DownUnderAllOver
Developments around the country

HUMAN RIGHTS

UN Report on the right to health in Australia

In June 2010 the UN Special Rapporteur on the Right to the Highest Attainable Standard of Health, Anand Grover, released his report following a mission to Australia in November and December 2009. The report focuses on the standard of living and quality of health care and health services for Aboriginal and Torres Strait Islanders, people in prison and immigration detainees.

The report considers issues of Indigenous health, the right to health of detainees in Australia, including prisoners and immigration detainees. It concludes that the Australian government should take steps to comprehensively enshrine enforceable and justiciable human rights, including the right to health, in Australian law. The Special Rapporteur observed inconsistencies and inequalities in treatment and access to services across different detention facilities, and was particularly concerned with the disproportionate impact of incarceration on Indigenous populations, as well as persons with mental illness. He also observed that Australia's continuing policy of mandatory detention poses significant barriers to the realisation of the right to health for asylum seekers and refugees.

The Special Rapporteur made a wide range of recommendations relating to regular inspections of all places of detention under the Optional Protocol to the Torture Convention, the Northern Territory intervention, national health policy, Indigenous health, health care in prisons, indigenous incarceration, and the conditions of detention of irregular migration arrivals. The full report is at www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.Add4.pdf.

Government introduces reforms to *Sex Discrimination Act*

On 24 June, the Attorney-General, Robert McClelland, introduced legislation to amend and strengthen the *Sex Discrimination Act 1984* by establishing breastfeeding as a separate ground of discrimination, extending protection against discrimination on the ground of family responsibilities in employment to both women and men, ensuring that protections from sex discrimination apply equally to women and men, and providing greater protection from sexual harassment for students and workers.

Introducing the amendment, the Attorney stated that the Bill is part of the Government's response to the report of the Senate Standing Committee on Legal and Constitutional Affairs into eliminating discrimination and promoting gender equality. He further stated that the Government will consider other recommendations from the Committee's Report as part of its commitment in *Australia's Human Rights Framework* to consolidate anti-discrimination legislation into a single comprehensive law.

Reports on gender equality, and on racism against African Australians

The Australian Human Rights Commission has launched major reports on gender equality and discrimination against African Australians.

The *Gender Equality Blueprint* sets out 15 recommendations to progress gender equality in five priority areas: balancing paid work and family and caring responsibilities, ensuring women's lifetime economic security, promoting women in leadership, preventing violence against women and sexual harassment, and strengthening national gender equality laws, agencies and monitoring.

A report on discrimination against African Australians, *In our own words – African Australians: A review of human rights and social inclusion issues* documents discrimination and racism against African Australians. According to Commissioner Innes,

> The discrimination these people face, which is sometimes inadvertent, takes place across the gamut of life's experiences, from employment to housing, education, health services and their connection with the justice system.

In our own words presents issues, solutions and best practice initiatives, identified by African Australians throughout these consultations, as well as observations and suggestions from other government and non-government stakeholders.

Both reports are at <humanrights.gov.au>.

Report on human rights in the Asia-Pacific

In May 2010 the Australian Parliament's Human Rights Sub-Committee published a much anticipated report on Australia's role in promoting and protecting human rights in the Asia-Pacific region, *Human Rights in the Asia-Pacific: Challenges and Opportunities*.

The Committee said that the 'Asia-Pacific is a diverse and complex region with a mosaic of human rights challenges' and found that there is a 'clear need to enhance mechanisms to protect human rights and to monitor and redress human rights violations'. The Committee further found that, while Australia has a 'significant role to play' in promoting and protecting human rights in the region, Australia must also be 'sensitive and cooperative in its approach and action on human rights matters'.

Consistently with evidence to the inquiry, the Committee stated that for Australia to propose possible models for an Asia-Pacific regional human rights mechanism would be

'premature', and that Australia should instead 'take its lead from organisations already established in the region, seek to address issues in which Australia has expertise or a shared interest, and infuse human rights standards and practices into relationships within the Asia-Pacific region'.

The Committee recommended that AusAID should 'adopt a human rights-based approach to guide the planning and implementation of development projects'. As well, it recommended that the Australian Government take a number of steps, including that it should be 'conscious of its human rights obligations in all of its regional relationships' in the areas of aid, trade and investment; continue to expand and strengthen its bilateral human rights dialogues with states in the Asia-Pacific; improve the level of ratification of core human rights treaties in the Asia-Pacific, and assist countries in meeting their obligations once they are parties; support the 'vital work' being done by NGOs and civil society in the promotion and protection of human rights in the region, and appoint a Special Envoy for Asia-Pacific Regional Cooperation on Human Rights to engage in regional discussions and consultations on how Australia can best support human rights in the Asia-Pacific.

The Committee concluded that it was 'mindful that Australia should not be prescriptive in what human rights approach or mechanism would best suit the region', but reiterated that Australia is 'well placed to foster an opportunity for discussion and progress on a cooperative approach to human rights challenges facing the Asia-Pacific region'. The Committee's full report is at <aph.gov.au/house/committee/jfadt/asia_pacific_hr/report.htm>.

