DownUnderAllOver
Developments around the country

HUMAN RIGHTS

Oversight and accountability of places of detention

Australia has moved a step closer to ensuring independent monitoring, inspection and oversight of places of detention. On 28 February 2012, the Commonwealth Attorney-General, Nicola Roxon, and then Acting Minister for Foreign Affairs, Craig Emerson, tabled a National Interest Analysis ('NIA') on Australia's ratification of the Optional Protocol to the Convention against Torture. The NIA has been referred to the Joint Standing Committee on Treaties for inquiry and report as to the national interest in ratification.

The Optional Protocol aims to prevent ill treatment and promote humane conditions by establishing systems for independent monitoring and inspection of all places of detention. At the national level, it requires that countries establish what is known as a 'national preventative mechanism', or NPM. An NPM is an independent body with a mandate to conduct both announced and unannounced visits to places of detention, to make recommendations to prevent ill treatment and improve conditions, and to report publicly on its findings and views.

At the international level, the Optional Protocol establishes an independent committee of experts, the UN Sub-Committee on the Prevention of Torture, with a mandate to carry out country missions to monitor deprivations of liberty.

The whole system is premised on the evidence and experience that external scrutiny of places of detention can prevent and redress torture and other forms of ill treatment. By making places of detention more open, transparent and accountable, it helps to ensure that persons deprived of liberty – whether people with psychiatric illness, prisoners, people with disability or asylum seekers – are treated with basic dignity and respect.

Australia signed the Optional Protocol in May 2009. Since that time, progress on ratification and implementation has been slow, with wrangling between the states and the Commonwealth about who is to foot the bill for detention monitoring and oversight. This is despite international evidence as to the very high social and economic costs of failing to prevent and redress ill-treatment.

Now that the NIA has been tabled, the Commonwealth, state and territory governments should all prioritise ratification and implementation of the Optional Protocol. Any further delay in the prevention of ill-treatment has intolerable social and economic costs and is simply not an option.

New Joint Committee to strengthen parliamentary human rights scrutiny

The Parliamentary Joint Committee on Human Rights has recently been established, mandated by the *Human Rights (Parliamentary Scrutiny) Act 2011*. Under section 7 of the Act, the Committee has two primary functions:

- to examine Bills, existing Acts and Legislative Instruments for compatibility with human rights and to report to both Houses of the Commonwealth Parliament on that issue; and
- to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and report to both Houses of the Parliament on that matter.

Pursuant to section 5 of the Act, the Committee is comprised of 5 Senators and 5 members of the House of Representatives. As at 26 March, the membership of the Committee was:

- Senators: Senator Sean Edwards (Lib); Senator Gary Humphries (Lib); Senator Ursula Stephens (ALP); Senator Matt Thistlethwaite (ALP); Senator Penny Wright (Greens);
- House of Representatives: Mr Harry Jenkins (Chair) (ALP); Ms Melissa Parke (ALP); Mr Dan Tehan (Lib); Mr Kelvin Thomson (ALP); Mr Ken Wyatt (Deputy Chair) (Lib).

Independent Monitor's first report on Australia's counter-terrorism laws

On 19 March 2012, the Commonwealth Government tabled in Parliament the first annual report of the Independent National Security Legislation Monitor on the operation of Australia's counter-terrorism and national security legislation. The Independent Monitor, Bret Walker SC, was appointed under the *Independent National Security Legislation Monitor Act 2010* (Cth) and is empowered to review and report on Australia's counter-terrorism and national security legislation, including its compliance with Australia's international human rights obligations.

The Independent Monitor's first report very usefully outlines the principles for assessing whether Australia's counter-terrorism laws are effective and remain appropriate and also identifies areas where the Independent Monitor will focus his work for 2012. While the Independent Monitor's initial report does not make any specific recommendations, the report raises a number of issues and specific concerns, which will form the focus of his work in 2012. These issues include:

- whether Australia's counter-terrorism laws remain proportionate to any threat of terrorism;
- whether some laws which confer 'extraordinary powers', such as allowing authorities to detain suspects for up to a week without charge, remain necessary at all;

- given that many of the 'emergency' laws were introduced immediately after 11 September 2001, the need to ensure such laws undergo greater scrutiny to determine if they remain appropriate;
- whether Australia's counter-terrorism laws are being used for matters unrelated to terrorism and national security; and
- the disproportionate impact that the operation of counter-terrorism laws may have on particular communities, including concerns in relation to the threat of laws being used rather than their actual use.

The report is available at: http://www.dpmc.gov.au/publications/INSLM/index.cfm.

Missed opportunity by High Court

The High Court has missed a major opportunity to strengthen and uphold the rights to free speech, freedom of assembly and freedom of the press in the case of *Wotton v Queensland* [2012] HCA 2 (29 February 2012).

