DownUnderAllOver
Developments around Australia

FEDERAL DEVELOPMENTS

'Don't leave home without your passport'

The recent revelation that an Australian woman, Cornelia Rau, was wrongfully detained in a Queensland prison and then at Baxter Immigration Detention Centre for a total period of almost 11 months certainly embarrassed the Federal Government, though not enough for it to issue an apology to Ms Rau and her family.

The wrongful detention of Ms Rau aptly demonstrates the 'detain now, ask questions later' approach of police and immigration authorities. Section 189 of the *Migration Act 1951* (Cth) empowers an officer to detain a person he or she 'knows or reasonably suspects' is an 'unlawful non-citizen'. The legislation places much faith in the 'reasonable suspicions' of the relevant authorities; a faith which is arguably misplaced when considering that a person's ability to speak a language other than English may give rise to a 'reasonable suspicion' that that person is an 'unlawful non-citizen' (in Ms Rau's case, her ability to speak fluent German was one of the reasons the authorities believed she was an 'illegal'). There are no doubt other cases where Australian citizens and residents have been wrongfully detained. During a recent visit to the Villawood Immigration Detention Centre, I met a woman in detention who had come to Australia from China about 12 years ago and claimed to be an Australian citizen. She was at one stage married to an Australian citizen and had a 10-year-old daughter by that marriage, who lived with her in Sydney. Yet she was detained by immigration authorities because she could not show them her Australian passport, which she said she had lost. She was forced to languish in detention for days while the authorities checked her identity.

These cases highlight the need to keep a proper check on the way in which the authorities exercise the detention power in s 189 of the *Migration Act*. As the system currently stands, the state is only brought to account *after* a person is detained, by which stage, the damage has already been done. Otherwise, the message to Australians is, it seems, 'don't leave home without your passport'.

The treatment of Ms Rau while in detention was degrading and humiliating, and highlights the everyday plight of asylum seekers. It has been reported that Ms Rau, who is schizophrenic, was the only woman held in high security at the Baxter Immigration Detention Centre and that she was kept in solitary confinement for 18 to 20 hours each day for two months. Ms Rau 'often cried, ate dirt and said she wanted to die' but was denied access to independent psychiatrists 'allegedly because she was unable to give written permission to be mentally examined'. When it was discovered that Ms Rau was in fact Australian, she was taken to Adelaide and provided with proper medical treatment. As Ms Rau's sister cleverly put it: 'During which leg of her flight from Baxter to Adelaide did she suddenly gain the basic human right to medical treatment?'. Asylum seekers experiencing mental illness continue to be denied proper medical treatment while in detention and their cries for help often go unnoticed because their status as 'illegals' makes them invisible and forgotten. The only good thing to come out of Ms Rau's detention and deplorable treatment is that it throws some light on the forgotten 'illegals', especially those with mental illness. (Sources: *Sydney Morning Herald*, 7 February 2005)

SERA MIRZABEGIAN is a Sydney lawyer.

Australia's First Specialist Human Rights Legal Centre

The establishment of the first specialist Human Rights Legal Centre in Australia is closer to becoming a reality following the endorsement of the proposal by the Public Interest Law Clearing House (Vic) and Liberty Victoria and the preparation of funding submissions to establish the Centre.

Following a period of extensive research and consultation, a joint PILCH/Liberty Victoria Working Group found that a specialist Human Rights Legal Centre is needed to monitor, assess and advocate human rights implementation, to take steps to ensure that human rights are protected, respected and fulfilled, and to seek redress and remedies for human rights violations. Particularly in the absence of a constitutionally or legislatively enshrined bill of rights, the Centre will play an important role in the legislative and institutional framework in Australia for the promotion, protection and realisation of human rights.

The Centre will aim to promote, protect and contribute to the fulfillment of human rights in Australia by conducting and facilitating strategic litigation, public policy advocacy, and community education. Strategic human rights-based litigation can be an important tool for social change and remains a significant legal service delivery gap across Australia.