Torture and ill-treatment in Papua New Guinea

After a country mission to Papua New Guinea in May 2010, the UN Special Rapporteur on Torture, Professor Manfred Nowak, expressed serious concerns about widespread and grave human rights violations, including a high level of crime and violence; entrenched gender discrimination; systematic torture and ill-treatment in places of detention; excessive use of force by, and 'a high level of corruption and unprofessionalism' among, law enforcement and correctional authorities; 'insufficient or totally non-existent' access to medical care in detention facilities; a weak commitment to the rule of law, and a culture of impunity.

The Special Rapporteur recommended that 'the international donor community considers the protection of human rights in the criminal justice system, and in particular the prevention of torture, as the highest priority.' This recommendation is particularly apposite to Australia, which is currently reviewing the PNG-Australia Development Cooperation Treaty. The review is a significant opportunity for Australia to enhance aid effectiveness, demonstrate leadership on human rights in the Asia-Pacific, and contribute to the realisation of human rights in PNG in practical and effective ways.

The Special Rapporteur's full report is at <ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10058&LangID=E>.

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FEDERAL

High Court restores the right to vote to over 100 000 Australians

In an historic decision, the High Court has struck down legislation which resulted in the early close of the electoral rolls and denied over 100 000 Australians the right to vote.

The decision is a landmark victory for representative democracy, political participation and accountable government. The challenge to the early close of the rolls was jointly conceived and coordinated by the Human Rights Law Resource Centre and GetUp!.

The case was a constitutional challenge to the validity of changes to the *Commonwealth Electoral Act 1918* made by the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006*. The Amendment Act resulted in the electoral roll being closed on the day on which the electoral writ is issued for new or re-enrolling voters, and three days after the writ is issued for voters updating enrolment details. Previously, the electoral roll remained open for a period of seven days after the issue of the writ.

According to the AEC, the calling of an election resulted in significant numbers of persons enrolling or changing enrolment during the 7 day period, particularly young Australians. The 7 day period enabled the AEC to advertise and promote enrolment and target particular groups with information campaigns, including Indigenous Australians and people experiencing homelessness. At the 2004 Federal Election, approximately 423 000 people enrolled, re-enrolled or updated enrolment during the 7 day period.

It is crucial to representative democracy and accountable government that all people have the right, and the practical opportunity, to vote. The early close of the rolls, which occurred thanks to Howard-era amendments, denied over 100 000 people the opportunity and right to vote. The legislation disproportionately disenfranchised Indigenous Australians, young people, people experiencing homelessness and people in remote communities. In so doing, the legislation diminished our democracy.

This decision, in ordering that the rolls stay open for at least 7 days to enable people to enrol or update their enrolment, restores and promotes the fundamental human rights to vote and, in so doing, enhances democracy and promotes representative government.

The Human Rights Law Resource Centre is a leading national human rights advocacy organisation which, in 2007, established constitutional protection of the right to vote in the landmark High Court case of *Roach v The Commonwealth*.

The matter was run pro bono by an outstanding legal team comprising Ron Merkel QC, Kristen Walker, Fiona Forsyth and Neil McAteer of Counsel, together with Mallesons Stephen Jaques.

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

Reforms to skilled immigration

Moves to restructure the skilled migration program, announced by the Immigration Minister Chris Evans on 8 February 2010, have been described as the most fundamental reform of Australia's skilled migration program in more than two decades.

A suite of changes to the skilled migration program have made it more difficult to gain permanent residence on the basis of migrants' skills, work experience and qualifications.

In announcing the policy changes, Minister Evans described Labor's vision for skilled immigration as moving from 'supply' to 'demand' driven selection; the reality, however, is that Australia's migration program has never been 'supply' oriented, or dictated by the qualities or desires of incoming migrants. Rather, the key shift that has occurred under the Labor government is a commitment to see employers rather than government as arbiters of who gains permanent residency on the basis of skills.

The reforms were introduced alongside an ongoing review of the points test by which many applications for skilled migration are assessed. The first step in this review was a re-drafting of the Skilled Occupations List ('SOL') which specifies the occupations which may form the basis for an application for a skilled visa. The SOL had barely changed in its ten years of operation, so its revision in July 2010 was extraordinary: the 400 occupations on the list were slashed to 161.

Among the most significant changes were de-coupling the international student program from permanent residence on the basis of a migrant's skills, and changes to the occupations which permit an applicant to gain permanent residency on the basis of their skills. To achieve both these ends, in February the Minister abolished the lists of occupations thought to be in short supply. Migrants with qualifications on these lists were previously awarded extra points and given priority processing of their applications, but in recent years legitimate less reputable educational facilities had been marketing courses which led to these qualifications to foreign students seeking to improve their chances of permanent residency. By abolishing the lists the government aimed to reverse these 'distortions' in the skilled migration program and to remove a structural incentive which had motivated some shady educational institutions to take advantage of vulnerable international students.

