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Developments around the country

HUMAN RIGHTS

Reintroduction of Human Rights (Parliamentary Scrutiny) Bill

On 30 September 2010, the Attorney-General re-introduced the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 in the House of Representatives.

The Bills comprise key elements of the Government's 'Human Rights Framework' and were subsequently referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report.

The Human Rights (Parliamentary Scrutiny) Bill 2010 establishes a Joint Parliamentary Committee on Human Rights, to be comprised of five members of the House of Representatives and five Senators, with two primary functions:

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

The Bill also introduces a requirement that each new Bill introduced to parliament be accompanied by a Statement of Compatibility which includes an 'assessment of whether the Bill is compatible with human rights'. This requirement also extends to certain legislative instruments.

For the purposes of both the Joint Committee and Statements of Compatibility, 'human rights' means those human rights and fundamental freedoms contained in the seven core international human rights treaties to which Australia is party.

The Senate Committee is due to report by 23 November 2010. Further details of the Committee's inquiry are at: <aph.gov.au/senate/committee/legcon_ctte/human_rights_bills_43/info.htm>

The Human Rights Law Resource Centre made a submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Bills. Notwithstanding gaps and deficiencies in the government's Human Rights Framework, the HRLRC welcomes the establishment of a Joint Parliamentary Committee on Human Rights and supports the expeditious passage of the Bills. The HRLRC submission does, however, make a range of recommendations as to how to strengthen and effectively operationalise the Bills. The HRLRC submission to the Committee is at <hrlrc.org.au/content/our-work/law-reform-and-policy-work/submission-on-human-rights-parliamentary-scrutiny-bill-2010-oct-2010/>.

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

Review of the UN Human Rights Council

The work, functioning and status of the UN Human Rights Council will be reviewed in 2011. An open-ended working group established by the Council to discuss this review took place between 25 and 29 October 2010.

On 20 October 2010, the HRLRC made a submission to the Working Group on the Review of the UN Human Rights Council in Geneva.

The submission considers ways to strengthen the Council and make it more effective in promoting and protecting human rights. To this end, the submission makes recommendations in the following areas:

- focus and conduct of the 2011 review of the Human Rights Council;
- responding to human rights situations of concern;
- strengthening the membership of the Human Rights Council;
- protecting and strengthening the special procedures;
- enhancing the operation of the Universal Periodic Review;
- enhancing the engagement of NHRIs and NGOs with the Human Rights Council; and
- improving follow-up and implementation of reports and recommendations.

The submission is at <hrlrc.org.au/content/topics/international-human-rights-mechanisms/strengthening-the-un-human-rights-council-hrlrc-position-paper-to-un-working-group-22-oct-2010/>.

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

Directions Paper released on a Charter of Rights for Tasmania

On 20 October 2010, the Tasmanian government released a 'Directions Paper' proposing a Charter of Human Rights and Responsibilities for Tasmania.

The Paper outlines a 'recommended model for a Tasmanian Charter of Human Rights and Responsibilities', which draws from and builds on the ACT *Human Rights Act 2004*, the Victorian *Charter of Human Rights 2006* and the findings and recommendations of the Tasmanian Law Reform Institute in October 2007. The Paper seeks to obtain views and written submissions 'from interested persons or organisations' on the proposed Charter by 29 November 2010. Following this process, the Tasmanian government will then determine 'whether the proposed model should be implemented in legislation'.

The Directions Paper, together with further information about the consultative process, is at <justice.tas.gov.au/corporateinfo/projects/human_rights_charter>

PHIL LYNCH is Executive Director of the Human Rights Law Resource Centre and **NOELLE RATTRAY** is a Solicitor at the Launceston Community Legal Service.

FEDERAL

Tax Laws Amendment (Public Benefit Test) Bill 2010

On 13 May 2010 Senator Xenophon introduced the Tax Laws Amendment (Public Benefit Test) Bill 2010. This private members Bill sought to amend the *Income Tax Assessment Act 1997* (Cth) by introducing a public benefit test to the requirements that must be met by an entity claiming tax exemption as a charitable or religious institution.

The Bill was referred to the Senate Economics Legislation Committee who published their report on 7 September 2010. The committee recommended the adoption of the bill introducing the public benefits test but also recommended that the government establish a National Charities Commission (or other suitably named organisation) to oversee this sector and administer the relevant tax exemptions.

While the committee did recommend the introduction of a public-benefit test, the main emphasis of the report was for the establishment of a Commission. The committee noted that four previous reports in the preceding 10 years have also recommended the establishment of a national commission for the not-for-profit sector, including the recent Henry Tax review. As with the public benefit test, countries such as the United Kingdom and New Zealand already have similar commissions.

Given that all previous reports conducted in the last 10 years recommended the establishment of a national commission for the not-for-profit sector, it could be assumed that the government would take action on this issue. However given their failure to do so to date and the precarious nature of the current federal Parliament it is unlikely that this issue will receive immediate attention from the government. One possibility is that the issue may be raised at the national tax summit due to be held in 2011; however it is likely to take a back seat to issues such as the proposed mining tax and changes to the income tax system.

As a side issue the Commission noted the high number of submissions it received regarding the behaviour of cult like organisations in Australia and recommended the Attorney-General conduct an inquiry into the practice of cults in Australia.

