

DownUnderAllOver

Developments around the country



FEDERAL

New immigration 'values' ease mandatory detention

The Rudd government has moved to further reform Australia's immigration policy, introducing 'seven key immigration values' to guide detention practices. The reforms, outlined by Chris Evans in a speech, *New Directions in Detention*, at the ANU College of Law, redefine mandatory detention, and supplement previous steps by government to end the so-called Pacific Solution and abolish temporary protection visas.

The values limit mandatory detention to unlawful non-citizens who have repeatedly refused to comply with visa conditions or are deemed to present a risk to the community. Asylum seekers will continue to be detained, but only for identification, and health and security checks, and will live in the community while their applications are processed. Importantly, there will not be a presumption to detain. Rather, the onus will rest on the Immigration Department to justify why an individual should be subjected to ongoing detention.

Indefinite or arbitrary detention is said by the values to be 'not acceptable'. To minimise prolonged detention, each individual will be reassessed every three months. The circumstances of those detained longer than six months are to be further reviewed by the Immigration Ombudsman.

Senator Evans did, however, pledge ongoing support to the excision of certain offshore islands from Australian migration zones. Asylum seekers arriving in an excised area will continue to be held on Christmas Island. Despite retaining the exclusion zones introduced under the Howard government, Labor pledged offshore detainees access to publicly funded legal advice, independent review of decisions, and external investigation by the Ombudsman.

The speech acknowledged the severe physical and mental damage often suffered by those held in immigration centres. The newly-restricted scope of mandatory detention recognises 'the centrality of the humane treatment of the individual'. The 'key immigration values' also seek to remedy the profound impact of previous immigration policy on Australia's international reputation by reflecting international treaty obligations.

When pressed on the issue of work rights for asylum seekers in the community whose cases were awaiting resolution, Senator Evans admitted the issue remained 'complex and unresolved'. If this is any indication, Labor's reform of immigration policy appears unfinished.

A copy of the transcript is available at <minister.immi.gov.au/media/speeches/2008/ce080729.htm>

HAYDN FLACK is a law student at the ANU.

Chief Justice French — new indigenous awareness on the High Court?

Few lawyers will be surprised by Justice French's appointment to the High Court, and there is little doubt that he will make an excellent Chief Justice. He is an independent person who has the support of all sides of Parliament; Shadow Attorney-General Senator Brandis welcomed Justice French's appointment. Justice French brings a wealth of experience as a judge both here and overseas, in tribunals, the legal aid commission, and in law reform. He is widely published and has expertise in constitutional law.

Justice French has been described as a federalist and a republican. He is also described as a 'black letter' lawyer, and is likely to take a fairly conservative and traditional view on statutory interpretation of both legislation and the *Constitution*. For example, he upheld the detention of the Tampa asylum-seekers. Of interest to indigenous people is his work in the WA Aboriginal Legal Service and the National Native Title Tribunal. He is likely to bring a fresh and enlightened perspective on native title to the High Court — one that is somewhat different to the prevailing orthodoxy.

If law is indeed 'marching with medicine but in the rear and limping a little' (*Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 283, 395 per Windeyer J) then, to employ the same metaphor, the law with respect to indigenous matters is still miles behind, not even yet in sight. Perhaps Chief Justice French will help bring indigenous matters to attention in a manner that is acceptable to the majority and, not to put a fine point on it (but mixing metaphors), that will point to the elephant in the room.

While High Court decisions concerning indigenous issues may not always be favourable to indigenous peoples, there is some hope that Justice French — who has sat down with tribal elders and traditional owners, and has shown a great understanding and respect for the ancient ways (see the *Blue Mud Bay* case page 182) — will bring his influence to bear, and perhaps open the eyes of others who do not share his knowledge of and insight into indigenous affairs.

ASMI WOOD teaches law at the ANU College of Law.

Australia ratifies UN Disabilities Convention

Australia has become the 30th country to ratify the UN *Convention on the Rights of Persons with Disabilities*, after depositing its instrument of ratification to the Convention 'on 17 July 2008.

The ratification followed an expedited process, including the Joint Standing Committee on Treaties recommending ratification of the instrument prior to releasing its report, and

means that Australia can participate in the inaugural election of the Committee on the Rights of Persons with Disabilities.

