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President, ALRC

It is almost impossible to believe, but this is the 20th opening Comment for *Reform* that I have written. Perhaps even more impossible to believe, these will be my final comments, since I will be stepping down on 30 November 2009 after more than 10 years as President of the Australian Law Reform Commission (ALRC).

The first edition of *Reform* was launched in January 1976 by the then Chairman of the ALRC, Justice Michael Kirby, who said the publication was 'designed to inform readers in an entirely informal way of the developments relevant to the reform of law in Australia'. Justice Kirby noted that:

> 'To escape irrelevance law reform must go out to the society it serves. In particular it must seek the participation and interest of the profession. It is usual to say that such a news sheet as this will only be as good as its contributors. But take heart. Remember this: it is designed to be read and thrown away. In due course, if a printing facility is acquired, a proper format will be designed and glossy photographs of persons prominent in law reform may even be introduced.'

The contents of that first edition included a summary of work-in-progress at the various Australasian law reform agencies and overseas developments (similar to what is now 'Reform Roundup'); a list of recent law reform publications and various other bits and pieces. It was 16 pages long.

Reform has grown and developed over the ensuing three decades, with the editorial quality consistently excellent, but the production standards rising dramatically during that period. It is unlikely that many readers actually treated Issue No 1 as a disposable item; certainly it is now the case that *Reform* sits proudly on the shelves in offices and libraries around the world.

No doubt *Reform* will continue to improve and evolve. Kirby's 1976 comment hinted at the link between advances in information and communication technologies and the production and dissemination of the journal and its contents. I would be surprised if, in future years, *Reform* does not take advantage of the opportunities of the electronic age, and utilise to a much greater degree the distribution and interactive capabilities of the internet, the ALRC's own increasingly sophisticated website, social networking sites, forums and blogs, and so on. At the moment, each issue of *Reform* is a wonderful resource—but a static resource. In future, I can easily see the major articles in *Reform*, written by the leading authorities in their fields (and it is rare for someone to decline an invitation to contribute) serving as a point of departure, stimulating interesting conversations, comment, criticism and debate across the community, rather than standing alone as an end in themselves.

The first edition of *Reform* with which I was associated focused on 'Arrivals and Departures: Issues in Immigration Law' (Issue 75, Spring 1999), and owed much to the insights and pre-eminent expertise in that field of my then colleague, Dr Kathryn Cronin—an ALRC Commissioner and, later, Deputy President—who is a now a leading London barrister specialising in human rights, migration and refugee claims, especially those involving children.

Since then, issues of *Reform* have been dedicated to such important themes as: 'Globalisation and Law Reform' (No 76); 'On the Bench: Perspectives on Judging' (No 77); 'Federalism and Regionalism' (No 78); 'The Challenge of the New Genetics' (No 79); 'Indigenous Customary Law' (No 80); 'Older People and the Law' (No 81); 'National and International Security' (No 82); 'Women in the Law' (No 83); 'Tribunals' (No 84); 'Media and the Courts' (No 85); 'Sentencing' (No 86); 'Corporate Social Responsibility' (No 87); and 'Juries' (No 90).

Perhaps it is only that they are among the most recent issues, and thus most fresh in my mind, but I am particularly proud of the issues on 'Life, Law and Leisure' (No 88, 2006); 'Water' (No 89, 2007); 'Animals' (No 91, 2008); 'Children and Young People' (No 92, 2008); and 'Native Title' (No 93, 2009).

All of these issues featured exceptionally strong content and production values, as well as provoking a great deal of discussion in the media and in the general community. For example, Dr Caroline West's article in *Reform* No 88 on 'The definition of the good life' spawned a fascinating national discussion through the media about Australians' attitudes to work and leisure—and in particular whether we work too many hours and in far too conventional a manner.

(It probably didn't hurt for promotional purposes that some media outlets misreported Dr West's floated suggestion of a five-hour work day as an ALRC recommendation to Government!)

Issue 89 on 'Water' featured one of the most striking cover images ever used for *Reform*, as well as a wonderful lead article by Australian dramatist, actor, comedian and broadcaster John Doyle. Entitled '100 years of mad ideas: The destruction of the Murray-Darling', this article could be taken for a brilliant piece of satire—were it not so strikingly, and tragically, accurate. The remainder of this Issue explores a range of critical concerns about water law, policy and management on the world's driest continent.

The special edition on 'Animals'—or more precisely animal law and welfare—also captured the public imagination, with such an unprecedented response that we abandoned our normal commercial practice and made the issue immediately available, in full, on the ALRC's website. My own comment that animal welfare may well become 'the next great social movement' has been quoted very extensively in Australia and overseas—and normally with approval, although occasionally there is the strange suggestion that concern for animals must come at the expense of people and take precedence over human rights, as if humanitarianism is a zero-sum game. In this Issue, we had the enormous honour and pleasure of securing an introductory article by Professor John Coetzee, the world-renowned novelist, critic, translator and Nobel Prize winner in Literature. (This led to some lively discussion within the ALRC about which of us would be brave enough to edit the work of a Nobel Laureate. In the event, of course, there was not even a single word we considered changing.)

In *Reform* No 92, the ALRC took the opportunity to reflect on what had happened—and even more significantly, what had not happened—in the decade following the release of the report *Seen and Heard: priority for children in the legal process* (ALRC 84, 1997), which considered Australia's obligations as a party to the *International Convention on the Rights of the Child*. The Issue contained a star-studded list of authors, including the Chief Justice of the Family Court of Australia, the Hon Diana Bryant, Federal Court Justice Susan Kenny, NSW Commissioner for Children and Young People Gillian Calvert, juvenile justice experts Rob White and Jenny Bargen, and the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Tom Calma.

However, most of the extensive media reaction was prompted by the sobering assessment provided by the National Children's & Youth Law Centre's James McDougall, Tiffany Overall and Peter Henley, whose review of the past decade indicated a disappointing lack of progress in many areas. For example, the ALRC's recommendation to establish a dedicated Children's Commissioner had been taken up in some states and territories, but not at the federal level. More worrying, the review found that: (a) only 5–10% of court case charges of child sexual assault are finalised, with only half of those resulting in conviction; and (b) the number of children Australia-wide in need of protection more than tripled over the decade, from almost 92,000 to more than 309,000. Hopefully, *Reform* No 92 served to rekindle the public debate about children in the legal system in such a way as to preclude another decade of inaction—there is no doubt that child protection and juvenile justice are areas in critical need of better policy, practice and resourcing.

Reform No 93, published earlier this year, focused on 'Native Title'—the vexed, complicated and controversial system through which Indigenous Australians can approach the courts to reclaim title to their customary lands and waters. This volume is certainly the most artistically accomplished of the nearly 100 editions of the journal to date, with a strikingly brilliant cover and interior graphic design work provided by David Williams and his team at Gilimbaa. Neither is the artwork let down by the editorial content. The Issue contained a majority of Indigenous authors, providing special expertise on the difficult legal, social, economic and environmental issues involved, as well as personal insights and passion. For example, it is impossible to read Monica Morgan's article 'What has native title done for me lately?' without feeling the frustration, sorrow and pain that comes with losing a native title claim in the courts, after already having lost your country through colonial appropriation.

Two other articles on native title prompted a great deal of media coverage and public debate. Tom Calma's scene-setting introductory piece frankly described the 'failing framework' of the current native title system, notwithstanding the 'good intentions'. The article by the Chief Justice of the High Court of Australia (and former ALRC Commissioner), the Hon Robert French, also candidly acknowledges the legal and practical difficulties facing Indigenous parties to a native title claim, and offers 'some modest proposals for improvement'—including, controversially, the possibility of reversing the burden of proof in such cases.

This edition of *Reform*, No 94 'Housing', focuses on one of the most pressing issues facing the nation today, the ability to provide adequate housing for all Australians. Federal Government initiatives in this area are outlined by the responsible Minister, the Hon Tanya Plibersek MP. Australian Human Rights Commission President, the Hon Catherine Branson, and her colleague Dr Cassandra Goldie assess the human rights implications of the national housing strategy, while Adam Farrar (NSW Federation of Housing Associations) considers the ramifications of a policy shift to community housing options. Various aspects of homelessness are debated by Robin Banks (Public Interest Advocacy Centre) and Chris Hartley (Homeless Persons' Legal Service), Karen Wilcox and Ludo McFerran (Australian Domestic and Family Violence Clearinghouse), and Rebecca Reynolds (Twenty10). Respected

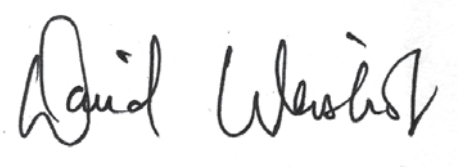
Aboriginal community leader Tom Slockee provides a personal perspective on Indigenous housing, drawing on his lengthy experience in this field. Chris Lamont (Housing Industry Association) discusses housing affordability, while Ian Winter (Australian Housing and Urban Research Institute) calls for more informed and constructive debate around the social objectives of land use planning. Other articles discuss reforms required in the areas of tenancy rights (Deborah Pippen, Tenants' Union ACT); and housing for the elderly (Susannah Sage Jacobson, Public Interest Law Clearing House of Victoria). The final article on this subject, by academic Graeme Wiffen, discusses the tensions that often arise in practice between providing housing and preserving heritage.

I want to take this last opportunity to acknowledge and thank the many Commissioners and staff of the ALRC who have contributed to *Reform* during the past decade, especially those involved in the less glamorous but no less important aspects of production, such as identifying and liaising with authors, editing copy and proofreading (and proofreading and proofreading some more). Finally, enormous thanks must go to the legion of people—from Australia and overseas; from other parts of government; from the judiciary, the legal profession and other professions; from industry and commerce; and from the universities, schools and the general community—who have written articles for *Reform*, or suggested themes, or maintained a subscription, or otherwise engaged with the ALRC in its inquiry work and community education efforts.

I began my Comment piece 20 editions ago, in *Reform* No 75 (Spring 1999), by remarking that:

> When I arrived in Australia in 1979, I was greatly in awe of the quality and breadth of the work of the Australian Law Reform Commission and its then chairman, Justice Michael Kirby. So it is with more than the usual politeness that I say I am deeply honoured to have been appointed to lead the Commission into the next century.

I am no less in awe of the institution a decade later, and can now appreciate even more the depth of the honour and the degree of trust.



HOME

Putting housing back on the agenda

The federal Government's response

By Tanya Plibersek

The Hon Tanya Plibersek MP, the ALP Member for Sydney, is the federal Minister for Housing, Minister for the Status of Women.

When Abraham Maslow proposed his famous hierarchy of needs, he found that housing and shelter were among the most basic.[1] Our homes are the base on which we build our lives, raise our families and become part of a community. For most Australians, their home is their largest asset.

In recent years it has become clear that there are significant public policy issues in Australian housing. The average cost of a house rose from five times the average income in 1996 to eight times the average income in 2007.[2]

For several years, rents have been rising faster than the Consumer Price Index (CPI). Data on rental stress shows that low and moderate income earners have been bearing the brunt of this problem.

More than 100,000 Australians are homeless every night.[3] Of greatest concern is that this estimate came from the 2006 Census, after more than a decade of economic growth.

The problem that underlies all of these issues is the supply of new homes. The National Housing Supply Council estimates that in 2009 Australia needed an additional 85,000 houses.[4] This is a problem that has been building over many years and will continue to worsen without major reform.

The global financial crisis

Overseas housing markets, particularly the US, contributed to the global financial crisis (GFC). The Australian housing market, in contrast, has not been significantly affected by the GFC. The undersupply of housing in Australia—and more cautious lending practices and better regulation in the banking sector—have protected us from some of the catastrophic events we've seen overseas.

The Government has updated consumer protection laws for mortgage holders. A single national regime is being established for the regulation of consumer credit with the Australian Securities and Investments Commission (ASIC) as the national regulator. Under the new laws all lenders will be required to consider hardship applications and the threshold for this assistance will be increased to $500,000.

The global financial crisis has reduced access to finance in the housing sector, particularly in multi-unit developments. There was a danger that even fewer houses would be built and the housing shortage would worsen.

That's why the Government's stimulus program has included large housing programs. More than 137,000 households had taken up the First Home Owners Boost by the end of July. The Boost, combined with record low interest rates, has helped a generation of first home buyers enter the market. At the same time, the Boost has supported jobs for builders and tradespeople as well as indirectly supporting jobs in finance, retail, building supplies and associated industries.

The Government has also made the largest ever investment in social housing. The social housing program is important for employment as well as being the first substantial increase in the supply of social housing in more than a decade.

Through the Nation Building and Jobs Plan we will build at least 19,200 new homes for public and community housing. We will also repair 60,000 existing dwellings. This will include major repairs to more than 10,600 run down homes that are already uninhabitable or were so run down they would have been sold off in the next two years.

Reform for the future

As Australia emerges from the global downturn, the need for reform will still be with us.

Over the past few years up to 150,000 new homes have been built each year. To make

a lasting difference to housing supply, we need to build up to 190,000 homes each year.

Delivering enough housing is a big challenge for all levels of government. Australians want housing that is part of a community and has good connections to transport, services and jobs. We also need housing in many different sizes and locations, reflecting different needs as people move through stages of life. Most of all we need housing at a price that people can afford to pay.

We need a good mix of greenfield developments on the edges of our cities and infill developments.[5] New housing needs to be linked to transport, either by making better use of existing infrastructure—like train stations and bus interchanges—or by adding new infrastructure as land is opened up.

The Australian Government has established Infrastructure Australia, including a major cities unit, to play a greater role in making our cities work. Funding has already been provided for key urban transport projects in several cities.

We are also working with the states and territories to improve the performance of our planning systems. Planning and land use policy need to deliver enough housing lots to meet future population growth, at prices that people can afford, in communities that provide people with good amenity.

Inefficiencies in planning systems add to the costs of building houses, costs that are eventually paid by home buyers. To improve housing affordability we need to reduce the time it takes to bring new developments online, without compromising the ability of residents to have a say in the future of their communities.

Low and moderate income earners

Low and moderate income earners, particularly renters, have been the most affected by housing affordability problems. Key workers in industries such as retail and hospitality, child care and apprentices have real difficulty in finding rental properties that they can afford.

Over the next four years, Australian Government programs will increase the stock of social and affordable housing by 80,000 dwellings: 30,000 in the social housing sector and 50,000 under the National Rental Affordability Scheme (NRAS).

We aim to encourage institutional investors, such as super funds, to invest in affordable residential housing. NRAS provides an annual payment for 10 years of $8,672, indexed to the rental component of the CPI, to build new homes and rent them to low and moderate income earners at 20% below the market rent.

Already, more than 10,000 incentives have been allocated and the first tenants have moved into more affordable homes. Over the next few years the Government expects to allocate 50,000 incentives.

Over the past decade public housing systems have been allowed to run down. They are now only able to offer housing to very disadvantaged people. Stock numbers have dwindled and too many social housing tenants are living in communities without good access to services, transport and jobs.

In addition to building more homes, the Australian Government is working with the states and territories on long-term reform in social housing. Central to the reform agenda will be building a small number of not-for-profit housing organisations that can operate alongside state and territory housing departments. We aim to build larger, commercially sophisticated organisations that can deliver better results for tenants and partner with the private sector to increase stock numbers. Over time we expect not-for-profits to become partners in big infill projects, guaranteeing that a proportion of new housing is available for people on low incomes.

Creating a new social housing system will be a decade-long reform. The first steps will include legislation to establish a regulatory system for not-for-profit providers, including appropriate prudential supervision. All governments have agreed to a range of reforms which provide more choice and involvement for tenants and improve the viability of the social housing system.

Homelessness

The Road Home, the Government's White Paper on Homelessness, was released in December 2008.[6] *The Road Home* sets the direction for our efforts to reduce homelessness and includes a role for all levels of government, non-government organisations and the community.

The Australian Government and the states and territories have provided $1.1 billion of new funding for homelessness services and homelessness-specific capital projects. These funds will be spent using Homelessness Implementation Plans in each state and territory and will see the expansion of services focused on helping people who are homeless find a house and keep it for the long term.

All states are putting a greater focus on preventing homelessness through programs such as youth services that keep people connected to their families or in education and training. Women and children escaping domestic violence will receive greater help to remain at home by improving security and providing perpetrators with other accommodation.

There are important legal and policy reforms that will contribute to improving the lives of people who are homeless. The House of Representatives is currently conducting an inquiry into homelessness legislation that will provide valuable advice as to what should be included in a new *Homelessness Act*. The inquiry will consider what should be done to promote high quality services for people who are homeless and the principles that should underpin

homelessness efforts. The Committee is expected to report in December 2009.

Attorneys General are currently discussing laws relating to domestic violence, including the recognition of apprehended violence orders across state borders. The Government's electoral reforms are considering barriers to voting for some people in the community, including people who are homeless and may have difficulty enrolling and voting.

Housing policy in Australia is coming under greater focus. Given the impact of housing policy on our families, communities and working lives, this should be no surprise. Increased birth rates, immigration, ageing and changes to the way we want to live will all mean that housing reform will continue to be necessary in years to come.

Endnotes

1. Psychologist Abraham Maslow first proposed a concept of a hierarchy of needs in his 1943 paper, *A Theory of Human Motivation*. The hierarchy suggests that people are motivated to fulfill basic needs, before moving on to other needs.
2. Real Estate Institute of Australia, Research Data Series: *Quarterly median house prices, all capital cities,* September 1996 and December 2007 and ABS Catalogue No. 6302.0: *Average Weekly Earnings, Australia*, Table 2, September 1996 and November 2007.
3. Australian Bureau of Statistics, *Counting the Homeless* (2008).
4. National Housing Supply Council, *State of Supply Report 2008* (2009).
5. A 'greenfield development' is development on lands that have yet to be built upon outside of agriculture or forestry uses, while 'infill developments' use land adjacent to or between existing development.
6. Department of Families, Housing, Community Services and Indigenous Affairs, *The Road Home: A National Approach to Reducing Homelessness* (2008).

From public to not-for-profit

The transformation of the social housing system

By Adam Farrar

On 29 March this year, the Federal Minister for Housing, Ms Tanya Plibersek MP, in a speech to the Sydney Institute, signalled a major policy shift—the decline of the public housing model in favour of the not-for-profit sector or 'community housing'.[1]

Policy options now being modelled within the Department of Families, Housing, Community Services and Indigenous Affairs propose a medium term target of growing community housing from around 45,000 homes under management today to 150,000. Much of this would be achieved through the transfer of housing managed by state housing authorities to community housing.

This is a profound policy change; although Australia lags behind other countries like the United Kingdom and the United States by more than 25 years in making this move. Of course, it mirrors other changes in service provision, such as alternate care, from state run to community run and state regulated. However, it is important to see how this change might be effected and what the benefits will be for lower income households.

The housing policy challenge

For more than 20 years housing policy in Australia has been a backwater. Because of this the housing system—as it affects low and moderate income households—has sunk deeper and deeper into crisis.

The headline problem of housing affordability is now fairly well recognised. Australia has among the least affordable housing of developed countries. Surprisingly, the global financial crisis has so far produced little more than a small dip in house prices in Australia, while in the US and the UK the housing bubble has burst with disastrous results for the economy and overextended low income households.

But below this apparently good news, our ongoing affordability crisis has particularly serious consequences. At the most extreme, it has made it almost impossible for many of the 100,000 people who are homeless on any one night to find secure accommodation. At the other end, it has created a growing polarisation between the generation who achieved high levels of home ownership and the wealth provided by that asset, and a generation for whom homeownership is now an impossibly high hurdle. This produces lifelong differences in social outcomes. While there has been a recent surge in first home ownership, made possible by the increase in the First Home Owners Grant and lower interest rates as a result of the current financial crisis, it is likely that this will be temporary as interest rates again increase and unemployment rises sharply. The subsequent pressure on rental markets is pushing up rents and displacing low income households from the few affordable rental properties available. A major consequence of all this is polarisation in our cities and in access to employment, as low and moderate income households are forced to live further away from available jobs, which in turn means many crucial services cannot access the lower-paid workforce they rely on—such as care workers—in high cost areas.[2]

The policy inertia in the face of the 'housing affordability crisis' over the past decade or more is made up of four linked policy failures.

- ◇ There has been a tragic failure to provide access to more appropriate community based accommodation as a process of deinstitutionalisation has been implemented over the past 20 years. The result has been an increased demand on public housing from people with complex needs and fewer alternatives for people who are homeless.
- ◇ In almost every Australian jurisdiction, there has been a reduction in the supply of public housing. Even as housing affordability has decreased, funding for public housing has fallen. In response to the scarce supply, public housing has become more tightly rationed to those on the lowest income. But because rents are based on household income, rental income also fell, forcing state housing authorities to sell off public housing just to raise funds to keep operating.
- ◇ There has been a failure to support the supply of low-cost rental housing for low and moderate income working households.