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AUSTRALIAN CAPITAL TERRITORY

Prison Based Legal Literacy Program

The Alexander Maconochie Centre ('AMC') is the 'human rights compliant' prison in the ACT. Before visiting it to participate in the AMC's first legal literacy program, my only exposure to the world of prisons was the graphic brutality and misery depicted in the HBO series *Oz*. The reality of my interaction with prisoners was the opposite of what I had seen in the media.

For two months, a small group of students from the Law Reform and Social Justice Program at the ANU College of Law went into the maximum security unit of the AMC accompanied by Jeremy Boland, Official Visitor, and tutor and SJD candidate in the College.

Our aim was twofold. First we sought to improve the legal literacy of the inmates who participated in the program. The second was to delve beyond textbooks and lectures, and witness firsthand how the ACT human rights legislation operates in practice. This is part of the larger goal of the Law Reform and Social Justice Program — to engage students with peoples lived experiences of law.

The only time that was available for both law students and inmates was Sunday mornings, and after extensive safety training we sacrificed sleep-ins and Barry Cassidy, to drive each week to the Canberra suburb of Hume, head through security scanning and make our way to 'Sentenced Unit One.' Having just finished their breakfast, the inmates met us in a programs room attached to the cell block.

In the first couple of weeks the discussions focused on the problems faced by prisoners in the AMC, from access to the gym to being locked down for extended periods. The issues then broadened and we covered an impressive range of material.

We began with the UN Standard Guidelines for Corrections, discussing the basics of international law and international politics. We moved on to the Australian guidelines based on the UN document, before reaching the ACT legislation that governs the inmates' lives.

An important constant theme was the nature of rights and their association with responsibilities: yes, inmates have the rights that others in the community have, but this is premised on full respect for the rights of others. In the AMC, this means that medical staff, programs officers and corrections staff, as well as other inmates, have the same rights as the participants in the program.

The most important outcome for me was the relationship of trust that we were able to form with the prisoners. I honed my empathetic skills, while keeping the relationship professional. By giving considerable autonomy to the prisoners as to what was discussed we were able to ensure the material was engaging and pertinent.

While prison is not an easy place to visit, it was important to see that the harsh detention conditions found in many other prisons have not been replicated in the ACT.

JOHN CROKER is a Law/Asian Studies student at the Australian National University.

NEW SOUTH WALES

Open justice in NSW

In 2010 the *Court Information Act* commenced operating in NSW. It promotes the goals of 'open justice' and 'free access to law' by making court information more easily accessible to members of the public and the media. To date the relatively haphazard procedures have placed pressure on court registrars, and resulted in inconsistent decisions about access. The new Act aims to simplify the process, and achieve broader access to law.

The stated objectives of the Act are to:

- promote consistency across the NSW jurisdictions in providing access to court information;
- provide open access to the public to certain court information;
- give additional access to this information to the media; and
- ensure a balance between open access, the administration of justice, and privacy and safety.

The Act acknowledges that, whilst members of the public may have access to the public gallery of the court, most of us — and most representatives of media organisations — do not cross this threshold. Nevertheless, we are entitled to know what occurs in our courts. Further, the Act supports the notion that simply observing court processes, does not always give the full picture about particular litigation, given the heavy reliance upon documents and other materials that are not examinable by the public. The Act attempts to address this by providing open access to some of these materials.

The Act establishes a regime of classifying court information into 'open access information' and 'restricted access information'. Open access information is accessible to anyone who asks for it. It includes material such as the indictment or originating process and pleadings, police fact sheet, written submissions, statement and affidavits admitted into evidence, expert reports, transcripts of proceedings, judgments and directions. It does not include any 'personal identification information' from which a person's identity or whereabouts could be determined, such as bank account numbers, Medicare number, date of birth, address, telephone number, and so on.

'Restricted access information' is anything that is not subject to 'open access', and a person may seek access to it by leave of the court. Before a court grants leave, it needs to consider a range of factors including the public interest, the effect upon the principle of open justice, the impact upon an individual's privacy or safety, and the possible effect upon the administration of justice.

Broader access to 'restricted' information is given to news media organisations, giving them effectively open access to the brief of evidence in criminal matters, transcripts of closed court proceedings, voir dire proceedings, transcripts and evidence relating to non-publication or non-disclosure applications, amongst other materials.

The Act aims to deal with matters of privacy, personal details, sensitivity and mis-use of information, and contains processes by which individuals, including litigants, might attempt to protect themselves from court information being improperly disclosed or used.

The Act is the result of a lengthy consultation and research process. In 2003 the NSW Law Reform Commission made recommendations in the *Contempt by Publication* report. In 2004 a NSW Supreme Court community consultation project studied access to court records. A 2006 reference from the NSW Attorney General's Department released a discussion paper titled *Review of the Policy on Access to Court Information*. The 2008 *Report on Access to Court Information* was published by the Attorney General's Department, following a public consultation process.

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Protective costs order to enable public interest environmental litigation against water pollution

The costs of public interest litigation are often prohibitive for individuals, NGOs and environmental groups. Rule 42.4 of the Uniform Civil Procedure Rules aims to address this issue by allowing a Court to make an order to cap the costs that one party can recover from another, if the other party is unsuccessful.