PHILIP LYNCH is Director of the Human Rights Law Resource Centre <hrlrc.org.au>

Protecting the human rights of people deprived of liberty

Australia is currently examining whether to accede to the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OP-CAT).

OP-CAT establishes a system of regular visits to places of detention by international and domestic independent expert bodies to prevent torture and other forms of ill-treatment from occurring.

In July 2008, the Human Rights Law Resource Centre made a submission to the National Interest Analysis of OP-CAT examining the benefits of Australia's accession and outlining what the domestic implementation of the obligations would entail.

The Centre's submission supports Australia's accession to OP-CAT, and says that it can be implemented with relative ease within Australia's existing political and legal structures.

See <hrlrc.org.au> under Policy Work>Domestic Submissions>Centre Urges Australia to Ratify OP-CAT.

PHILIP LYNCH is Director of the Human Rights Law Resource Centre

Protecting women's rights

In May, the Rudd government announced plans to consider whether Australia should become party to the *Optional Protocol to the Convention on the Elimination of all forms of Discrimination against Women* (OP-CEDAW). As part of the consultation, the HRLRC made a submission to the National Interest Analysis supporting Australia's accession to OP-CEDAW.

OP-CEDAW establishes two procedures: a communication and an inquiry procedure. The communication procedure allows individuals or groups (or people acting on their behalf) to submit a communication to the Committee on the Elimination of Discrimination against Women alleging violations by a State of the substantive rights protected under the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). The inquiry procedure allows the Committee to initiate inquiries into reliable information indicating grave or systematic violations of CEDAW by a State.

Accession to OP-CEDAW would strengthen the protection of women's rights in Australia by providing a mechanism under which individual and more widespread violations of CEDAW could be examined, assessed and remedied. It would also signal Australia's re-engagement with the United Nations and commitment to international human rights standards.

The Centre thanks Simone Cusack, formerly of Blake Dawson, for her contribution to the submission to the National Interest Analysis.

The Centre's submission is available at <hrlrc.org.au> under Policy Work>Domestic Submissions>Protecting Women's Rights.

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

Calls for amendment of taxation laws

On 7 July, the Human Rights Law Resource Centre and Blake Dawson jointly wrote to the federal government calling for an amendment to the Commonwealth *Income Tax Assessment Act 1997* ('ITAA') to introduce a deductible gift recipient (DGR) category for human rights organisations.

The common law definition of 'charity' forms the basis for determining whether certain tax concessions are available to not-for-profit organisations. One of the key principles that has evolved from this definition is that organisations involved in political activities (such as advocacy, or lobbying for changes to the law or government policy) are not 'charitable' in nature. This means that organisations involved in advocating social or structural change, in favour of recognising human rights for example, are denied access to a number of tax concessions.

The previous Australian government recognised the difficulties with the current conception of 'charity', and the lack of access for 'advocacy' organisations to tax concessions such as income tax exempt charity and DGR status. However, the recognition of these problems did not manifest in any actual changes to the way in which 'charity' is defined in our law, or to the availability of tax concessions under the ITAA for entities that take part in advocacy-based activities.

It is hoped that the strong support which the Rudd government has shown for advancing human rights, together with the introduction of amendments to the same effect in the United Kingdom, may indicate there is now a climate supporting real and achievable change in favour of entities that engage in human rights activities. Blake Dawson and the Centre therefore requested that the Rudd government consider introducing amendments to the ITAA to create a new DGR category for entities that promote the advancement of human rights in our community.

The Centre acknowledges the outstanding pro bono work of Teresa Dyson, Partner, and Sarah Hickey, Lawyer, of Blake Dawson on this submission.

PHILIP LYNCH is Director of the Human Rights Law Resource Centre.

AUSTRALIAN CAPITAL TERRITORY

New cross-examination rules: over-stepping the human rights mark?

On 3 July 2008, ACT Attorney-General Simon Corbell presented the Sexual and Violent Offences Legislation Amendment Bill 2008 to the Legislative Assembly. The 'dual' objectives of this Bill, according to its Explanatory Statement, are 'treating complainants in sexual and violent offence proceedings and other vulnerable witnesses with respect and dignity during the prosecution process, and ensuring a fair trial for the accused.' The opinion of many local criminal law defence practitioners, however, is that aspects of the Bill unnecessarily limit the human rights of defendants and their representatives (as enshrined under the ACT *Human Rights Act 2004*) and amount to a significant fetter on the administration of efficient and fair justice in the ACT.