In addition, new hurdles, known as the Job Ready Program, have been imposed on international students seeking residence on the basis of their Australian trade qualifications. Now, to be eligible to apply for a permanent residence visa, such applicants must complete 12 months' work experience in their nominated trade with an Australian employer, who must ratify the applicant's competency. Again, the rationale is to prevent migrants from using the paper qualifications gained as an international student to access permanent residence, and to prevent educational bodies marketing their services accordingly.

Another major impetus for these reforms was a large backlog of applications that had arisen in recent years. In response, the Minister (extraordinarily) annulled approximately 20 000 visa applications lodged overseas prior to September 2007 promising to repay application fees but not other fees paid, for instance for legal advice. Most dramatically, new legislation has been introduced into parliament to amplify the powers of the Minister to 'cap and cull' applications on the basis of a range of criteria including occupation, allowing the Minister to cap the number of visas for, say, IT workers, and to nullify all applications in the pipeline which exceed that number. While the application charge would be refunded, all other costs of the application would go uncompensated and, of course, the applicant's expectations for the success of their valid application would be thwarted. These broad powers would allow the government to clear backlogs, but also to micromanage the queue for potential new residents, selecting the most attractive applications in any given year.

For more information on all of these changes see the Immigration Department's website: <immi.gov.au/skilled/general-skilled-migration/whats-new.htm>.

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National Legal Profession Reform

A national legal profession has been a long time coming in Australia. In May 2002 the Standing Committee of Attorneys-General initiated the move towards a national profession and uniform legislation with the National Practice Model Laws Project and the subsequent development of the Model Rules.

In April this year the National Legal Profession Reform Taskforce released the reform package for comment. The proposed reforms have caused debate among the various stakeholders, including law societies and bar associations, practical legal training providers and academics. Some of the major proposals include the introduction of a national regulatory framework and admission to an Australian legal profession.

A national regulatory framework provides for the establishment of a National Legal Services Board and Advisory Committees. The Board is intended to be small with between five to seven members, two nominated by the Law Council of Australia and the Council of Chief Justices and the remaining appointments based on experience and knowledge in the practice of law, consumer protection and regulation of the profession. The number and nature of the Advisory Committees are not provided for in the draft legislation, however membership is to include persons with relevant experience and expertise from the courts, consumer groups, legal education providers, insurance entities, the profession and government. Some conduct rules and continuing professional development obligations will remain under the control of state and territory professional associations.

A National Ombudsman would be appointed to determine consumer complaints and disciplinary matters. The move towards consumer-centred legislation is demonstrated by provisions allowing complaints against law practices as well as individual practitioners, complaints by beneficiaries of trust and wills concerning legal costs, complaints of charging 'more than fair and reasonable costs', and a five year statutory period for making a complaint. The move away from self-regulation of the profession is seen in the authority of the Ombudsman to immediately suspend practitioners where serious allegations are made against them, initiate proceedings against practitioners without consultation with professional organisations, require practitioners, in solicitor/client costs disputes, to lodge the disputed costs with the Ombudsman's office, and to conduct audits of law practices to assess their compliance with the Law and Rules.

The National Legal Services Board will be responsible for granting and renewing practising certificates. Applicants for admission will continue to apply to state or territory Supreme Courts, but a single Australian practising certificate and the establishment of an Australian Legal Profession Register will allow a practitioner to practise in any Australian jurisdiction. Foreign lawyers will apply for an Australian registration certificate to enable them to practise as a lawyer in any Australian jurisdiction.

The Board may place conditions on practising certificates to define the type of legal work a practitioner can engage in, such as principal or employee of a law practice, a barrister only, a corporate lawyer or government only, or a volunteer at a

community legal service. Applicants who wish to restrict their practice to volunteer work will be able to apply for a practising certificate at no cost or a reduced cost. Community legal services are defined broadly and include not-for-profit organisations and organisations that provide legal and legal-related services.

The Taskforce advises that the proposed reforms will result in a net annual benefit to Australian regulators and law practices of $16.9 million in the first year and thereafter of $17.7 million per year. The reforms also provide for the maintaining of a single general trust account for law practices that practise in more than one jurisdiction; the saving to those practices is estimated at $11.6 million per year.

The federal Attorney-General, Robert McClelland, in an interview with Chris Merritt from *The Australian* on 14 May 2010 said that:

> The measures we are taking brings the legal profession into the 21st century and importantly, from Australia's point of view, it gives them a greater ability to launch into the rapidly emerging markets in South East Asia. British firms in particular are trying to seek a foothold here in Australia because they realise we're on the doorstep of these rapidly emerging markets. By unifying the profession we think it will be easier for Australian lawyers to take advantage of these rapidly emerging markets. So in that sense the profession is also going to benefit.

Submissions to the review were due by 13 August 2010. For further information see <ag.gov.au/legalprofession>.