Lex Wotton, an Aboriginal man convicted of offences associated with the Palm Island riots that followed the death of Mulrunji Doomadgee in 2004, unsuccessfully challenged the terms of his parole. Those terms include conditions that he 'not attend public meetings on Palm Island without the prior approval of the corrective services officer' and that he 'be prohibited from speaking to and having any interaction whatsoever with the media'. He was also unsuccessful in challenging the constitutional validity of section 132(1) of the Queensland *Corrective Services Act* which makes it a criminal offence for a journalist to interview or obtain a written or recorded statement from a prisoner, including a person on parole in the community, without the written approval of correctional authorities.

According to the majority in the High Court, the provisions of the Corrective Services Act are reasonable and appropriate to ensure 'community safety and crime prevention'.

The Human Rights Law Centre ('HRLC') disagrees. Substantial evidence demonstrates that community safety and crime prevention are best served through the social reintegration of parolees and measures which promote their full participation and engagement in civil, political and community life.

Provisions which make it a criminal offence for journalists to speak to parolees are an unacceptable limitation on the right to free speech and freedom of the press. Freedom of speech and a free press are fundamental to Australia's representative democracy. It is disappointing that the High Court has not taken the opportunity to affirm this as a principle of constitutional law.

Mr Wotton was represented on a pro bono basis by Ron Merkel QC, Kristen Walker and Alistair Pound of Counsel, together with lawyers Levitt Robinson and Allens Arthur Robinson. The Human Rights Law Centre also assisted with the case.

Baillieu government retains Victorian Charter of Human Rights

Victoria's Charter of Human Rights will be retained following the tabling of a Baillieu government statement on its future on 14 March 2012. According to the statement, 'the Government is strongly committed to the principles of human rights and considers that legislative protection for those rights provides a tangible benefit to the Victorian community'.

The government statement was made in response to the Scrutiny of Acts and Regulations Committee ('SARC') Report, *Review of the Victorian Charter of Human Rights and Responsibilities Act 2006* tabled in September 2011. Despite 95 per cent of submissions calling for the Charter to be retained or strengthened, the Report recommended stripping courts and tribunals of the power to hold government to account or to provide people with remedies when their human rights are violated. If accepted, the recommendations would have rendered the Charter completely ineffective.

The government statement in response recognises that there is an 'ongoing place for courts in protecting rights' under the Charter. The government has committed to seeking further 'evidence-based' advice on how courts and tribunals can best fulfil this role, including by consulting with 'key stakeholders' such as the Law Institute of Victoria, Victoria Legal Aid, Victoria Police, the Public Interest Law Clearing House and the Human Rights Law Centre.. They have also pledged to consider the inclusion of additional rights in the Charter in order to bring it into line with international human rights standards.

According to a joint press release from the Premier and the Attorney-General on 14 March 2012:

> At the time SARC was finalising its report, and subsequently, there have been major court decisions handed down in the High Court and in the Court of Appeal about the operation of the Charter Act in the courts' (Attorney General) Robert Clark said.
>
> There has been limited opportunity to observe the practical effect of those decisions on the various roles of the courts and VCAT in relation to the Charter.
>
> The Government will therefore seek specific legal advice in relation to these issues, as well as in relation to the risks and benefits of SARC's proposals for the possible inclusion in the Charter of additional rights from the International Covenant on Civil and Political Rights.

The Premier Mr Ted Ballieu concluded:

> SARC's report and today's Government response lay the basis for ensuring that Victorians' rights are recognised and respected whenever new laws are being proposed in the Parliament and are upheld in all dealings Victorians may have with the State Government or its agencies.

PHIL LYNCH, **BEN SCHOKMAN** and **RACHEL BALL** of the Human Rights Law Centre

FEDERAL

Bargwanna on proper use of trust funds by Trustees

There are many organisations that use a trust as a vehicle for holding funds intended to be used for the purposes of their charity. Any that do so should carefully consider the decision handed down by the High Court on 29 March 2012 in *Commissioner of Taxation v Bargwanna* [2012] HCA 11.

The Court was concerned with whether the income tax exemption under Division 50 of the Income *Tax Assessment Act* 1997 (Cth) ('the Act') for a private charitable fund could be met if the trust fund was used for multiple purposes in addition to the charitable purpose. The Court considered whether it constituted a breach of trust by the trustees to use trust money in their personal capacity.

The Kalos Metron Charitable Trust was established by the father of Mrs Bargwanna, who together with her husband, were the trustees of the trust. The trustees applied to the

Australian Tax Office for income tax exempt status for the trust on the grounds it was a charitable trust. If endorsed it would have qualified the trust as an entity exempt from income tax, within the operation of Div 50 of Pt 2-15 of the Act. The exemption from income tax would only apply if 'the fund is applied for the purposes for which it was established': s 50-60 of the Act. The court considered whether the Commissioner was wrong to deny the trust income exempt status on the basis that the funds had not been duly administered for a charitable purpose having consideration both to the deeds of the trust and the application of the funds.

Administration of a charitable trust is the same as for a private trust. A key difference is that a trust for charitable purposes lacks the individual beneficiaries who commonly hold the beneficial interest in the trust assets. Although individuals may benefit from any distributions from the trust they do not (and cannot) have an enforceable right to a distribution.

