one which requires the tenant to pursue Local Court proceedings.

Unfinished Business

Terminations 'without grounds'. Renting in NSW will remain unnecessarily insecure, because landlords will retain their current ability to end tenancies 'without grounds'. Notice periods will be increased, but the Tribunal will lose its discretion to take 'circumstances of the case' into account during termination proceedings. As a result, termination notices without grounds will *always* end a tenancy. The law should be trying to discourage landlords from using notices without grounds, not making the use of such notices more attractive.

Exclusions. Those renters who are not covered by the current Act — particularly boarders and lodgers — continue to be excluded under the draft Bill. These exclusions highlight the urgent need for occupancy legislation that covers all marginal rental housing in NSW.

For a copy of the Tenants Union of NSW's full submission on the *Draft Residential Tenancies Bill 2009* please visit <tenants.org.au> or phone (02) 8117 3700.

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QUEENSLAND

Sustainable development and the plight of koalas in south-east Queensland

As in other Australian jurisdictions, planning and development processes in Queensland are a particularly contentious realm of public policy. Major new planning and development legislation came into effect in Queensland on 18 December 2009. The *Sustainable Planning Act 2009* replaces the *Integrated Planning Act 1997*. This revamp of planning legislation follows the significant and controversial reform of local government areas in 2008, when 157 existing local government councils were amalgamated into 73 new councils.

The new legislation does not represent a radical departure from the previous regime, although it does include increased power for the state government to intervene in local government planning processes. It also places increased pressure on government to process development applications quickly, with deemed approval for applications where strict timelines are not complied with. Finally, in an attempt to reduce the volume of matters being fought out in the Planning and Environment Court, the legislation introduces a three-tiered structure for contested planning decisions: free alternative dispute resolution (through the Planning and Environment Court); low-cost access to a Building and Development Dispute Resolution Committee, a tribunal conferred with a wide jurisdiction; and, as a last resort, the Planning and Environment Court.

Perhaps indicative of 'reform fatigue', the introduction of a new planning regime has delayed government action on new planning regulations to address a precipitous decline in koala numbers in key habitat areas in south-east Queensland. The regulations are to be made under the *Sustainable Planning Act 2009*. Councils have asked that the draft regulations be subject to further consultation before refinement and commencement. The regulations direct local government and state planning authorities on how they must incorporate koala conservation and habitat protection into their planning processes, in key south-east Queensland areas.

Court reforms

The State Government is currently consulting with the legal community and the wider public on a draft bill which will widen the civil and criminal jurisdictions of the Magistrates Court (for example, through allowing the Court to summarily finalise a wider range of indictable offences) and the District Court (for example, though increasing the monetary limit of the Court from $250 000 to $750 000). The bill also proposes changes to evidentiary and other aspects of the trial process. A final bill is to be introduced into Parliament in the early part of 2010.

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SOUTH AUSTRALIA

The SA Premier, Mr Mike Rann, has again claimed to be the victim of the publication of defamatory matter that is actionable. Mr Rann is no stranger to bringing actions for defamation. In the late 1990s, as Leader of the Opposition, he sued the then SA Premier Mr John Olsen for suggesting that Mr Rann had 'lied' (see *Rann v Olsen* [2000] SASC 83), and in May 2009 he threatened an action for defamation against the then Leader of the Opposition, Mr Martin Hamilton-Smith.

The background to Mr Rann's latest legal action is that in late November 2009 Channel Seven aired an interview with Ms Michelle Chantelois, during which she claimed to have had an affair with Mr Rann. She asserted that she had sex with him on a number of occasions, and in differing locations, most infamously on the Premier's desk in his office at Parliament House.

Mr Rann, although admitting that a 'friendship' had existed, vehemently denies that the relationship extended to anything of a sexual nature. He initiated an action for defamation against Channel Seven alleging (among other things) that the broadcast in question was made with 'reckless indifference to the truth of the account of Ms Chantelois'.

In a related matter, the estranged husband of Ms Chantelois, Mr Richard Phillips, has been charged with assaulting the SA Premier by striking him with a rolled up magazine at a public function. On the basis of pre-trial statements, it seems likely that at trial Mr Phillips' defence will invite the court to consider any effect an alleged sexual relationship between his wife and Mr Rann had on his state of mind leading up to and during the alleged attack on Mr Rann.

What started as merely a sensationalist TV ratings winner for Channel 7 had the potential to become a lengthy and complex legal quagmire for Mr Rann, with Mr Rann suing Channel Seven and his government prosecuting Mr Phillips.

Mr Rann's action for defamation against Channel 7 has since settled. The full terms of the settlement agreement are confidential, but Channel 7 aired a statement on 14 February 2010 that was clearly part of that settlement agreement, in which it: expressed regret at the embarrassment the interview with Ms Chantelois had caused the Premier; retracted any implication that the alleged sexual relationship had affected his performance as Premier; retracted any implication that the Premier had interfered with, or influenced; Ms Chantelois' employment; and acknowledged that the Premier had denied the existence of the relationship alleged by Ms Chantelois. Interestingly, the statement did not retract the allegation that there had existed a sexual relationship between Ms Chantelois and Mr Rann, as alleged by Ms Chantelois.