In 2009, the Blue Mountains Conservation Society ('BMCS') was keen to undertake civil enforcement action against Delta Electricity for water pollution of the Cox's river in Lithgow. However BMCS did not want to risk an adverse costs order and closure of their organisation. They sought an order under rule 42.4 of the Uniform Civil Procedure Rules to limit their costs exposure in the event that their enforcement action was unsuccessful. In September 2009, Pain J of the Land and Environment Court made an order that the maximum amount recoverable by either party to the proceedings was $20 000 on the basis the proceedings were in the public interest.

Delta appealed to the Court of Appeal on the basis of legal errors of Pain J's decision including that the underlying purpose of rule 42.4 was to ensure the proportionality of costs to the complexity of proceedings. They also argued it was not reasonably possible to categorise proceedings as public interest litigation at the outset.

In October 2010, the Court of Appeal handed down its decision in *Delta Electricity v Blue Mountains Conservation Society* [2010] NSWCA 263 with the majority (Basten JA and Macfarlane JA) dismissing the appeal (Beasley JA dissenting). Basten JA made a number of useful comments for public interest litigation. He said litigation may be characterised as being in the public interest despite it being early in the proceedings. In this case the public interest nature was directly relevant to the propriety of a maximum costs order and, if the proceedings are in the public interest, rule 4.2 of the Land and Environment Court Rules 2007 would operate to qualify the Appellant's expectation that it would recover its costs if successful. He also noted that the principle of open standing for civil enforcement to prevent a breach or threatened breach of environmental laws would be seriously undermined if some protection against large costs bills was not available.

Consequently, the Blue Mountains Conservation Society can now pursue its pollution case in the Land and Environment Court.

KIRSTY RUDDOCK is principal solicitor at the NSW Environment Defender's Office.

Bail Bill 2010 (NSW)

In October 2010 the Department of Justice and Attorney-General (Criminal Law Review Division) released Review of Bail Act 1978 (NSW) and an exposure draft of the Bail Bill 2010. Submissions on the Bill were invited within a two-week consultation period. As the Law Society of NSW stated in their submission, this timeframe was inadequate for proper consideration of this important piece of legislation.

The Bail Bill 2010 redrafts the current Act in several significant ways. The purpose of the redraft, according to the Criminal Law Review Division, is to have an Act drafted in plain English and to have the content structured in a logical manner so that it is easy to navigate and apply. Further, the Review

recommended changes to the Act to ensure 'workable, just and contemporary legislation is in place.' As several of the submissions in opposition to the Bill note, the drafters have not achieved these aims and the Bill contains provisions that clearly undermine the presumption of innocence.

For example, the removal of the s 32 criteria to be considered in bail applications in the current Act, which seeks to balance the interests of the accused and the protection of the community. The s 32 criteria have been replaced with clause 48(1) which provides that in determining a bail application the bail authority is to have regard to the objects of the Act. The objects in clause 3 are limited to:

a) ensuring the person will appear before court;
b) preventing the commission of any offences by that person;
c) protecting any person against whom it is alleged that an offence was committed; and
d) preventing the person required to appear from interfering with witnesses or with the course of justice.

Not only are these objects more restrictive than the current criteria, they make no mention of the interests of the accused.

Another example can be found in Clause 40(1)(a) of the Bill, which extends the limitation on the length of adjournment from 8 to 42 days, where bail has been refused. While the Review acknowledges the growing remand population and the issues for people held on remand, there is no clear statement as to why the adjournment period has been extended in this way.

The insertion of clause 40(1)(a) appears not to have been recommended in the Review, but its inclusion again indicates that the interests of an accused are not of paramount importance and leads to the conclusion that the presumption of innocence is further undermined.

To view the Bail Bill 2010 and *Review of Bail Act 1978* (NSW) go to <lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/pages/CLRD_reports>

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NORTHERN TERRITORY

Child protection

On 18 October 2010 the Board of Inquiry into Child Protection in the Northern Territory handed down its findings in *Growing them Strong, Together*.

This area of government business has been the subject of close scrutiny in recent years, following revelations of extreme violence including sexual crimes against children in Central Australia by Crown Prosecutor Nanette Rogers SC in 2006, the release of the Board of Inquiry Report into the Protection of Aboriginal Children from Sexual Abuse in June 2007 (*Ampe Akelyernemane Meke Mekarle* — 'Little Children are Sacred') followed promptly by the Howard Government's Intervention through the *Northern Territory National Emergency Response Act* 2007 (Cth) ('the NTER'), legislation which has been continued by the Gillard administration.

The Report is the first detailed examination of the business of child protection in the Northern Territory. It is a hugely comprehensive document at over 800 pages in length, and contains 147 recommendations. The Board reiterates a number of key demographics peculiar to the Northern Territory:

- Aboriginal people comprise just over 30 per cent of the population.
- Of the child population, Aboriginal children comprise 43 per cent of the total number of children living in the Northern Territory. Most of these children live away from regional centres, the bulk living in very remote areas (27.3 per cent). In the rest of Australia, the number of children living in such areas comprises less than 1 per cent of all children.

Clearly, this simple data set raises a number of questions about the traditional models of child protection employed not only in the Northern Territory but Australia-wide. The Board notes the delivery of child protection services in the Northern Territory simply do not fit the demographic, nor the geographic location of children at risk.