Adam Farrar is the Executive Director of the NSW Federation of Housing Associations, the peak industry body for housing associations in NSW. Adam is currently the Principal Housing Policy Adviser for the Australian Council of Social Service (ACOSS) and has held directorships in many community sector organisations, including ACOSS, NSW Shelter, Australian Housing & Urban Research Institute, Australasian Housing Institute, and Community Housing Federation of Australia.

Public housing, which once was a stepping stone for low income working families into home ownership, has been unavailable to this group so they have been forced to rent on the private market. The federal Government did provide tax incentives for investment in new rental housing—negative gearing and capital gains tax concessions. But these tax concessions pushed all new investment to the top of the market, while the supply of low cost rental housing fell. Low and moderate income private renters have been largely ignored in the housing crisis.

- ◇ Finally, most jurisdictions (except WA and SA) failed to support access to home ownership by lower income households following the collapse of the government funded home loans scheme HomeFund in NSW and similar agencies in other states.

All of this has begun to change with the policies put in place by the Rudd Labor Government. A new tax incentive, the National Rental Affordability Scheme (NRAS), has been introduced for affordable housing; a new National Affordable Housing Agreement between the states and the Australian Government has been signed; a National Partnership Agreement has been reached on homelessness; and more than $6 billion has been provided for new social housing as part of the economic stimulus measures. Title to the majority of the properties developed in this way will go to community housing providers.

But, of all these developments, perhaps the most far reaching—although the least explicit—is the policy objective of shifting from public housing to community housing as the main provider of low cost housing.

The contribution of the community housing sector

In the late 1970s not-for-profit housing providers began to emerge as a reaction to the one-size-fits-all approach to public housing. While public housing provided a volume response for low income working families, it largely excluded singles, people with disabilities, older people and other higher needs groups. These were the very people that the Commonwealth's Commission of Inquiry into Poverty—led by Professor Ronald Henderson in the early 1970s—had just shown were the most disadvantaged in the private rental market.

In NSW, housing associations, formed in 1982, went a step further than public housing and aimed to have an impact on the private rental market by head leasing private stock, providing access to households that real estate agents often excluded and helping to hold down prices in local markets.

The establishment of a sector that is more responsive to previously excluded groups and influences the market more widely has led to a robust network of not-for-profit housing providers operating in local communities or regions across the state. These providers have established a wide range of partnerships to ensure that their tenants have access to the supports they need to sustain housing. They have brought a community development approach to their local communities and working with their tenants.

This 'housing plus' approach now is taking on other dimensions. Community housing associations are providing housing that is accessible to low to moderate income working households. This not only responds to the affordability crisis for this largely ignored group, but it also provides a far more diverse community of tenants, diluting what has become concentrations of disadvantage—particularly in public housing estates. The Rudd Government's new NRAS will provide refundable tax credits[3] to subsidise investment in new affordable housing.

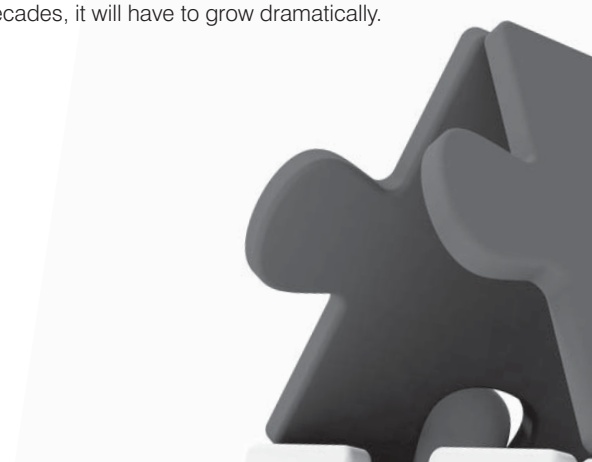
And this is another way the sector has been changing. Community housing providers can, and have been, leveraging public investment or subsidies by borrowing to construct more housing. Unlike the public sector, the community sector can borrow to increase the supply of low cost housing. Similarly, the community sector can use the tax concessions—particularly GST exemptions—that are available to charities to reduce the cost of procurement and maintenance.

Perhaps the best way to conceptualise the potential of these changes is to envisage two important aspects. First, not-for-profit housing providers are moving away from being defined by government programs. Instead they are operating a particular, not-for-profit part of the housing market (or 'housing system' if the term 'market' causes any nervousness). Second, they are beginning to provide the full suite of housing products (in the UK, for example, they provide home ownership products like shared equity) available to households, but specifically for low and moderate income households—the very people the existing market is so badly failing to supply.

In the UK and the US, housing associations complement this business with activities often described as social enterprise. In response to the needs of their tenants and the communities in which they are housed, many also provide training, education, preschools and the like.

A more responsive system

If community housing is to become the solution to the combined market and policy failure of the past few decades, it will have to grow dramatically.



In its first report last year, the National Supply Council (another initiative of the Rudd Government) projected the supply gap of affordable housing as 250,000 rental dwellings nationally.[4] While not all of this could be expected to be met by community housing providers, it indicates what a well-functioning housing system needs to do. Considering community housing currently manages around 40,000 homes,[5] very substantial growth is needed to meet demand.

Growth is also needed to build the kind of organisations that can operate successfully. Large balance sheets will help to support financing and provide confidence to private sector partners in larger development projects. But, far more importantly, growth is necessary to allow providers to employ staff with the specialist skills needed to deliver housing that will be sustainable for people with a range of needs; to undertake community building; and to design the innovate housing that will be sustainable into the future.

The largest housing association in the country today has a bit less than 3,000 homes. But the projections undertaken by the NSW Federation of Housing Associations suggest that some associations could be two to three times this size by the middle of next decade.[6]

So far, the capacity to grow is based on four strategies:

- ◇ taking on the management of a substantial part of the homes built under the Government's current economic stimulus package (around 20,000);
- ◇ managing a substantial part of the homes built using the NRAS tax subsidy (50,000);
- ◇ developing new homes by using the surpluses and leveraging the assets from the portfolio already managed; and
- ◇ transferring public housing stock to community housing.

The last strategy will, of course, not add directly to the supply of housing for low income households. However, by allowing tenants to receive rent assistance, it will add to income streams that can be used for future development. It will strengthen balance sheets. Finally, it will build stronger organisations that can operate effectively in the new environment.

More than these practical effects, however, the real impact of community housing will be to take affordable housing out of one paradigm—highly stigmatised, rationed more and more tightly, and subject to the short term policy decisions of government—into another that integrates this stock into a wider and growing affordable housing market.

Of course this transition also creates some tensions. Public housing providers, with their long waiting lists, are reluctant to lose the little resources they have to respond to this demand. These issues, however, can potentially be overcome.

With strong Commonwealth backing, a number of jurisdictions are creating shared waiting lists from which applicants can be drawn by both public and community housing providers. Better still, this can create a system in which consumers have no 'wrong doors' if they want to apply for low cost housing.

Any such system can be done well or badly. If community housing providers are simply required to house applicants based on the decisions of public housing systems, then many of the benefits of community housing are lost. But if there is a genuinely shared system, which provides easy access for applicants to a wide range of services, while allowing each provider to make their own allocations decisions, then we will have taken a great step forward. We are seeing both of these approaches emerge in different jurisdictions.

There is also another path that could ease the tension with public housing providers. That is to let them join the not-for-profit sector. As well as transferring management to existing not-for-profits, public housing management could be devolved to organisations at arms length from government created from the existing public housing operations in a particular area. These would, in effect, become not-for-profit housing associations.[7]

The other tension is between not-for-profits and for-profit providers. We have seen some of the major risks associated with the entry of for-profits into areas such as child care with the collapse of ABC Learning. Is it possible that we will reproduce this in the affordable housing segment of the housing market? On one hand we want to see low cost housing become a natural part of the housing market, and so should welcome the involvement of for-profits. But will it be at the expense of quality? Will it squeeze out the not-for-profit sector? Will it open the door to poorly regulated, high risk growth?

Legislative and regulatory changes

One answer is to extend the regulatory regime being required for not-for-profit housing providers to for-profits that deliver affordable housing using government subsidies such as NRAS or require them to contract out the management to not-for-profits if they wish to avoid this. Despite some advocacy, the Commonwealth did not go down this path with the introduction of NRAS.

Regulation has been a key underpinning of the growth of the not-for-profit sector. Four jurisdictions now have statutory regulation. NSW became the most recent when it moved from an administratively based registration system with a community housing amendment to the *Housing Act*.[8] The Commonwealth is currently progressing the establishment of a national regulatory framework, which could result in a single national regulatory system or in harmonising the existing state and territory approaches.

Regulation is important for three reasons. If public housing is to be transferred, it is essential to

protect the rights and level of service for tenants. From a government point of view, the protection of its assets and investments, and assurance that they will not be captured by providers, is crucial to winning central agency support. Thirdly, for the expansion of the system, appropriate regulation can make a big difference to the entry of financial institutions into low cost residential housing. In the UK, the knowledge that government was effectively ensuring the viability of organisations was crucial to the creation of a mortgage market and was calculated to be worth 100 basis points on the cost of funds.[9]

However, the best form of regulation is far from settled. At the moment, regulatory systems in different jurisdictions range from minimum compliance standards, to extensive black letter regulation. A well-regarded approach introduced in NSW (and currently favoured at a national level) takes a risk-based approach by both focusing the Code on the main areas of risk, and by assuming an approach to regulatory oversight that seeks to identify emerging risks in order to provide active support or intervention to prevent them becoming critical. And it is this approach that is needed to assure lenders that—as in the UK over the past quarter of a century—'no deal will fall over'.

Regulation of a new and expanding not-for-profit sector in housing markets is crucial. But there is just as strong an argument for extending regulation to the other parts of the system. This includes public housing as well as for-profit providers. Clearly, when regulating a fast evolving sector, there is a risk of over regulation. Other providers' systems, such as aged care providers, are beginning to enter this sector and are expressing concern about overlapping regulatory requirements.

Charitable status

There is one final legislative reform challenge that could make or break this vision of a fundamentally new low cost segment of the housing market led by not-for-profits. This is overcoming a threat to their charitable status, which would rule them out of the wider affordable housing business. Most providers are public benevolent institutions and rely on this status, not only to reduce costs through GST exemptions, but also for access to fringe benefits tax exemptions which make it possible to ameliorate the relatively low wages in all community sector services. However, the basis of their charitable status is the 'relief of poverty' head—something that the ATO has interpreted in its narrowest, most residualised form. Unless this interpretation changes, most providers will be required to narrow their service provision—providing only for the poorest of the poor.

A lot now hangs on the outcome of the current review of the Australian tax system.[10] If, as proposed by many from the sector, a new head of charity is introduced or the charitable purposes under the 'other purposes beneficial to the community' head is extended to explicitly identify the provision of affordable housing as a charitable purpose, a fundamental shift might be possible in the bottom end of our housing markets and in our approach to housing policy.

If not, Minister Plibersek's bold aspirations may never get off the ground.

Endnotes

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Human rights sign-posts along 'The Road Home'

By Catherine Branson and Cassandra Goldie

The release of the federal government's White Paper on Homelessness, *The Road Home*, in December 2008 marks the first time in 20 years that homelessness has been so prominently placed on the national political agenda.

The Road Home finally gives Australia a national housing strategy with clear targets for reducing homelessness.[1] This is significant. It represents an unprecedented and progressive step by the Australian Government towards reducing homelessness in Australia.

The Road Home signalled a need to strengthen homelessness legislation and, as a result, the Government has announced a Parliamentary Inquiry into homelessness legislation.[2] The House of Representatives Standing Committee on Family, Community, Housing and Youth 'will make inquiries into the principles and service standards that could be incorporated in such legislation' and give particular consideration to 'the scope of any legislation with respect to related government initiatives in the areas of social inclusion and rights'.[3]

The Road Home and the Parliamentary Inquiry provide us with the perfect opportunity to ensure that our efforts to reduce homelessness in Australia are effective and comply with our international human rights obligations.

This article suggests five human rights-based principles which should inform the government's response to homelessness: monitoring progress; participation in policy development and service delivery; preventing forced evictions; reform of public space law and effective remedies for breaches of housing rights.

Monitoring progress

Under the International Covenant on Economic, Social and Cultural Rights (ICESCR) to which Australia is a party,[4] we have an obligation to take steps, to the maximum of our available resources, to progressively realise the right to adequate housing for all people in Australia.[5] This involves all levels of government committing to measurable outcomes and taking 'deliberate, concrete and targeted' legislative, policy and budgetary steps towards the full realisation of the human rights of homeless persons.[6]

Australia's track record in meeting this international obligation was reviewed this year by the United Nations (UN) Committee which monitors the implementation of the ICESCR. The Committee expressed concern about the increase in the rate of homelessness in Australia. It requested that Australia's next periodic report include disaggregated data and information to allow the Committee to assess Australia's progress in realising the right to an adequate standard of living, including housing, in particular for Indigenous peoples.[7]

The Road Home certainly provides a ray of hope by identifying and committing the government to achieving key targets for reducing homelessness in Australia. Its dual target of halving homelessness and eliminating primary homelessness (for example, people 'sleeping rough') by 2020 should be commended. Progress towards these goals is to be measured through interim targets by 2013, such as a 25% reduction in primary homelessness and a 20% reduction in overall homelessness.

The Road Home also acknowledges that our current national data and research systems are inadequate to monitor how well we are achieving these targets.[8] This is not unusual. Governments face a significant challenge in monitoring whether they are meeting their international obligations to progressively realise the human right to adequate housing.[9]

The good news is that Australia is well-placed to become a leader in this area. The Australian Bureau of Statistics has developed a Homeless Enumeration Strategy,[10] which aims to generate Census data on the number of people who are homeless. Coupled with several other important data sources, the Strategy is a firm basis upon which to design a framework for monitoring Australia's compliance with its obligation to fulfil the human right to adequate housing. Work is also underway to develop a National Development Index to measure

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Australia's progress using social, economic and environmental indicators.[11] The degree to which the right to adequate housing is realised should be one of those indicators.

In sum, *The Road Home* sets out a promising national research strategy. It is imperative that the Australian Government now moves quickly on a strategy to address the gaps in data collection and research, which will be essential for tracking progress. The monitoring framework needs to be transparent, independently verifiable, and linked to our international obligations, to ensure accountability both to the Australian public and internationally.

Participation in policy development and service delivery

A human rights-based approach to addressing homelessness requires the direct and meaningful participation of people who experience it. Not only does their participation in the policy-making and service delivery processes accord them respect and dignity, it also improves the likelihood that policies and services will be relevant, effective and welcomed by those they are designed to assist.[12]

The Road Home has shown promise in this regard. It explicitly recognises as a guiding principle that people who are homeless or at risk of homelessness need to be placed at the centre of service delivery and design.[13] Moreover, it was developed through a public consultation process, during which more than 300 people experiencing homelessness gave their views.[14]

Putting this principle into practice is a challenge—but one that can be met. For example, the government can ensure that relevant services are sufficiently funded to enable the active participation of people experiencing homelessness in the management, decision-making and evaluation structures of these services. Guaranteed avenues for such participation could even be a part of contracting frameworks. Many excellent examples of participation by people experiencing homelessness in service delivery already exist and could provide important guidance.[15]

Preventing forced evictions

The international human right to adequate housing includes freedom from 'forced evictions'. However, forced eviction is the key causal factor of homelessness.[16] It is the main reason that couples, and couples with children, seek assistance from homelessness support services.[17]

According to Australia's international commitments under the ICESCR, we have an obligation to take all appropriate measures—to the maximum of our available resources—to ensure that adequate alternative housing or resettlement is available to those who are forcefully evicted and unable to provide for themselves.[18]

But Australia's record on this is far from perfect. First, we have been criticised by the UN Special Rapporteur on Adequate Housing for not having adequate legal protection in place to prevent forced evictions.[19] Secondly, we lack national standards for tenancy laws which could ensure compliance with the ICESCR. At present, state and territory tenancy laws typically permit landlords to evict tenants, even when the tenant will be made homeless.[20]

The Road Home indicates that the Australian Government will review tenancy laws. This is a welcome development.

The review should include a recommendation that all eviction laws comply with our minimum human rights obligations. A significant body of case law and analysis already exists to help construct the kinds of protections that need to be inserted into eviction laws to protect human rights.

For example, in South Africa, where the right to adequate housing is protected in the Constitution, the High Court of South Africa has ruled that, where a tenant will become homeless if evicted by a private landlord, the court may join the responsible government department to the eviction proceedings. The court can hear submissions from the government about arrangements to rehouse the tenant.[21] The Constitutional Court of South Africa has also ruled that, in appropriate cases, the government may be ordered to compensate a private landlord if an eviction needs to be delayed until re-housing can be arranged.[22]

This kind of procedure in our tenancy tribunals could significantly improve coordination of services and ensure that there is an appropriate balancing of the competing interests of private landlords and vulnerable tenants, especially when children are involved. This would also help to prevent people being made homeless, and reduce both the personal costs to those facing homelessness and the flow-on costs to the state.

Reform of public space laws

A strong commitment to reducing homelessness in Australia is a promising start. But eliminating homelessness will not be easy or quick.

Until we eliminate primary homelessness, there will continue to be people living 'rough' or sleeping in public places, and laws which regulate the use of public places will continue to impact disproportionately upon them.

Commonly referred to as 'quality of life' laws, these laws criminalise activities like sleeping, sitting, storing personal belongings, urinating and standing in public spaces. 'Move on' powers have a similar effect. The enforcement of these laws tends to discriminate against homeless individuals because they criminalise conduct which people experiencing homelessness generally have no choice but to conduct in public places.[23] These laws have the effect of criminalising homelessness and thus violate their right to freedom from cruel, inhuman or degrading treatment.

But regrettably, *The Road Home* is silent on the need to protect people experiencing homelessness from policing of public space laws.

The UN Special Rapporteur on Adequate Housing expressed concern about the use of public space laws in Australia against people living in public places, and called for these laws to be reviewed to ensure that adequate human rights protections are in place.[24]

The Government's homelessness strategy needs to include a commitment to the review of public space laws and their impact on people who are homeless.[25] For example, public space laws should be amended to include defences for homeless individuals which allow them to avoid the imposition of criminal sanctions. For instance, the laws could provide that a person who is homeless is entitled to use public space without interference unless there is a reasonable risk that the person's conduct will cause harm to another person.[26] In addition, a 'Charter of Rights' could be established to limit police powers, allowing for the protection of the rights of public space users to access public spaces without fear of intimidation or harassment by police officers.[27]

Effective remedies for breaches of housing rights

Australia lacks effective remedies for breaches of the right to adequate housing which is at odds with our obligation to 'progressively realise' the rights contained in the ICESCR.[28] Effective remedies should take the form of administrative remedies which are 'accessible, affordable, timely and effective',[29] and 'whenever a [ICESCR] right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.'[30]

Australia has been criticised in this regard by the UN Special Rapporteur on Adequate Housing who specifically identified a lack of mechanisms for people to complain about violations of housing rights in Australia.[31] For example, the Australian Human Rights Commission cannot investigate complaints in relation to the right to adequate housing because rights contained in the ICESCR are excluded from the definition of 'human rights' under the *Australian Human Rights Commission Act 1986* (Cth).[32]

The Australian Human Rights Commission recommends that the federal government consider ratifying the Optional Protocol to the ICESCR,[33] as a first step to redressing the lack of complaint mechanisms for violations of housing rights in Australia.

But more can be done here too. Federal anti-discrimination laws could be amended to prohibit discrimination on the grounds of social status or homelessness.[34] Currently, there is no federal law protecting people experiencing homelessness against discrimination on the ground of their homelessness,[35] for example, when trying to secure employment, obtain social security benefits or enrol their children in school. In this way, discrimination perpetuates disadvantage and prolongs homelessness.

Further, the Australian Human Rights Commission is advocating for the need for a national Human Rights Act which explicitly protects the right to adequate housing (as well as other 'core' economic, social and cultural rights). Such an Act could be drafted to ensure that courts take the principle of 'progressive realisation' into account when making decisions relating to the right to adequate housing. Under the South African Constitution, for example, the government is obliged to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of the rights to health care services, sufficient food and water, social security and adequate housing.[36] An Australian Human Rights Act could be similarly drafted.

Conclusion

The Australian Government's strong commitment to addressing homelessness in Australia is to be applauded. The challenge now is to design the laws, policies, services and protections to ensure that every person—whether they are living in a public place, seeking emergency housing, or facing eviction from their home—is afforded the basic rights to which we are all entitled, regardless of our socio-economic status. These rights are our human rights.