The Bill automatically precludes a defendant from personally cross-examining a complainant or similar act witness in proceedings involving sexual and violent offences. While there

is little objection taken to the application of this restriction to sexual offences, there is significant concern about extending its application to proceedings for 'violent offences.' The definition of 'violent offences' includes common assault and assault occasioning actual bodily harm as well as a range of more serious crimes. The Bill requires that if a defendant is self-represented in such a proceeding, then they are required to obtain representation for the purpose of cross-examining the complainant. Unlike the equivalent provision in Queensland's *Evidence Act 1977* (which is the only remotely comparable provision in Australia in relation to 'violent offences') the Bill does not provide a mechanism for assisting the defendant to obtain or fund this mandatory representation. There is no agreement for a court-appointed (or funded) representative to become involved — nor has there been any specific agreement made for Legal Aid ACT to take up the slack.

Another concerning aspect of the Bill relates to the disclosure of evidence. The Bill provides for witnesses in proceedings for sexual and violent offences who are children or intellectually impaired to have their evidence-in-chief constituted by the playing of their original police interview rather than by their giving evidence in person. Unfortunately, however, the Bill sets out a convoluted and restrictive process for allowing the defendant and his or her legal representatives access to a copy of a video recording of the interview. They must first send written notice of their request for access. They are then given access to see and listen to the police interview but they are not permitted to take or obtain a copy of the video.

Since the Bill was presented, submissions have been provided to the Attorney-General by members of the local profession, the ACT Legal Aid Office and Human Rights Commission, all of whom raised concerns about the effect of some aspects of the Bill. In particular, the ACT Human Rights Commission went so far as to warn the Attorney-General that the proposal to extend the restriction on direct cross-examination of complainants by defendants to proceedings for violent offences runs a real risk of being the subject of (perhaps the first) 'declaration of incompatibility' under the ACT *Human Rights Act* issued by the Supreme Court. As the ACT Government approaches the caretaker period commencing 12 September 2008 — and in advance of the election on 18 October 2008 — only time will tell whether any of these warnings are heeded.

E. McLAUGHLIN is a solicitor with Legal Aid ACT

AAT casts shadow over ACT human rights oasis

The ACT Administrative Appeals Tribunal has set aside the Discrimination and Human Rights Commissioner's decision to refuse to exempt from the ACT *Discrimination Act 1991* conduct that would discriminate on the grounds of nationality and national origin (*Raytheon Australia Pty Ltd & Ors v ACT Human Rights Commission* [2008] ACTAAT 19). The AAT will now grant the exemption and permit the discriminatory conduct.

Raytheon Australia, a defence systems multinational, sought the exemption on the basis that it was contractually bound by the US International Traffic in Arms Regulations (ITAR) to restrict the activities of employees who are 'nationals of third countries', when working with imported defence technology. Raytheon maintained that, without the exemption, it would have to cease operations in the ACT, and this would impact not only on the local economy but also on Australia's national security and defence capacity.

Raytheon also relied on a similar exemption to anti-discrimination laws having been granted in each state jurisdiction where it had been sought. So far, exemptions that allow racial discrimination have been granted to Raytheon and other defence manufacturers in Queensland, New South Wales, Victoria, South Australia and Western Australia.

The AAT judgment is usefully summarised and analysed at <acthra.anu.edu.au/cases/case.php?id=86>. It is a disappointingly narrow reading of both the *Discrimination Act* and the *Human Rights Act 2004*. A spokesman for Civil Liberties ACT said that an exemption is 'authorised racism'. The Commissioner, Dr Helen Watchirs, is considering whether to appeal the decision.

The Commissioner's decision not to grant the exemption (at <hrc.act.gov.au> under 'News'), emphasised the harm done by racial discrimination, and distinguished the ACT statutory framework from that in other jurisdictions because of its *Human Rights Act*. The decision was warmly praised by the Secretary of Unions ACT, Kim Sattler, who applauded the Commissioner's 'bravery in meeting her obligations to uphold the right to equality'.

Following the AAT's decision, Ms Sattler noted that the issue of ITAR's discriminatory application in Australia needs to be resolved at a federal government level. An Australia-US defence treaty is currently being considered by the Joint Standing Committee on Treaties, but its terms do not change the ITAR requirements that restrict the activities of employees according to their nationality.