Further, no child protection model in Australia focuses on the needs of the Aboriginal child, their families or their communities. Models focus on a traditional construct — a small number of families, usually centrally located, who inflict physical harm on their children. This approach fails to incorporate the many other risk factors present, such as poverty, overcrowded living conditions, inter-generational trauma, alcohol and drug misuse. Subsequently they fail to respond to family or community need before children are harmed.

The report recommends comprehensive inclusion of and collaboration with, Aboriginal communities in addressing the myriad of problems currently being experienced in remote communities. This is hardly new stuff. Similar recommendations were made in the New South Wales Aboriginal Child Sexual Assault Taskforce report in May 2006 ('Breaking the Silence, Creating the Future: Addressing Child Sexual Assault in Aboriginal Communities in New South Wales'), 'Little Children are Sacred' in 2007 and also in the NTER review report of 2008.

The NTER has largely been acknowledged as ineffective in tracking down perpetrators of child sexual assault in Aboriginal communities, but in other areas of social need as well. This is attributable quite simply to the lack of evidence based need in remote Aboriginal communities underpinning Commonwealth policy. Despite huge signs at the entrance to each of the 73 affected communities, alcohol continues to be a significant and derailing problem for the communities, impacting directly on the capacity of residents to provide proper care for children.

Growing them Strong, Together identifies the need for the development of an Aboriginal workforce to deal with community and family issues in Aboriginal communities. Given the current chronic lack of services, the only option for child protection workers is to remove children. Invariably this means removing them from their community and kinship network and placing them in either Darwin or Alice Springs, usually hundreds of kilometres away, and most likely with a non-Aboriginal family. It remains to be seen whether engagement with the local Aboriginal populations is attempted this time around.

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QUEENSLAND

Civil and justice system reform

The first phase of substantial reform to the Queensland civil and justice system is now complete with the commencement of most provisions of the *Civil and Criminal Jurisdictional Reform*

and Modernisation Amendment Act 2010 on 1 November 2010 (some reforms had commenced earlier, on 1 September 2010).

The reforms follow completion in December 2008 of a wide-ranging review of the civil and justice system by Martin Moynihan, a former judge of the Supreme Court of Queensland and, more recently, Chairperson of the Crime and Misconduct Commission ('CMC'). Some of the key changes introduced by the legislation include revising the range of indictable matters that may be determined by a magistrate; increasing the jurisdictional limit of the District Court in criminal matters (to deal with all indictable offences with a maximum of 20 years imprisonment or less, up from a general limit of 14 years); streamlining the committal process; increasing the monetary limits for the Magistrates Court (from $50 000 to $150 000) and District Court (from $250 000 to $750 000); and giving the courts greater powers to require disclosure (for full details, including the Moynihan Report, see <justice.qld.gov.au/justice-services/justice-reform/background-and-overview>).

The 2010 reforms are the first phase only; 'second phase' reforms are currently under discussion, with legislation to emerge next year.

Ministerial corruption

Former State Labor Minister Gordon Nuttall has been convicted on further official misconduct charges. Last year he was convicted of receiving secret commissions, including from recently-deceased businessman Ken Talbot, and sentenced to seven years imprisonment. The latest convictions are for official corruption (in relation to payments received from another businessman, Brendan McKennariey) and perjury (committed during CMC hearings into the allegations in September 2006). Sentencing on the latest convictions is yet to take place. The Government has rejected Opposition suggestions of wider misconduct, stating that the corruption convictions are evidence only of the actions of a 'lone wolf'.

Law and order drum beat continues

The Bligh Government has foreshadowed the introduction of legislation which 'will take its tough stance on violent crime to a new level, introducing standard non-parole periods to ensure jail time fits the crime' (Anna Bligh & Cameron Dick, 'Standard minimum jail terms part of sentencing reform', Media Statement, 25 October 2010). Essentially, the legislation will remove the discretion currently exercised by sentencing judges to set non-parole periods for offenders committing violent crimes (including sexual crimes). Minimum non-parole periods have not yet been prescribed — this will be one of the tasks of the recently established Sentencing Advisory Council (legislation establishing the Council is currently before the Parliament).

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SOUTH AUSTRALIA

Further attempts to restrict access to abortion services

Recently, the Consent to Medical Treatment and Palliative Care (Termination of Pregnancy) Amendment Bill 2010 was introduced in the Legislative Council of the SA Parliament. The Bill was introduced and read by Mr Dennis Hood, one of two Family First party representatives in the Legislative Council.

The Bill seeks to amend the *Consent to Medical Treatment and Palliative Care Act 1995* (SA). That Act deals primarily with consent to medical treatment in the palliative care environment, but section 15 applies to medical practice generally, and places a duty upon a medical practitioner to explain to a patient:

(a) the nature, consequences, and risks of proposed medical treatment;
(b) the likely consequences of not undertaking the treatment; and
(c) any alternative treatment or courses of action that might be reasonably considered in the circumstances of the particular case.

The Bill aims to extend the above section 15(c) requirement by inserting a section 15A that places a further duty upon a medical practitioner performing an abortion to provide a pamphlet to the woman concerned containing information with respect 'to the option' of 'having the baby adopted' and placing it 'in foster care', including information about the various processes involved in such courses of action. The Bill makes it clear that a failure to provide such a pamphlet would have implications on the lawfulness of the abortion pursuant to section 82A of the *Criminal Law Consolidation Act 1935–1975* (SA).