Australia can only gain if it draws upon human rights standards to produce targeted reforms of our laws, policies and service design. It is by proceeding in this way that we will give ourselves the best chance to get it right.

Endnotes

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4. *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 1966.
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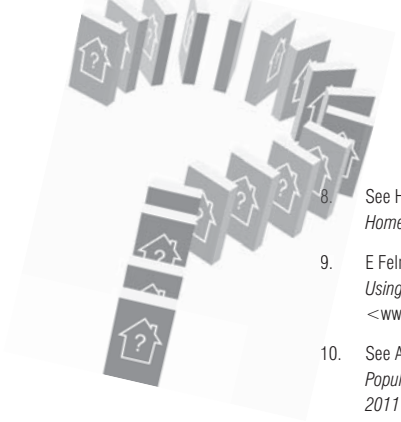

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Reform road home needs more than good intentions

By Robin Banks and Chris Hartley

In 10 years, Australia has seen an extraordinary shift in focus on homelessness and with it, recognition of the complex causes of homelessness and the need to deal not simply with the provision of shelter, but to address those underlying complexities.

In that time, there has been a spotlight shone on the impact of the law and legal system as both a causative factor in respect of homelessness, but also as a serious and enduring barrier for people seeking to move out of homelessness into more stable and healthy lives. While much has changed in terms of public awareness of homelessness, there remain many enduring myths: myths that have the potential to skew the focus of responses to homelessness and, consequently, impair our capacity to reduce overall homelessness.

Many people in the community would picture a typical homeless person as a middle-aged man of Anglo-Celtic origin, sleeping rough in one of our inner cities. When thinking about services for homeless people, most people would think of men's hostels and shelters in the inner urban centres run by the major charities and not-for-profit organisations.

Yet the data on homelessness tells a very different story. In 2001, the national Census recorded that there were 99,900 homeless people of whom almost half were under the age of 25 (46%), and a slightly smaller proportion were women (42%). Of the total population of homeless people counted, 14% were rough sleepers. Most others, while transient, were finding some form of temporary shelter, be it with friends or family, or in supported accommodation services.[1]

By 2006, the total number of homeless people recorded in the Census had increased to 105,000.[2] More recently released data indicates that a significant proportion of homeless people are not living in major urban centres, but rather can be found living in rural areas.

The same 10-year period has seen a growing focus on the legal needs of homeless people and the development of services to respond to those needs. While there are services run by local lawyers (including the Reverend Tim Costello in St Kilda) that have provided legal assistance to homeless people for many years, the first large scale attempt to respond to the legal needs of homeless people came with the establishment of the Homeless Persons' Legal Clinic (HPLC) by the Public Interest Law Clearing House (PILCH) in Victoria in 2001. This service coordinated the delivery of legal services on a pro bono basis by private law firms at clinics run at crisis accommodation centres and welfare agencies around Melbourne. Since then, similar services were established in 2002 by Queensland PILCH (QPILCH) and in 2004 by PIAC in partnership with PILCH NSW.

A key challenge for all of these services is reaching beyond those members of the homeless community who fit the 'popular' perception to the more hidden homeless communities of women, young people, and people in regional areas. Another challenge is to understand the legal issues that are affecting these communities systemically and to seek to bring about reform to laws and programs in the hope that we can begin to seriously reduce the number of people becoming homeless and remaining so.

On the first count, in Victoria, the HPLC has established two clinics in Bendigo and one women-specific clinic in St Kilda. Across the border, a number of regional outreach services have been developed by Legal Aid NSW, which initially got involved in HPLS through a clinic in outer Sydney. There is also a specific HPLS clinic operating for women in inner Sydney and work is currently underway on responding to the needs of Aboriginal people who are homeless, rough sleepers and others who have limited contact with the service. The HPLC in South Australia is currently investigating the use of video teleconferencing to link homeless people in regional and remote areas to law firms based in Adelaide. It is clear that legal services are developing and evolving to respond to emerging and previously unmet needs and in response to improved understanding of the homeless population.

The other critical element of the work of the legal services has been the identification of systemic legal problems and the development

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of law and policy reform proposals to deal with them. Each of the services has worked on a range of law reform issues, some specifically state-based, others resulting from national laws and programs. Some of the key challenges faced are to achieve reforms to the systems in the major human services bureaucracies that can and do impact on the day-to-day lives of homeless people. These include the rules and procedures in Centrelink and housing departments, and the processing of fines (particularly on-the-spot fines). In the area of law reform, significant work has been done to highlight the situation of homeless people in the electoral systems, in the regulation of boarding and rooming houses, public order offences and discrimination issues.

It is important that homeless people themselves are involved in the identification and reform of these systemic issues. Unfortunately there has been an enduring myth that those that have experienced homelessness are unable or unwilling to engage in law reform and public policy work. However, not only is such involvement an important element of the human rights of homeless people,[3] it is also likely to result in public policy decisions that are better targeted and more effective in responding to issues surrounding homelessness.

HPLS in NSW and the HPLCs in Victoria, Queensland and SA are leading the way in ensuring decision makers hear the voices of homeless people. A clear focus of HPLS is to gain the input of homeless people to its policy work in a creative and engaging way. A recent example of this focus was the human rights consultation workshops that HPLS and PIAC held in homeless shelters throughout Sydney in response to the Australian Government's National Human Rights Consultation. These events were jointly conducted with Milk Crate Theatre, a group that produces theatre for the homeless and disadvantaged community. At each workshop, the actors from Milk Crate Theatre performed three stories that were inspired by the real life stories of people from the homeless community. Each of these stories reflected and explored a number of different human rights issues and how they currently play out in Australia.

After the performance, homeless people in attendance were encouraged to provide their stories and ideas about how their human rights are (or are not) protected in Australia and how these protections could be improved. In total, approximately 130 homeless people attended these consultation events. Their answers, ideas and suggestions were used to inform HPLS' submission to the National Human Rights Consultation. The submissions from the HPLCs in Victoria, Queensland and SA were similarly developed through extensive consultations with those who had experienced homelessness.

Homelessness legal services are also leading the way in establishing dedicated consumer bodies that are equipped to advise government agencies on the best ways of engaging with homeless people. One such group, Street Care, was established by HPLS with funding support from the City of Sydney in February 2009. Street Care, made up entirely of currently and formerly homeless people, is not a short-cut for government to hear from homeless people, but rather a mechanism to provide advice on how best to do so. Since its establishment Street Care has been involved in a number of projects including assisting HPLS to set up and run the human rights workshops. Members of Street Care have also spoken at a number of events including at the Homelessness NSW Annual Conference, the City of Sydney and Mission Australia's 'Housing When?' Conference and the Newcastle City Council's Homelessness Forum.

Street Care has been established to ensure that decision makers hear not only the Street Care members' voices but also those of other members of Sydney's homeless community. To facilitate this, in May 2009 members of Street Care came up with the idea of conducting a 'Street Survey' of those currently experiencing homelessness. The survey contains specific questions such as whether compulsory Centrepay payments (a direct bill-paying service for people receiving payments from Centrelink) are a good thing, as well as enabling participants to provide feedback on other systemic issues in the area of homelessness that requires reform. So far more than 40 people experiencing homelessness have responded to Street Care's Street Survey. The answers provided thus far clearly express the need for greater investment in crisis accommodation and training for police and other enforcement agencies that come in contact with homeless people. The responses provided to the Street Care Street Survey will be used to inform the policy and advocacy work of Street Care and HPLS over the next few months.

It is vital that legal and other services set up in response to homelessness are providing services that respond to unmet need. In order to better understand the needs of homeless people in the areas of service delivery and law reform it is essential that we, as advocates, become the change we would like to see. When acting as advocates for the legal and human rights of homeless people, services must ensure that they are respecting the rights of homeless people to be actively involved in decision-making processes that affect them. To fail to do so means that we are no longer speaking with, or on behalf of, homeless people; we are speaking over the top of them.

Endnotes

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Security of Tenure

Tenancy law reform

By Deborah Pippen

At a national level, much has been made recently of expanding access to affordable housing (including private rental housing), increasing stock in public and community housing and improving access to supported and emergency accommodation.

All of these developments are needed and not without their controversies, even down to the definition of 'affordable housing'. However, the obvious problem that persists and has not been examined at the national level is the glaring inequity of people's housing experiences in relation to housing rights and protection. The right to housing requires governments to recognise that all people have a right to secure, safe, affordable, appropriate housing—regardless of whether they own their housing; are paying a mortgage holder to one day own it; or are paying some form of rent. Furthermore, this right must be protected. But this right is not adequately protected in Australia. This article highlights the key issues addressing housing rights in terms of residential tenancy legislation.

Renter households

Renter households are those households that pay rent to live in a dwelling; this encompasses all forms of accommodation. When considering rental accommodation it is important to recognise that this is not an insignificant part of the population. In 2006, 28.5% (2,063,947) of Australian households were in some form of rental accommodation with more than 1.7 million households renting from private landlords and 369,000 households renting from state/territory housing authorities. A further 147,000 households (2% of all households) were renting from other landlords such as employers (including the Defence Housing Authority).[1]

Residential tenancy legislation is under the jurisdiction of the states and territories. The history of the development of tenancy legislation in Australia demonstrates the status of tenants. As noted in an Australian Housing and Urban Research Institute Positioning Paper:

> The various landlord-tenant laws in Australia were all originally inherited from the same source: the English law of the early 19th century. Government's main concern at the time was protecting legitimate rights to ownership and possession. Thus when Australia adapted English residential tenancy law for domestic use it was heavily weighted in the landlords favour. It was not until the 1970s that Australian tenancy laws were reviewed in the context of housing conditions and outcomes.

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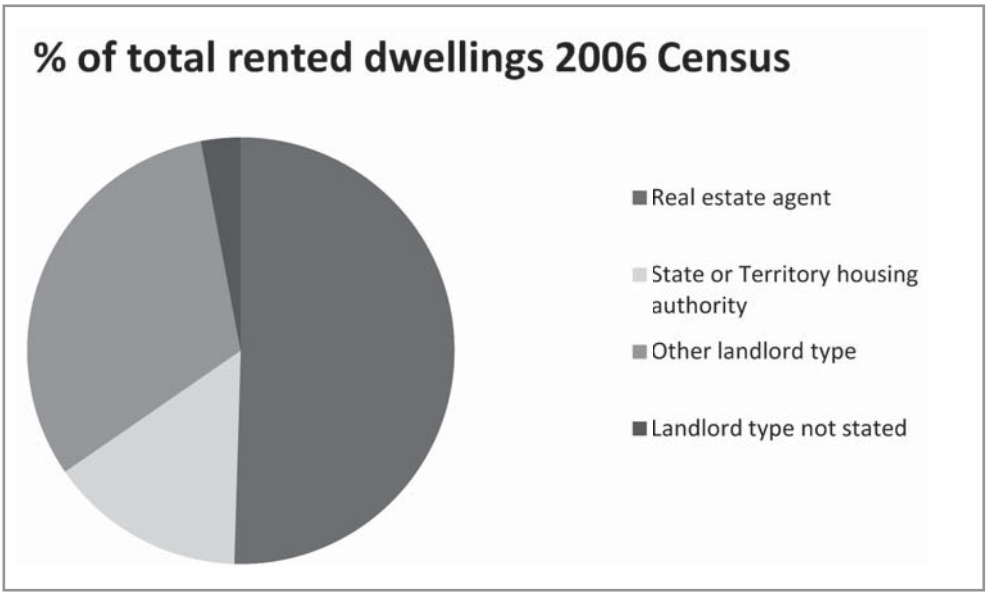

> … there is a heavy reliance on tenancy law to provide equity in landlord-tenant relations in Australia … Tenancy protection in Australia today is based on principles of basic health-related housing standards, minimum notice periods for 'no cause' eviction, and limits on the frequency of rent increases … Residential tenancy law in Australia has invariably sought to 'balance the interests of tenants and landlords' rather than to provide strong rental consumer protection … Consequently, arguments about broader legal protections have been limited, and arguably contemporary residential tenancy law is still weighted in the landlord's favour.[2]

The need for national consistency in residential tenancy legislation to ensure minimum standards is by no means new. In 2004, in its overview of tenancy law across the country, the National Association of Tenants' Organisations (NATO) recommended the development of national minimum standards for residential tenancy legislation.[3] This reiterated NATO's position in 1997, which in turn was a response to a 1995 report prepared for the Commonwealth Department of Housing and Regional Development.[4] These reports demonstrated the disparity between states and territories in terms of levels of protection of basic rights to accommodation and access to dispute resolution mechanisms. The most glaring differences were—and continue to be—protection of people in forms of rental accommodation other than private rental and security of tenure.[5] These two fundamental elements affect what other rights tenants might have and whether they are in the position to assert those rights. The table below demonstrates the level of disparity, with an overview of legislative coverage across the country as well as the level of security of tenure.[6]

Australian Capital Territory	New South Wales	Northern Territory	Queensland
Covers all residential tenancy agreements (public and private tenants). Some coverage of all other tenures including caravan parks, boarders and lodgers, student accommodation. Known as occupants. No cause termination: 26 weeks (182 days) for tenants. Limit doesn't apply to occupants.	Covers all residential tenancy agreements (public and private tenants). Does not cover: caravan parks, boarders and lodgers, some other classes of dwelling. No cause termination: 60 days. 14 days at the end of the fixed term.	Covers all residential tenancy agreements (public and private tenants). Does not cover: caravan parks, or boarding houses where less than 3 boarders, holiday, emergency or charitable accommodation. No cause termination: 42 days.	Covers all private residential tenancy agreements (including long term caravan park residents). Separate legislation covers residential services such as boarding houses. Does not cover some other classes of tenure. No cause termination: 60 days.

South Australia	Tasmania	Victoria	Western Australia
Covers private and community housing residential tenancy agreements. Only certain parts of the Act apply to public housing residential tenancy agreement. Does not cover some other classes of dwelling. Includes boarders and lodgers. Residents of caravan parks are not covered. No cause termination: 90 days.	Covers all residential tenancy agreements. Does not cover some other classes of dwelling. Some caravan park residents may be covered. No cause termination: only at end of a fixed term lease. Anywhere between 14 and 28 days.	Covers all residential tenancy agreements plus rooming house residents. Some long-term caravan park residents are covered. Does not cover short-term caravan park residents and other classes of residencies. No cause termination: 120 days.	Covers all residential tenancy agreements (public, private and caravan park). Does not cover boarders and lodgers, or some other classes of dwelling such as nursing homes or hotels. Does not cover tenancies of less than 90 days. No cause termination: 60 days.

It is notable that there are single examples of both universal coverage of residential tenancy legislation (in the ACT) and very limited use of no grounds termination (in Tasmania). While there are issues with the practicalities of both of these elements in both jurisdictions, their existence would seem to indicate that such legislation is not detrimental to housing markets. However, the wide disparity across all jurisdictions does highlight the very different housing experiences across the country.

In the United Nations Special Rapporteur's report on adequate housing as a component of the right to an adequate standard of living, the lack of consistent legislation was noted as a weakness in implementing and monitoring the right to adequate housing. The report also noted that,

> legislation gives little regard to the rights of tenants. Tenancy laws and anti-discrimination acts are difficult to use due to the pressure of the market and the existence of 'black-list' databases. Other [laws], such as the anti-social behaviour amendments to the *Residential Tenancies Act* (NT), complicate the problem.[7]

The Special Rapporteur also observed that legislation in most states and territories allows 'landlords to freely evict tenants'.[8]

The lack of any significant and consistent changes in tenancy legislation across the country as a whole is a clear indication that national leadership is needed to ensure that Australia meets its human rights obligations, as noted above. To date, federal Government involvement has been limited to an initial investigation culminating in the 1995 report for the Commonwealth Department of Housing and Regional Development.[9] Currently the federal Government has limited its national rental housing policy considerations to affordability issues and public and community housing. References to general tenancy rights have been limited to recommendations in the White Paper on Homelessness[10] to investigate the impact of lack of security of tenure and tenancy databases—but only in terms of homelessness, ignoring the wider implications of lack of security of tenure.

Consistent legislation can be achieved by adopting national minimum standards such as those detailed in the National Affordable Housing Agreement (NAHA), which currently lists as an aspirational objective that all 'Australians have access to affordable, safe and sustainable housing that contributes to social and economic participation'.[11] Notably, there is no reference to security of tenure. A basic element of such standards should be a clear commitment to universal coverage of tenancy legislation and security of tenure.

People who rent their homes without the coverage of tenancy legislation include those in educational, institutional, boarding and lodging, supported accommodation and nursing home accommodation. Often they are more prone to unjust treatment during their tenancy and generally have very limited resources and options for alternative accommodation. Without such protection these tenants have little to no recourse to legal dispute resolution mechanisms when there are problems—ranging from the need for urgent repairs, to harassment and ultimately eviction. Where there are legal remedies available via the formal court system, this is obviously well out of the reach of many because of limitations on their financial and other resources. As noted in NATO's *Leaking Roofs* report:

> It is essential that all tenants who have been granted the right to occupy residential premises as their principal place of residence be protected by tenancy legislation.[12]

In relation to what housing rights are protected by tenancy legislation, security of tenure is fundamental. It has been described by the Centre on Housing Rights and Evictions (COHRE) as 'one of the indispensable pillars of the right to adequate housing'.[13] Tenure is linked to many other aspects of a person's experiences of home and, therefore, life. When a person feels secure where they live, they are more likely to actively

participate in the community because they feel part of that community. They are more likely to take an opportunity to improve their homes, confident that they will not then have to leave until they wish to, or there is a clear and reasonable basis to do so, with the possibility of an independent arbiter if there is a dispute. On a more individual level, they are more likely to have positive experiences in terms of participating in work and education; have better health outcomes in relation to stress related problems; and even be more likely to undertake long-term planning. They are also more likely to assert other rights, without fear of the ultimate retribution of losing their home. As also noted by COHRE, 'without security of tenure, the full enjoyment of housing rights is not possible, and forced eviction can become a real and perpetual threat'.[14]

While there are many issues that are crucial to a person living in rental accommodation enjoying the same level of housing rights as those in other tenures, security of tenure must be the starting point for tenancy law reform.

Endnotes

1. Australian Bureau of Statistics, *Australian Social Trends, 2008 – Renter Households*, <www.abs.gov.au/> at 14 September 2009.
2. T Seelig and A Morris, *Motivations of Investors in the Private Rental Market*, Australian Housing and Urban Research Institute, Positioning Paper No 87 (2006), 9.
3. H Blunden, C Martin and the National Association of Tenants' Organisations, *Leaking Roofs—Australian Tenancy Law* (2004).
4. R Kennedy, P See and P Sutherland, *Minimum Legislative Standards for Residential Tenancies in Australia*, Commonwealth Department of Housing and Regional Development (1995).
5. Tenancies are terminated only where grounds exist as prescribed by legislation; appropriate notice is served and a Tribunal determines that ending the tenancy is justified.
6. H Blunden, C Martin and the National Association of Tenants' Organisations, *Leaking Roofs—Australian Tenancy Law* (2004), 18.
7. UN Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, Miloon Kothari, Mission to Australia, 11 May 2007, A/HRC/4/18/Add.2.
8. Ibid.
9. R Kennedy, P See and P Sutherland, *Minimum Legislative Standards for Residential Tenancies in Australia*, Commonwealth Department of Housing and Regional Development (1995).
10. Department of Families, Housing, Community Services and Indigenous Affairs, *The Road Home: A National Approach to Reducing Homelessness* (2008).
11. Council of Australian Governments, *Intergovernmental Agreement on Federal Financial Relations, Schedule F – National Affordable Housing Agreement* <www.coag.gov.au >, at 30 September 2009.
12. H Blunden, C Martin and the National Association of Tenants' Organisations, *Leaking Roofs—Australian Tenancy Law* (2004).
13. Centre on Housing Rights and Evictions website <www.cohre.org/view_page.php?page_id=89>, at 30 September 2009.
14. Ibid.

Staying home, staying safe

The value of domestic violence protection order provisions in homelessness strategies

By Karen Wilcox and Ludo McFerran

Studies have shown that domestic violence—also known as family violence and intimate partner violence—is a leading cause of homelessness for women and children in Australia.[1]

On any given week, victims of domestic violence flee their homes to sleep rough: in cars, on friends' floors or, if they are fortunate, in refuges. For this reason, there has been a rising tide of policy development and activism in the past decade aimed at containing and remedying homelessness for victims of domestic violence. This has led to legal and policy responses which provide a framework for victims to remain safe while residing in their own homes.