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ACT

A 'virtual' court to solve the backlog

The latest innovation by the ACT government to improve access to justice for its people involves:

1. appointing two of the existing Magistrates to a dual position of part time District Court Judges
2. converting a Magistrates court into a jury room
3. listing criminal and civil matters for these dual Magistrate/Judges, so that the Supreme Court is relieved from a two year back log of new matters and reserved judgments
4. using the existing Registry of the Magistrates Court, Supreme Court, and ACT Civil and Administrative Tribunal (ACAT) to deal with the caseload of the dual Magistrate/Judges.

The Government refers to this new court as the 'Virtual District Court of the ACT', or 'VDC'. The VDC plan assumes that the two dual Magistrate/Judges are available for extra duties and their time is not utilised in full by their current judicial responsibilities; statistics regarding the Magistrates Court show in 2008/2009 decisions were reserved for more than 12 months in only 13.9 per cent of civil matters and 6 per cent of criminal matters. The VDC plan also assumes that the existing Registry is currently under-utilised, leaving it with time to attend to the additional VDC caseload.

The VDC is a proposed solution to a problem which has been of concern to practitioners, their clients, and the community for over two years, however it does nothing but add an extra layer to the existing system. The ACT government relied heavily on a comparison between the ACT and NSW case load and justice system to formulate the VDC plan. Given that the total population of the ACT is 320 000, compared with 7 million in NSW, using the comparison suggests that the decision-makers are unaware of the real sources of the problem in the ACT.

Bail applications before the Supreme Court have increased by 82.5 per cent since 2006/2007 and this is one of the elements clogging the Courts' operation. But the delay in Supreme Court dispositions may be because of the number of appeals from the Magistrates Court and ACAT: questions that the government should have asked are: 'Why do so many cases end up before the Supreme Court on appeal, both from the Magistrates Court and from the ACAT?' and 'What proportion of Magistrates Court and ACAT decisions is overturned by the Supreme Court?'.

ACAT does not list residential tenancy matters before the experienced Members who had served the former RTT; wrong decisions give rise to appeals which in turn give rise to increase in caseloads which increases the Supreme Court backlog.

Funding of the two dual appointments is the equivalent of one full time District Court judge; one wonders why the government did not adopt the most direct solution and appoint an additional Supreme Court judge.

The government claims that 'establishment of the VDC will provide significant improvement to access to justice'. That remains to be seen.

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NSW

Domestic Violence Death Review Team

Women's Legal Services NSW has long campaigned for a 'domestic violence death review team', and in May 2010 welcomed the introduction of the Coroners Amendment (Domestic Violence Death Review Team) Bill 2010 (NSW). The NSW Team will be a multi-disciplinary and multi-agency team, including non-government representation, and will be in the State Coroner's Office which will give its work independence and credibility.

The Bill defines 'domestic violence death' to include a death caused *directly or indirectly* by a person in a domestic relationship with the deceased person. This acknowledges the far-reaching consequences of domestic violence, and means that the Team's brief will be broad enough to include domestic violence related deaths and not just 'homicides'.

The Domestic Violence Death Review Team is part of a comprehensive Domestic and Family Violence Action Plan (*Stop the Violence End the Silence*) announced by the NSW government in June 2010. Other welcome initiatives include increased funding for the community legal centre rural women's outreach program, expansion of the Legal Aid NSW Domestic Violence solicitor service, and expansion of domestic violence pro-active support services ('DVPASS') in high priority areas of NSW.

These are a few of the 91 government actions proposed in *Stop the Violence End the Silence* in the areas of prevention and early intervention; protection, safety and justice; provision of services and support; building capacity, and data collection and research.

The government has made a commitment to develop a range of indicators to measure progress in reaching the goal of reducing domestic and family violence in NSW. Women's Legal Services NSW looks forward to keeping the NSW

government accountable for achieving success with these crucial policy initiatives.

If the government's welcome new residential tenancy provisions relating to domestic violence, [see *Residential Tenancies Reform* item below] are a sign of future commitment, we can be optimistic about implementation of *Stop the Violence End the Silence*.

For more information about the Domestic and Family Violence Action Plan go to <women.nsw.gov.au> or contact Women's Legal Services NSW.

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Residential tenancies reform

The *Residential Tenancies Act 2010* ('RTA') passed through the NSW Parliament in June 2010 and is expected to commence late in 2010. It is predominantly a 'tidy-up', and an amalgamation of the currently operating *Residential Tenancies Act 1987* and *Landlord and Tenant (Rental Bonds) Act 1977*, but it does include some initiatives that are new to NSW.

Of these, the proper regulation of Residential Tenancy Databases (sometimes known as 'bad-tenant databases' or 'black-lists') is a most welcome inclusion. Tenants will be able to apply to the Consumer, Trader and Tenancy Tribunal to have incorrect or unjust database listings removed, and they will be able to pursue compensation for any loss caused by inaccurate, ambiguous or out-of-date listings. Neither of these is currently possible.