ACT COMMITTEE

NEW SOUTH WALES

'Taking justice into custody': the legal needs of prisoners

The Law and Justice Foundation of NSW has just released *Taking Justice into Custody*, a study exploring the capacity of prisoners in NSW to get legal assistance for their criminal, civil and family law issues. The study included in-depth interviews with prisoners, ex-prisoners, prison staff, legal and other support services as well as a review of available literature and statistics.

The report highlighted the range of legal issues people face as they move through the incarceration process. While all prisoners have criminal law issues, imprisonment also entails civil and family law problems as people are suddenly excised from their daily lives. These add to legal problems accumulated prior to custody and those particular to being an inmate (eg prison disciplinary matters, parole).

The study identified opportunities for prisoners to access legal information, assistance and representation, including prison libraries, assistance from prison staff, access to a telephone legal advice service and visiting legal services. However, research also illustrated how opportunities may be missed or compromised through the interplay of factors such as the prison and legal environments, inmates' own capacity, convoluted pathways to legal help, and prison culture.

The report and summary report can be downloaded at <lawfoundation.net.au/publications>. Hard copies can also be ordered from the Foundation on 02 9221 3900 or <publications@lawfoundation.net.au>.

SUZIE FORELL is senior researcher at the Law and Justice Foundation of NSW.

NORTHERN TERRITORY

The Blue Mud Bay case

The recent High Court decision in *Northern Territory of Australia v Arnhem Aboriginal Land Trust* [2008] HCA 29 (30 July 2008) (the 'Blue Mud Bay' case) confirms what many Yolgnu have always known: their land was never subject to faraway notions of *ngapaki* (white law) sovereignty and colonisation, but always remained part of the *rom*, or Yolgnu law and custom. Although conscious of the reality that the Australian state asserts sovereignty over them, it is not something the Yolgnu ever accepted or consented to.

In March 2007 the full court of the Federal Court (French, Finn and Sundberg JJ) held in *Gumana v Northern Territory* (2007) 158 FCR 349 that, following two grants made in 1980 as an estate in fee simple under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), the traditional owners of Blue Mud Bay in north-east Arnhem land had exclusive fishing and recreational rights over the intertidal zone and tidal rivers overlying the granted parcels of land. This had an immediate impact on existing commercial fishing enterprises in the Northern Territory, as 80 per cent of the coastline is Aboriginal land.

The Northern Land Council, on behalf of the Northern, Tiwi and Anindilyakwa Land Councils, immediately entered into negotiations with government and industry to grant interim permits and licences for industry fishing in the intertidal zone. The Councils observed it was the Yolgnu's intention to become more involved in the fishing industry.

The Northern Territory Government and Fishing Industry lodged an appeal, arguing the *Fisheries Act* (NT) did give the Director of Fisheries the power to issue fishing licences to those fishing in waters overlying Aboriginal Land. On 30 July 2008 the High Court by majority upheld the decision of the full court of the Federal Court, stating that persons who entered the intertidal zone were entering onto Aboriginal land, therefore fishing licences issued under the *Fisheries Act* did not apply and the entry was not 'otherwise in accordance with ... a law of the Northern Territory'.

The decision marks a significant development in Native Title law across Australia. To date, most litigation has either confirmed the existence of sovereignty over Aboriginal land, or fixed up gaps in favour of the presumption of colonisation. This case, however, confirms for the Yolgnu position that their *rom* exists, as well as assertion of their rights under Native Title.

In a separate matter, in June 2008 Mansfield J granted permission for the owner of the McArthur River Mine, Xstrata, to divert the McArthur River to allow for expanded mining operations (*Lansen v Minister for Environment and Heritage* [2008] FCA 903). Apart from environmental concerns, traditional owners say the diversion will upset traditional cultural process and sacred sites. Already a number of complaints have been made by traditional owners seeking access to the land covered by the mining lease. Following Mansfield J's decision, trespass notices were issued to a number of traditional owners who wished to perform ceremony at one of the sites. An appeal was heard in the full court of the Federal Court in mid-August 2008, with a decision to be handed down in December.

RUTH BREBNER is a Darwin lawyer.