The legal framework

Domestic violence protection orders are a key feature of Australia's legal response to domestic violence.[2] They offer protection against violence through court orders restraining the future conduct of an individual towards one or several victims. Domestic violence protection orders can be tailor-made to suit the needs of individual victims by way of particular restraints imposed through the provisions, or conditions, of the order. In all states and territories, these orders have a degree of open-endedness in relation to proscribed behaviours, to ensure individualised outcomes can be determined by the court.[3] Nonetheless, two specific provisions in protection order laws have the direct potential to impact on homelessness. These are the so-called 'exclusion' or 'ouster' orders, which contain conditions preventing perpetrators of violence from approaching or coming into the home where the victim lives; and court-ordered changes to residential tenancy agreements, often required to make exclusion orders effective if victims have shared rented accommodation with defendants who are the leaseholders. These provisions will be considered in this article.

The first specific domestic violence protection order legislation in Australia was the New South Wales *Crimes (Domestic Violence) Amendment Act 1982* (NSW). It was possible for victims of domestic violence to obtain an 'exclusion' condition under this Act, but by 1987 only 3.2% of orders made in NSW included such conditions.[4] Research has shown a low utilisation of exclusion conditions in protection orders.[5]

The reasons for this are likely to be complex. For some victims of domestic violence, remaining in the relationship is desirable or necessary (for financial or other reasons), so protection from future violence is best provided by a 'basic' protection order prohibiting future violent conduct, but permitting ongoing contact. For example, under s 36 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), every order prohibits the defendant from:

> assaulting, molesting, harassing, threatening or otherwise interfering with the protected person or a person with whom the protected person has a domestic relationship.

For other victims of domestic violence at high risk, safety can only be found by escaping into hiding and ensuring the offender does not know their whereabouts.

However, for the victims of domestic violence who *would* find it best to stay in their own home and 'have the violence leave', exclusion orders with appropriate practical supports offer a sound protective strategy. The fact that courts may not be issuing such orders in these situations reflects a complex web of community and judicial unease, with concern for the hardship for defendants leading to the conditions being seen as controversial.[6] Concern for the property rights and accommodation needs of the defendant, deferral of occupancy issues to property settlements under family law, or a belief that

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exclusion is only warranted when the violence was physical, has at times underpinned judicial decision making.[7] Community beliefs about 'rights' to real property has complicated the issue further: 'a man's home is his castle'.[8] In its 2006 report, the Victorian Law Reform Commission noted,

> despite the legislation being relatively clear, there seems to be a hesitation in removing a person from 'his' home with a related failure to acknowledge that this is exactly where the violence occurs.[9]

The legislation itself in some states and territories has, in practice, discouraged the use of exclusion conditions. For example, if the option is not explicitly mentioned in an Act, it can be 'invisible' to lawyers or police prosecutors when seeking orders on behalf of victims.[10] Similarly, where equal priority is given to the accommodation needs of both the complainant and the defendant, this makes it difficult for exclusion orders to be made.[11]

Some governments in recent years have passed laws to increase the visibility of exclusion orders in their legislation, and to prioritise the victim's accommodation needs in any determination. In Tasmania, the court may require the person against whom the order is made 'to vacate premises … *whether or not that person has a legal or equitable interest in the premises*'.[12]

Recent law reform activity in some jurisdictions has further strengthened exclusion order provisions, with courts now directed to consider them in certain circumstances. In the Northern Territory, this applies to matters where a child is involved:

> The issuing authority must presume that the protection of the protected person and child is best achieved by them living at home.[13]

Similarly, the new *Domestic Violence and Protection Orders Act 2008* (ACT) states that in deciding the application for a final order, the court must consider:

> The accommodation needs of the aggrieved person, each child of the aggrieved person, and each child of the respondent.[14]

In Victoria, under s 82 of the *Family Violence Protection Act 2008* (Vic), the court *must* consider whether to include an exclusion condition, whether or not a child is involved. This means that the court must make a decision as to whether the perpetrator should be excluded from the premises occupied by the aggrieved person and child; it cannot simply avoid this question. Furthermore, it *must* take into account the 'desirability of minimising disruption' to the aggrieved person and child. This has the potential to address homelessness for families already facing the hardship of violence.

Some domestic violence laws have been drafted to recognise that exclusion orders are unworkable where there is a lease for the home in the defendant's name. In Queensland, s 62A of the *Domestic and Family Violence Protection Act 1989* (Qld) allows the court to consider a sole tenancy application at the same time as it considers the protection order. Section 150 of the *Residential Tenancies Act 1994* (Qld) also allows a tenancy tribunal to grant sole tenancy to the person experiencing violence. Changes to residential tenancy laws in Victoria contained within the *Family Violence Protection Act 2008* (Vic) provide an avenue for victims to apply for changes to leases with the state's tenancy tribunal.[15]

Two jurisdictions fast-track this process by providing for concurrent alteration of tenancy agreements at the protection order determinations. The *Family Violence Act 2004* (Tas) gives the court the power to terminate a tenancy agreement and establish a new one benefiting the 'affected person'.[16] Tenancy agreements can be redrafted in the victims' name, even where they previously may not have been a party to it. A similar provision is also available in the NT and is before the SA Parliament at the time of publication of this article.[17]

Other provisions in domestic violence laws have also been of value in preventing homelessness for victims. Police holding powers (available in all states and territories), bail provisions and 'cooling-off' police orders also provide potential for short-term removal of perpetrators at times of high risk, so that victims are less compelled to flee in emergencies. For example, under the *Family Violence Act 2004* (Tas), the court can require a violent person to vacate premises[18] and a police officer may detain a person without charge for a period 'reasonably' required to secure the safety of the victim.[19] Where there has been an arrest, bail is only available where the release of the offender would not 'adversely affect the safety, wellbeing and interests of an aggrieved person'.[20] In the NT, Western Australia and Victoria, police can directly issue short-term 'cooling-off' orders or notices which require the perpetrator of violence to remain away from the victim for up to 72 hours.[21]

The need for a supportive service system

In order for exclusion orders to be effective in keeping victims safe as well as out of homelessness, a range of other factors needs to be addressed. These include the availability of funding for security alarms, new locks and security upgrades; risk assessment and safety planning; case tracking; enhanced policing responses; and outreach support and counselling. In addition, victims of violence need sufficient financial security to pay for their mortgage or rent, which may be difficult under current social security, child support and family law property arrangements. As many victims of violence remain concerned about the potential homelessness of their partner, an adequate system supporting exclusion orders would also contain targeted shelter beds for removed perpetrators.

The need for support to enhance the practicality of exclusion orders was recognised and embraced by the first system-wide 'integrated response' to domestic violence, the ACT Family Violence

Intervention Project (FVIP), whereby crisis support workers work with police during or after domestic violence call-outs. Between 2000 and 2006, the proportion of domestic violence victims having to seek refuge accommodation in the ACT was reduced from 13% to 4%, and offenders remaining at home fell from 38% to 25%.[22]

In the ACT, a specialist domestic violence court bolsters the system of protection orders available under the law. In this court, a specially trained and experienced magistrate hears protection order matters, and arguably, this leads to enhanced understanding of the complexities of victims' needs and, presumably, better outcomes.

The Tasmanian Government has built on the successes of the FVIP in the ACT with its integrated whole-of-government response to domestic violence, known as 'Safe at Home'.[23] The Safe at Home response has included practical support systems, such as safety planning, security patrols, and funding for security upgrades, transport and emergency perpetrator accommodation, in addition to the law reforms noted above. Since its introduction, there has been a decrease in the proportion of shelter residents seeking accommodation because of domestic violence.[24]

In NSW, a pilot program known as 'Staying Home, Leaving Violence' has been expanded to additional regions across the state. This program supports exclusion orders by providing easier access to lock changes, security upgrades and safety plans for escape in the event of a critical incident.

Several developments in Victoria have also complemented the new legal framework. These include the specialist Magistrates' Court pilot, where protection order, criminal, victim compensation and family law issues can be resolved concurrently in the one court, providing an opportunity for the court to address inconsistent outcomes, such as those which arise when there is a conflict between state protection orders and federal family law decisions.[25] In addition, the Victoria Police *Code of Practice* aims to 'support aggrieved family members to stay safely in their own homes'.[26]

Conclusion

The 'exclusion order' approach to tackling the problem of domestic violence-related homelessness is relatively new, but is gaining ground through law reforms and policy developments across the country. This solution is in keeping with our current understanding of human rights[27] and accords with notions of fairness and justice, insofar as those already suffering abuse are prevented from enduring additional suffering through homelessness. While exclusion orders are not the solution in every case, the promotion of this option should be considered an important strategy in any homelessness policy.

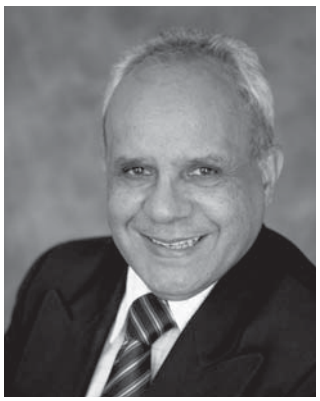
Endnotes

1. Department of Families, Housing, Community Services and Indigenous Affairs, *The Road Home: A National Approach to Reducing Homelessness* (2008); S Murray, *Somewhere Safe to Call Home: Violence Against Women During Homelessness* (2009).
2. Various names are used in each jurisdiction (eg, apprehended domestic violence order (ADVO), intervention order, restraining order, family violence order), so the generic term 'protection order' is used in this article.
3. In some states and territories similar orders are also available to prevent workplace, neighbour and street violence.
4. L McFerran, *Taking Back the Castle: How Australia is Making the Home Safer for Women and Children* (2006), 2.
5. Ibid. ACT commentators, however, suggest that exclusion orders have been well-used in ACT courts.
6. Ibid; Victorian Law Reform Commission, *Review of Family Violence Laws* (2006), 320–324.
7. L McFerran, *Taking Back the Castle: How Australia is Making the Home Safer for Women and Children* (2006), 2.
8. Ibid.
9. Victorian Law Reform Commission, *Review of Family Violence Laws* (2006), 321.
10. For example, the *Restraining Orders Act 1997* (WA) provides a general condition preventing approach to the victim's residence (s 13) but does not have specific ouster provisions. See also Victorian Law Reform Commission, *Review of Family Violence Laws* (2006), 323.
11. For example, s 12(d) of the *Restraining Orders Act 1997* (WA) states that the court is to have regard to 'the accommodation needs of the respondent and the person seeking to be protected'.
12. *Family Violence Act 2004* (Tas) s 16(3) (emphasis added).
13. *Domestic and Family Violence Act 2007* (NT) s 20.
14. *Domestic Violence and Protection Orders Act 2008* (ACT) s 47.
15. *Family Violence Protection Act 2008* (Vic) s 262.
16. *Family Violence Act 2004* (Tas) s 17.
17. Intervention Orders (Prevention of Abuse) Bill SA 2009.
18. *Family Violence Act 2004* (Tas) s 16(3).
19. Ibid s 11(1).
20. Ibid s 12(1).
21. *Restraining Orders Act 1997* (WA) s 3A; *Domestic and Family Violence Protection Act 2007* (NT) pt 2.6; *Family Violence Protection Act 2008* (Vic) pt 3 div 2.
22. R Holder and J Caruana, *Criminal Justice Intervention in Family Violence in the ACT* (2006), 59.
23. This is not to be confused with the evaluation project being undertaken in Victoria which uses the same name.
24. 2L McFerran, *Taking Back the Castle: How Australia is Making the Home Safer for Women and Children* (2006).
25. Problems arise for victims of violence where they have a protection order preventing contact by the perpetrator, but family court arrangements requiring a degree of shared parenting. In Victoria, the capacity to resolve this is bolstered by s 90 of the new *Family Violence Protection Act 2008* (Vic).
26. Victoria Police, *Code of Practice for the Investigation of Family Violence* (2004), [1.2].
27. Victorian Law Reform Commission, *Review of Family Violence Laws* (2006), 324.

Oh, when will they ever learn?

A personal perspective on Aboriginal housing issues

By Thomas Slockee



Thomas Slockee is the Chair of the NSW Aboriginal Housing Office. He has been referred to as a dynamic and visionary community leader, at the front line in bringing about new management systems and structures for Aboriginal Housing in NSW. He was the first Aboriginal and Torres Strait Islander person ever appointed to the position of Chairman of the Southern Area Health Service Board. He was also the first and only Aboriginal person elected to the Eurobodalla Shire Council. Tom was the Inaugural Chair of the Board of the Aboriginal Housing Office in NSW. He was also Board Director for Aboriginal Hostels Ltd in 1998–2000. This article expresses his personal opinion.

> 'Access to safe and healthy shelter is essential to a person's physical, psychological, social and economic well-being and should be a fundamental part of national and international action ... An integrated approach to the provision of environmentally sound infrastructure in human settlements, in particular for ... urban and rural poor, is an investment in sustainable development that can improve the quality of life, increase productivity, improve health and reduce the burden of investments in curative medicine and poverty alleviation ... As a first step towards the goal of providing adequate shelter for all, all countries should take immediate measures to provide shelter to their homeless poor ... All countries should adopt and/or strengthen national shelter strategies … facilitate access of urban and rural poor to shelter by adopting and utilizing housing and finance schemes and new innovative mechanisms adapted to their circumstances ... People should be protected by law against unfair eviction from their homes or land ...'[1]

Aboriginal and Torres Strait Islander peoples do not have adequate standards of living, housing and security. Housing (shelter) is a right—yet most Aboriginal and Torres Strait Islander peoples have to endure homelessness and standards of housing that are much lower than other Australians. In the area of housing and homelessness, Aboriginal and Torres Strait Islander peoples are in constant anxiety about their future.

People are now using the term 'affordable housing'. But there is much more to living than just having affordable housing and most good housing managers realise that it's about looking after people—not just the bricks and mortar.

Many Aboriginal and Torres Strait Islander peoples who live in what is referred to as public housing or community housing face extreme poverty, poor health, lack of opportunity for employment, family mental illness, family instability and violence. Most Aboriginal people I talk to in the course of my work say they are in a crisis situation because of an inability to access public or community sector housing.

Other Aboriginal and Torres Strait Islander peoples who try to find shelter as tenants through the private market encounter overwhelming discrimination and racism. Yes, there are tenants' rights. But our people seem to be under the constant threat that if they don't live according to 'white fella' ways or standards, then eviction and homelessness will be their lot.

The fact is: there is ongoing discrimination against Aboriginal people in the area of housing. There is a dire shortage of housing for the urban Aboriginal and Torres Strait Islanders population. Mainstream housing is very difficult to obtain—even through government housing departments! As one Aboriginal person said: 'For an Aboriginal person to get non-Aboriginal housing, like through the real estate (agent), you don't get it. You just don't. Nobody will house you. It doesn't matter what references you have.'

Indicators show that Aboriginal and Torres Strait Islanders social and economic disadvantage hasn't improved and in some cases has worsened, yet governments pursue a dictatorial, 'top-down' approach, which in the long run is doomed to fail and leave Aboriginal and Torres Strait Islander peoples in a worse position.

I agree with the sentiments expressed by Australians for Native Title and Reconciliation (ANTaR) in an open letter to the Federal Indigenous Affairs Minister, the Hon Jenny Macklin MP, printed in *The Australian* newspaper, which, in part, reads:

> Tangentyere[2] has rejected the blackmail that will make housing

> conditional upon Aboriginal communities signing leases that will relinquish control to the government. … In May 2007, Macklin criticised the Howard Government's attempt to impose a 99 year lease on Tangentyere: "No other group of Australians would have their property rights treated this way ... we do not want land tenure reform being made a condition of funding for basic services." We agree that infrastructure and services for Aboriginal people should not depend upon the surrender of fundamental rights.
>
> We recognise the right of town camp residents to self-determination. We also endorse the Productivity Commission's recent call for an end to 'top-down' directives from government and for the empowerment of Aboriginal communities. Closing the gap will not be achieved in any other way.
>
> The use of coercive powers established under the Intervention threatens the existence of one of the most successful Aboriginal organisations in the country and sets a dangerous precedent for undermining all Aboriginal community initiatives. Such discriminatory action would be unlawful without the suspension of the Racial Discrimination Act—an action condemned by the Human Rights Commissioner and international human rights bodies …[3]

In 2001 the Australian Housing Ministers issued a *Ten Year Statement of New Directions for Indigenous Housing* with a vision for better Indigenous housing stating that;

> Aboriginal and Torres Strait Islander people throughout Australia will have:
>
> - access to affordable and appropriate housing which contributes to their health and well being; and
> - access to housing which is safe, well designed and appropriately maintained.
>
> There will be a vigorous and sustainable Indigenous community housing sector, operating in partnership with the Commonwealth and State, Territory and Local Governments.
>
> Indigenous housing policies and programs will be developed and administered in consultation and cooperation with Indigenous communities and with respect for Aboriginal and Torres Strait Islander cultures.[4]

All this is now in the bin as a new reform agenda is rolled out. Under the guise of 'reform', Aboriginal and Torres Strait Islander housing is being condemned, attacked and even dismantled.

A brief history

I have been part of the development of Aboriginal community housing for the past 25 years. I have seen housing programs offered through the Commonwealth Department of Aboriginal Affairs and the Aboriginal Development Commission, then through the Aboriginal and Torres Strait Islander Commission (ATSIC) and then the NSW Aboriginal Housing Office.

It all began in the mid 1970s with the Commonwealth Department of Aboriginal Affairs, which funded Aboriginal community organisations for land and housing. Self-determination was the principle and self-management was the approach. This was before the formation of the Land Councils in NSW.

Aboriginal community organisations were formed under the policy of self-determination to address the appalling conditions of our people in employment, training, education, health and other social issues—including housing. The policy was one of self-determination and community control.

There was no plan, no strategy, no policy on the proliferation and the locations of these new Aboriginal community organisations.

In about 1980, the Aboriginal Development Commission (ADC) implemented a strategy that required Aboriginal housing organisations to increase their rents to cover all housing related costs and administration costs. The grant for administration was to be phased out over a period of five years. Housing management was the sole responsibility of the Aboriginal community organisations. Control of and responsibility of the Aboriginal Housing Company and its homes was completely in the hands of the people themselves. That is, the company looked after rent collections, repairs and maintenance and payment of local rates and other charges (for example, sewerage). No effective training and support was put in place. It was a 'build and abandon' approach.

The ADC was abolished and ATSIC was created with Regional Councils making decisions for housing grants. Many community organisations—especially those on 'Reserves' or 'Missions'—were confused about who funded the grants and who was responsible for administering the funds. There were also challenging community conflicts during this period.

The intentions and goals were optimistic. What Aboriginal people wanted was the opportunity to do something ourselves to address the atrocious conditions our people were living in. Aboriginal people were just trying to get our people decent housing and create situations where we could get better education, training, employment and health care.

In NSW, the state government also had a responsibility and was funded by the Commonwealth to address the deplorable situation in Aboriginal housing. The main response was the Houses for Aboriginals (HFA) program, which operated mainly in urban and large regional centres. HFA houses were owned and managed by the Housing Commission. There was a change in policy (about 1990) and the NSW government began funding housing for the Aboriginal community through the Housing Aboriginal Community Program (HACP).

Even though the HACP was designed as a guideline for local Aboriginal community organisations to put in place policies that would bring about effective and efficient housing management practices, this never really happened. Housing needs were not being addressed by the mainstream and many of our people had dropped out and were living rough or in overcrowded conditions. Many of our people in charge of the Aboriginal community organisations (including Local Aboriginal Land Councils) just used local practices and customs (for example, giving preference to family members) in allocations and did not really apply strong rental settings and collection and arrears management.

Even before the HACP, many efforts have been given to train and support Aboriginal Community Organisations with Aboriginal Housing. There was limited success and effective property and tenancy management is still a major challenge.

The NSW Aboriginal Housing Office (AHO) was created in 1998 and inherited a system that was chronically ill. Other states had created Aboriginal housing structures within mainstream departments—most have since been abolished and swallowed up by mainstream housing initiatives. The AHO, with its separate legislation, is also under threat as mainstream forces critically assess and condemn Aboriginal community housing providers.

Aboriginal and Torres Strait Islanders want reform. Non-Aboriginal managers must realise that reform in our sector is a long, hard process that requires constant and sensitive engagement with our diverse communities and organisations and a willingness and capacity on behalf of bureaucrats representing the government to negotiate and implement locally appropriate strategies after proper consultation.

This situation of having a multitude of small Aboriginal housing providers—including multiple providers in many small towns—is the making of non-Aboriginal policy makers, who in the past operated in a largely uncoordinated way and with apparently no regard for the long-term sustainability of the Aboriginal housing sector. As a result, many of the houses that Aboriginal housing providers now have responsibility for were built to an inappropriate standard and there is a significant backlog of repairs and maintenance. The NSW AHO inherited this problem and has not been funded adequately to address all the issues.