Had Mr Rann's action for defamation gone to trial, the defence of justification — that what was said was substantially true — may have been raised. The crucial question would have been whether there was a sexual relationship between Ms Chantelois and Mr Rann, and a court could have decided that there was such a relationship. In addition to the obvious legal consequences, there were potential political ramifications.

Mr Rann has promulgated a *Ministerial Code of Conduct* which states, among other things, that 'a Minister shall not dishonestly or wantonly and recklessly attack the reputation of any other person'. An adverse finding in his defamation action against Channel Seven could have led to a determination that he has breached this clause. Furthermore, many of Mr Rann's denials of a sexual relationship with Ms Chantelois have been specifically addressed to the voting public, so had there been a finding in a defamation action that a sexual relationship did exist, there may have been further breaches of the *Ministerial Code of Conduct*, namely: 'Ministers must ensure they do not deliberately mislead the public or the Parliament'; 'Ministers must ensure that their personal conduct is consistent with the dignity, reputation and integrity of Parliament'; and 'Ministers must accept standards of conduct of the highest order. Ministers are expected to behave according to the

highest standards of constitutional and personal conduct in the performance of their duties. They must act honestly and diligently and with propriety'.

Of course, had there been such breaches of the *Ministerial Code of Conduct* the political consequences are by no means certain. The Code makes it clear that in cases of a prima facie breach 'the Premier shall decide, in his or her discretion, the course or action that should be taken'. Although the Opposition would surely have suggested that Mr Rann's resignation would have been an appropriate response, the final decision would remain with the Premier. In any case, the result of having settled the defamation claim is that the politically embarrassing, and possibly politically fatal, allegation of sexual (and hence ministerial) misconduct has been effectively silenced in the run up to the state election in March 2010.

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TASMANIA

Following a number of unsavoury incidents by senior members of the Labor Government in Tasmania, wide-spread community concern that corruption had become institutionalized, and a recommendation from a parliamentary joint select committee on ethical conduct, legislation was recently passed establishing an Integrity Commission in Tasmania, the fourth such body to be established in Australia, after similar bodies in Western Australia, New South Wales and Queensland.

Under the *Integrity Commission Act 2009* (Tas) passed late last year, the Integrity Commission has the power to initiate investigations, compel witnesses to give evidence, seize documents, enter premises and, subject to magistrate approval, place politicians under surveillance. Public officials able to be investigated by the Integrity Commission include senior bureaucrats, local government representatives, senior police officers, politicians, senior statutory officers and government businesses. After an initial investigation and a recommendation from the Chief Executive, the Integrity Commission will be able to establish a Tribunal able to utilise its extensive powers to investigate and where appropriate recommend sanctions. A nationwide search for an appropriate Chief Executive and Chief Commissioner is currently underway.

In other law reform news, legislation has recently been passed giving legal parental status to the same-sex partner of a woman who has a child through fertility treatment. The legislation is retrospective, meaning that legal recognition of co-mothers exists since 2003 when the *Relationships Act* (Tas) was passed, an Act that recognised same-sex relationships in other Acts.

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VICTORIA

Archaic protest law precedent set for 'besetting'

On 22 January 2010, the County Court at Melbourne considered s 52(1A) of the *Summary Offences Act 1966* (Vic), which no Victorian court had done before. S 52(1A) makes it an offence to 'beset' any premises. The offence of besetting was introduced into the *Summary Offences Act* in 1970 around the time of the Vietnam demonstrations and extensive trade union picketing in Melbourne. Much debate surrounded the passage of the Bill with parliamentarians noting the dubious meaning of the term 'beset' and the potential impact of the offence on civil liberties.

The matter before the County Court was an appeal against conviction and sentence in the Magistrates Court at Melbourne, where the charge was found proven and the appellant was fined $1000 without conviction. The appellant was charged with the offence after taking part in a non-violent protest outside Liberal party headquarters in Melbourne shortly before the Federal election in 2007. The protest, which caused the front entrance of the headquarters to be blocked, was against the dumping of nuclear waste in the Northern Territory.

Counsel for the appellant submitted that besetting required a hostile intent and so, to be found guilty of the offence, it was not enough to simply obstruct the premises. As there is no case law on 'besetting' under the *Summary Offences Act*, the appellant relied on case law that considered the term in tort, where it means a hostile intent to place persons in fear or to hesitate before entering. His Honour Judge Hicks held that although there is some ambiguity and considerable debate surrounding the term beset, the offence does require hostile intent. His Honour relied on the decision of His Honour Justice Murphy in *Dollar Sweets Pty Ltd v Federation Confectioners Association of Australia* [1986] VR 383 at 388. The appeal was upheld, the orders of the Magistrates' Court were set aside, and the charge was dismissed.