QUEENSLAND

The politics of indifference

Regular readers of this journal will recall a Brief in June 2007 by Tamara Walsh ('Poverty and the criminal justice system', Vol 32(2), 108–109), previewing a research report into homelessness, poverty and the criminal justice system in Queensland. A more detailed account of the research is provided in this issue (at p 160). Dr Walsh's research report, published as 'No Vagrancy: An examination of the impact of the criminal justice system on people living in poverty in Queensland' (available at <qshelter.asn.au/files/No-Vagrancy-Combined.pdf>) raised concern, among other issues, about police move-on powers, recommending that they be substantially narrowed.

The Queensland Government has so far not responded to the report, with Police Minister, Judy Spence, reported in the *Courier-Mail* (Margaret Wenham, 'Clamour for Spence sacking gets louder', 5–6 July 2008, page 30) as suggesting the (impeccably researched) report was just 'a compendium of views from nameless, homeless people'.

Two recent cases confirm the validity of the concerns raised by the 'No Vagrancy' report.

In 2006 old age pensioner Bruce Rowe, who had become homeless following the death of his wife some years earlier, was changing his clothes in a public toilet in the Queen Street Mall. A cleaner at the end of his shift became sick of waiting for him to vacate the toilets and asked police officers to remove him. Rowe was found guilty in the Magistrates Court of contravening a 'move on' order and of obstructing police, under the *Police Powers and Responsibilities Act 2000* (Qld). After unsuccessfully appealing to the District Court, the convictions against Rowe were quashed by the Court of Appeal in June (*Rowe v Kemper* [2008] QCA 175, 27 June 2008).

In the other case, homeless man Peter Willimae was drinking alcohol in a public place with a friend in inner city Brisbane in March this year. After refusing to dispose of the alcohol when asked to do so by police officers, the situation escalated. Police searched his bag, a scuffle ensued, and Willimae was pinned to the ground, kneed and punched. A passing third party, who suggested that the force being used was excessive, was charged with obstructing police. The whole incident was caught on video camera. The third party successfully applied for and used the video footage in his court hearing, and in mid-July the magistrate dismissed the charge and awarded costs in his favour. Willimae's charge was heard by a different magistrate, without the video footage, and he was found guilty and fined \$400. The treatment of Willimae has been referred to the Ethical Standards branch of the Queensland Police.

Following the Court of Appeal's decision in the Rowe case, the Queensland Council for Civil Liberties, the chair of the Legal Aid Commission, and a range of community organisations were quoted in Wenham's article in the *Courier-Mail*, calling on the Police Minister to resign, given her studied intransigence on the underlying issues raised by the case.

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SOUTH AUSTRALIA

Assimilate! Integrate! Tolerate! Accept?

Resettling in Australia raises difficulties for people of all ages, but arguably difficulties are exacerbated for young people. The majority of African youth have arrived in Australia as humanitarian entrants, often as unaccompanied minors or as guardians for young siblings. Many have experienced years of protracted social and political conflict, displacement, loss of family members, abuses of power by authorities and impoverished and unsafe conditions in crowded refugee camps.

A significant shortcoming of Australia's Integrated Humanitarian Settlement Strategy is the lack of legal education programs that can assist individuals to achieve adequate levels of understanding of their legal rights and obligations. For migrant and refugee youth, this can significantly impair their ability to uphold their rights and responsibly participate in society, resulting in a risk of social alienation.

The Legal Education and Awareness Project (LEAP) is an initiative of the Legal Services Commission of South Australia providing youth-focused and culturally appropriate legal education for African youth from newly arrived and emerging communities. The project was funded by a state Attorney-General's Crime Prevention Grant for one year. In response to strong community support, and in recognition of the significant issues it is addressing, the Commission has decided to fund the project for a further year.

Since its launch in September 2007, the project has delivered (to July 2008) 26 education sessions to a total of 440 mainly African youth from the Sudan, Eritrea, Ethiopia, Somalia, Congo, Burundi, Kenya, Zambia, Liberia and Sierra Leone, from a diversity of cultural and linguistic backgrounds. LEAP sessions involve conversations around both rights and responsibilities, with a focus on strengthening community links and connecting youth with the various support networks available.

A key focus of LEAP has been to address issues arising from the interactions of police with African youth. Youth involved with LEAP report that they are frequently approached and questioned; photographed; subjected to 'heavy handed' treatment for minor offences resulting in escalating conflict and further charges such as resisting arrest or assaulting police; subjected to verbal threats, derogatory and racist comments, and excessive force – in some cases while restrained; and ridiculed or dismissed if they mention they may report an incident. While these reported issues may be shared by youth generally, they appear to be a particular problem for African youth.