In SA the lawfulness of a procedure to terminate a pregnancy is governed by sections 81, 82 and 82A of the *Criminal Law Consolidation Act 1935–1975* (SA). In SA abortion is a serious crime, carrying a maximum potential penalty of life imprisonment (see s 81, CLCA). Both the woman concerned (s 81(1), CLCA), and the third party performing the abortion may be charged (s 81(2), CLCA), and, with respect to the third party, it matters not whether the woman 'is or is not with child'. In essence, a third party may be charged with attempting an impossibility, and liable to life imprisonment for that attempt.

Legislative amendments in 1969 (see s 82A, CLCA) provided for valid defences to this crime. The primary defence is that an abortion is lawful if performed by a legally qualified medical practitioner after that person and another medical practitioner have formed an opinion, in good faith, and after both personally examining the woman concerned, that

> the continuance of the pregnancy would involve greater risk to the life of the pregnant woman, or greater risk of injury to the physical or mental health of the pregnant woman, than if the pregnancy were terminated (s 82A(1)(a)(i), CLCA).

In assessing this risk the medical practitioners may take account of the pregnant woman's 'actual or reasonably foreseeable environment' (s 82A(3), CLCA). There exist some restrictions as to where the procedure must be performed, and the woman concerned must have resided in SA for at least two months prior to the procedure (s 82A(2), CLCA). As may be seen, and contrary to 'pro-life/anti-choice' assertions, abortion is not lawful in SA — the *Criminal Law Consolidation Act 1935–1975* (SA) makes it clear that it remains prima facie unlawful, but that there merely exist defences to that crime (see s 82A(9)).

Why the Family First party have sought to amend the *Consent to Medical Treatment and Palliative Care Act 1995* (SA), rather than the *Criminal Law Consolidation Act 1935–1975* (SA), is largely unclear, although one might suggest that the later amendment would likely receive more attention, and therefore possibly greater opposition. The Bill aims to force medical practitioners, prior to performing an abortion, to offer the 'alternatives' of adoption and foster care. The drafters of this

Bill thereby demonstrate a complete misunderstanding of the subject matter and intention of the Act that the Bill seeks to amend. The *Consent to Medical Treatment and Palliative Care Act 1995* (SA), as the name suggests, is designed to regulate various medical treatments and practices. When section 15(c) of the Act talks of 'alternative treatment or courses of action' it means alternative '*medical*' treatments or courses of action. Adoption and foster care cannot be described as medical treatments or courses of action, no matter how broadly 'medical' is defined.

Even if it is accepted that adoption and foster care are somehow medically related procedures, they do not provide any '*alternative*' to the medical issue complained of, as they in no way seek to solve the medical issue in question: namely, an unwanted pregnancy. In effect, as an alternative treatment for ridding herself of an unwanted pregnancy, the Family First party is suggesting that the woman remain pregnant for the duration. This is nonsensical.

In his First Reading Speech Mr Hood, in claiming that the predominant purpose of the Bill is merely to provide information concerning alternatives to abortion, goes on to say that this is further justified by the fact that there are actually no unwanted pregnancies, as there exist plenty of 'couples' ready and willing to care for the foetus once born (see Hansard Reports for Legislative Council, 27 October 2010, p 1181). This attempt to deal with the flawed logic within the Bill (mentioned in the preceding paragraph) displays an astonishingly naïve view of the relationship between a foetus and the woman, and is consistent with the conventional patriarchal perspective that defines the woman as a mere incubator for the far more valuable foetus. It is almost as if, as far as Mr Hood is concerned, nothing of consequence occurs between a woman discovering that she has an unwanted pregnancy, and a happy couple accepting the born baby with open arms. A desired pregnancy is often difficult, let alone an unwanted one. One can only guess at the torture constituted by suffering through an involuntary childbirth.

In any case, despite stating altruistic motives, the effect of the Bill will be to further restrict access to abortion services, by adding to the burden of obstacles that must already be surmounted in order to satisfy the requirements for a lawful abortion. Mr Hood implicitly acknowledges as much near the end of his speech (see Hansard Reports, as above, p 1184). Fortunately, on current numbers, the Bill is unlikely to be successful.

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Judge Hora's A-Team and appropriate dispute resolution in SA schools

The SA government has developed a program in conjunction with the Office for Youth, where young people aged 16 to 25 are brought together to generate recommendations which feed into the decision-making and policy development process. These A-Teams (the A refers to Action) discuss a current issue and develop recommendations for better responses by government.

A-Teams are run in association with the Adelaide Thinkers in Residence program, also unique to South Australia. Retired Judge Peggy Fulton Hora was asked to be the Adelaide Thinker in Residence for 2009/2010.

Two A-Teams examined the topics of 'Appropriate Dispute Resolution in Schools' and 'Courts and Public Perception' respectively. The initial consideration process comprised an introduction to the issue, questions and considerations. The group met with key experts from the fields of education and justice sectors, senior public servants including representatives from the SA Department of Education and Children's Services ('DECS'), and Judge Hora who spoke with the A-Teams on a number of occasions.