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New Victorian Police powers

When the *Charter of Human Rights and Responsibilities Act* was enacted in 2006 it appeared that a new era had arrived in the relationship between government and citizens in Victoria. The Charter was described by Professor George Williams as marking 'a decisive departure, at least in Victoria, from the long-held notion that the best protection for human rights is the good sense of our parliamentary representatives ...' (Melbourne University Law Journal, Vol 30 [2006] p 881).

When the *Summary Offences and Control of Weapons Acts Amendment Act* ('the SOCW Act') was passed during a late-night sitting of the Victorian Legislative Council in December 2009, however, it became obvious how weak the Charter really is, and how readily our elected representatives ignore it.

The SOCW Act gives police in Victoria increased powers to search any person (including a child) in a designated area, even when there is no reasonable suspicion that the person is carrying a weapon. There is no exemption for peaceful protests applying to the random search powers. Accordingly, these powers breach the rights of freedom of association and freedom of expression contained in the Charter. In a statement put together by the Minister for the purposes of review by the Scrutiny of Acts and Regulations Committee ('SAR Committee'), the government admits that this new power is a breach of the Charter of Human Rights. In the Minister's own words, the SOCW Act is 'incompatible with the Charter to the extent that it provides powers for police to randomly search persons and vehicles in public places within designated areas, even if the police have not formed a reasonable suspicion

that the person or vehicle is carrying a weapon ...' (Hansard, Legislative Assembly, 12 November 2009).

Under the SOCW Act, police can conduct pre-arrest strip searches of any person, including children, in certain circumstances. The government has sought to justify this in the interests of community safety, but this is a grossly insufficient justification for a law that disregards fundamental human rights. In addition, SOCW gives police new 'move-on' powers which are distressingly broad. For example, the police have the power to give directions to a person to 'move on' whenever an officer believes the person 'is likely to breach the peace' or 'is likely to endanger the safety of other persons'. In Parliament, Mr Della-Riva said that 'The direction to move on from a particular location may be for a specific period not exceeding 24 hours. The penalty for non-compliance is set at 5 penalty units' (Hansard, 10 December 2009).

The Federation of Community Legal Centres said to the SAR Committee that such broad move-on powers involve 'granting police powers based on subjective predictions of future behaviour by individual police officers.' Such powers are inevitably 'prone to be applied in a discriminatory and disproportionate way against some of our most vulnerable community members, including people who are homeless, young people, Aboriginal people and people experiencing mental health issues.'

A motion by Greens MLC Sue Pennicuik that would have seen the SOWC Act submitted to a process of public consultation (including a round table with the many social service and social justice organisations that have expressed concern at the new legislation) was voted down by both government and coalition members. In refusing to allow the SOWC to see the light of public consultation, the government has ignored the clear recommendation of the Victorian Privacy Commissioner who, in her submission to the SAR Committee, said that she was 'concerned with the lack of public consultation, including the lack of consultation with her office, regarding a proposal with such an adverse impact on the rights of Victorians.' She recommended 'that the Bill not proceed until such time as proper consultation is undertaken necessary for a proposal of this kind.'

The Government is clearly prepared to pass laws which are incompatible with the Human Rights Charter, without any public consultation and for its own political purposes in the lead up to an election year. The erosion of the Charter has begun.

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WESTERN AUSTRALIA

Search powers for WA police

In November 2009 the Criminal Investigation Amendment Bill 2009 (WA) was referred to the Legislation Committee of the Upper House after lengthy debate in State Parliament. The Bill proposes granting WA Police greater search powers by removing the current requirement of reasonable suspicion in some prescribed or declared area.

These laws clearly breach basic human and civil rights such as the right to privacy, freedom from degrading treatment, freedom of movement and freedom from arbitrary interference. As well, they are likely to have a discriminatory effect, with an increased negative impact on vulnerable groups such as the young, homeless or indigenous.

Interestingly, earlier this year the European Court of Human Rights in Strasbourg ruled that very similar 'police stop and search' powers under UK terrorism laws are illegal. The judgment said: 'The court considers that the powers ...are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse'. The Court accepted evidence that the incidence of searches under these powers had quadrupled, and that they had been used in a discriminatory way with a higher chance of being search if you are from a minority group.

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Permanent foster care

The Western Australian government is the first in Australia to introduce permanent legal care of foster children to foster parents.

Following the British system of special guardianship, foster parents can become legally responsible for the children of abusive or drug addicted parents until the children turn 18. Court orders would give birth parents two years to rehabilitate drug or alcohol problems before legal guardianship is granted to foster parents. After this time birth parents will have no chance for appeal.

While birth parents will be encouraged to maintain contact with their children, as in an open adoption, some feel that the legislation is doomed to fail birth parents, as it centres upon having strong and supportive drug and alcohol rehabilitation services, which are few and far between, for families in need.

Those in favour of the legislation however, feel it is one that will benefit foster children, as it will give them a sense of stability and belonging.

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