Also welcome are new provisions that will mean a residential tenancy agreement is no longer an obstacle to escaping domestic violence. The new law will allow survivors of domestic violence to leave a tenancy without incurring any further liability to the landlord, and to change the locks and exclude from a rented home a person who is subject to an AVO — even if the violent person is named as a tenant. The law will be flexible enough to allow survivors of domestic violence to continue or to conclude their housing arrangements, according to what suits them best.

For the first time the law in NSW will recognise that shared-households are both commonplace and complex. New provisions will make it easier to transfer or sub-let a tenancy, although the landlord's consent will still be required. More importantly, the RTA will allow the severance of tenants' liabilities when co-tenancies end. The RTA law will also make it expressly clear that a share-house occupant who does not have a written residential tenancy agreement is not to be regarded as a 'tenant' under the Act. Share-house occupants will need to seek advice about obtaining tenants' rights under the new law.

The current law provides no incentive to negotiate the payment of rent arrears once a tenancy has been terminated: if landlords do not want the tenancy to continue, tenants are likely to use whatever means they have to secure a new home — and an arrears debt will often become a low priority in their list of outgoings. The RTA will ensure that tenancies can continue as long as arrears are paid, even if the Tribunal has already made orders to end the tenancy, although landlords will be able to ask the Tribunal to override these new provisions when tenants have 'frequently failed to pay'.

Aside from these new initiatives, the RTA takes several existing concepts from the *Residential Tenancies Act 1987* and amends them to varying degrees: provisions about uncollected goods, water usage charges, rental payment methods, alterations to premises, and liability for abandonment. A more flexible approach will be taken to vacant possession dates when the landlord ends a tenancy.

But the most significant change will be to the ending of tenancies 'without grounds'. Landlords will need to give 90 days notice of termination, which is an increase from the current 60-day notice period. Tenants will be able to apply to the Tribunal to have a termination notice declared 'retaliatory', if it has been given in response to an attempt by the tenant to assert their rights. Currently tenants have to wait for the landlord's application for termination orders before they can ask for such a ruling.

These improvements will be undermined by the removal of discretion for the Tribunal to consider the 'circumstances of the case' in no-grounds termination matters. The Tribunal rarely employs this discretion, and only in extreme cases — its real value to tenants is that it encourages sensible negotiation where the landlord's need for their property is genuinely less urgent than the tenant's immediate housing needs. It probably also makes landlords think twice before trying to end tenancies for really dubious reasons. The removal of this discretion will ensure that tenants remain cautious about pursuing their rights, as it will make no-grounds notices of termination the landlord's ultimate trump card.

For further information on the *Residential Tenancies Act 2010*, please visit <tenants.org.au> or contact the Tenants Union of NSW.

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Bail briefing paper

The New South Wales Parliamentary Research Library has recently published a Briefing Paper (5/2010) *Bail Law: Development, Debate and Statistics*.

The paper summarises the changes to the *Bail Act 1978* (NSW) from 1978-2010, including amendments to the granting of bail for serious offences like murder, and to the various presumptions and conditions and the limitation on the number of applications for bail. The paper also briefly comments on the government's justifications for making these changes.

In outlining the recent criticisms of bail law the paper focuses on arguments pertaining to civil liberties, the lack of evidence provided by the government for placing restrictions on applying for bail, and the increasing number of young people on remand. The paper canvasses statistics pertaining to trends in bail outcomes and trends in the remand population, and summarises three key reports in relation to bail and young people (NSW Law Reform Commission, *Young Offenders*, Report 104, December 2005; Hon James Wood AO QC, *Special Commission of Inquiry into Child Protection Services in New South Wales*, November 2008; Noetic Solutions Pty Limited, *A Strategic Review of the New South Wales Juvenile Justice System: Report for the Minister of Juvenile Justice*, April 2010), noting the government has not responded to the specific recommendations in these reports. These recommendations have included amending the *Bail Act* to ensure more appropriate bail conditions for young people, and addressing the lack of suitable accommodation for young people on bail.

Finally, the report includes the review of bail laws in Victoria, noting that the Victorian Law Reform Commission has made over 150 recommendations to improve bail law and practice, including that there should be no presumption against bail for any offence, that the Victorian *Bail Act* be amended to be more appropriate for young people and that bail support services should be improved for indigenous people and other marginalised groups who are over represented in the criminal justice system.

The report notes that a significant number of young people are spending time on remand because of a lack of suitable accommodation for young people on bail, and concludes that changes to the NSW bail laws since 2002 have 'followed the dominant trend of making it more difficult for accused persons to obtain bail both in relation to a range of offences, and where the accused person is regarded as a 'repeat offender''.

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NORTHERN TERRITORY

Welfare reforms and the *Racial Discrimination Act* in the NT

The welfare-quarantining provisions that accompanied the Northern Territory Intervention in 2007 required the suspension of the *Racial Discrimination Act 1975* (Cth) ('RDA') because they apply exclusively to Indigenous people and communities. These welfare laws enable the government to sequestrate at least 50 per cent of Indigenous welfare for expenditure on items in particular stores. The decision regarding which items can be purchased is made by Centrelink staff, and is processed through a BasicsCard, which requires special facilities and often results in Indigenous people queueing in separate lines. Over 16 000 Indigenous people in 73 communities have lost control of their welfare money in this way.