It should be noted that the law makes a distinction between the purpose as deeded in the trust and the actual application of the trust funds. This is not to say that the trust purpose must be met each tax year, as the Commissioner accepts that a fund may be 'applied' for charitable purposes without immediate expenditure of income as it is derived; or that accumulation does not negate charitable purpose. However in *Bargwanna*, the trustees mingled the trust monies with personal monies including using the trust as an offset against their personal mortgage to reduce interest on the latter.

This admixture of other funds caused it to lose its distinct identity; moreover benefits were derived personally by the trustees. This created an intersection between the concept of breach of trust and the revenue law exemption requirements. However even if the trustees obtained absolution under s 85 of the *Trustee Act 1925* (NSW) as having acted honestly and reasonably, this cannot be used to 'cure' the requirements under s 50-60 for the distinct fund to be applied for the charitable purpose. The requirement cannot be read down to 'substantially applied' or 'one the whole applied', especially since the maladministration led to personal benefits for the trustees and were not in the furtherance of the public charitable purpose of the trust.

Therefore any organisation or persons using a trust to hold assets and income for the furtherance of their charitable purpose should take care the trustees maintain a separate, identifiable fund for the trust and that there is no intermingling of monies or derivation of personal benefit for the trustees. Failure to do so not only puts the trustees at risk of breaching trust duties but also risks the income tax exempt status of the charitable trust.

ELEN SEYMOUR teaches Taxation Law and Financial Services at the University of Western Sydney.

Rethinking the law curriculum: strategies for rural and regional Australia

In 2001, a themed issue of the *Alternative Law Journal* (26(2)) explored issues related to access to the law and to legal services in regional, rural and remote communities. In their editorial, Jeff Giddings and Jennifer Nielsen called for increased research attention to better understand what constitutes regional, rural and remote communities, and to assist the formulation of more appropriate policy to meet their legal service and other needs.

In the decade since, greater attention has been directed to the legal and justice needs of rural communities, with particular attention to the increased decline of legal practitioners in these areas. Indeed, many rural and regional legal service providers either have, or will soon have, insufficient legal professionals employed to respond to the legal needs of their communities. Research suggests that failure to address recruitment and retention problems in rural and regional legal practice will restrict access to justice in rural and regional Australia. However it also suggests that students who undertake their legal studies at a rural or regional university are more likely to seek employment in a rural or regional area, compared with those who study in metropolitan areas. Despite this link, the typical law school curriculum does not actively deal with preparing graduates for employment within regional and rural community contexts.

Following this, a collaborative team of law school academics has commenced work on an Australian Learning and Teaching Council funded project that aims to develop strategies within the undergraduate law curriculum to prepare and attract lawyers and other legal professionals for legal careers in rural and regional Australia. Led by Dr Amanda Kennedy (UNE), this project represents the start of an ongoing collaboration to improve learning outcomes for rural and regional legal professionals. It intends to develop curriculum resources for use within all Australian law schools and to establish an active Rural and Regional Legal Education Network.

The team's initial work has been to comb the existing research to document the factors that distinguish rural and regional legal practice as a career option, and to map learning resources suited to embedding within the law school curriculum strategies to expose students to, and prepare them for such career pathways.

Along with Dr Kennedy the team comprises:

Professor Paul Martin (Director, Australian Centre for Agriculture and Law, UNE), Dr Theresa Smith-Ruig, Debbie Bridge and Suzanne Whale (UNE), Professor Reid Mortensen and Caroline Hart (USQ), Associate Professor Claire Macken (La Trobe), Richard Coverdale (Director, Centre for Rural Regional Law and Justice, Deakin), Trish Mundy (Wollongong), and Dr Jennifer Nielsen (SCU).

Alongside this project, the universities concerned are collaborating in the development of a National Rural Law and Justice Alliance, which will be launched at the second National Rural Law and Justice Conference to be held at Coffs Harbour in Northern NSW between the 18th and 20th of May 2012. Together with many rural organisations, these academic institutions are making a concerted attempt to improve the quality and availability of rural law and justice services.

The team is very keen to hear from those interested this project. Please contact Dr Kennedy (akenne21@une.edu.au) or any of the other team members.

For more details on the National Rural Law and Justice Conference go to http://www.une.edu.au/law/rrljconference.

JENNIFER NIELSEN works in the School of Law & Justice at Southern Cross University; **AMANDA KENNEDY** works in the Australian Centre for Agriculture and Law, at the University of New England.

ACT

New *Evidence Act*

On 1 March 2012 the *Evidence Act 2011* (the Act) commenced. The Act implements the model uniform evidence law which has been endorsed by all Australian Attorneys-General, and which has been implemented by the Commonwealth, NSW, Victoria, Tasmania and the Northern Territory.

The new Act goes further than other States and Territories in that it incorporates the 'journalist privilege' contained in the Commonwealth *Evidence Act 1995*, and model provisions not adopted by the Commonwealth, such as a 'professional confidential relationship privilege', mutual recognition of self incrimination certificates, and a wider range of circumstances in which a person is taken to not be available to give evidence.