Information was provided to the team members via a variety of forums including workshops, panels and presentations. Of particular interest to the Appropriate Dispute Resolution ('ADR') group was evidence that suggested the use of traditional punitive measures including suspensions, expulsions and detention was not particularly successful when addressing issues of school student disengagement. Group members were introduced to restorative justice approaches that attempt to repair any harm done and are relationship-based. The group's challenge was to make recommendations that considered evidence-based benefits of restorative approaches in schools while also addressing the barriers to adoption and implementation.

The A-Team considered how ADR methods such as restorative approaches within schools can help students feel included in their school and the wider community. Final recommendations were then presented to government and key stakeholders. The Alternative Dispute Resolution in Schools A-Team concluded that SA schools should, 'adopt restorative approaches as a way of reducing the number of behavioural issues within schools'.

The A-Team provided a rare opportunity for young people to represent their cohort and participate in the government decision-making process. The final report by the A-Team detailing their research, considerations and final recommendations (with the assistance of the Office for Youth policy unit) was recently provided to the South Australian Premier and relevant key government decision-makers. This report is now available to the wider community on the Office for Youth website.

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TASMANIA

Tasmania's Forests

A statement of principles signed to by the major logging industry and environment movement organisations appears to be the first step in a peace deal that should see conflict in Tasmania's forests ended. The Statement of Principles sees agreement that Tasmania's ancient forests be protected and that future forest industry in the State be overwhelmingly plantation-based. The deal which still needs to be signed off on nationally would see a federally-funded compensation package, perhaps running into the hundreds of millions of dollars paid to forestry contractors to leave the industry. The trade-off would see protection of high conservation forest in the Tarkine Rainforests, Blue Tier, Styx, Great Western Tiers and the Upper Florentine protected. According to Phill Pullinger, the Director of Environment Tasmania (one of the signatory organisations to the Statement of Principles):

> The forestry industry, unions and environment groups have found common ground in the interests of all Tasmanians. This will pave the way for a sustainable timber industry that protects jobs and also protects the state's remaining unique native forests.

While there is still a lot to be negotiated, it is a first step to end the forest wars in Tasmania.

Tasmanian Land Conservancy's New Leaf Project

Further progress in the forests is the securing of 28,000 hectares of native forests purchased from the Gunns holdings and purchased with the assistance of philanthropists Jan Cameron and Rob and Sandy Purves. This is the largest property offering in Tasmania and will be the biggest private conservation deal in Australia. Areas included in the purchase range from old-growth forests in the Blue Tier, sub-alpine forests around Ben Lomond and land on the Skullbone Plains near Bronte Park with huge heritage values and many endangered species habitat.

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VICTORIA

Suspended sentences abolished

Suspended sentences of imprisonment abolished in Victoria at the same time non-custodial options have been revamped, and the much-criticised provision for a mandatory prison term for a second offence of driving while disqualified has been abolished.

These reforms reflect the final recommendations of Victoria's Sentencing Advisory Council in 2008.

Suspended sentences have been criticised for net-widening, that is, for being too readily used where a non-custodial sentence might otherwise have been imposed. Breach of sentence conditions meant a person with a suspended sentence could easily end up in prison. The Sentencing Advisory Council recommended that suspended sentences be phased out and at the same time that non-custodial options be tightened up to provide greater supervision, program obligations and so on, so that courts would be more likely to use them rather than moving straight to a custodial discussion.

The single main category of summary offence for which suspended sentences have been used in Victoria was a repeat offence of driving while disqualified, for which a mandatory prison sentence was required. Many magistrates were understandably reluctant to impose a prison term and used the suspended sentence to moderate the harshness of the mandatory provision. This provision is now fortunately also abolished.

The tabloid media and conservative politicians view suspended sentences as 'soft on crime' and have been delighted with the abolition. There are probably more mixed feelings amongst progressive and rehabilitative critics, but some at least will presumably also be pleased with the reform, for opposite reasons to those of the tabloids.

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Surveillance in public places

The Victorian Law Reform Commission ('VLRC') released its final report on surveillance in public places in May 2010 ('the Report').

The Report recommends an educative approach to regulating the use of surveillance. In many respects, the VLRC's recommendations may not go far enough in putting in place clear, practical and enforceable provisions concerning the use of surveillance. Much has been left to a new independent regulator to provide non-binding guidance to surveillance users at a future date. The VLRC sees the new regulator's role as 'taking surveillance users with it' through consultation and advice.

Despite adopting this educative approach, the VLRC recognises the necessity of stricter measures to regulate more serious instances of inappropriate use of surveillance. The Report recommends additional civil penalties (in addition to the existing, little used, criminal penalty regime in the *Surveillance Devices Act 1999* (Vic) ('SDA')), recognising that in some areas, guidelines are not enough, and legislative sanctions are required. In addition, the VLRC proposes amending the SDA to

- prohibit the use of surveillance in toilets and change-rooms; and
- introduce a new offence for serious misuse of surveillance devices.

Finally, to provide individuals with recourse against serious invasions of privacy, the VLRC proposes the introduction of two statutory causes of action which are to attract remedies including injunctive relief and damages.

The VLRC opts not to recommend a system of registration or licensing or a formal complaints handling system. It is clear that economic considerations have significantly influenced the VLRC's decision not to recommend these and other stricter measures. The VLRC expresses a reluctance to place additional burdens on business and government.