The AHO engaged in a major sector strengthening and reform strategy in 2008 and I believed that this strategy would address the problem of having too many small and unsustainable Aboriginal housing providers and bring a provider accreditation system into operation.

I and others, believed in and advocated for the Aboriginal Housing sector reform to be that of a strategy to establish a small number of larger scale, specialised regional housing management services, building on the positive demonstrations under the South East Area Regional Management Service (SEARMS) and Murdi Paaki Regional Housing Company (MPRHC), from which valuable lessons have been learned. The governments have required a different strategy, which has been developed without engagement with Aboriginal leadership and the community. It will be very challenging to bring about effective reform. When will the white fella ever learn!

Aboriginal leadership

The Murdi Paaki region is a good example of Aboriginal people taking leadership in Aboriginal housing. The ATSIC Murdi Paaki Regional Council took the initiative and did a comprehensive study of Aboriginal Community Housing Organisations in its area. It was obvious that small Aboriginal housing organisations—which were a result of 'white fella' policies—were not sustainable and that major reform was necessary. The MPRHC was established to take over the ownership or management of Aboriginal Community Housing stock where local housing organisations had either fallen into liquidation or were struggling with the management of their assets. Murdi Paaki Housing was formed in 1997 and set about rescuing the assets of many small housing organisations in towns around outback New South Wales. The Murdi Paaki region covers almost one third of

NSW and includes some of the most remote and isolated communities in the state. The MPRHC has overcome challenges and today is providing services for the betterment of Aboriginal communities.

SEARMS is also another example of Aboriginal leadership taking the initiative to reform. Established in 2003, SEARMS is a co-operative that consists of six Aboriginal housing providers, servicing the Aboriginal communities NSW south coast. Management Model. SEARMS was created as a pilot Regional (communities included Batemans Bay , Ulladulla Mogo and Moruya). The main goal was to improve property and tenancy management of the community-owned rental properties, and bring about better outcomes in management and delivery of housing. A key challenge was to ensure that local housing organisations were able to face the challenges ahead with the escalating costs of maintaining existing stock and providing new homes in the communities into the future. By a negotiated agreement during the establishment phase, SEARMS assumed many of the policy and management functions while leaving communities in control of other aspects of decision making. Collaboration, participation and accountability to communities and tenants are central features of the model.

I remain optimistic that the structures created through the leadership of Aboriginal and Aboriginal and Torres Strait Islander peoples will remain and that the NSW Government will allow Aboriginal people to develop the strategies; and allow Aboriginal people to plan and implement Aboriginal housing programs that will make the difference and 'close the gap'—now and into the future. Another part of me is cynical as I observe what's happening in the Northern Territory and other states. I and, I believe, other Aboriginal leaders are angry, frustrated and disheartened while we wait patiently (in hope) for the decision makers to consult and listen to the collective knowledge and advise of Aboriginal people who have been working tirelessly at the community and bureaucratic levels for many years, trying to bring about reforms.

I believe that may be at the mercy of the 'white fella' again, as a 'mission manager' attitude seems to be the current way of dealing with Aboriginal issues.

The road ahead is likely to be a rough one as non-Aboriginal policy makers dominate and the rights of Aboriginal and Torres Strait Islander peoples are denied. The great white and black hope is to close the gap but if Aboriginal people are not involved, then the gap will not close and the desperate plight of Aboriginal people will worsen. Then it may be known as 'the great white hoax'.

Maybe they could add a verse to the song:

> Where has all the Aboriginals gone, long time passing?
>
> Where has all the Aboriginals gone, long time ago?
>
> Where has all the housing gone? O they are homeless everyone.
>
> Oh, when will they ever learn?
>
> Oh, when will they ever learn?

Aboriginal and Torres Strait Islander peoples' quality of life—our physical, psychological, social and economic well-being—is at risk.

Please listen to us: engage, talk and listen. Work with us, so that together we can make a difference and have a better Australia.

Endnotes

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Elder law, elder abuse and housing

By Susannah Sage Jacobson

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The author thanks Dahni Houseman, Seniors Rights Policy Officer, for assistance in drafting this article.

Access to housing is a basic human right. For older Australians, secure accommodation, both in terms of personal security and tenure, is particularly important.[1]

According to the Australian Bureau of Statistics (ABS) the number of Australians aged 65 or older will reach 26% of the population by 2051. In real figures this will mean nearly eight million older Australians, more than double the current demographic.[2] As such it is increasingly important that legal policy makers specifically consider the relevance of elder law and the impact on older persons of all law reform initiatives.

Housing law and policy are of particular relevance to older people, but the law reform priorities are perhaps different than one may think. Contrary to views that issues around aged-care accommodation and retirement village regulation are of central concern, statistics released earlier this decade on living arrangements for older Australians tell a different story. The reality is that in Australia 77% of older people live in private dwellings in the community, with 20% of these living in family households incorporating children, other relatives or friends, and only 6% living in assistance accommodation.[3] These figures suggest that quite different issues regarding housing security are of paramount concern to older Australians.

This article sets out these priorities and highlights the strong link between elder law, elder abuse and housing.

Housing and accommodation security

The legal issues commonly arising for older Australians in relation to housing may be summarised by reference to their personal accommodation situations.

Home ownership

Those older people in the community lucky enough to own their own home are unfortunately not immune to housing related legal issues. The vast majority of older people living in private dwellings in the community face the predicament of being asset rich and cash poor and struggle to maintain their financial independence. Over the past 10 years, a modest home in many Australian capital cities has become a significant asset in financial terms, however this has not translated to disposable income for most older Australians. The financial burden of maintenance and rates on their homes, as well as the need for services such as home care have resulted in the increased need for older people to become involved in complex financial arrangements such as reverse mortgages or family agreements. Overall, financial hardship also limits access to legal advice and assistance should problems arise. Home ownership also often results in older people sharing accommodation with dependent adult family members, often giving rise to grandparenting issues and the risk of elder abuse.

Retirement villages and owners' corporations

Similarly, older persons resident in private retirement villages or properties managed by owners' corporations may face similar concerns to those in private independent dwellings. The buy-in costs, depreciation and maintenance issues and potential for complex management arrangements compound the financial hardship. The potential for neighbourhood disputes and harassment in these accommodation options is also increased, particularly where residents may be managing age-related health disorders—such as dementia or depression—that can result in anti-social behaviours.

Rental, shared accommodation and non-private dwellings

Older people face tenancy issues similar to all tenants who may be disabled, disadvantaged or in financial hardship. Older people resident in boarding and rooming houses or caravan parks may be particularly vulnerable to financial exploitation, sub-standard services, eviction and co-tenant disputes and harassment.

Public and community housing

Similar to residents in retirement villages and owners' corporations, public and community housing tenants face issues relating to high-density living for older people. Notably at the 2001 Census, older tenants comprised approximately 29% of all public housing tenancies, with 48% of these tenants being 75 years of age and older. Commonly these residents may face increased financial hardship and higher incidence of neighbourhood disputes and harassment.

Aged care and independent living units

Residents in aged-care accommodation face particular issues at entry, such as the need to navigate complex agreements and ongoing costs that can give rise to financial hardship. Although there is regulation of this sector,[4] residents may also face vulnerability to elder abuse and sub-standards services, particularly if they reside in independent living units.

Homelessness

Finally, it has been estimated that 250,000 people across Australia over the age of 60 are homeless or at risk of homelessness.[5] There are a number of risk factors for homelessness among older people in our community including:

- ◇ lack of suitable housing and housing stress;
- ◇ financial pressures;
- ◇ inadequate income support;
- ◇ poor physical and mental health;
- ◇ major life changes such as death of a partner;
- ◇ family relationship breakdowns; and
- ◇ elder abuse.

In summary, across all the living arrangements and accommodation options listed above, all older people face vulnerability to financial hardship and the risk of elder abuse.

Elder abuse

Elder abuse, as defined by the World Health Organisation, is 'a single or repeated act or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person'.[6] As such, elder abuse may constitute any knowing, intentional, or negligent act by a caregiver or any other person that causes harm (physical, psychological, financial or social) or a serious risk of harm to an older person, where the older person and the perpetrator are in a relationship involving trust, dependency or proximity.[7]

Although is it difficult to establish meaningful figures regarding the rate of elder abuse in the community, ABS data shows that one in five people experiencing physical abuse within an intimate partnership are over 55.[8] This figure is reflected in studies conducted both in Australia and overseas which have found that 4–10% of people referred to aged-care services are victims of some form of abuse.[9] There are further estimates which indicate that 3–5% of all people over the age of 65 who are living in the community suffer from some form of abuse.[10] The most prevalent form of elder abuse is that of financial abuse. This form of elder abuse arguably has the greatest potential to impact on an older person's living arrangements.

There are some legal remedies available to older people who have experienced incidents of elder abuse, but older people are often not able to access legal assistance for financial reasons or choose not to pursue these avenues of assistance for a range of social and cultural reasons. The reasons for this lack of action are complex and varied. However, it may often be that the older person is reliant on the perpetrator for care and assistance and may not want to upset the relationship.[11] As such the older person may see greater value in maintaining the status quo than facing the possibility of damaging the relationship or displacement where accommodation is concerned.

Research has shown that 90% of elder abuse is committed by family members. There are significant indicators of financial dependency as well as dependency in relation to housing, transport and care. A significant number of perpetrators of abuse have similar issues regarding social isolation or lack of community support to the older person and are also often under severe financial stress. Overwhelmingly, the consequences of elder abuse for the victim are extremely serious, placing their living arrangements, personal circumstances, financial, physical and mental health in jeopardy. It is for this reason that victims of elder abuse are also at significant risk of accommodation insecurity or even homelessness.

Law reform priorities

Efforts to address the issue of elder abuse are actively being undertaken across all levels of government at both the state and federal level as

well as by the not-for-profit sector. Many of these measures centre around community education campaigns on elder abuse and the rights of older people and also support for increased access to specialised legal services for older persons.[12] Human rights law has also been identified as a potential tool for combating elder abuse in jurisdictions where human rights legislation has been enacted, such as Victoria. Submissions to the recent National Human Rights Consultation have highlighted the benefits of a Commonwealth Human Rights Act in protecting older people from elder abuse.

The 2007 Commonwealth Parliamentary Report on *Older People and the Law* identified law reform priorities in the areas of guardianship and administration and discrimination law and retirement village regulation to protect vulnerable older people, and recommended reducing the barriers to accessing legal services.[13] The Commonwealth has not yet responded to the recommendations in this report.

At the state level, some initiatives in these areas of law are being taken. For example, in Victoria the laws surrounding powers of attorney and guardianship and administration are being reviewed with a view to ensuring vulnerable older people are adequately protected and that adequate remedies are available against perpetrators of elder abuse.[14]

Conclusion

This article has sought to highlight the link between housing and accommodation security for older people and elder abuse in our community. Not only are the housing arrangements of older people a causal indicator of elder abuse, but the identification and recognition of elder abuse necessarily involves consideration of the impacts on accommodation. The strength of this relationship means that the law reform priorities for ensuring older people maintain secure housing are similar to measures suggested to prevent and address elder abuse. In addition to the basic need to alleviate financial hardship, and increase access to legal services among older people, strengthening human rights, power of attorney, guardianship and administration law to protect vulnerable older people are all measures that ultimately also strengthen their housing security.

Endnotes

1. House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law*, 2007, [7.1].
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The dilemma of now

The 'invisible' youth homelessness crisis

By Rebecca Reynolds

It is true to say that the changes the federal Government is talking about in relation to the way homelessness is dealt with—at a state and federal level—are a 'once in a generation' opportunity.

Government information talks about proactive and extensive ways to make meaningful social changes that actually address the problems of homelessness in Australia. We have both federal and state governments that say they are willing to work together; a national consultation process that promises to overhaul homelessness legislation; a policy that aims to reduce significantly homelessness and the factors that lead to it; and the money to support the policy. Government housing reforms promise new homes and extensive renovations to tired community housing stock and, since the initial announcements, an extensive process of acquisition and revitalisation has been undertaken. Most of the acquisition is of land on which to build new stock—which takes time—and most of the revitalisation requires, logically, that tenants be moved out of their current accommodation for renovations to occur.

But what do we do while these things are happening? Do we just ask the young person accessing the youth support service Twenty10, who is in need of housing, to 'hold out' until building is complete and renovations are finished? I doubt any policy makers or community workers would suggest that this is appropriate. But it is really hard to quantify youth homelessness for those in government who are in a position to make accommodation more immediately available for the young people we see at Twenty10 on a daily basis. Traditional data collection mechanisms tend to make young people invisible to the system as it is difficult to describe what homelessness looks like for young folk in 2009.

Difficult to describe because when I think about what youth homelessness looks like, the picture is something that is more easy for us all to relate to than the idea of sleeping rough on the street. Homelessness looks like a night on a friend's couch, or staying out all night dancing. It looks like turning that night out at the pub into an all night tryst or walking the streets all night and sleeping through the day. While many of us have been there at some point, the big difference is that we usually have been there by choice. We have an alternative.

Young people experiencing homelessness in 2009 are forced into these situations night after night, just so they can have somewhere to rest or some way to kill time.

And then there are those who have secured themselves a room in some form of boarding or shared accommodation—a room that is often shared with others. Take Tami, for example. Tami is a young person who Twenty10 was helping to sort out identification. Tami had been thrown out of home when he told his parents that he was gay. He was unable to communicate with his parents or access the family home, and was having difficulty getting his birth certificate to prove his identity. Think about how many times you need to prove who you are to get things done! Enrolling for courses, signing leases, negotiating with Centrelink and public housing authorities … the list continues. But with the support of his case manager and after many conversations with the Roads and Traffic Authority, the final step in getting an identity card sorted was a piece of mail with Tami's current address on it. The mail itself was not the problem—the problem was Tami being able to get into the boarding house bedroom where the mail was located, as the room was being rented by another person at the time. There is really nothing worse than not knowing what you are walking into—but that is Tami's daily reality.

Visibility problems

Our homeless young people are invisible to most of our community. You probably would not think twice if you walked past them on the street, saw them sleeping in the sunshine in the local park or bought them a drink in a bar. It is with this in mind that, as the Government starts talking about introducing specific homelessness legislation, we strongly encourage the retention of a broad definition of homelessness. If only those who are roofless are counted in homelessness data collection methodologies, then this will lead us to solutions and policies that only tackle a small percentage of the problem.

Rebecca Reynolds is the Managing Director of Twenty10, a not-for-profit organisation based in Sydney, that supports and works with young people, communities and families of diverse genders and sexualities.

While the government has, metaphorically, aligned the planets to attempt to shift the fundamental circumstances that lead to homelessness, there is a different collection of circumstances at work that are impacting on the young people who are accessing Twenty10 and other youth accommodation and crisis services across Australia. As services and workers, we are encouraging and supporting a systemically invisible group of people to become visible and ask for the assistance that they are entitled to—only to not be able to provide them with any sustainable solutions. There is an inadequate supply of community and government housing stock and a private rental market that is applying an ever increasing amount of financial pressure to renters.

Hence, our dilemma at Twenty10. While improvements are on the way and broad based issues are being tackled, ours is the dilemma of what do we do right now? What do we do tonight? Next week? Next month? Backpackers' hostels and boarding houses are a short-term solution but it is an impossible ask for a young person or a service to continue to pay for these services on a daily basis—when and if they are available. There are also significant concerns around the standards of many facilities that provide temporary accommodation. Additionally, in being forced to use these services, young people of diverse genders and sexualities are often being placed at an even greater risk of homophobic violence, intimidation and discrimination. These young people are at greater risk of being fired from tenuous employment situations (where the least experienced is often the first to go); of being unable to maintain a school schedule; of not being able to prepare or store food; of not being able to wash and dry clothes ... the list goes on. Governments (at all levels) and our communities need to step up and speed up the efforts to find a solution to this problem—a solution that is effective today and into the future.

Our homeless young people are clever and resilient. They take what the world throws at them and find a way to make it work. They set a strong example for governments and services to emulate. I wonder if we are as ready and able to deal with the challenges that are there for us to tackle.

Social objectives in planning for affordable housing

By Ian Winter

The Ten Commandments—despite being etched in clay tablets an age ago—are today a subject of scholarly debate.

Some Biblical scholars maintain the third commandment (the one about not taking the Lord's name in vain) was originally about swearing an oath of cooperation with your neighbours rather than today's version of 'thou shalt not swear when a hammer has whacked thine thumb'.[1] It is argued that the third commandment originally had a social objective—mutual collaboration. Neighbourly assistance to bring in the harvest was critical to survival. The third commandment's collective intent, while apparently obvious in its original social context, is re-interpreted in contemporary society in an individualist manner—my hammer, my thumb, my oath.

As the third commandment has lost sight of its social objectives so too has land use planning. Land use planning has social values embedded within it, but today these are rarely explicit. A conscious effort to make these obscured social objectives part of the public debate about metropolitan planning would, I believe, advance somewhat stalled conversations in urban policy and planning about how we will live together successfully. One illustration of this is planning for affordable housing.

Planning for affordable housing, at its best, makes the value judgment that neighbourhoods in which households on a range of incomes can afford to live are better. It makes an explicit commitment to social difference and thereby justifies the use of planning legislation and practices to deliver an amount of affordable housing that can either preserve or enhance the social mix of a neighbourhood. It is a rejection of socio-economic homogeneity—a rejection of having lower income households living in one part of the city and higher income households in another. It is also a value judgment that planning is rightly concerned about the social dimensions of the neighbourhood.

The South Australian Government provides a good example of land use planning with explicit social objectives. It has made clear that it is planning for affordable housing to promote social mix in the community. Whether or not one agrees with this particular social objective, and the values that go with it, is not my primary concern. The mere fact that the social objective is explicit is, I believe, a starting point for a more constructive urban policy debate. But this approach to land use planning is unusual. Is it unusual because we do not need more affordable housing? Is it unusual because we do not know how to plan for affordable housing? Or is it unusual because we have failed to debate the social objectives of land use planning?

Do we need more affordable housing?

The National Housing Supply Council *State of Supply Report 2008* states that 'housing affordability for first home buyers and private renters declined over the decade to 2008'.[2] In 2006 the proportion of lower income private renters in housing stress increased to 60%, from 43% in 1996.[3] Australian Housing and Urban Research Institute (AHURI) research finds that these circumstances will deteriorate to 2045 as 'the number of lower-income households in housing stress is projected to increase by 84% (or 13,500 households per year).'[4]

Demography is a key driver of our housing affordability destiny. Single person households represented 1.8 million or 25% of all households in 2001. They are the fastest growing household type and are projected to increase to between 2.8 million and 3.7 million (28% to 34%) of all households in 2026.[5] Households on one income find it that much more difficult to meet housing costs.

Australians are also consuming more housing space. Despite the average household size falling throughout the 20th century (from 4.5 to 3.0 persons), and down to 2.51 persons in 2006, the size of houses has increased. The size of houses grew one third between 1988 and 2008; from 181 square metres to 239 square metres. The average cost of housing in Australia rose in the same 10 year period by $65,000 to $236,000.

Dr Ian Winter is the Executive Director of the Australian Housing and Urban Research Institute (AHURI).

On these figures there can be little doubt that we need to plan for an increased supply of affordable housing.

Do we know how to plan for more affordable housing?

Nicole Gurran and colleagues in some recent work for AHURI found that in many cities of the United Kingdom, Ireland, USA, and Netherlands, the land use planning system plays a central role in promoting the supply of affordable housing. The approaches can be grouped under five different strategic objectives:

1. Increase housing supply
2. Reduce barriers to affordable housing development
3. Preserve and offset the loss of low-cost housing
4. Encourage new affordable housing
5. Seek a dedicated affordable housing supply in new developments.[6]

Different planning tools will be more or less effective in pursuit of such strategic objectives dependent upon local land and housing market conditions.