Self-defence and police restraint

The ACT Attorney-General, Simon Corbell MLA, has referred to the Law Reform Advisory Council a Bill which would limit people's ability to rely on self-defence when accused of assaulting police.

The Crimes Legislation Amendment Bill 2011 says that a plea of self-defence may not be relied on by a person who resists what they believe was unlawful imprisonment, if that perceived unlawful imprisonment was due to restraint imposed by a police officer. Examples of 'restraint' in the Bill are detention for breath analysis, and a direction to remain at a place while roadside drug screening test is carried out.

The Bill, which is at the same time subject to scrutiny by the ACT Legislative assembly's Standing Committee on Justice and Community Safety, appears to raise issues such as a person's rights in responding to the exercise of police powers, and how best to address the question of assaults on police.

Housing protest afloat

A university student is living in a teepee on a floating platform on Canberra's Lake Ginninderra, as an alternative to the high cost of student accommodation. In late March, after two months on the lake, William Woodbridge was told by the ACT Department of Territory and Municipal Services to vacate the lake. Woodbridge said he would defy the order to move on, even though the ACT had said it would not enforce fines if he vacated as required. In early April Woodbridge applied to ACT Supreme Court for an injunction, relying on an unspecified 'serious question of law', and 'authority' given to him by local Ngambri people to remain on the lake.

SIMON RICE teaches law at the ANU and chairs the ACT Law Reform Advisory Council.

NORTHERN TERRITORY

Acquisition of crime-used property in the Northern Territory

All jurisdictions have legislation which allows property in connection with criminal activity to be seized. In the Northern Territory, property is liable to be forfeited under the *Criminal Property Forfeiture Act.* One such ground for forfeiting property is if it is 'crime-used'. Property is 'crime-used' if it is connected with the commission of an offence, is used to store property unlawfully acquired during the commission of an offence, or if an act or omission is done on the property in connection with the commission of an offence (s 11). The property is declared to be forfeited to 'compensate the Territory community for the costs of deterring, detecting and dealing with the criminal activities' (s 10).

Justice Mildren criticised the wideness of the scheme in *DPP v Green* [2010] NTSC 16 (at [21]-[22]):

> the wide definition of crime-used property … gives rise to the possibility that what may be forfeited, for a relatively trivial offence, may be the offender's own home … the Act has been described by both counsel as draconian in its reach. I doubt whether Dracos himself would have conceived of a law so wide reaching.

There is no doubt that the scheme is a lucrative one for the government: the Australian Institute of Criminology reported that by 2009 'the Northern Territory Police ha[d] seized over $13 million dollars in criminal property forfeiture cases, with approximately $5 million forfeited to the Crown'.

The enactment of laws of the Territory is uniquely limited by the application of the *Northern Territory (Self-Government) Act 1978* (Cth), s 50 of which requires laws with respect to the acquisition of property to be on just terms. The validity of the Territory's acquisition of property by way of the *Criminal Property Forfeiture Act* was recently challenged before the Court of Appeal of the Northern Territory in *Dickfoss v DPP & Ors* [2012] NTCA 1.

In July 2009 Mr Dickfoss was charged with offences under the Territory's *Misuse of Drugs Act.* Subsequently a restraining order was granted over 9.1ha of freehold land owned by Mr Dickfoss and his father as crime-used property. In September 2009 both filed objections to the restraint of the land. In March 2010 Mr Dickfoss's father died. In August 2010 Mr Dickfoss pleaded guilty and was sentenced in relation to the cultivation and possession of a commercial quantity of cannabis. In October 2010 the NT Office of the Director of Public Prosecutions filed for forfeiture of the land on the basis it was crime-used property. In January 2011 the Supreme Court delivered judgment, inter alia, ordering forfeiture of the land, as well as rejecting two constitutional challenges to the *Criminal Property Forfeiture Act*.

In the leading judgment at [55] and [56], Riley CJ set out the difference between the position under the *Northern Territory (Self-Government) Act 1978* and the *Constitution*: the Legislative Assembly of the NT may enact legislation on all subject matters, and s 50 acts as a restriction on that power. However, the power of the Commonwealth Parliament to enact legislation is limited to the heads of power identified in s 51 of the *Constitution*. Further, at [58], not every acquisition of property will fall within the scope of the constitutional guarantee in the context of the *Constitution*, or, by analogy, the restriction in the *Northern Territory (Self-Government) Act*. His Honour relied on the principles in *Burton v Honan* [1952] 86 CLR 169 and *Re Director of Public Prosecutions; ex parte Lawler* (1994) 179 CLR 270 to find (at [63]) that the *Criminal Property Forfeiture Act* 'is not by its nature and object a law to which the guarantee of just terms applies. It is an Act providing for the forfeiture of property used in or derived from unlawful activity.'

Mr Dickfoss has filed for special leave to appeal to the High Court. It is anticipated his application will be heard in the middle of the year.

SUE ERICKSON is an Assistant Parliamentary Counsel in the Office of the Parliamentary Counsel, Northern Territory.