Legal services will be provided by pro bono lawyers, academics and law students under the auspices and supervision of the Centre. The Centre will work closely with community legal centres, legal aid commissions and other human rights organisations to identify the human rights issues and needs of marginalised or disadvantaged individuals as well as groups and opportunities for the use of strategic human rights litigation and other strategies to address these issues and needs. Depending on the expertise and resources of collaborating organisations,

the Centre could act as instructing solicitor, in a co-counsel arrangement, or as a provider of technical litigation advice or resource support.

Strong expressions of support for, and interest in involvement in, the Centre have been received from Allens Arthur Robinson, Blake Dawson Waldron, Mallesons Stephen Jaques, Minter Ellison, the Law Institute of Victoria, the Victorian Bar and numerous community legal centres and human rights organisations. Strong expressions of interest and support have also been received from academics at the University of Melbourne Law School, Monash University Law School Castan Centre for Human Rights and La Trobe University Law School. Freehills is providing pro bono advice to assist with the incorporation and establishment of the Centre.

Funding in the amount of $230,000 per annum is being sought from a range of governmental and philanthropic funds and trusts, including from the Federal Government and the Victorian Government under the Attorney-General's Justice Statement, to establish and operate the Centre. Lawyers from Allens Arthur Robinson, Blake Dawson Waldron, Mallesons Stephen Jaques and Minter Ellison have provided extensive assistance with the preparation of funding submissions. It is anticipated that this funding would enable the Centre to provide over $1 million of free legal services each year. There are strong complementarities between the aims of the Centre and those of the Victorian Government under the Justice Statement in relation to the alleviation of disadvantage and the promotion of human rights.

Pending the receipt of funding, PILCH and Liberty Victoria aim to establish the Centre by July 2005.

PHILIP LYNCH is Coordinator of the PILCH Homeless Persons' Legal Clinic.

NEW SOUTH WALES

Just kidding

The jocular Premier of NSW, Bob Carr, finds incarceration an amusing idea. He is reported (*Sydney Morning Herald*, 28 January 2005) as being 'tongue-in-cheek' when announcing gaol terms for people who extend 'Happy New Year' greetings after 26 January. In the same witty vein he proposed criminalising comments on the weather.

It's a good thing that he was only joking. You can never be too sure in NSW, where sending people to gaol is a quick fix for any social ill. Carr wasn't joking when, only two weeks earlier, he boasted that NSW's prison population has hit 9000 for the first time, thanks to longer sentences, tougher bail laws and higher police numbers (*Sydney Morning Herald*, 14 January 2005).

A recent example of the 'lock up the problem' mentality was the Government's response to some enthusiastic but inappropriate self-help measures by jurors. After two jurors inspected the scene of an alleged crime on their own frolic, the convictions were set aside and a retrial was ordered. An appeal and retrial was an expensive exercise for the state, and no doubt a highly traumatic one for the victims of the crime. The jurors' conduct was described by the appeal court as 'regrettable', which might understate it a bit.

In a knee-jerk response, the NSW Government, with the 'it was our idea first' support of the Opposition, passed the *Jury Amendment Act 2004* (NSW), criminalising the conduct of a juror who makes inquiries 'for the purpose of obtaining information about the accused, or any matters relevant to the trial'.

Bob Debus, the NSW Attorney General, said that the legislation will be 'a clear deterrent to jurors who are tempted to ignore the directions of the judge which require them to make their decisions according to the evidence' (*NSW Hansard*, 9 November 2004).

Jurors are sworn and have their duties and responsibilities explained to them. Where does a government get the idea that threats of gaol alter such conduct? Where is the data to support such a legislative measure? How frequent and serious are the instances of such conduct? (The Hansard debates recorded three in a year).

As the gaols fill and the statute books bulge with imprisonment provisions, we must wonder if criminology research ever informs criminal justice policy. That could only be another tongue-in-cheek proposal from Bob Carr.

SIMON RICE is a NSW lawyer.