> For example, in high growth areas, protective mechanisms may be required to retain existing levels of low-cost housing, whereas in areas of lower land value non-financial incentives could be introduced that encourage a proportion of the development to be set aside for purchase by social housing providers or low-income households.[7]

The following table details a range of planning mechanisms that can be used to pursue affordable housing objectives.[8]

Table 1: Planning strategies and mechanisms for affordable housing

Strategic objective	Approach/mechanism
Increase housing supply	◆ Audit of potential residential land ◆ Government dedication/acquisition of land ◆ Land development or renewal authority ◆ Land development incentives/penalties
Reduce barriers to affordable housing development	◆ Audit existing planning controls ◆ assess impact of proposed regulations on housing affordability ◆ Development controls permit diverse housing, in as many areas as possible ◆ Faster approvals for preferred development ◆ Overcome local barriers to affordable housing construction
Preserving and offsetting the loss of low-cost housing	◆ Social impact framework ◆ Preserving particular house types at risk ◆ Assistance for displaced residents
Encouraging new affordable housing	◆ Graduated planning standards relating to building use and context (eg boarding houses near transport require less parking) ◆ Planning bonuses/concessions on development standards for designated affordable housing creation or contribution ◆ Fast track approvals for affordable housing meeting defined criteria ◆ Fee discounts for affordable housing meeting defined criteria
Securing new dedicated affordable housing	◆ Voluntary negotiated agreements for affordable housing contribution ◆ Inclusionary zoning—mandatory contributions for all identified development in the zone to contribute to affordable housing fund/ supply ◆ Impact fees—mandatory contribution to offset impact of development on affordable housing needs

The South Australians have progressed one of these approaches—inclusionary zoning to secure new dedicated affordable housing. In March 2005 the *Housing Plan for South Australia* was released with the explicit aim of providing for affordable housing in major, new developments on government land. Fifteen per cent of such developments are to include affordable housing with 5% being for those who have complex housing needs:

> In implementing the 15% target, an important aspect of Housing SA's strategy has been to work closely with the Department of Planning and Local Government, and the Local Government sector to provide support for planning mechanisms that provide specific provisions and incentives for affordable housing developments. Emphasis has also been on supporting socially inclusive and sustainable communities that provide a mix of household types throughout the community.[9]

An amendment to the *Development Act 1993* (SA) gave explicit legal definition to affordable housing with the objects of the Act expanded to include 'to promote or support initiatives to improve housing choice and access to affordable housing within the community'.

Since July 2007 some 900 housing starts have been undertaken to meet these affordable housing commitments in South Australia.

Other states and territories have taken steps, less comprehensive than South Australia, to plan for affordable housing. Victoria and NSW, through their respective land development agencies, have instigated affordable housing supply targets. VicUrban aims to have 25% of house and land packages sold in the lowest quartile of house prices. In NSW, Landcom targets 7.5% of its house and land packages to be sold at prices affordable to moderate income households. In Western Australia, the East Perth Redevelopment Authority aims to deliver up to 15% of all new housing as affordable housing. In the ACT, 15% of all new house and land packages are to be sold in the $200,000–300,000 price range.

We know how to use the planning system to provide for an increased supply of affordable housing. We also know we need more affordable housing. So why in Australia do we not use our land use planning system more frequently to affect an increased supply of affordable housing? One reason is because we have not debated and made explicit what the social objectives in planning for affordable housing should be.

Planning and social values

Though contemporary land use plans might articulate social aspirations such as 'protecting liveability', or 'increasing the supply of well located affordable housing', these lack a clear commitment to an express social objective. What is meant by 'liveability'? Whose 'liveability'? Does 'increasing the supply of well located affordable housing' mean something about creating greater social mix, or is it about access to jobs? Moreover, without the legislative change needed to drive them and the concrete measures needed to implement them, such statements remain aspirations rather than clear strategic objectives.

This lack of explicit social objectives in planning helps to explain the apparent gulf between the views of suburban communities and their governments on our cities' futures, on how we are going to live together. Plans for a 'compact city' seem a long way from our suburban reality. All this 'compactness' at least seems to imply a different way of living, different social outcomes. Be it about neighbouring, noise levels, privacy, or time spent with family and friends, these are all aspects of social life in the compact city that could be different. Yet rarely does land use planning purposefully engage with these social outcomes.

It is not that these social outcomes can simply be read from the urban form. The physical dimensions of neighbourhood and cities do not determine these things, but they can shape them.

Observers of land use planning in Australia will recognise this long standing critique that the physical, technical and aesthetic dimensions of land use planning have been embraced and practiced more readily than the social aspects.

This has long been the case despite the origins of Australian town planning in the English social reform movement at the turn of the 19th century. Expert analysts have explained why this is so and made sustained calls for social objectives such as equity to be centre stage in urban policy.[10]

One obvious reason for the lack of explicit social objectives is because it is difficult. Debate of social objectives is not straight forward. There is not a singular, overarching 'public interest' that will come to a comfortable consensus.[11] It all seems so subjective, judgmental and difficult compared to the 'obvious', 'calculated', 'rational' objective of higher population density. But our discomfort in discussing these issues is no reason to bury them and pretend they do not exist. Such non-decisions also have particular social outcomes. As Skidelsky warns the substitution of words for targets that codify the uncodefiable, and the substitution of bureaucratic directives for professional honour and wisdom, are today too common.[12] We must drop our 'moral neutrality'.

The philosopher Michael Sandel, the 2009 Reith lecturer for the BBC, in seeking to revitalise public discourse argues that in recent decades we have tended to shy away from debates about moral values—preferred to ignore them and leave them undisturbed, conducting public life without reference to them but that this means suppressing moral disagreement.

> A more robust engagement with our moral disagreements could provide a stronger, not a weaker basis for mutual respect.[13]

The housing and urban research community has an obligation to contribute to this robust engagement in two ways. First, by being transparent about its value orientation, and there is healthy debate within journals such as *Housing, Theory and Society* on this matter. Second, by conducting research and providing understanding of the issues important to public life. And this is why AHURI is committed to working with all governments in Australia to develop a national cities' research program.

Land use planning is unavoidably value-laden. Land use planning affects the shape and form of our residential environment. It shapes how we live together. It shapes our social relations. Decisions about whether to retain or supply affordable housing in particular neighbourhoods are decisions about what types of households will be able to afford to be neighbours. They are decisions about social mix. They are judgments that social mix, social heterogeneity, is better than social homogeneity. We need to identify such objectives, debate them, and pursue them—whatever they ultimately are—so that we can continue to live together successfully.

Endnotes

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2. National Housing Supply Council (2009) *State of Supply Report*, 82.
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Unscrambling the decline in housing affordability

By Chris Lamont

Newspapers, radio and television often feature differing opinions as to the reasons for the decline in housing affordability.

These reasons include: negative gearing, bigger houses, the first home owner grant, urban sprawl, greedy builders and developers and the unrealistic expectations of generation X and Y. In sighting these issues there is a tendency to rely on the 'vibe' of the issue—a concept brought to prominence by the Australian movie *The Castle*.

In reality, no single issue explains the decline in housing affordability. Like other complex issues, there are multiple factors that need to be assessed in detail. Population growth, quantity of existing housing stock, annual residential construction starts, wage growth, tax regimes, cost and impact of regulation, availability of residential infrastructure, and the supply and price of skilled labour are just a few of the issues that impact on affordability.

What is clear is that the decline in affordability is closely related to restrictions in housing supply (as demand for housing grows).

A snapshot across Australian capital cities shows a disparate situation in respect to property taxes, infrastructure charges and planning laws. Not surprisingly there is an inverse relationship between the quantum of these taxes and charges and housing affordability. For example, a house and land package in Sydney worth $550,000 comprises taxes and charges levied by the federal, state and local governments in the order of $140,000. The same house and land package in Adelaide is subject to $42,000 in taxes and charges.

This example provides part of the explanation on the supply side of the equation. The other factor is the different planning schemes that exist in each jurisdiction. Delays and complexities associated with the New South Wales and Queensland planning schemes mean it takes at least twice as long (on average) to prepare a new residential development. The impact of delays in these states mean that holding and associated costs in the order of $30,000 are incurred for each new dwelling, pushing the price just that much further out of reach for many first home buyers.

Why is it important to examine the supply of new housing in explaining the issues associated with housing affordability? Because without an efficient supply of new housing a growing population is forced to compete for existing housing stock.

The bulk of the house price boom occurred between 1999 and 2004. The median house price for the period rose by 67% (after general inflation) or $162,300. During this period there was strong wage growth and very strong growth in Australia's population, driven primarily by immigration.

Immigration, particularly skilled immigration, remains a necessary and important measure required to drive the Australian economy, but unfortunately there has been little attempt to assess the net size of Australia's net annual immigration programs and the corresponding impact on housing demand. A detailed and accurate assessment would look at all forms of immigration (both temporary and permanent) and assess the corresponding level of housing demand.

Australia's private rental market has a national vacancy rate approximating 1.5%. Many experts would consider 3% to be the market clearing rate. In view of the record low in private rental vacancy rates, it is hardly surprising that rents have grown over the past four years at a rate of more than 10% in most capital cities.

Some say the increase in house prices (and thereby rents) is due to investors taking advantage of negative gearing and other taxation incentives. But investment in the private rental market has declined in recent years despite falling vacancies and growing yields. If negative gearing is a cash bonanza for property investors in the private rental market, why have private investors not met the growing demand for private rental accommodation?

Econometric assessments undertaken by ACIL Tasman and the Housing Industry Association (HIA) have looked at the impact of a range of tax changes on property prices including negative gearing. The study concluded that the

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impact of negative gearing on house prices was statistically insignificant. This was in contrast to the impact of restrictive and complex planning and zoning policies, which were found to have driven up the price of land and artificially constrained the supply of housing in both infill and outer areas.

The combination of restrictive planning and onerous tax and charging regimes has stifled investment and the supply of new housing. This has occurred over a number of years and today there is a chronic shortage of housing. The National Housing Supply Council, established by Prime Minister Kevin Rudd, was tasked with assessing the current shortage of housing and identifying the expected shortage to the year 2020. The Council's first report conservatively estimated a national housing shortage of 85,000.[1]

Of some concern is the Council's projection on the shortage of housing over the next few years. Based on a medium demand and supply assumption, the supply gap in housing is expected to grow by 46,000 dwellings in the next two years. By 2013 the Council estimates Australia will be 203,000 dwellings short of required demand.[2] This projected shortage, if realised, will have significant implications, not just for vacancy rates and housing affordability, but also for the number of homeless Australians.

The above estimates should then be viewed against predictions of 30–40% reductions in house prices. There are those who refer to what happened to house prices in the United States and conclude that the Australian housing market is about to collapse and house prices will soon experience wholesale price reductions. Those seeking to use the US as a reference for making projections for the future of Australian house prices would be well advised to look at the oversupply that existed in the US housing market immediately prior to the drop in prices and the relatively stringent lending requirements that exist in Australia.

Housing affordability has improved in Australia in 2009, but this has not occurred on account of a drop in house prices. Indeed there is some evidence to suggest that house prices in the 'entry level' segment of the market have experienced some modest price growth in certain areas of Australia.

Significant reductions in interest rates have delivered improvements in housing affordability for owner occupiers. The HIA–Commonwealth Bank of Australia *First Home Buyer Affordability Report* revealed a 14.6% improvement in affordability for the March 2009 quarter, which came hot on the heels of a 40% improvement at the end of 2008. The primary contributing factor in this improvement is the 4% saving in the standard variable mortgage rate.

In the longer term, however, further reductions in interest rates will not sustain the improvement in affordability. Interest rates have reached the end of the downward cycle and upward pressure is already being experienced.

Addressing supply shortages and bottlenecks is the only means of providing an acceptable level of housing affordability. For many it will be obvious: unless the supply of housing roughly approximates the level of housing demand there will be a price movement.

For more than a decade in Australia, housing demand has exceeded supply. The National Housing Supply Council predicts that this will continue and hence the prospects for housing affordability in the year 2020 are sobering.

There is not only a requirement to boost the supply of housing to address housing affordability, but in the current economic climate there are employment and economic benefits. No other industry sector can generate as much activity or employment as quickly as the residential construction industry. Activity in the sector provides employment in manufacturing, law, business, sales, and of course, construction.

Removing onerous tax and charging regimes is the first step in providing more affordable housing. Improving planning, land supply and zoning processes will also increase both the number of new residential dwellings constructed and housing affordability.

The most unaffordable housing in Australia is generally found in areas that have the most complicated and inefficient planning systems, high levels of taxation and infrastructure charging on housing. Unless these issues are addressed, affordable housing for many Australians will be nothing more than a pipe dream.

Endnotes

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Retaining the 'spirit of place'

Housing and heritage

By Graeme Wiffen

Tensions between heritage and housing often arise.

Many will immediately think of an old house, which new owners want to extend, on a big block suitable for subdivision. Is the line of old houses near a railway station a heritage precinct or are they on land suitable for higher density? Should an old factory or a school with heritage significance be converted to 'New York style lofts', or is this introducing high density living to a new area?

Note that economics do not always go the one way. Demolishing the old house may allow for a more intensive use of the site, but the conversion of the factory might allow for an intensity that would not be allowable if the factory were demolished and more recent planning restrictions applied.

Heritage issues, therefore, impinge on housing as an aspect of the regulation of land use, and the most contentious issues often centre on which set of policies should apply. While this article refers to Australia's heritage laws, most heritage issues are addressed at the local level by councils administering their local land use schemes.

Terminology

It is useful to avoid talking of 'heritage buildings' and to prefer 'places of heritage significance'. The difference is important intellectually in approaching the question of the identification of what is important and legally in setting the parameters of the regulatory activity that heritage has become. As a regulatory activity, questions of heritage quickly intersect with law. Heritage laws are important in land use and development and seem to be under continual scrutiny.

These are some of the questions that the laws address.

What is significance?

The Australian national group of the International Committee for Monuments and Sites (Australia ICOMOS) is an organisation for heritage professionals. The Burra Charter, sponsored by Australia ICOMOS, asserts that in considering places with cultural heritage significance:

> The *aim of conservation* is to retain the *cultural significance* of a *place*.
>
> *Place* means site, area, land, landscape, building or other work, group of buildings or other works, and may include components, contents, spaces and views.
>
> *Cultural significance* means aesthetic, historic, scientific, social or spiritual value for past present or future generations. *Cultural significance* is embodied in the *place* itself, its *fabric, setting, use, association, meanings, records, related places and related objects*.[1]

At the recent ICOMOS Congress in Quebec, delegates considered how the task of conservation was not so much to preserve fabric but to assist in maintaining the 'spirit of place'.

Setting a daunting regulatory task, ICOMOS is calling for the protection of the:

> Spirit of place (which) is defined as the tangible (buildings, sites, landscapes, routes, objects) and the intangible elements (memories, narratives, written documents, rituals, festivals, traditional knowledge, values, textures, colours, odours, etc.), that is to say the physical and the spiritual elements that give meaning, value, emotion and mystery to place.[2]

So a place may not be a house and may have natural or cultural significance and—within cultural—the significance may be within an Indigenous or non-Indigenous tradition. Similarly, the issue may not be to save an historic building, but to identify the significance of a place and work out how to preserve that significance, ideally in a way that maintains the 'spirit of place'.

Regulatory scheme

Considering the question in this way does allow for a range of regulatory approaches. Walk

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down a city street where old facades have been preserved in front of multi-story developments and, before condemning the tokenism of facadism, consider: What is the place? Is it the buildings or the street with a historical streetscape? What was the significance? Does keeping the facade maintain it? Is the issue less about preserving the buildings and more about determining a setback between the old facade and the facade of the high-rise above it? And as the Quebec Declaration says: What about the 'odours' *(sic)*?

World heritage sites are required to have a buffer zone, so important heritage laws for the Sydney Opera House are not only those that preserve the building but the planning laws that protect views to and from the building up and down Sydney Harbour.

Australian heritage laws adopt the strategy of listing places of heritage significance on a heritage register. Reliance is often placed on plans of management to provide the fine detail of how places are to be treated. Once heritage significance is decided on, there can be trade offs with what is less significant but which may be of value to the owner.

Significance for whom?

It is clear that heritage is complex in a multicultural country with a long Indigenous tradition. Australia is also a federated nation of nine jurisdictions with heritage laws. Australia's first national heritage laws, the *Australian Heritage Commission Act 1975* (Cth), took a national perspective through a Register of the National Estate. By 2003 this comprised more than 14,000 items. In a pre-*Dams* case[3] view of the *Constitution*, the Register of the National Estate was not supported by civil or criminal sanctions, but listing on the Register had persuasive authority. Unlike the US model on which it was based, this Register was not integrated with the state and territory lists, which did have sanctions.

This model changed in 2004, when the then Commonwealth Government repealed the legislation and brought national heritage laws within the omnibus *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). Earlier the Council of Australian Governments had decided that heritage issues should be dealt with at whichever level of government is appropriate.[4] The effect is to require attention to how a heritage place relates to Australia's governmental divisions, not just for administrative convenience, but as part of the identification of significance. Is a place of national significance? Or state or territory significance? Or is it of local significance? While the duplication between the Register of the National Estate and the state and territory heritage registers has been reduced, there are misgivings that the new List of National Heritage Places under the EPBC Act has only 105 items of (truly?) national significance.[5] The state and territories are to list items of significance to their areas and local government to its registers.

Significance for what?

The national legislation—the EPBC Act—protects the heritage values of a place, which is defined to include:

> 'The place's natural and cultural environment having aesthetic, historic, scientific, or social significance or other significance for current and future generations of Australians.' (s 528)

Pause to note how broad this definition is. It moves a long way from the old house that has historic or architectural significance. For example, a place of social significance to a migrant group, who initially had few resources, may be very unprepossessing in aesthetic appeal and have little historic significance.

Note also the move to protect values. There was some fear that moving from protecting a place to protecting its values may, with an unsympathetic regulator, downgrade the overall protection: how little needs to be preserved to protect a place's heritage values rather than the place itself? Some landmark cases though may go the other way. In considering the question of whether to allow the damming of a river in Queensland, the effect of the farming activities that would be facilitated on the Great Barrier Reef 500km away was judged to be relevant.[6]

Who decides?

Heritage in some respects is a contentious and perhaps nebulous concept. Who decides what to protect is, therefore, an important issue. Heritage groups argue that questions of identification and management should be separated.[7] What is heritage is a question for heritage experts. Whether what is identified should then be protected is a question of the allocation of resources, which, as a political issue, should be decided in a political process. Politicians seem to prefer to get involved in the first question and so perhaps avoid any opprobrium when they might decide not to protect a place with identified heritage significance. In most of Australia's heritage legislation, the question of whether to list a place on a heritage register is a ministerial decision.

Who pays?

Broadly, the upkeep of a place with heritage significance falls to the owner. Most jurisdictions have a system of competitive grants that can be used to assist. Some jurisdictions provide for concessional local government rates. The Keating Labor Government introduced a tax-offset scheme for approved expenditure on a place listed on a heritage register. This was replaced with a grants program in 1999.

Heritage is a matter of private and public concern. Which should prevail and at what stage should this be considered? Potential financial hardship to the owner could be considered at the listing stage,[8] at the stage of assessing an application to carry out work at a listed place, or not at all.

Heritage can easily be seen as an expensive impediment to the urgent and necessary provision of housing by homeowners for their families and by governments for a rapidly increasing population. It can also seem bedeviled by vague rules and discretionary judgments. Returning to the ICOMOS ambitious definition of the 'spirit of place' heritage significance is, on the other hand, an attempt to identify the places we want to keep in the midst of constant and vast changes and a way of teasing out the deeper meanings in where we live. Heritage is central to housing because it comprises 'the physical and the spiritual elements that give meaning, value, emotion and mystery to place'.

Endnotes

1. Article 2.2, *The Australian ICOMOS Charter for the Conservation of Places of Cultural Significance* (Burra Charter) quoted in B Boer and G Wiffen *Heritage Law in Australia* (2006), 108.
2. ICOMOS, *Quebec Declaration on the Preservation of the Spirit of Place,* Adopted at Quebec, Canada, 4 October 2008, at the 16th General Assembly, <www.international.icomos.org/quebec2008/index.htm>, at 16 September 2009.
3. *Commonwealth v Tasmania* (1983) 158 CLR 157, which accepted Commonwealth power in relation to heritage matters under the external affairs power and the World Heritage Convention.
4. Heads of agreement on Commonwealth/State roles and responsibilities for the Environment, Nov 1997, Article 6, <www.environment.gov.au/epbc/publications/coag-agreement/index.html> at 16 September 2009.
5. See <www.environment.gov.au/heritage/places/national/list.html> at 16 September 2009.
6. *Queensland Conservation Council Inc v Minister for Heritage* [2003] FCA 1463 (the Nathan Dam case).
7. S McIntyre-Tamwoy *Australia ICOMOS Comments on NSW Heritage Amendment Bill 2009*. See Policies and Submissions <www.icomos.org/australia> at 16 September 2009.
8. Productivity Commission (2006) *Conservation of Australia's Historic Heritage Places*, Report No 37, Recommendation 10, p xxxv.

Commission News

In February 2009, Emeritus Professor David Weisbrot AM became the longest serving President of the ALRC in its 34-year history. Professor Weisbrot will be leaving the ALRC at the end of November having overseen 15 inquiries during his term. His first inquiry was into the federal civil justice system, which culminated in the landmark report *Managing Justice: A review of the federal civil justice system* (ALRC 89, 2000). Other significant inquiries followed including *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC 96, 2003); *Fighting Words: A Review of Sedition Laws in Australia* (ALRC 104, 2006); and the inquiry into privacy laws, *For Your Information: Australian Privacy Law and Practice* (ALRC 108, 2008). Other inquiries during the Weisbrot presidency covered areas of marine insurance; a review of the *Judiciary Act*; civil and administrative penalties; protection of classified and security sensitive information; gene patenting; uniform evidence law; sentencing; client legal privilege and the three current inquiries into secrecy laws, royal commissions and family violence.