This controversial legislation has been criticised by the United Nations Human Rights Committee, the UN Committee on the Elimination of Racial Discrimination ('CERD Committee') and the UN Special Rapporteur on Indigenous Rights, James Anaya. They pointed out that the laws breach international human rights obligations by imposing welfare restrictions and differential treatment of Indigenous people. The Special Rapporteur described the use of the distinct BasicsCard as humiliating.

On 1 July 2010, new legislation to reinstate the RDA in relation to social security legislation in the Northern Territory came into effect. As a result, a non-discriminatory income management scheme will commence from 31 December 2010. This does not repeal the welfare-quarantining measures, but extends their reach across all people the Northern Territory. The government claims that this will restore the dignity of Indigenous peoples. Income control will now apply to all Northern Territory welfare recipients who are young (between 15 and 24), are long-term unemployed (for more than 12 months), or are referred for Income Management by a Centrelink social worker or Child Protection Authority. Indigenous people who are currently on income management will be assessed to determine if they will continue under the scheme. Exemptions may apply where the recipient demonstrates to Centrelink that their children are enrolled in school or early childhood services, are attending regularly and have been immunised. There are also exemptions for full-time students or apprentices and those who have been working for at least 15 hours per week.

Income management applies to all forms of society security payments, including Youth Allowance, Newstart Allowance and Parenting Payment. Quarantined income can be used exclusively for 'priority items' such as food, rent, utilities and clothing in stores that have facilities for the BasicsCard. It is estimated that the number of those who will have their welfare income controlled in the Northern Territory will increase to 20 000. The government will consider rolling out the legislation to all disadvantaged regions across Australia in 2011 (Macklin, House Hansard, No 18, 25 November, 2009: 12783, and Macklin media release 22 June 2010).

Other provisions that accompanied the Northern Territory Intervention, relating to alcohol and pornography restrictions, conversion of leasehold to five-year leases, community store licensing, and law enforcement powers, have been re-designed to more clearly be 'special measures' under the RDA to help Indigenous people in the NT achieve equal human rights. Measures relating to publicly-funded computers and the business management areas powers will remain unchanged. The CERD Committee has already stated that any tinkering will not sufficiently class the legislative provisions as special measures. Special measures under Article 1(4) of CERD must confer a *benefit* on members of a (racial) class, and the measures must be for the *sole purpose* of securing *adequate advancement* of the beneficiaries in order that they may enjoy equal human rights and the protection given by the special measures must be necessary. Without objective evidence that the Intervention has benefitted Indigenous people in the Northern Territory, the government will find it difficult to prove that the amendments comply with the RDA.

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QUEENSLAND

Mulrunji's Death-in-Custody (Pt VI)

This column last reported on events following the 2004 death-in-custody of Mulrunji (Cameron Doomadgee) in Vol 34(3). In May this year a further coronial inquest finished with an open finding. The unreliability of witnesses' evidence meant it was not possible for the Coroner to reach a conclusion on whether the injuries suffered by Mulrunji after a struggle with Senior Sergeant Chris Hurley were intentional or accidental (Hurley was acquitted of manslaughter by a Townsville jury in 2007).

The Queensland Crime and Misconduct Commission ('CMC') has also now reported on its review of the internal police probe into the initial police investigation of Mulrunji's death, and concluded that it was 'seriously flawed' (*CMC Review of the Queensland Police Service's Palm Island Review*, June 2010). The CMC has recommended that consideration be given to the bringing of disciplinary proceedings for misconduct against a number of police officers involved in the initial police investigation and in the subsequent internal police review. Two of the implicated police officers have obtained an injunction against the Police Commissioner, on the basis of apprehended bias, requiring the Commissioner to delegate the decision about disciplinary proceedings to another senior officer (*Kitching v Qld Commissioner of Police* [2010] QSC 303 (19 August 2010)). The police officers argued that the Commissioner had been compromised by events surrounding his proposed reappointment. The Chairman of the CMC, Martin Moynihan SC, formerly a judge of the Supreme Court of Queensland, and the state government had provided different accounts as to whether Moynihan provided approval for the proposed reappointment, as required under statute. As it turns out, in the same week that the injunction was granted the state government chose to extend the Police Commissioner's contract for two years, rather than appoint him under a new contract, thus avoiding the need for approval by Moynihan.

Ticketing of public nuisance offences

A new public nuisance offence was introduced in Queensland in 2004 — now contained in s 6 *Summary Offences Act 2005* (Qld). The offence criminalises behaviour which is disorderly, offensive, threatening or violent, and interferes with another person's peaceful enjoyment in a public place. The legislation introducing the offence also required the Queensland Crime and Misconduct Commission ('CMC') to review the operation of the offence, and the CMC duly reported in 2008.