NEW SOUTH WALES

Clearing the air: reform of pollution law in NSW

On 8 August 2011, a hazardous material known as Chromium VI was released on the site of the Orica ammonium nitrate plant at Kooragang Island. Aside from giving rise to serious community concern, the incident highlighted a number of limitations in NSW pollution regulation.

In response to this and further incidents (and following the O'Reilly Report into the Orica incident), the NSW Government has enacted legislation that separates the Environment Protection Authority ('EPA') from the Office of Environment and Heritage, changes the composition of the EPA Board, and imposes new obligations on industry for emergency management and data publication. Amid increased community concern around pollution regulation, the re-establishment of an independent EPA provides an opportunity to strengthen pollution regulation and improve the protection of the environment in NSW.

At the request of the Nature Conservation Council of NSW, the Environmental Defender's Office NSW has prepared a discussion paper to inform the future direction of pollution regulation and the NSW EPA. The paper, entitled 'Clearing the Air: Opportunities for Improved Regulation of Pollution in New South Wales', outlines significant shortcomings of the current system in protecting human health and the environment.

The discussion paper addresses the existing model for pollution regulation in NSW; the need for a more integrated approach across agencies such as the EPA and Department of Planning; key elements of an effective pollution management system; opportunities for better community engagement; and priorities for effective compliance and enforcement.

The paper proposes an enhanced approach to managing pollution that:

- places duties on regulators and polluters to minimise and, where possible, eliminate pollutants from entering the environment;
- sets pollution management on an objective, scientifically based foundation;
- strengthens the role of the EPA in strategic planning and decision making;
- strengthens the pollution licencing system and increases transparency around information relating to polluting activities;
- enhances and broadens the use of existing tools to minimise pollution loads and drive continual improvement;
- strengthens community engagement in pollution management decisions; and
- enhances the EPA's role as an independent regulator.

The discussion paper is available at http://www.edo.org.au/edonsw/site/policy_discussion.php

NARI SAHUKAR is Acting Policy Director, Environmental Defender's Office NSW.

Review of NSW victims compensation scheme

The NSW government has announced a review of the state's victims compensation scheme. Price Waterhouse Coopers has been appointed to conduct the review. An Issues Paper was published in March and the final report is due to government in mid-2012.

Part of the rationale for the review is that the scheme is not financially sustainable in the longer term with the government looking for the delivery of 'faster and more effective financial support for victims'.

Many community legal centres in NSW assist clients who have experienced domestic violence and sexual assault to make applications for compensation. Many clients are Aboriginal women and claims include long histories of domestic violence or child sexual assault.

Victims compensation can validate the very difficult disclosures of violence by victims and provide some sense of accountability and acknowledgement by the community of the harm done and impact on their lives. The compensation awards, although not large, provide practical support and assistance that beneficially impact on their lives.

It is important that the government hear about the benefits of a compensation scheme for people who have experienced domestic violence and sexual assault. The discussion paper can be downloaded from NSW Victims Services website - www.lawlink.nsw.gov.au/vs

JANET LOUGHMAN is Principal Solicitor at the Women's Legal Services NSW. EDWINA MacDONALD is Law Reform and Policy Solicitor at Kingsford Legal Centre.

Tasers, police tactical options and non-lethal force

'The police killed our friend and someone needs to pay for what happened.'

Dan Silva, a friend of Roberto Laudisio Curti, quoted in *The Australian,* 21 March 2012.

'I think we need to have a far more rigorous review of the circumstances in which it's legitimate for a police officer in any state to fire 50,000 volts at a citizen who has not been found guilty of anything. It cannot be the first response. It must at best be a final response brought in by a fly-in squad, not used by every general police officer.'

David Shoebridge, NSW Greens MLC, on *7:30 Report*, ABC TV, 19 March 2012.

Based on media reports of the incident, we know that 21 year-old Brazilian student Roberto Laudisio Curti died early on the morning of Sunday 18 March 2012 after police officers used both capsicum spray and multiple taser applications in an attempt to arrest him. Police were seeking to arrest Mr Laudisio Curti as a suspect in the reported theft of a packet of biscuits. About 30 minutes had elapsed between the theft and the attempted arrest, leading to doubts as to whether Mr Laudisio Curti was guilty, or just in the wrong place at the wrong time. Whatever the case, an apparently healthy young man died following an interaction with the NSW Police Force.

The NSW Police Commissioner said in 2008, at the time Tasers were rolled out to Local Area Commands,

> If this is but one option that gives the police officers in the streets of NSW some alternative rather than to use deadly force, rather than to shoot somebody and killing them, then this is a good option.

According to the NSW Police Force's Standing Operating Procedure ('SOP') for Taser Use, the circumstances in which Taser use is authorised are much broader:

The TASER may be used at the discretion of the TASER User as a tactical option after proper assessment of the situation and the environment to:

- Protect human life
- Protect yourself or others from person/s where violent confrontation or resistance is occurring or imminent
- Protect officer/s in danger of being over powered or to protect themselves or another person from injury
- Protection from animals.