QUEENSLAND

(In)discretion and skinny-dipping in the Sunshine State

When the exercise of discretion lapses into reflexive application, unjust outcomes can follow. As reported by *The Courier-Mail* (26 January 2005), nearly four and a half years ago a Queensland public school teacher took a 'skinny-dip' on an isolated beach on the Sunshine Coast. Two patrolling police officers spotted him. He was not swimming near other people, but one of the police officers chose to charge the unfortunate bather with indecent behaviour rather than issuing a warning. The teacher subsequently pleaded guilty by letter, and was fined a small amount. Despite a clean record, being held in high regard as a teacher, and the trivial nature of the offence, a conviction was recorded. In 2004, on being offered a teaching contract by a private school, he was informed that a routine police check would be conducted. At this point, he became alarmed about the consequences of his conviction for his future employment prospects, and appealed to the District Court to have the conviction removed from his record. The District Court has now upheld the appeal, and suggested that it would be 'disturbing' if a practice of recording convictions had developed whenever defendants pleaded guilty by letter in the Magistrates Court. If such a practice has developed, the travails of the skinny-dipping teacher may lead to positive change, with a copy of the District Court's reasons reportedly being sent to the Chief Magistrate.

Hooked on drug courts

The use of specialist courts to deal with drug-dependent offenders is well established in the United States, and is increasingly becoming a feature of the judicial systems of other common law countries (including Canada, England and New Zealand). In Australia, drug courts are now being used in a number of states, including Queensland. On 27 January 2005 the Queensland Government announced that $10.5 million would be spent on extending the drug court program to the end of 2006. While the emergence of specialist drug courts may turn out to be an important development in addressing the needs of a particular class of offenders, a degree of scepticism may still be warranted. First, due to a lack of methodologically sound research, claims about reduction in crime and improvements in health have not been clearly established, even in the United States. Second, such courts entrench the prejudice that certain drugs per se cause crime (so-called 'dangerous' or 'illicit' drugs), which is plainly incorrect. Of course, consistent with much criminal legislation, the term 'drug' is misused anyway, generally excluding both

prescribed drugs and freely available drugs such as alcohol and caffeine. And third, although responding to the 'drug problem' in a more sophisticated way than conventional approaches, drug courts pose no threat to the generally irrational and punitive approaches to drug use sanctioned by governments. The focus on managing the consequences of established criminal law forestalls a more thorough-going critique of underlying justifications for the criminalisation of some drug use.

STEVEN WHITE teaches law at Griffith University.

TASMANIA

First female Supreme Court Judge appointed

Hobart Magistrate Shan Tennent has been appointed as Tasmania's next Supreme Court judge. It is the first time a woman has been appointed to the Supreme Court bench in Tasmania.

Her appointment came amidst much speculation and controversy, Attorney General Judy Jackson having announced in June 2004 that she intended to appoint a woman to the position. Opposition Leader Rene Hidding described this as a 'tokenistic, unsustainable and sexist stance'. Although the call for expressions of interest in the position did not specify the preferred gender of applicants, many prominent figures, including the new Chief Justice Peter Underwood, spoke publicly about the need for any appointment to be made on merit, in order to maintain public confidence in the court. There was speculation that barrister Olivia McTaggert or Magistrate Helen Wood may have been potential candidates, but it appears that neither applied for the position.

New Governor less controversial

The Supreme Court vacancy arose when Chief Justice William Cox resigned to become the Governor of Tasmania. William Cox is likely to be a much less controversial Governor than the former vice-regal representative, Richard Butler. Mr Cox and his wife Jocelyn appear not to be letting the extravagance of Government House go to their heads — they often return to their suburban Hobart home for the weekend.

No sex order

In December, a Launceston Supreme Court Judge made the unusual order that a 24-year old man abstain from having sex with his 16-year-old girlfriend until her next birthday. The age of consent is 17 in Tasmania. The man was given a four-month suspended sentence. There were a number of disturbing comments made during the trial, including the Crown Counsel, Ms Lang Goodsell, appearing to argue that the sex of the accused was important, stating 'What are the odds of a 23-year-old woman having sex with a 15-year-old male?' Justice Evans replied 'What's that got to do with it?' The accused's counsel also made comments implying that the girl was not sexually inexperienced when the relationship began.

SAMANTHA HARDY teaches law at the University of Tasmania.