Contrary to widely expressed concerns about the effects of the new provisions on vulnerable persons, including from academics, Caxton Legal Centre and Legal Aid Queensland, the CMC review concluded that 'the legislative change itself did not appear to have a significant impact on public nuisance offending or on the police and courts response to it' (CMC, *Policing Public Order: A Review of the Public Nuisance Offence*, May 2008, p xvii). To improve management of public nuisance offences in the criminal justice system, the CMC made a number of recommendations, including that ticketing of public nuisance breaches be introduced as a further option available to police in enforcing the offence.

The Queensland government conducted a 12-month trial of public nuisance ticketing in 2009 in South Brisbane and Townsville, and has decided to adopt the approach across the State, with legislation to follow later this year. An evaluation of the trial by Griffith University found that 'indigenous people were up to 14 times more likely to be dealt with for public nuisance offences and five times more likely to be ticketed than non-Indigenous people, but the overrepresentation of Indigenous people did not increase with ticketing' (The Hon Anna Bligh, Premier and Minister for the Arts, 'Public Nuisance Ticketing to be extended statewide', Media Statement, 15 June 2010). The adoption of a ticketing approach has come in for some criticism, including that it may replace more constructive ways of addressing public nuisance issues (see, eg, Tamara Walsh, 'Poverty, Police and the Offence of Public Nuisance' (2008) 20 *Bond Law Review* 198, 205-06).

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SOUTH AUSTRALIA

SA anti-bikies law reviewed

Following the SA Supreme Court's decision to declare the South Australia 'anti-bikies' law control orders invalid (*Totani & Anor v the State of South Australia* [2009] SASC 301), the State of SA has been granted special leave to appeal to the High Court of Australia — *State of South Australia v Totani & Anor* (A1/2010).

The SA Supreme Court invalidated s 14 of the *Serious and Organised Crime (Control) Act 2008* (SA) ('Control Act'), declaring that it went beyond legislative power, and was against the Kable doctrine that judicial power cannot be a mere instrument of the executive (*Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51).

Before the High Court, the Solicitor-General for the State of South Australia has maintained the argument that the Control Act respects the impartial and independent judicial power of the courts (see *State of South Australia v Totani & Anor* [2010] HCATrans 95 and 96), and that the SA Supreme Court therefore erred in law. Strategically speaking, it is a bold move, which, if successful, means that the Rann Government can continue its punitive stance against outlaw motorcycle gangs using its self-proclaimed 'toughest law in the world' as its predominant weapon.

While waiting for the High Court to make its decision, we can take this opportunity to reflect on the continuing expansion of police powers, and use of criminal intelligence disguised as evidence. Secrecy of highly important intelligence is a key factor in the fight against organised crime. However, one should ask where the limits of secrecy lie, and whether punitive reaction to organised criminal activities is a preferable alternative to rule of law.

The tendency in South Australia to penal populism is not an isolated case; other states, such as New South Wales and Queensland, introduced similar legislation, mirroring the punitive approach of the SA Control Act. Under the NSW legislation the Supreme Court is involved much earlier in the declaration phase, in charge of examining the Police Commissioner's criminal intelligence and calling for a public hearing. There is arguably a willingness in the NSW legislation to maintain and respect the role of judges in reviewing secret police evidence. Nevertheless, the NSW legislation clearly refers to an *eligible* judge being selected by the Attorney-General, and to the possibility of excluding members of outlaw motorcycle gangs from the public hearing in case criminal intelligence is compromised. Therefore, the independent and impartial role of the judiciary is restricted.

Under the SA Control Act, judges are not involved at all in the declaration phase: it is up to the SA Attorney-General to review the Police Commissioner's submission and issue a declaration. The judiciary is sidestepped at once in this phase, and, as pointed out by the SA Supreme Court, judicial powers are considerably restricted in the phase of the control orders (s 14).

The forthcoming High Court ruling is an important test case because of its widespread application and interest across Australia, reflected in the fact that the Attorneys-General of the Commonwealth, NSW, Victoria, WA, Queensland, and the NT intervened in the High Court appeal. This case may be a watershed moment in favour of or against penal populism, criminal intelligence and the rise of police power.

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TASMANIA

Greens in a power-sharing government

The March 2010 Tasmanian election saw the Labor Party lose its absolute majority and, after a nail-biting couple of weeks, a hung parliament was returned: Labor won 10 seats, Liberals 10 and the Greens 5. The Liberals were convinced they were going to be able to form government, especially after a verbal promise from the Labor Premier David Bartlett that he would support whoever won the most votes, which the Liberals did. The Governor, however, after referring to the Constitution, denied the Liberals government because they did not obtain the support of another party and therefore could not be assured of stable government. They had refused to negotiate in any way with the Greens. The Governor then directed Labor to see if they could for a government. Labor negotiated a ministry and a parliamentary secretary position in the cabinet for the Greens and formed government. If Liberal leader Will Hodgman had picked up the phone and spoken to the Greens about possible power sharing he would have been Premier of Tasmania.