A recent report by the Migrant Resource Centre showed that 72 out of 468 youths taking part in a survey had been arrested and charged with minor offences during 2005 to 2007. The Commission duty solicitor at the Youth Court has noted that African youth are overrepresented in offences such as loitering, providing false details and resisting arrests. Perhaps this is the practical side of the intellectual debate between integration and acceptance.

An important dimension of LEAP is to build positive relations between communities and the police. Police have invited the LEAP Legal Education Officer to deliver training to enhance their understanding of young people's pre-migration experiences and the challenges of resettlement. LEAP has also contributed to the continuing professional development

program for SA Magistrates, and is working with the community relations committee of the Courts Department.

The interest generated by LEAP confirms the value of providing young people with opportunities to improve their understanding of legal rights and responsibilities and to express their views and expectations of the justice system and law enforcing authorities.

For further information on LEAP, contact Christian Cifuentes, Legal Education Officer, on 08 8463 3699, cifuentes.christian@saugov.sa.gov.au

Australian law says WHAT...?!

Since March 2004, the Legal Services Commission has run a project to develop migrant communities' understanding of Australian law, with a particular emphasis on family law, including domestic violence and child protection. The Family Law & Culturally and Linguistically Diverse (CALD) Communities Project has been working with new and emerging migrant communities to find what they need to know about family law and what legal problems they face in Australia. This has enabled development of a framework of culturally appropriate and practical legal education, in the form of workshops, cartoon-based learning resources and theatre, shared so far with over 6,000 migrants in South Australia.

While there is a broad range of migrant communities in South Australia, the Project's main focus is on arrivals under the Humanitarian and Refugee Program, who tend to be more vulnerable and require intensive support. They include groups from Uzbekistan, Iraq, Burma, Afghanistan, Southern Sudan, and Western and Central Africa where no comparative legal systems exist and the rule of law has been compromised by war and political instability. The Family Law & CALD Communities Project enhances the understanding of new and emerging communities about Australian family law, domestic violence and child protection, which can present a major challenge for many people settling from these vastly different cultural and legal systems.

For further information on the Family Law & CALD Communities Project, contact Kate Howard, Legal Education Officer, on 08 8463 3396, howard.kate@saugov.sa.gov.au, or visit lsc.sa.gov.au/cb_pages/cald_resources.php.

CATHERINE IRVING is a Legal Education Officer working in Adelaide.

TASMANIA

More than six years after the then Attorney-General Peter Patmore requested the Tasmanian Law Reform Institute review Tasmania's sentencing laws, the comprehensive Final Report was finally released in June 2008. The Report makes 96 recommendations including the establishment of a Sentencing Advisory Council, whose primary role would be to bridge the gap between the community, courts and government by informing, educating and advising on sentencing matters. The proposed establishment of the SAC is timely with vocal opponents, including *The Advocate* newspaper in Tasmania's north-west, concerned at the adequacy of sentences for violent and property crimes, and critical of bail decisions.

Importantly, the Final Report concludes that:

[i]f there is a perception that sentencing is becoming more lenient this is not borne out by the evidence of Supreme Court sentencing patterns. If anything sentencing has become more severe.

The introduction of the 'day fine', calculated as a proportion of the daily income of the offender, was also recommended although the Report suggested a feasibility study be undertaken to ensure a workable model could be adopted. If introduced, Tasmania would be the first jurisdiction in Australia to adopt such a system, although given the support for the concept from a number of law reform bodies, including the Australian Law Reform Commission, it should not be long before other jurisdictions also move in this direction.

BENEDICT BARTL is Solicitor at Hobart Community Legal Service

VICTORIA

Transparency and accountability in prison administration

A recent VCAT decision (*Western Suburbs Legal Service v Department of Justice*, VCAT, Unreported, Deputy President Coghlan, 25 June 2008) has held that a report regarding separation orders and high security units in Victorian prisons is not exempt from disclosure under the *Freedom of Information Act 1982* (Vic). VCAT ordered that the document should be released to Western Suburbs Legal Service ('WSLS').