SOUTH AUSTRALIA

Statutes Amendment (Relationships) Bill

South Australia's heady 'Dunstan' era saw the state lead the way with the introduction of a number of significant social reforms. For example, during 1972, South Australia became the first Australian jurisdiction to decriminalise consensual sexual activity between homosexual adults. Other Australian jurisdictions followed suit, with Tasmania finally joining the fray in 1997.

Since South Australia decriminalised homosexual sex in the 1970s, Australian jurisdictions have seen the incremental development and implementation of laws designed to provide same-sex couples with official recognition of the nature of their relationship. These laws, in many instances, place same-sex couples on an almost equal footing with heterosexual couples — particularly in matters of property, health care, superannuation and so on.

South Australia is now, however, the laggard rather than the leader. A recent attempt to remove discriminatory provisions from 54 South Australian Acts has stalled in the parliament. The Statutes Amendment (Relationships) Bill was, on 8 December 2004, referred to the Social Development Committee for review. The Bill seeks to make provision for same-sex couples to be treated on an equal basis with opposite sex couples.

The South Australian Government has already conducted its own inquiry and, as a result, removed what it thought to be the main sticking points from the Bill. These points were related to the sacrosanct nature of the family as the natural vehicle for raising children and, in particular, concerned questions about whether same sex couples should have access to assisted reproductive technology to help them conceive children and whether they should be able to adopt.

The arguments against providing same-sex couples equal treatment are old and tired. I don't want to revisit them in any detail here. It is sufficient to say that the main concerns are, as usual, about the impact that recognising same-sex relationships might wreak on the bastion of 'good' societies; that is, heterosexual marriage, or at least heterosexual marriage-like relationships.

One quite innovative argument against the proposed amendments related to the lack of recognition given to long-term non-sexual relationships. Family First gave an example of two women from the local church who live in a long-term same-sex domestic situation without sharing a sexual relationship. Is it just me or does it seem a little strange that a conservative political party like Family First is arguing that the proposed amendments are not inclusive enough? Perhaps they are playing ducks and drakes. Politics is strange.

As usual, the law follows social or cultural practices when sexuality is at stake. Same-sex couples do manage to have children. More importantly, despite removing the provisions about assisted reproductive technologies and adoption, the passage of the amendments would provide same-sex couples equal recognition in many areas that are not directly allied to traditional and conservative ideas about family or children.

It is decent and fair-minded to recognise the commitment many same-sex couples bring to their relationship. How can we continue to ignore discriminatory practices concerning, for example, probate, the 'right' to visit an ill partner in hospital, the ability to make funeral arrangements, and access to a long-term partner's superannuation, among others.

Sure, we are talking about minority rights, but other Australian jurisdictions have already resolved this debate. The failure of the South Australian Parliament to enact laws about non-traditional relationships only serves to drive a deeper wedge between groups within an already fragmented society. Perhaps the whole situation is a reflection of a more conservative South Australia that is unlikely to lead the way in terms of social reform. Don Dunstan would be bitterly disappointed.

PAUL MARKS lectures in Legal Studies at Flinders University.

VICTORIA

New *Occupational Health and Safety Act 2004*

Twenty years after the introduction of the *Occupational Health and Safety Act 1985* (Vic), we see the new *Occupational Health and Safety Act 2004* (Vic). Purportedly implementing the proposals contained in Chris Maxwell QC's extensive report, insiders have revealed that barely a third of Maxwell's suggestions have ultimately been taken on board. The Bill went through so many drafts that it almost set a new record in the Office of the Chief Parliamentary Counsel. It was being re-drafted right up until its introduction, including sweeping cuts being made during marathon weekend sessions featuring the upper elites of the union and industry 'stakeholders'. The final result represents, in many respects, a dilution of what Maxwell had identified as necessary changes to bring Victorian health and safety law up to scratch in the 21st century and to try to rein in the disturbing death and maim figures for workers in the state.