Professor Weisbrot's commitment to law reform is renowned across the legal, policy and government sectors and the high standing and regard in which the ALRC is currently held—in Australia and internationally—is largely due to his leadership, commitment, judgment and dedication to the integrity of the law reform process. Professor Weisbrot has been a mentor to ALRC staff and interns; and his intelligence, generosity and humour are at the heart of the organisation.

The ALRC also farewells Professor Les McCrimmon, whose term ends in November. Professor McCrimmon has worked at the ALRC for the past four years, leading the ALRC's landmark Privacy Inquiry as well as the inquiry into uniform evidence laws and most recently into the *Royal Commissions Act 1902* (Cth) and related issues. As Commissioner in charge of the review of Australia's privacy laws, Professor McCrimmon oversaw one of the largest inquiries undertaken in the ALRC's history. The 2,700–page final report, *For Your Information: Australian Privacy Law and Practice* (ALRC 108, 2008), was published in three volumes, and contains 295 recommendations for reform. The breadth of the subject matter covered in this Inquiry required the ALRC to undertake one of the largest community consultation programs in its history, including well over 250 face-to-face meetings with individuals, organisations and agencies, roundtables, phone-ins, and public forums. The ALRC received 585 written submissions from a broad cross-section of individuals, organisations and agencies, which helped direct the ALRC in developing its priorities and determining the ultimate reform agenda. This report provides a clear framework for establishing world's best practice in privacy protection and is a credit to the leadership provided by both Professor McCrimmon and Professor Weisbrot.

The ALRC wishes both Professor Weisbrot and Professor McCrimmon the very best for their futures, knowing they will remain part of the wonderful extended ALRC family.

The ALRC's inquiry work has continued at a high level during 2009, with three current inquiries in hand. The Inquiry into Royal Commissions was due to report at the end of October 2009. The Secrecy Inquiry has received an extension to its October deadline and is now due to report on 11 December 2009. On 24 July 2009, the ALRC received Terms of Reference from the Attorney-General for a third inquiry that will address issues concerning violence against women and children. The Family Violence Inquiry is due to report in July 2010.

Implementation report

ALRC 104—Fighting Words

The Australian Government response to *Fighting Words: A Review of Sedition Laws in Australia* (ALRC 104, 2006) in December 2008 supported almost all of the report's recommendations. The response indicated that the Australian Government would introduce legislation to implement the recommendations in 2009.

In June 2009, the Anti-Terrorism Laws Reform Bill 2009 (Cth)—a private Senator's Bill sponsored by Senator Scott Ludlum—was introduced into the Australian Parliament. The Bill proposes to repeal s 80.2 of the *Criminal Code Act 1995* (Cth), which provides for the offence of sedition.

ALRC 103—Same Crime, Same Time

At a Federal Criminal Justice Forum in Canberra in September 2008, the Minister for Home Affairs, the Hon Bob Debus MP, noted that some of the main priorities for action that emerged from the Forum included:

- ◇ implementation of *Same Crime, Same Time: The Sentencing of Federal Offenders* (ALRC 103, 2006). The Minister added that the report is now being actively considered;
- ◇ providing more diversionary options for sentencing judges and magistrates (which is considered in *Same Crime, Same Time*); and
- ◇ establishment of a Federal Parole Board (*Same Crime, Same Time*, Recommendation 23–1).

ALRC 102—Uniform Evidence Law

The *Evidence Amendment Act 2008* (Cth) was assented to on 4 December 2008, substantially implementing the recommendations of *Uniform Evidence Law* (ALRC 102, 2005). The amending Act incorporates almost all of the recommendations of Uniform Evidence Law, except for the recommendations in relation to a general confidential relationships privilege. The Government has indicated that it will address these issues at the time it responds to the ALRC's report *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (ALRC 107, 2007).

ALRC 99—Genes and Ingenuity

The ALRC is still awaiting the Government response to *Genes and Ingenuity: Gene Patenting and Human Health* (ALRC 99, 2004).

In March 2009, the ALRC made a submission to the Senate Standing Committee on Community Affairs Inquiry into Gene Patents, which is primarily looking at the patentability of gene sequences—a much more narrow area than that considered in *Genes and Ingenuity*. The ALRC drew on its experience from the ALRC inquiry into the intellectual property aspects of genetic material and technologies, which culminated in the release of the *Genes and Ingenuity* report. The Committee is due to report by December 2009.

In *Genes and Ingenuity*, the ALRC recommended an amendment to the *Patents Act 1990* (Cth) to establish an exemption from patent infringement for acts done to study or experiment on the subject matter of a patented invention; for example, to investigate its properties or improve upon it (Recommendation 13–1). In March 2009, IP Australia released a consultation document *Exemptions to Patent Infringement*, which sets out a proposal for an experimental use exemption under the *Patents Act* that is consistent with the ALRC recommendation.

In March 2009, IP Australia also released *Getting the Balance Right: Toward a Stronger and More Efficient IP Rights System*. This consultation paper proposes a number of amendments to the *Patents Act*, including two amendments that were recommended in the *Genes and Ingenuity* report:

- ◇ an amendment to include usefulness among the grounds considered during examination and re-examination and clarify that the requirement for usefulness is only satisfied if the patent specification discloses a specific, substantial and credible use for the invention (*Genes and Ingenuity*, Recommendation 6–3); and
- ◇ an amendment to clarify that 'balance of probabilities' is the standard of proof applied to all requirements during examination, re-examination and opposition proceedings (*Genes and Ingenuity*, Recommendation 6–3 and 8–3).

It is expected that drafting instructions based on the proposals in the two IP Australia consultation documents will be completed by the end of 2009, with legislation expected to be introduced in the Australian Parliament in 2010.

ALRC 96—Essentially Yours

The *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) received Royal Assent in July 2009 (entry in force 5 August 2009) implementing two key recommendations of *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC 96, 2003):

- ◇ amendment of the definition of 'disability' in the *Disability Discrimination Act 1992* (Cth) to clarify that the legislation applies to discrimination based on genetic status (Recommendation 9–3); and
- ◇ amendment of the *Disability Discrimination Act* to prohibit an employer from requesting or requiring information, including genetic information, from a job applicant or employee, except where the information is reasonably required for purposes that do not involve unlawful discrimination (Recommendation 31–3).

In *Essentially Yours*, the ALRC also recommended amending the *Privacy Act* to permit a health professional to disclose genetic information about his or her patient to a genetic relative of that patient where the disclosure is necessary to lessen or prevent a serious threat to an individual's life, health or safety, even where the threat is not imminent (Recommendation 21–1). In June 2009, after extensive consultation, the National Health and Medical Research Council (NHMRC) finalised the *Guidelines for National Privacy Principles about Genetic Information* under s 95AA of the *Privacy Act*. The Guidelines outline the circumstances in which genetic information may be used and disclosed for the purposes of lessening or preventing a serious threat to the life, health or safety of an individual.

ALRC 89—Managing Justice

In December 2008, the Australian Government introduced the Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2008 (Cth). The Bill will amend the *Federal Court of Australia Act 1976* (Cth) to allow the Federal Court to refer a proceeding, or one or more questions arising in a proceeding, to a referee for report. This will be useful in many cases, including where technical expertise is required. In *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89, 2000), the ALRC recommended that the Federal Court should consider the use of referees (or 'assessors') in native title proceedings (Recommendations 76 and 77).

ALRC 84—Seen and Heard

The *Evidence Amendment Act 2008* (Cth) implements a number of recommendations in *Seen and Heard: Priority for Children in the Legal Process* (ALRC 84, 1997) that were incorporated into the *Uniform Evidence Law* report. These include:

- ◇ a new test for the competence of a witness to give sworn and unsworn evidence that focuses on the capacity of an individual to understand a question and to give an answer to a question that can be understood (*Seen and Heard*, Recommendation 98);
- ◇ a prohibition on general warnings about the unreliability of children's evidence, instead permitting a warning to be given only upon request of a party and where the court is satisfied that there are circumstances particular to that child (other than the child's age) that affect the reliability of the child's evidence (*Seen and Heard*, Recommendation 100); and
- ◇ confirmation that the court may seek expert opinion evidence to assist it to determine if a witness is competent to give evidence (*Seen and Heard*, Recommendation 101).

In 2009, the Australian Government released *Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009–2020*. A number of the outcomes outlined in the Framework reflect recommendations in *Seen and Heard*, including:

- ◇ exploring the potential role for a National Children's Commissioner (Recommendation 3);
- ◇ national standards and monitoring of the out-of-home care system (Recommendations 161–162); and
- ◇ improvement in data collection (Recommendation 166).

ALRC 80—Legal Risk in International Transactions

In *Legal Risk in International Transactions* (ALRC 80, 1996), the ALRC recommended that Australia accede to the *Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters 1965* (the Convention) (Recommendation 9). The Convention makes serving documents in foreign countries quicker and cheaper by enabling them to be provided to a designated central authority in participating countries. On 25 June 2009, the Convention was tabled in the Australian Parliament, together with a National Interest Analysis proposing that Australia become a party to the Convention. Tabling in the Australian Parliament represents the first step in the formal process for Australia's accession to the Convention.

ALRC 77—Open Government

In November 2008, the Australian Government introduced the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008 (Cth). The Bill repeals the power to issue conclusive certificates in the *Freedom of Information Act 1982* (Cth) (FOI Act) for all exemption provisions. While the ALRC did not recommend the removal of all powers to issue conclusive certificates in *Open Government: A Review of the Federal Freedom of Information Act 1982* (ALRC 77, 1995), it did recommend that provision for a conclusive certificate in s 33A (documents affecting relations with states) and 36 (internal working documents) of the FOI Act should be removed (see Recommendations 45 and 53A).

In March 2009, the Australian Government released exposure drafts of two Bills that propose a significant overhaul of the FOI Act. Many of the provisions of the Information Commissioner Bill 2009 (Cth) and the Freedom of Information Amendment (Reform) Bill 2009 implement the ALRC recommendations in *Open Government*:

- ◇ the insertion of a new objects clause that explains clearly the underlying rationale for the FOI Act and its significance for the proper working of representative democracy (Recommendations 1–5);
- ◇ the establishment of a dedicated Freedom of Information Commissioner (Recommendations 18–27);
- ◇ the extension of the FOI Act to contracted service providers and subcontractors delivering services for and on behalf of the Commonwealth (Recommendations 99–102);
- ◇ the amendment of the Cabinet documents exemption to ensure that it only covers documents at the core of the Cabinet process (Recommendations 46–48).
- ◇ the amendment of the internal working documents exemption to relate to deliberative processes (Recommendations 51–52); and
- ◇ the repeal of exemptions for Executive Council documents, documents arising out of companies and securities legislation and documents relating to the conduct of an agency of industrial relations (Recommendations 50, 57, 72).

In May 2009, the ALRC made a submission to the Department of Prime Minister and Cabinet,

expressing strong support for the two Bills and noting that they substantially implement the ALRC's recommendations. The ALRC did, however, note that the Bills do not implement a number of ALRC recommendations (including recommendations relating to time limits, fees, and the application of the Act to parliamentary departments and agencies listed in Schedule 2 of the FOI Act); as well as a number of recommendations relating to the FOI Act made in *Australia's Federal Record* (ALRC 85, 1998).

Reconciliation

The ALRC has established an Indigenous Advisory Committee to assist in building stronger relationships with Indigenous peoples, and to ensure that the concerns and perspectives of Indigenous communities are more effectively integrated into the federal law reform process.

Speaking at the historic first meeting in August 2009, ALRC President Professor David Weisbrot said that in establishing an Indigenous Advisory Committee, 'the ALRC's intention is to ensure that Indigenous people are effectively engaged in our work, so that Australia's laws have proper regard to Indigenous interests and protect and promote Indigenous culture'.

'The ALRC acknowledges that the Australian legal system historically has failed to deliver better legal, social and economic outcomes for Indigenous peoples. As the premier national law reform body, the ALRC has the opportunity—and indeed the obligation—to contribute to greater social justice, equity and inclusion in Australia. Securing the advice and the experience of the outstanding members of the Indigenous Advisory Committee is a critical first step towards realising these important ambitions.'

The establishment of an Indigenous Advisory Committee is one of several initiatives included in the ALRC's Reconciliation Action Plan (RAP). Other measures in the RAP include commitments by the ALRC to:

- ◇ suggest future references that address the particular needs, concerns and priorities of Indigenous peoples;
- ◇ facilitate greater direct participation of Indigenous people in the work of the ALRC as staff members and as student interns;
- ◇ consult more widely and effectively with Indigenous people and communities; and
- ◇ ensure that the ALRC's reports and recommendations to the Australian Government fully take into account Indigenous perspectives.

Foundation Members of the ALRC's Indigenous Advisory Committee are:

- ◇ Professor Larissa Behrendt, Director, Jumbunna Indigenous House of Learning, University of Technology Sydney;
- ◇ Ms Neva Collings, Solicitor, Environmental Defender's Office;
- ◇ Mr Lincoln Crowley, Barrister, NSW Indigenous Barristers Strategy Working Party;
- ◇ Ms Megan Davis, Director, Indigenous Legal Centre, University of NSW;
- ◇ Mr Darryl French, Program Manager Aboriginal Studies, Tranby Aboriginal College;
- ◇ Ms Terri Janke, principal solicitor of Terri Janke & Associates;
- ◇ Mr Warren Mundine, Chief Executive Officer, NSW Native Titles Services;
- ◇ Mr Steven Ross, Coordinator, Murray Lower Darling River Indigenous Nations; and
- ◇ Mr Maurice Shipp, Manager, Indigenous Children's Strategic Policy, ACT Government.

Internship program

The reputation of the ALRC's internship program continues to grow both locally and overseas. There was strong competition for the 15 internship places offered by the ALRC in 2008–09. The successful candidates were of a high calibre, providing invaluable input into the ALRC's inquiries and other areas of the ALRC's work.

The internship program is an important part of the ALRC's community education program. An internship at the ALRC provides an opportunity for students to increase their awareness of law reform issues and improve their research and writing skills, while contributing to an ALRC inquiry. Interns become a member of the team for one of the ALRC's current inquiries and are supervised by a legal officer.

In 2008–09, our interns were involved in a range of other ALRC work areas. Interns provided articles and book reviews for inclusion in *Reform*, assisted in the development of online forums for ALRC inquiries, attended consultation meetings and participated in ALRC functions.

For the first time, a student from the Harvard Law School in the United States joined the ALRC. Ms Isley Markman worked full-time at the ALRC on the Secrecy Inquiry in January 2008 as part of the Harvard Clinical Placement Program.

Mr Peter Fox, from the University of Maryland in the US, and Ms Smriti Sriram from Durham University in the United Kingdom, were also offered placements with the ALRC as part of the winter intake of interns. Mr Fox worked on various aspects of native title, which were incorporated into *Reform* 'Native Title' (Issue 93, 2009) while Ms Sriram joined the Secrecy team.

The internship program will be expanded in the next year to include a targeted Indigenous internship stream. The ALRC has committed to creating opportunities for Indigenous peoples to be involved with the ALRC as interns as part of the Reconciliation Action Plan.

Inquiring into inquiries

The review of the Royal Commissions Act

By Joyce Chia

Dr Joyce Chia is a Legal Officer at the Australian Law Reform Commission and is currently assigned to the Royal Commissions Inquiry.

Dr Mohamed Haneef's visa was cancelled. Cornelia Rau was illegally detained. Saddam Hussein's regime pocketed kickbacks from the Australian Wheat Board. These are the issues that prompted the most recent Australian federal public inquiries.

The Australian Law Reform Commission's (ALRC's) inquiry into Royal Commissions and other forms of public inquiry is the first comprehensive review of the structure and mechanisms of federal public inquiries. Much has changed since the *Royal Commissions Act* was enacted in 1902, and much has been learnt since then. Despite the rapid growth of other accountability mechanisms, public inquiries still play an important and high-profile role in Australian public life. The ALRC's proposals are designed to ensure that public inquiries are more useful and effective, as well as more accountable, in the future.

A Royal Commission, or a public inquiry of some sort, is often called for when something goes badly wrong in Australian public life. Those calling for a Royal Commission are attracted by the independence and status of a Royal Commission, and its ability to get 'at the truth' by compelling witnesses to give evidence in its investigations. Royal Commissions, however, are often also very expensive, lengthy, and formal, and the glare of the media spotlight can ruin lives and careers forever.

Faced with a call for a Royal Commission, the Australian Government can establish a Royal Commission, or it can establish a form of public inquiry which has no statutory basis and therefore has no legal power to get anyone to answer its questions or provide information. A member of a non-statutory inquiry, unlike a Royal Commissioner, also has no automatic legal protection from being sued. Of course, a government can also choose to do nothing, or it could in some cases appoint a standing body, such as the Commonwealth Ombudsman, to inquire into the matter.

All of these options have disadvantages for a government. The length and cost of the typical Royal Commission, and the court-like procedures that tend to be followed in Royal Commissions, may be unsuitable for the particular inquiry. A non-statutory inquiry may be perceived as toothless, since a witness can simply refuse to answer its questions. Doing nothing may not be a politically feasible option. A standing body may not have the power to inquire into the matter, or may be considered insufficiently high-profile for the subject of inquiry.

An alternative would be to enable the establishment of a quicker, cheaper and more flexible form of inquiry than a Royal Commission, with the powers and protections of a Royal Commission. This is what the ALRC proposes in its recent Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75).[1] The ALRC proposes, however, that this form of inquiry should not have the most intrusive powers available to Royal Commissions, and should not be able to require a person to incriminate him or herself.[2]

The Discussion Paper proposes that a two-tier structure of public inquiry should be created in a new *Inquiries Act*. The proposed Act is designed to give the Australian Government greater flexibility in establishing public inquiries. Some events, while not justifying the expense or status of a Royal Commission, may justify a smaller inquiry with statutory powers to compel evidence. Similar two-tier structures can be found in other jurisdictions such as Canada.[3]

Under the ALRC's proposals, Royal Commissions will remain the highest form of executive inquiry in Australia, and will be established by the Governor-General to inquire into matters of 'substantial public importance'. The second tier of inquiry will be an 'Official Inquiry', which may be established by a Minister to inquire into a matter of 'public importance'. An 'Official Inquiry' may, however, be converted into a Royal Commission, and inquiries established outside the proposed statutory framework may be converted into Official Inquiries or Royal Commissions. This gives the Australian Government flexibility to 'upgrade' inquiries if this appears necessary during the course of an investigation.

Both forms of inquiry will be able to: compel a person to attend or appear before the inquiry; take evidence on oath or affirmation; compel a

person to answer questions; and compel a person to produce documents or other things. The ALRC proposes, however, that certain powers will be available only to Royal Commissions, to ensure appropriate protection of the rights and interests of those affected by inquiries. Powers which will be restricted to Royal Commissions include the power to apply to a judge for a warrant to arrest a person who fails to attend or appear, or for a warrant to exercise powers to enter premises and search and seize information.

The proposal for the introduction of Official Inquiries is only one aspect of the ALRC's inquiry. Another important aspect of the review is the need to ensure the independence and accountability of Royal Commissions and Official Inquiries. As Dr Scott Prasser has argued, the primary value of public inquiries lies in the public perception of their independence.[4] Since the independence of such inquiries is critical to their effectiveness, the ALRC proposes that the new *Inquiries Act* should provide that Royal Commissions and Official Inquiries are to be independent in the performance of their functions.

Public inquiries are also unusual in that, as ad hoc mechanisms, they are not generally subject to the same forms of accountability as standing bodies. The ALRC proposes a number of measures to improve the accountability of public inquiries. For example, it proposes that the Australian Government should be required by statute to table final reports of such inquiries (or a statement of reasons why part of a report is not being tabled); publish updates on implementation of any recommendations the Australian Government accepts; publish summary information on the costs of the inquiry; and consult Indigenous peoples in the development of procedures in inquiries significantly affecting Indigenous peoples.

The ALRC's inquiry also considers ways to improve the effectiveness of Royal Commissions and other inquiries. For example, the ALRC proposes reforms to the powers of Royal Commissions and Official Inquiries to obtain, and ensure appropriate protection, of national security information. Difficulties in accessing and using national security information have arisen in previous inquiries, such as the Clarke Inquiry into the Case of Dr Mohamed Haneef.