The benefits for Tasmania in having Green representation in parliament has enormous potential, but it will take goodwill and vision from both Labor and the Tasmanian Greens to succeed. Forestry has been a constant source of division in the state, and a proposal to hold a roundtable of stakeholders has been initiated. Talks continue but, if common ground is found on the way Tasmania's forests are managed, it would be a major breakthrough after almost 30 years of forest battles.

A Tasmanian Charter of Rights?

Attorney-General Lara Giddings has recently announced that a Bill to enact a Charter of Rights will be introduced into Tasmania's lower house. The move follows the recommendations of the Tasmanian Law Reform Institute's Final Report on a Charter of Rights in October 2007. In reporting on the proposed Bill, *The Mercury* (22 June 2010) reported that the Bill is likely to include economic, social and cultural rights. If so, the Tasmanian Charter will be broader than similar legislation in the Australian Capital Territory and Victoria.

Facebook stalking

A test case believed to be a Tasmanian first, involving alleged stalking on Facebook, is now before the courts. Western District Police recently charged a 40-year-old former Burnie man with numerous offences including stalking. The Police Commander said the case would raise issues about the law and further define what stalking is in relation to on-line communication.

NOELLE RATTRAY is Solicitor at the Launceston Community Legal Service.

VICTORIA

Progressive Law Network Formed

A new professional body, the Progressive Law network (PLN) has been established for law students and legal professionals interested in using their legal skills to effect positive social change and advance environmental issues. At the present time there is little support in educational institutions for those wishing to do so, as the focus of most institutions and law student societies is on corporate career paths.

The PLN believes a lack of information and options for students is leading many to become discouraged, isolated and/or abandon aspirations to work in public interest law. The PLN was formed in April by students at Monash University with an eye to fostering support and facilitating career paths for those wishing to work these areas. An initial cross-campus social event revealed a significant number of interested students wanting to find ways to use their legal training to further social and environmental justice causes in Australian society. Areas of particular interest to the PLN are environmental protection, refugee rights, Indigenous issues, climate change, appropriate dispute resolution and law reform, particularly where public participation in environmental issues is threatened by civil action.

While initially student-run, the PLN founders seek to create a national network for the entire legal profession, aiming to place high-quality, informed and passionate graduates in organisations as interns, volunteers, research assistants and potential employees. Other activities slated are barrister-shadowing, events, conferences and training.

Several organisations and individuals have already expressed support for the PLN, including the Environmental Defenders Office, the Federation of Community Legal Centres, the Law Faculty at Monash and a number of academics and barristers. The PLN is planning to hold its first conference in March 2011. Academics, students, practitioners and organisations wishing to join or offer support are warmly invited to contact the PLN at progressivelaw@yahoogroups.com

PENELOPE SWALES is a law student at Monash University.

Private prosecution a legal first

The Fauna and Flora Research Collective Inc ('FFRC') has filed a charge and summons with the Magistrates' Court of Victoria at Ringwood against VicForests, the state-owned enterprise responsible for logging Victoria's native forests.

The FFRC, who will prosecute the case, has charged VicForests under s 45(1) of *the Sustainable Forests Timber Act (Vic)* 2004, which makes it a criminal offence to undertake timber harvesting operations that are not authorised. An unauthorsied timber harvesting operation may be one that is contrary to the relevant Forest Management Plan. Criminal procedure requires the group to provide its evidence in support of the charge at a later date.

FFRC undertakes surveys for threatened species in and around Australasia. The group also assesses forests that may provide critical habitat for threatened species. FFRC played a significant role in the *Environment East Gippsland v VicForests case*.

SOPHIE BIRD is a lawyer with Lawyers for Forests.

Prisoner access to IVF

In July 2010 the Supreme Court of Victoria found that Kimberley Castles, a prisoner at HM Prison Tarrengower, is entitled under s 47(1)(f) of the *Corrections Act 1986* to undergo IVF treatment at her own cost. The finding overturns a decision by the Secretary of the Department of Justice to deny Ms Castles access to IVF treatment, and means that Ms Castles will be eligible for permits to leave prison on a visit-by-visit basis.

The judgment affirms the principle — well-established in international human rights jurisprudence — that prisoners should not be subjected to hardship or constraint other than that which necessarily result from the deprivation of liberty. Particular attention is paid to the fundamental importance of prisoners' access to healthcare, and IVF treatment is recognised as legitimate treatment necessary for the preservation of health.

However, the decision of the Supreme Court does not mean that all Victorian prisoners have a right to access IVF treatment. The decision turned, to a significant extent, on the extraordinary facts of Ms Castles' case: she was already undergoing treatment when she entered prison, her eligibility for IVF treatment expires in December of this year by reason of her age, she is willing and able to cover her own costs, and she has the lowest possible security rating. In light of all these facts, the prison authorities were not able to provide a reasonable explanation for refusing Ms Castles' request to continue accessing treatment.

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