JAMES FARRELL is Manager/Principal Lawyer at PILCH Homeless Persons' Legal Clinic.

VCAT reforms

The Victorian Civil and Administrative Tribunal ('VCAT') has committed to improving its accessibility and equity through a wide-ranging review progress and a new three-year strategic plan ('strategic plan'). VCAT proceedings can have a significant effect on the lives of marginalised people, as VCAT orders can result in homelessness and significant reductions in individual liberties. On this basis alone it is clear that VCAT has extraordinary potential to realise and protect human rights.

The PILCH Homeless Persons' Legal Clinic ('HPLC') has commented on VCAT's procedures and operations with specific emphasis on the quality of decision making and decision review by the Tribunal. Among the numerous positive actions listed in the strategic plan, the HPLC welcomes initiatives to:

- strengthen the right to a fair hearing at VCAT;
- provide recording of *all* VCAT hearings and access to recordings;
- increase recording of tribunal decisions on Austlii;
- implement a strengthened complaints process; and
- increase regional access to VCAT and expand hours of operation.

In 2010, the HPLC responded to the 'Transforming VCAT discussion paper' and made submissions which focussed exclusively on quality of decision making by the Tribunal. Our response proposed a confined model of internal review of VCAT decisions and focussed on disadvantaged individuals likely to be significantly affected by VCAT operations. In the short term it appears that VCAT has no plans for any form of internal review of its decisions. In commenting on this issue, the strategic plan refers to the resourcing implications and notes it is unclear what 'sensible limits' could be applied to a right of internal review.

Although we continue to advocate for internal review of VCAT decisions, we keenly await details of a number of initiatives in the strategic plan which will potentially improve the

consistency, predictability and quality of decision making at the Tribunal. These initiatives include the:

- 'strategic approach' to be taken to the allocation of professional development resources;
- application of the professional development register (in our view Member capabilities would clearly be improved by a minimum requirement of professional development activity and core training responsibilities);
- Code of Conduct for Members and a Customer Service Charter; and
- formal appraisal of Members during their term of office.

We commend VCAT on its commitment to improving its processes, which in turn improve users' access to justice and realisation of human rights, and look forward to working collaboratively with VCAT to achieve these outcomes.

CHRIS POVEY is a Senior Lawyer, PILCH Homeless Persons' Legal Clinic.

Summary of the Victorian Climate Change Act 2010

The Victorian *Climate Change Act 2010* was passed by Parliament on 3 September 2010 (not yet in force). It implements a number of actions outlined in the government's Climate Change White Paper which was released on 26 July 2010.

The two parts of the Act that could lead to genuine emission reductions are the inclusion of an emission reduction target for Victoria of 20 per cent of 2000 levels by 2020; and amendments to the *Environment Protection Act 1970* to allow greenhouse gas emissions from licensed premises to be regulated as a 'waste' through licensing and approvals. In the White Paper the government stated that the new powers would be used to require any new power stations to have an emission intensity of less than 0.8 CO2e per MWh which will prevent the construction of new power stations based on conventional brown coal technology. Regulations to implement this standard are yet to be developed. The government has not yet committed to imposing emission reduction requirements on existing premises.

The Act contains a number of other supporting provisions which although are unlikely to lead to any significant mitigation or adaption action in the near future, are at least a step in that direction. These include a requirement that government decision-makers take climate change into account in a small number of government decisions (limited to certain decisions in six Acts listed in the Schedule); a requirement for the Environment Minister to develop an adaptation plan every four years which outlines climate impacts, risks to Victoria and priority areas for adaptation (although there is no requirement that the actions in the plan be implemented); and a requirement for the government to report every two years on climate change science and Victoria's progress towards its emission reduction target.

The Act also repeals the *Forestry Rights Act 1996* and replaces it with provisions in the *Climate Change Act* which create new arrangements for the ownership, registration and transfer of forestry and carbon sequestration rights. Forest carbon rights will now form an interest in land and will be registered on the title. The owner of land and the owner of the forest carbon right can enter into a 'Forest Carbon Management Agreement' to set the management obligations for the management of vegetation or the carbon sequestration.

For the first time in Victoria, the Act sets up a scheme to allow carbon sequestration and soil sequestration rights to be sold on any Crown land, including land subject to a lease. The government can declare specific land or classes of land to be available for sequestration, and/or invite expressions of interest for use of Crown land for sequestration. The government can then assign carbon rights on Crown land to individuals or companies who want to purchase carbon offsets, or who operate as a provider of carbon offsets.

Neither the private land nor Crown land sequestration provisions in the Act require the owner or purchaser to consider biodiversity issues when using the land for sequestration purposes, however the government has committed to developing biodiversity standards for offsetting on Crown land over the coming months.

A more detailed summary of the Act, along with analysis of its strengths and weaknesses can be found on the EDO <edo.org.au/edovic/policy/edo_vic_climate_change_act_paper.pdf>

NICOLA RIVERS is Law Reform Director, Environment Defenders Office

Brown Mountain win

11 August 2010 saw a rare win for the environment. Environment East Gippsland ('EEG') has been working to protect East Gippsland's forests for about 30 years. We believed the destruction being wrought by the state government's logging monopoly, VicForests was out of hand. In September 2009, we sued VicForests for planning to destroy Brown Mountain's old growth forests and its rare wildlife. This was the test case for the law that is meant to protect endangered wildlife, namely the *Flora and Fauna Guarantee Act 1988* and Action Statements subsequently made under that Act.