In reviewing the original decision of the Department of Justice to deny access to the document, VCAT considered the 'public interest' arguments for release of the document in the context of human rights considerations regarding separation orders and transparency of Correctional Services.

WSLS had sought access to the document '*Corrections Inspectorate Review of the Administration of Separation Orders – High Security and Management Units*' ('Report') dated September/October 2004, produced by the Corrections Inspectorate ('CI'), now Office of Correctional Services Review ('OCSR').

The Department contended that the Report was exempt from release pursuant to the FOI Act because it deals with internal working documents and relates to documents to which the secrecy provisions of the *Corrections Act 1986* (Vic) apply.

WSLS contended that the exemptions did not apply, and that the public interest required release of the Report.

In determining the issue in favour of WSLS, VCAT referred to the strong public interest in transparency regarding separation orders, and public debate regarding the operations of CI/OCSR.

The proceeding involved a number of human rights considerations, in light of the standards enshrined in the *Victorian Charter of Human Rights*, the *ICCPR*, the *UN Standard Minimum Rules for the Treatment of Prisoners*, and the *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.

WSLS submitted that both the Department and VCAT are obliged by s 7(1)(g) of the *Public Administration Act 2004* to respect and promote the human rights set out in the *Charter* in making decisions and in its actions generally. As well, WSLS submitted that, under s 32 of the *Charter*, VCAT should interpret the 'public interest' in the FOI Act in light of the 'right to access information' in s 15 of the *Charter*.

VCAT did not actually make a ruling on the *Charter*, but did find that the public interest clearly weighed in favour of release of the document, saying (at 63):

...there is a public interest in ensuring that the prison system operates appropriately; disclosure, if anything, can only promote its good administration.

ZOE BATEMAN and **CARMEL MCINERNEY** are lawyers with Corrs Chambers Westgarth and acted pro bono for Western Suburbs Legal Service in the proceeding.

WESTERN AUSTRALIA

New homicide laws for Western Australia

On 1 August 2008 the *Criminal Law Amendment (Homicide) Act 2008* (WA) ('the Act') commenced operation. The Act significantly amends WA's homicide laws. Many, but not all, of the changes are consequent upon the Law Reform Commission of Western Australia's *Review of the Law of Homicide* report discussed in March 2008's *DownUnderAllOver* (Vol 33(1), p 56).

Prior to these reforms, there were three general homicide offences in WA: wilful murder, murder and manslaughter. Now, consistent with all other Australian jurisdictions, there are two general homicide offences: murder and manslaughter. However, the newly-defined offence of murder is different from other jurisdictions. The mental element of murder in most Australian jurisdictions includes an intention to kill or cause grievous bodily harm. Under the *Criminal Code* (WA) the term 'grievous bodily harm' encompasses both life-threatening and permanent injuries. Under the new laws an intention to cause a permanent but non life-threatening injury is no longer sufficient to establish the mental element of murder. The offence of murder also includes what is commonly referred to as 'felony-murder'. In simple terms, the type of conduct that will constitute murder in WA is now confined to circumstances where death is intentionally caused; caused by the intentional infliction of life-threatening harm; and is caused by the infliction of life-threatening harm and that harm is inflicted for an unlawful purpose.

The Act also makes major changes to a number of defences, with defences of emergency and duress reformulated. Notably the defence of duress is, for the first time in WA, available as a defence to murder. Self-defence has been simplified and expanded, partly to ensure that the defence is available in appropriate cases to victims of domestic violence. A partial defence of excessive self-defence has been introduced; this applies if the act that caused death was an unreasonable response in the circumstances but where all other requirements of self-defence are met. The partial defence of provocation has been repealed; WA being the third Australian jurisdiction to abolish this defence. The offence of infanticide has also been removed.

Importantly, the penalty for murder has been changed: life imprisonment is no longer mandatory. A person convicted of murder in WA will now face life imprisonment unless that sentence would be 'clearly unjust' given the circumstances of the offence (and the offender) and the offender is 'unlikely to be a threat to the safety of the community' once released. There is now sufficient discretion to enable sentencing judges to impose a proper sentence in cases calling for leniency. Such cases might include a mercy killing, a killing carried out as part of a failed suicide pact, a killing by a mother of her infant and a provoked killing where the offender does not pose any danger to the community.

VICTORIA WILLIAMS is co-author of the Law Reform Commission of Western Australia's *Homicide Report*.