The 'Tactical Options Model' provided in the SOPs also encourages officers to take account of the following factors when determining which tactic and/or weapon to use in a situation: Age; Gender; Size; Fitness; Skill Level; and Multiple Officers/Subjects.

Factors like cultural background and impairment from drugs and/or alcohol don't appear. These are surely factors which may influence an individual's behaviour and, in the case of drugs or alcohol, possibly alter a person's physiological response to being Tasered.

Internationally, opinion is still divided as to whether Tasers can be described as 'non-lethal'. The NSW Police Force SOPs describe them as a 'less lethal' option. The NSW Police Force has announced that detectives from the Homicide Squad are investigating all circumstances surrounding Mr Laudisio Curti's death, including the deployment of police tactical options, with all information to be provided to the NSW Coroner.

The NSW Ombudsman has confirmed that he has independent oversight of the Police Taser investigation. The Ombudsman Bruce Barbour said: 'All issues relating to the police involvement in this matter will be the subject of appropriate and thorough scrutiny by my office.'

It is hoped that Mr Laudisio Curti's legacy will be a thorough review of police Taser use in NSW, particularly the practice of multiple applications of the Taser by one or more officers during the same incident. But before the NSW Ombudsman or the NSW Coroner have even commenced their investigations into the incident, the NSW Police Force is already apparently looking to 'upgrade' to 'X2 Twin Tasers', which provide a 'back-up shot'.

NSW EDITORIAL COMMITTEE.

QUEENSLAND

Coal mine to go ahead

On 27 March 2012, the Queensland Land Court handed down its decision in *Xstrata Coal Qld Pty Ltd v Friends of the Earth – Brisbane Co-Op Ltd* [2012] QLC 013 resulting in a win for Xstrata to undertake extensive coal mining operations in the Wandoan district in Queensland.

The decision considered objections by a number of landowners in the affected area, under the *Mineral Resources Act 1989* (Qld) ('MRA') and the *Environmental Protection Act 1994* (Qld) ('EPA'), as well as the Friends of the Earth ('FoE').

While the Court made some orders in favour of the landowners – notably through the exemption of parts of their land from the mining lease areas – none of the objections resulted in orders to refuse any of the mining lease applications.

In addition to the Court's methodical consideration of the areas for mining, water issues, dust, noise, social impact and access — all of which impacted upon the landowners, there are two issues of note considered by the Court.

First, the Court found that it did not have jurisdiction in an MRA objection to make recommendations on activities regulated under the *Water Act 2000* (Qld). While some of the activities of mining inherently involved water (such as drawdown in the aquifers and water quality) and would properly fall within an MRA objection, other activities are to be treated separately. Specifically, section 235(3) of the MRA does not authorise diversion or appropriation of water without an authority under the *Water Act*. On this basis, they are not activities authorised by the MRA and are therefore outside the scope of the Court's authority.

The Court found that 'the groundwater monitoring program for the shallow and alluvium aquifers … [was] inadequate', however it was powerless to make a recommendation to the Minister. It did however point out that it is 'unsatisfactory that the impacts of water extractions and diversions are not properly assessed and considered under the *Water Act* until after the project has been approved under the MRA and the EPA'.

Second, the FoE objected to the project under the MRA and the EPA on climate change on grounds particularly based on the 'scope 3' emissions (such as greenhouse gas emissions arising indirectly from the company's activities). These would include the shipping of coal and its ultimate consumption as an energy source.

The science of climate change was not disputed – but the applicant miner argued that stopping the project would have no impact on greenhouse gas emissions overall, and that the coal from the project would have negligible impact on climate change.

The Court accepted the applicant's position taking a cost benefit analysis under which there were significant economic benefits to the public. The environment was not the only relevant consideration. The Court found that it could only consider activities regulated under the MRA, which excluded the scope 3 emissions argued by FoE. Likewise, it was constrained to a consideration of environmental impacts in Queensland.

What these two findings highlight is that the legal framework for consideration of the environment is quite contained and thus inadequate to properly consider the inherently interconnected and complex environment, including climate change as a global issue. The legislative framework – no doubt echoed in other jurisdictions – segregates different aspects of land and environment to different regimes of management. While the MRA and EPA might be connected, other aspects of resource management are not, thus constraining a holistic approach to decision-making, and straining parties' resources in objecting. The rigid structure of environmental and resource management therefore has impacts both substantively and procedurally.

KATE GALLOWAY teaches law at James Cook University.

SOUTH AUSTRALIA

A welcome inconsistency

The SA Parliament recently passed the *Arkaroola Protection Act 2012* (SA), establishing the Arkaroola Protection Area. Approximately 600 sq km in size, the Protection Area region

lies approximately 700 km north of Adelaide. The objects of the *Arkaroola Protection Act 2012* (SA) are:

- to provide for the conservation of nature in the Arkaroola Protection Area;
- to support the conservation of objects, places or features of cultural or spiritual value to the Adnyamathanha people within the Arkaroola Protection Area;
- to support scientific research and environmental monitoring in the Arkaroola Protection Area;
- to foster public appreciation, understanding and enjoyment of nature and objects, places or features of cultural value in the Arkaroola Protection Area; and
- to ensure that the development and management of the Arkaroola Protection Area is completed consistently with the preceding objects.