Before Justice Osborn handed down his ruling in *Environment East Gippsland Inc v VicForests* [2010] VSC 335 (11 August 2010), EEG had already set a precedent for social justice. We obtained standing, won an interim injunction against the logging and did not have to put up costs security of $160 000.

After a four week hearing, VicForests were ultimately ordered to carry out expert surveys before logging. Species' habitat identified by EEG is to be protected and VicForests was ordered to pay 90 per cent of EEG's legal costs.

JILL REDWOOD is Coordinator, Environment East Gippsland Inc.

WESTERN AUSTRALIA

The Prohibited Behaviour Order Bill 2010 — using publicity and shame to control antisocial behaviour

The Liberal government in WA presses on with its law-and-order agenda. One of its most contentious initiatives is the Prohibited Behaviour Orders Bill 2010, which is currently before the WA Parliament. According to WA Attorney-General, Mr Christian Porter, the Bill aims at 'the persistent group of offenders who are responsible for a disproportionate amount of antisocial behaviour', such as graffiti, general damage to property, shoplifting, threatening, and inappropriate behaviour on public transport. Upon enactment of the Bill, a court may issue a Prohibited Behaviour Order ('PBO') against a person from the age of 16 years who has been convicted of an offence if he or she has a history of offences involving antisocial

behaviour and is likely to commit a further such offence. The Bill defines antisocial behaviour as 'behaviour that causes or is likely to cause … harassment, alarm, fear or intimidation to one or more persons; or ... damage to property'. A PBO can impose any constraints on a person's otherwise lawful activities that the court considers reasonably necessary to reduce the likelihood of the person committing a further offence involving antisocial behaviour. In this way, a person found guilty of a graffiti-related offence could be prohibited from possessing spray cans, a person convicted of an alcohol-related assault could be prohibited from drinking alcohol, or a person who has threatened others on public transport might be prohibited from using a particular train line or public transport as a whole.

Breach of the constraints is a criminal offence with a maximum penalty of five years imprisonment. In order to ensure that such orders are effectively enforced, that they deter anti-social behaviour and reassure the public that something is being done about antisocial behaviour, the orders will generally be publicised. The *Prohibited Behaviour Order Bill 2010* (WA) provides that, unless the court orders otherwise, details of the person and the order will be posted on a government website, even in the case of juveniles, and that anyone is free to republish that information. While the proceedings for a PBO are classified as civil proceedings, they follow on from, and require, a criminal conviction. As such PBOs represent a serious attack on the right of the young to anonymity in judicial proceedings and could indicate a fundamental shift towards the use of publicity and shame as a tool to control antisocial behaviour. The 'naming and shaming' approach of the Bill is proving particularly controversial. The President of the WA Law Society, Mr Hylton Quail, has described it as 'completely retrograde, medieval justice' and singled out the publicity provision as 'the most repugnant part of the proposed legislation'.

The proposed PBOs are based on a variant of the Anti-Social Behaviour Order ('ASBO') model operating in the UK, which was initially introduced in England and Wales through the *Crime and Disorder Act 1998*. Despite the fact that the UK Coalition government has recently announced plans to abandon the ASBO system because it has proven ineffective and criminalising, the government in WA is determined to go ahead with its planned PBOs. The WA Attorney-General is confident that the ASBO system has been sufficiently adapted for WA circumstances to warrant an introduction of the new powers.

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Review of Coronial Practice

In recent issues, this column has reported on coronial law reform throughout Australian States and Territories noting in DUAO 35(2) that it is now the turn of Western Australia. The Law Reform Commission of Western Australia has just released their Background Paper regarding the review of the coronial jurisdiction and practices of the coronial system in that State, including the operation of the *Coroners Act 1996 (WA)*. The terms of reference for the review ask the Commission to consider any areas:

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

To address these issues, the Commission has consulted with those involved in the delivery of coronial services in WA and experts in coronial law. The resulting Background Paper sets out the history of the WA coronial jurisdiction and current processes in addition to the issues arising from its initial consultations. These matters are outlined in Chapter Four of the Paper and include: the role of the coroner including core issues such as the place of prevention, the scope of inquests and response to and implementation of coronial recommendations; systemic issues such as delays in inquest, communication between the coroner's office, coronial service delivery entities and external stakeholders, information provision and training; investigative matters including investigations into specific deaths and investigative powers; and the role, rights and support of the family of the deceased in the coronial process — an issue that has found considerable purchase in Australasian coronial reform with regards to a number of issues such as post-mortem practices, cultural issues and coronial liaison.

With the release of the Background Paper, the Commission is also interested in hearing from people who have experienced the coronial process in Western Australia. People can participate in a survey, which can be accessed at <http://www.surveymonkey.com/s/lrcwa_coroners1>, or can receive an electronic copy of the survey by emailing the Commission at lrcwa@justice.wa.gov.au with the words 'Coroners Survey' in the subject line.

The Commission also invites interested parties to make comments or submissions. For more information see the Background Paper, available at <lrc.justice.wa.gov.au/3_coronial_pub.html>.

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