Still, some significant changes have made it in, including:

- a new appeals process (both internal and external reviews) against WorkSafe inspectors' decisions
- large increases in the fines attaching to most offences under the Act. For example, the penalty for failing to provide a safe workplace is increased from $256,250 to $922,500 for a company and from almost $52,000 to almost $185,000 for individuals
- new sentencing options such as adverse publicity orders, orders to undertake improvement projects and enforceable undertakings
- imposing a possible five-year jail term on a person convicted of recklessly engaging in conduct that places, or may place, another person at a workplace in danger of serious injury
- allowing authorised union representatives to enter a workplace to investigate suspected breaches of the OHS laws
- clarifying that references to 'health' include psychological health as well as physical health
- protecting volunteers from liability.

Legislating away forest protests — the *Safety on Public Lands Act 2004*

For several years the Victorian Government, as a cynical means of preventing protests and public scrutiny regarding the continued destruction of our remaining native forests, relied on a vague provision in the *Forests Act 1958* (Vic) to set up 'exclusion zones' around logging sites. These zones were often hundreds of square kilometres and operated to exclude members of the public from accessing large parts of public forests. The legal validity of these zones was regularly called into question but never definitively ruled on in a superior court.

Whether exclusion zones are legal is now a moot point, thanks to the new *Safety on Public Lands Act 2004* (Vic). The Act allows for the an area of state forest to be declared a 'public safety zone' for a number of purposes, including logging. The declaration must specify the area of the zone, the purpose of the zone, the period for which the zone applies and the activities that are permitted, prohibited or restricted in the zone. A range of offences with hefty fines apply, including when a person re-enters the zone after being directed by an authorised person to leave. To overcome a recent case that gave primacy to the holder of a miner's right, the Bill specifically states that such a person must not re-enter a public safety zone after being directed to leave.

KING RAMESSES II is a Melbourne lawyer.

WESTERN AUSTRALIA

New Court of Appeal established

The *Acts Amendment (Court of Appeal) Act 2004* (WA) was assented to on 9 November 2004, establishing a permanent Court of Appeal as a division of the Supreme Court of Western Australia. On 1 February 2005, the Court commenced operations. The long-awaited Court seeks to advance the administration of justice by improving the quality and timeliness of appeal judgments and the efficiency of the appellate process as a whole, as has been the experience of similar models in New South Wales, Victoria and Queensland.

The Judges of the Court of Appeal are Justices Christopher Steytler, Neville Owen, Christine Wheeler, Leonard Roberts-Smith, Carmel McLure and Christopher Pullin, with Justice Steytler appointed as the President. While Justice Steytler will be responsible for the day-to-day operation and administration of the Court, the Chief Justice remains the Head of the jurisdiction and will preside over the Court when sitting.

Justice Steytler has determined that the new Rules of Court will take effect from 2 May 2005. The new rules will embody some quite progressive changes and it is hoped that the profession will welcome the changes as enthusiastically as the Court(!). The new registry will be organising a series of seminars for the profession to facilitate a smooth transition.

CATIE PARSONS is a Judge's Associate in Perth

State Administrative Tribunal opens its doors

Following the passage of the *State Administrative Tribunal Act 2004* (WA) and *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004* (WA), the State Administrative Tribunal (SAT) opened its doors for business on 1 January 2005. It represents a significant advancement in ensuring that WA's citizens are accorded a high standard of administrative justice.

Three judicial members head the SAT: the Hon Justice Barker of the Supreme Court as President and Judges Chaney and Eckert of the District Court as Deputy Presidents. They are supported by 13 full-time non-judicial members, a huge contingent of sessional members drawn from various professions, occupations and fields, and about 55 full-time staff.

Over 800 different applications can be made to the SAT (which has both review and original jurisdiction) covering areas such as guardianship, administration, town planning, strata titles, credit agreements, revenue objections and the discipline of professionals and tradespeople.

To make the application process easier, a computer program called the 'SAT Wizard' has been specially designed to enable citizens to create an application in minutes. It allows applicants to tailor an application form to the Act, regulation or other law under which they are applying to the SAT and therefore to their specific situation.

For more information on the SAT, visit its website at: <www.sat.justice.wa.gov.au>.

SHANNON CHAPMAN is the Associate to the President of the State Administrative Tribunal in Perth.