The legislation places an onus upon the Minister to develop a management plan for the Arkaroola Protection Area as soon as practicable after the commencement of the Act, and such management plan must be 'consistent with, and seek to further, the objects' of the Act. The Act also expressly leaves native title issues untouched, and allows that native title may exist over, or in relation to, the protected area. The future policy direction for the area seems to be a desire to obtain both national and world heritage listing for the Arkaroola Protection Area.

Arguably the most significant provision of the Act is that 'rights to undertake mining operations or regulated activities cannot be acquired or exercised pursuant to a mining Act in respect of land within the Arkaroola Protection Area', and such a blanket mining prohibition 'has effect despite the provisions of any other Act'. This effectively protects the area from any kind of mining activity in perpetuity.

The significance of this mining ban is further enhanced by the fact that mining exploration and development at Mount Gee, an area within the now protected zone, had already begun over 5 years prior to the legislation. Indeed, the mineral explorations company set up to develop the Mount Gee site, Marathon Resources Ltd, had described the site as 'one of Australia's largest undeveloped uranium deposits'. As a consequence of passing this legislation, the SA government has agreed to pay Marathon Resources Ltd the sum of $5 million as compensation for no longer being able to exploit the site.

The *Arkaroola Protection Act 2012* (SA) thus effectively bans mining, mineral exploration, and even grazing within the Arkaroola Protection Area. The fact that the SA government has passed legislation which may function as a template for protecting other areas of natural and/or cultural significance, both within SA and nationally, despite being a government that relies heavily on the economic benefits of mining and even describes itself as 'unashamedly pro-mining', is a welcome policy inconsistency.

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TASMANIA

Following a Review of the *Residential Tenancy Act 1998,* the Minister for Consumer Protection, Nick McKim, has confirmed that Tasmania will become the first state or territory in Australia to introduce minimum standards into residential properties. Whilst further work is required on the actual detail of the proposed minimum standards, there has been broad support from all the relevant stakeholders, including public housing providers, the Tenants' Union of Tasmania and landlords. In future all residential premises must guarantee hot and cold running water, toilet facilities, a bath or shower, and cooking facilities. Additionally, all landlords will need to ensure that premises contain adequate heating in the main living area as well as being free from roof leakages, free of substantial drafts and adequately ventilated. The Bill is likely to be introduced later this year and will hopefully act as a model from which other states and territories soon follow.

In other law reform news, the Tasmanian Law Reform Institute (TLRI) has released its final report *Tendency and coincidence evidence and Hoch's case.* The report calls for reforms to the admissibility of tendency and coincidence evidence. That is, evidence which goes to a pattern of behaviour or the character of the accused. Currently, the wording of Tasmania's evidence laws means that separate allegations made by separate complainants will often be heard at separate trials, leading to reduced chance of conviction according to Terese Henning, co-author of the Report and university academic. If the TLRIs suggested amendments are adopted it will see more sexual assault cases able to hear related complaints at the same trial as well as allowing the jury to ultimately determine if the stories were concocted by the complainants or actually took place. With the introduction of uniform evidence law in a number of Australian jurisdictions, the Attorney-General Brian Wightman has passed on copies of the report to other Attorneys-General with discussion to follow at the April meeting of the Standing Council of Law and Justice.

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VICTORIA

Practicing certificate changes to increase pro bono

The Victorian government has introduced legislation that will allow more Victorian legal practitioners to assist the community through pro bono legal advice and assistance.

The Legal Profession and Public Notaries Amendment Bill 2012 will amend the *Legal Profession Act 2004* to remove restrictions that currently prevent corporate legal practitioners from volunteering their services for pro bono legal work other than with community legal centres.

Organisations including the Public Interest Law Clearing House, the Law Institute of Victoria and the Australian Corporate Lawyers' Association had been lobbying for the changes to allow 'in-house' lawyers who work for businesses, governments or community organisations to provide the same range of pro bono assistance to the community as lawyers engaged in other forms of legal practice.

The government estimates that the arrangements will allow up to 2700 legal practitioners who hold corporate practicing certificates to engage in pro bono work on the same basis as other practitioners.

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WESTERN AUSTRALIA

Coronial law reform: Watch this space

The Law Reform Commission of Western Australia ('the Commission') has recently released its review of Western Australia's coronial system and has made a total of 113 recommendations for comprehensive reform of legislation, policy and practice. Recommendations have been influenced by successful practices in other jurisdictions while being tailored to the unique demographic and geographic needs of this sizeable state. The Commission recommends a completely specialised jurisdiction with a State Coroner and Deputy based in Perth with dedicated regional coroners servicing the north and south of the state. A major structural reform recommended by the Commission is the repositioning of the Coroners Court under the umbrella of the District Court to bring it more overtly within the judicial hierarchy of the state and to provide a clear line of accountability to a chief judicial officer.

A significant (though perhaps unsurprising) finding of the review was that regional Western Australians did not have equality of access to coronial services. This was reflected in the uneven quality of regional coronial investigations, inadequate training of regional magistrates acting as coroners and failure to provide the counselling service required by legislation.

WA was the first Australian jurisdiction to legislatively embrace the role of the coroner in the prevention of future deaths and this has now become an important focus of the work of modern coroners. The Commission recommends that this role be strengthened by making death prevention a primary object of the *Coroners Act* and by establishing a team within the Office of the State Coroner to conduct research to support and inform the coroner's decision-making and recommendatory functions and to assist in focussing public resources into meaningful and targeted death prevention strategies. It also recommends that Western Australia establish a legislative scheme (similar to that in Victoria) for mandatory response to coronial recommendations by public statutory bodies.

One way in which the coronial jurisdiction has moved on elsewhere is in the use of less-invasive post mortem examination techniques. Western Australia currently has a very high autopsy rate with up to 95 per cent of all cases being subject to a full internal post mortem examination; in most other Australian states the rate is between 70 and 75 per cent. Recommended changes to encourage the use of external or preliminary post mortem examinations will assist coroners to make decisions about whether a full internal post mortem examination is necessary for investigation of the death.

A particular problem with coronial investigations experienced in many jurisdictions is the investigation of deaths in healthcare settings. In WA, police investigations are heavily dependent upon statements from witnesses provided through legal counsel some significant time after the death rather than gathered through questioning by police immediately following a death. This can give the appearance of bias as well as significantly contributing to problems of delay. The Commission has recommended that a specialist healthcare death investigation team be established, to be comprised of the coroner's medical advisers, a nursing professional and two coroner's investigators, located within the Office of the State Coroner. The team would be tasked with investigations of hospital deaths and provision of advice to enable the timely assessment of cases that warrant further investigation at inquest. The team would also be tasked with liaison and education to enhance cooperation between the Coroners Court and the healthcare sector.

As WA has more immigration detention and processing facilities than any other Australian state, the Commission has recommended that Western Australia legislate, as far as is constitutionally possible, to ensure that deaths of persons in Commonwealth care of custody are adequately investigated. Under the Commission's recommendations such deaths will be subject to mandatory inquest and the coroner will be required to comment on the treatment and care of persons who die in Commonwealth custody.

Other recommendations include that the Corruption and Crime Commission actively monitor and review investigations into police-related deaths and that provisions be enacted to enable information sharing between coroners and agencies undertaking specialist investigations into deaths that are also subject to coronial investigation.

The Department of the Attorney General is currently working on a comprehensive response to the Commission's report.

TATUM HANDS is author of the Law Reform Commission's Review of Coronial Practice in Western Australia.

Coroner says Christmas Island tragedy was 'foreseeable'.

On 23 February 2012 the Western Australian State Coroner, Alastair Hope, delivered the 'Christmas Island Tragedy' inquest findings. The findings pertain to the death of 50 asylum seekers, who died in the coastal sea territory of Christmas Island on 15 December 2010. The deceased were on board a vessel identified by Australian authorities as Suspected Irregular Entry Vessel 221 ('SIEV 221'). The Coroner reported that the event involved the largest peacetime loss of human life in a maritime incident in Australian waters in 115 years.

Of those who died, 30 bodies were recovered and identified, and the Coroner was satisfied that drowning was the cause of death in each case. The bodies of 20 of those who died were not located. The Coroner established their identities beyond reasonable doubt and was satisfied that their deaths were caused by drowning or as a result of injuries caused by the sinking of the vessel. 42 of the 90 passengers on board survived.

The Coroner's findings establish the circumstances surrounding the incident, including but not limited to:

- Arrival of SIEV 221 at Christmas Island;
- Emergency Calls from SIEV 221 to 000;
- the Involvement of Border Protection Command;
- Available Intelligence; and
- the Response to the Emergency.

The Coroner drew conclusions regarding a number of key issues raised by the inquest, including whether the disaster was foreseeable, whether or not it was a realistic possibility for the rescue vehicles to have arrived earlier, the quality of the emergency response and the conduct of those responsible for organising the journey.

Critically, the Coroner found the tragedy was foreseeable and that the AFP, as the government agency responsible for search and rescue operations on Christmas Island, was not prepared in its response to tragedy. He found that the AFP did not have

'a viable marine rescue service on the island' and that this was 'extremely unsatisfactory and unsafe'.

In relation to the emergency response, the Coroner found that the naval and customs officers involved acted as efficiently as they could have in the circumstances and 'demonstrated great courage and resourcefulness'. He also found that it appeared 'both the vessel and its passengers were expendable' to the individuals responsible for organising the journey and that they undoubtedly contributed to the deaths. However, he made an open finding as to how the deaths arose due to pending criminal prosecutions.

The findings also include 14 recommendations directed primarily towards the possibility of 'enhancing surveillance to the north of Christmas Island, improving the capability for an emergency at sea response from Christmas Island and reducing risks for naval personnel involved in rescue operations'.

The full report is available at <http://www.coronerscourt.wa.gov.au/_files/Christmas_Island_Findings.pdf>.

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