The ALRC also proposes the publication of an *Inquiries Handbook* to address matters relating to the administration of inquiries, the appointment and remuneration of legal practitioners assisting an inquiry or representing witnesses, and the suitability and use of different procedures. This proposal is designed to consolidate the institutional knowledge in establishing, administering and conducting inquiries, so that there is no need to 'reinvent the wheel' each time a new inquiry is established, and so that lessons learned from one inquiry can be passed on.

Other proposals designed to improve the effectiveness of inquiries include providing that inquiries have the power to: appoint expert advisors; refer questions of law to the Federal Court; and apply to the Federal Court for enforcement of its notices and directions. The use of expert advisors is designed to enhance the capacity of inquiries to investigate matters requiring specialist expertise, and should also give the Australian Government greater flexibility in appointing members of public inquiries. For example, a technical expert may be able to conduct an investigation more effectively if a legal expert is able to advise on the legal issues arising in the investigation.

The power to refer questions of law to the Federal Court would enable an inquiry to resolve a dispute about the exercise of its powers, rather than waiting for a party to seek judicial review. The power to apply to the Federal Court for enforcement of notices and directions is designed to enable more timely, and therefore more effective, punishment for failing to comply with an inquiry than relying on the threat of a prosecution some time down the track.

The ALRC's inquiry into Royal Commissions and other forms of public inquiry

The ALRC began its current inquiry in January 2009, with its Terms of Reference requiring it to review the operation and provisions of the *Royal Commissions Act 1902*, and to examine whether an alternative form or forms of Commonwealth executive inquiry should be established by statute.

The Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75), was released in August 2009 following extensive consultations around the country. The ALRC's final report was due to be delivered to the federal Attorney-General on 30 October 2009 and will be publicly available after it has been tabled in the federal Parliament. All ALRC publications are available online as soon as they are released.

Endnotes

1. The final report of the Royal Commissions Inquiry was being finalised at the time of publication and is under a parliamentary embargo. This article is based on proposals made in the Australian Law Reform Commission's Discussion Paper Royal Commissions and Official Inquiries (DP 75).
2. The ALRC also proposes that an Official Inquiry would not have power to require information subject to client legal privilege. Presently, Royal Commissions do not have this power, although the ALRC's 2007 report, *Privilege in Perspective*, recommended that Royal Commissions should have this power if it is specified in the letters patent. See Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, ALRC 107 (2007), Rec 6–2. The Australian Government has not yet provided a formal response to the recommendations in this report.
3. A tiered model was also recently proposed in the New Zealand Law Commission's report, *A New Inquiries Act*, Report No 102 (2008). The New Zealand Parliament is presently considering the Inquiries Bill 2008 (NZ), which is based on the recommendations of the New Zealand Law Commission.
4. S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006).

Testing the bounds of secrecy

A better approach to protecting government information from unauthorised disclosures

By Michelle Salomon

Michelle Salomon is a student at the University of Maryland School of Law. She worked at the Australian Law Reform Commission as an intern, assigned to the Secrecy Inquiry, in July and August 2009.

The author wishes to thank Anna Dziedzic for her thoughtful comments on earlier drafts and mentorship.

As the recommendations of the ALRC's final report are subject to parliamentary embargo, this article is based on the proposals in the ALRC's Discussion Paper.

The government collects and produces vast amounts of information, much of it highly sensitive.

In some instances, we rely on public servants to keep information secret—in others, we want them to share, or publish, information to meet other public interests. When public servants have to make judgment calls, they should be able to turn to the law for certainty as to whether a disclosure will be applauded or criminalised.

In an increasingly interconnected world, it is critical that Commonwealth information that does not belong in the public domain remains secure and confidential. However, there also should be compelling efforts to ensure that government is transparent and accountable. Australia is striving to achieve the proper balance.

The Australian Law Reform Commission (ALRC) is currently conducting an inquiry into federal secrecy laws. This article will highlight one feature of the ALRC's proposals by examining the prosecutions of three past cases under s 70 of the *Crimes Act 1914* (Cth).[1] The actual outcome of the prosecutions will be contrasted with what their outcome might be, hypothetically, had the offences been prosecuted under the ALRC's proposed new offence: had the prosecution been required to prove harm to a specified public interest. Although it is not a present requirement for the prosecution to prove harm, the issue of harm is frequently discussed in sentencing offenders.[2]

The ALRC's Secrecy Review

The Australian Attorney-General, the Hon Robert McClelland MP, has asked the ALRC to review federal secrecy laws in Australia, thereby marking the fourth of a series of ALRC inquiries into the laws surrounding secrecy, privacy and freedom of information.[3] In June 2009, the ALRC released a Discussion Paper containing proposals aimed at setting out directions for reform.[4] The ALRC will submit a final report with its recommendations to the Attorney-General on 11 December 2009.

Secrecy laws regulate the disclosure of government information. There are roughly 500 secrecy provisions scattered throughout Commonwealth legislation—about 70% of these expressly attach criminal liability for breach, while the remainder establish a duty not to disclose certain information. However, where such provisions regulate Commonwealth officers, a breach of a duty not to disclose may attract a criminal penalty under s 70 of the *Crimes Act*. Under the *Crimes Act*, harm is neither an express nor an implied element of the offence that the prosecution must prove.

To address the lack of clarity, certainty and consistency surrounding secrecy provisions, the ALRC has made a preliminary proposal to repeal s 70 of the *Crimes Act* and create a general secrecy offence in the *Criminal Code* (Cth). Under that proposal, criminal penalties would only be imposed when the prosecution can prove that a nexus exists between the unauthorised disclosure and harm to identified public interests. Disclosures lacking any likely, intended or actual harm would normally be addressed by administrative remedies.[5]

Criminalising disclosure

Under the ALRC proposals, criminal liability would only be imposed where the prosecution can prove that the disclosure did, was reasonably likely to, or intended to:

- ◇ harm the national security, defence or international relations of the Commonwealth;
- ◇ prejudice the prevention, detection, investigation, prosecution or punishment of criminal offences, breaches of a law imposing a penalty or sanction, the enforcement of laws relating to the

confiscation of the proceeds of crime, or the protection of the public revenue;

- ◇ endanger the life or physical safety of any person;
- ◇ pose a serious threat to public health or public safety;
- ◇ have a substantial adverse effect on personal privacy; or
- ◇ have a substantial adverse effect on a person in respect of his or her lawful business or professional affairs or on the business, commercial or financial affairs of an organisation.[6]

The ALRC has formed the preliminary view that other kinds of harm such as harm to the effective working of government or harm to internal government processes are more appropriately protected by administrative processes.

Testing the bounds of secrecy: Three case snapshot

[1] *R v Goreng Goreng*[7]

Ms Tjanara Goreng Goreng was a Commonwealth officer with the Office of Indigenous Policy Coordination. Ms Goreng Goreng was found to have intentionally disclosed information she obtained through her employment on several occasions:

A. Without authorisation, Ms Goreng Goreng emailed copies of work-related documents to her daughter, who was working on a school project related to Indigenous peoples. Two of the documents shared were already in the public domain, but the third was marked confidential.

B. Ms Goreng Goreng also disclosed four internal work emails that had been written by or sent to her supervisor. The emails discussed government plans to address alleged human rights violations taking place in the Mutitjulu Aboriginal community, including child prostitution, sexual abuse and pornography.[8] Ms Goreng Goreng forwarded the emails to her friend, Ms Dorothea Randall, a finance officer and well-known member of the Mutitjulu community. In some of the emails, Ms Goreng Goreng made negative remarks about her supervisor's professionalism, his motives and the Department's policy.

C. Ms Goreng Goreng was also charged with disclosing the details of a confidential meeting she attended, where a Mutitjulu youth worker had made allegations of financial mismanagement against Ms Randall. This charge was not proved because the jury could not agree on a verdict.

Outcome under current secrecy framework

The jury found Ms Goreng Goreng guilty of five counts of breaching s 70 of the *Crimes Act*. The Supreme Court of the Australian Capital Territory ordered that Ms Goreng Goreng pay $2,000, subject to a three-year good behaviour bond. In sentencing, the court recognised that while the unauthorised disclosures did not result in actual harm, they generated considerable potential harm: there was the risk of further disclosure and misrepresentation of the position of the Office of Indigenous Policy Coordination, the Department and/or the Australian Government.

Hypothetical outcome under ALRC proposal

The harm discussed in the sentencing judgment is not a criminal offence under the ALRC model. In sentencing, the court stated that Ms Goreng Goreng's conduct in leaking the information prejudiced the public interest in 'fulsome and frank' communications within government.[9] In the ALRC's view, this kind of damage to internal government processes is more appropriately handled through administrative remedies.

Under the ALRC's proposed general secrecy offence, the court would have to consider whether the unauthorised disclosures actually caused harm, were reasonably likely to cause harm or intended to cause harm to one of the public interests specified by the ALRC.

The disclosures Ms Goreng Goreng made to her daughter are unlikely to meet any harm requirement. Most relevantly, the disclosures concerning the youth worker and her supervisor

may have had a substantial adverse effect on the supervisor and youth worker's personal privacy and/or professional affairs.[10]

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[2] *R v Kessing*[11]

While Mr Allen Robert Kessing was employed as a customs officer with the Australian Customs Service (ACS) he worked on reports of an investigation into criminal activity and organised crime believed to be taking place at Sydney's Kingsford Smith Airport. The reports were given a security classification and provided to Mr Kessing's managers.

On 31 May 2005, an article appeared in *The Australian*, which described lax security at Sydney Airport citing information from the ACS reports.[12] That article—which noted that airport workers 'have been involved in drug-smuggling and stealing from passengers'—inspired a comprehensive expert review of airport safety which resulted in a $200 million Government plan to improve airport security.[13]

Mr Kessing was charged with disclosing the information in the reports in contravention of s 70(2) of the *Crimes Act* (as Mr Kessing resigned from the ACS on 10 May 2005, he was charged under s 70(2), which covers former Commonwealth officers).

Outcome under current secrecy framework

A jury convicted Mr Kessing and the court sentenced him to nine months imprisonment, released upon entering into a $1,000 and nine-month good behaviour bond. In sentencing, the court recognised that there may have been public interest in the exposure of information on airport security, but stated that this was no justification for his communication of the content of the reports.[14] The court acknowledged that the disclosure did not result in any actual harm, but said that it had the potential to damage the reputation of persons engaged in work at the airport and prejudice public confidence in the ACS.

Hypothetical outcome under ALRC proposal

The general secrecy offence proposed by the ALRC covers disclosures likely to harm public safety and/or prejudice the investigation of breaches of the law.[15] It is likely that the disclosures made by Mr Kessing could have compromised airport security and the safety of people using the airport, and also may have prejudiced investigations into criminal activity at the airport.

Separate to the ALRC's Inquiry, a Committee of the House of Representatives has recommended that the Australian Government enact legislation to protect people who make public interest disclosures (or 'whistleblowers'). The Australian Government has not yet formally responded to this inquiry.[16]

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[3] *R v Kelly*[17]

When Mr Desmond Patrick Kelly was a senior public servant with the Commonwealth Department of Veterans' Affairs (DVA), the DVA sent him and 300 other employees a draft proposed statement for the Minister of Veteran's Affairs in response to a review of veterans' entitlements. Later that day, an email was sent notifying all recipients that the ministerial statement would not be made public and advised that previous communication concerning the proposal should remain confidential.

A few days later, an article was published in the *Herald Sun* on the Government's proposal to cut the veterans' package by $500 million, which would have the effect of denying benefits to, 'war widows asking for rent assistance, soldiers bombed in Darwin and veterans exposed to radiation in Hiroshima'.[18] The article claimed to have had access to confidential government documents and included a direct quotation from the withdrawn ministerial statement.

Mr Kelly was charged under s 70(1) of the *Crimes Act* for breach of a duty not to disclose information which came into his possession as a Commonwealth officer.

Outcome under current secrecy framework

A jury convicted Mr Kelly of one count of breaching s 70(1) of the *Crimes Act* and he was ordered to pay a $1,000 bond, for 12 months of good behaviour. The conviction was overturned on appeal on the basis that the evidence used to convict Mr Kelly was considered too weak to support a conviction—mere records of phone calls between Mr Kelly and the journalists did not suggest that he communicated the information to them.[19]

Hypothetical outcome under ALRC proposal

Under the ALRC's proposed offence, it would be unlikely that the prosecution could prove that relevant harm resulted from the alleged disclosure. The sentencing remarks considered the disclosure to have caused an embarrassment to government and the exposure of a bad policy decision, but under the ALRC's proposal, a threat to the effective working of government would not be enough to warrant a criminal conviction.

Conclusion

As the following three cases highlight, the requirement that the prosecution prove that a disclosure caused, or was likely to cause harm to a specified public interest may lead to prosecutions being proved in a limited range of situations. While criminal sanctions play an important role in deterring unauthorised disclosures, the ALRC has suggested a greater focus on administrative sanctions and effective information handling policies and practices within government.[20] The ALRC's proposals seem to be more faithful to the factors that influence conduct in the workplace and would, if adopted, provide an improved framework for keeping secrets both safe and sound.

Endnotes

1. The final report of the Secrecy Inquiry was being finalised at the time of publication and is under a parliamentary embargo. This article is based on proposals made in the Australian Law Reform Commission's Discussion Paper (DP 74), *Review of Secrecy Laws* (2009).
2. Section 16A(2)(e) of the *Crimes Act 1914* (Cth) provides that the court must have regard to any injury, loss or damage resulting from the offence.
3. ALRC, *For Your Information: Australian Privacy Law and Practice*, ALRC 108 (2008); *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (2004); *Open Government: A Review of the Federal Freedom of Information Act 1982*, ALRC 77 (1995).
4. See ALRC, *Review of Secrecy Laws*, Discussion Paper 74 (2009).
5. Ibid, Proposals 7–2 and 7–3.
6. Ibid, Proposal 7–1. Proposal 7–2 organises the general secrecy offence into three tiers, designed to match a criminal penalty with the gravity of the conduct.
7. [2008] ACTSC 74; Transcript of Proceedings, *R v Goreng Goreng* (Supreme Court of the Australian Capital Territory, Refshauge J, 14 October 2008), 5.
8. V Violante, 'Goreng Goreng guilty of email leak', *Canberra Times* (online), 26 August 2008, <www.canberratimes.com.au/news/local/news/general/goreng-goreng-guilty-of-email-leak/1253796.aspx> at 16 September 2009.
9. Transcript of Proceedings, *R v Goreng Goreng* (Supreme Court of the Australian Capital Territory, Refshauge J, 14 October 2008).
10. See ALRC DP 74, Proposal 7–1(e) and (f).
11. [2007] NSWDC 138.
12. M Chulov, J Porter, 'Airport staff "smuggling drugs"—Secret Customs report exposes criminal links' *The Australian*, 31 May 2005, 1.
13. J Wheeler, *An Independent Review of Airport Security and Policing for the Government of Australia* (2005); see also R Ackland, 'Kessing's Case Highlights the Media's Ethics', *The Sydney Morning Herald* (online), 27 February 2009, <www.smh.com.au/opinion/kessings-case-highlights-the-medias-ethics-20090226-8iz9.html> at 16 September 2009.
14. [2007] NSWDC 138, [49] and [59].
15. See ALRC DP 74, Proposal 7–1(b) and (d).
16. See House of Representatives Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Whistleblower Protection: A Comprehensive Scheme for the Commonwealth Public Sector*, 2009.
17. [2006] VCC; *R v Kelly* [2006] VSCA 221.
18. M Harvey and G McManus, 'Cabinet's $500m rebuff revealed', *The Herald Sun*, 20 February 2004.
19. *R v Kelly* [2006] VSCA 221, [34] (Callaway and Redlich JJA and Coldrey AJA).
20. See ALRC DP 74, Ch 13–15.

The war at home

Re-assessing the rules of engagement and our legal armoury

By Isabella Cosenza

Isabella Cosenza is a Senior Legal Officer at the Australian Law Reform Commission (ALRC). She is currently assigned to the joint ALRC/ New South Wales Law Reform Commission Inquiry on Family Violence.

While homes should be safe havens and family life critical to our well-being, the alarming reality is that a significant number of individuals are facing or fleeing a war at home.

Family violence encompasses varying degrees of severity—at the worst culminating in death. Violence can be physical, sexual, emotional, psychological, social, economic, or spiritual. Whatever form it takes, a central and predominant feature is that violence involves the perpetrator exercising control and power over the victim. Violence can be directed towards partners, children, elders, siblings, other relatives, persons within Indigenous kinship groups, and those being cared for—although not all of these groups are recognised uniformly across state and territory family violence legislation.

Family violence is being committed across different terrains—from regional and rural areas to remote Indigenous communities—and it involves perpetrators and victims across socio-economic, generational, cultural and religious divides. The casualties of family violence are predominantly women. The Australian Bureau of Statistics has estimated that nearly one in three Australian women experience physical violence and almost one in five women experience sexual violence over their lifetime.[1] There are, however, a large number of silent victims—those who are unknown, who may be too ashamed or frightened to report family violence. Addressing the under-reporting of family violence remains a challenge.

As with any war, the costs and consequences of family violence to the individual and to the wider community are significant. Of immense concern is the finding that family violence is the leading contributor to death, disability and illness in women of reproductive age in Victoria.[2] In 2009, the economic cost of violence against women and children in Australia has been estimated at $13.6 billion.[3] Studies have documented the adverse emotional and psychological impact on children experiencing or being exposed to family violence.

The causes of family violence are multi-faceted, complex and intertwined. Achieving a ceasefire will require more than a single solution. Social, cultural, attitudinal, economic, political, and legal factors all come into play. Prevention and protection strategies will invariably need to address the enormously difficult problems of homelessness, poverty, mental illness, access to justice by marginalised communities, drug and alcohol abuse—to name just a few. Indeed family violence has been the subject of numerous reports and inquiries over the decades. The National Council to Reduce Violence against Women and their Children, in its report *Time for Action*, focuses on strategies and actions for prevention, early intervention, improved service delivery and justice.

ALRC's Terms of Reference

Within the context of this wider social fabric—and alongside a number of key concurrent inquiries relevant to this area—the ALRC has been asked to consider the interaction in practice of family violence laws and child protection laws with the *Family Law Act 1975* (Cth) and the criminal law. The ALRC has also been asked to consider the impact on victims of inconsistent interpretations or applications of sexual assault laws within the context of family violence.[4]

In each case, the ALRC has been asked to consider whether improvements could be made to the relevant legal frameworks. The ALRC's Terms of Reference are therefore limited to considering improvements to the law—although undeniably laws cannot be considered in isolation from the social and cultural frameworks and the processes within which they operate.

The relevant interactions that the ALRC is to consider cross: geographical jurisdictions; federal and state jurisdictions created by the division of legislative powers; criminal and civil jurisdictions; and public and private law. The potential battlefields are, therefore, numerous

and splintered. For example, a woman may simultaneously be involved in: civil proceedings to obtain a family violence restraining order; a criminal prosecution for the act of violence committed against her; family law proceedings to determine parenting orders; and child welfare proceedings in respect of children considered at risk because of their having experienced or been exposed to family violence. Each set of proceedings has its own rules of engagement. Legal representation across the cases may be fragmented or non-existent. The delivery of legal services may be dependent on federal and state or territory cooperation. For example, the federal machinery of the Family Court does not have an investigative arm to examine allegations of child abuse and is reliant on state and territory child welfare authorities in this regard—which from many accounts are battle-weary and severely under-resourced.

The danger of multi-jurisdictional involvement is that victims of violence—particularly children—may be left in no man's land or worse, thrust unwittingly into the line of battle. This can result, as outlined below, because of the fact that courts across jurisdictions may be preoccupied with making orders that are consistent with each other—rather than focusing on the issue of whether individuals are at risk of violence.

Resolving inconsistent orders—masking the potential for violence

Concurrent or consecutive proceedings may arise in the local or magistrates court, the Children's Court or Youth Court, and the Family Court or Federal Magistrates Court. This raises the potential for conflicting orders. A person may simultaneously be subject to a restraining order, bail conditions and Family Court contact orders.

For example, there may be direct conflict between a family violence restraining order made in the local court which prohibits a father from approaching the family home, and a contact order under the *Family Law Act* which provides for the father to collect children for contact from the family home. Section 68Q of the *Family Law Act* provides that in cases of such inconsistency, the contact order prevails and the family violence restraining order is invalid to the extent of the inconsistency. This may expose victims to further violence. Previous reports have recommended that when the Family Court makes a contact order it should satisfy itself that the order will not expose women and children to an unacceptable risk of violence, irrespective of whether the proposed contact order and an existing family violence order are inconsistent.[5]

The Family Court may make orders inconsistent with a family violence order—even when it is aware of the order—because the mere existence of the order does not amount to evidence of violence. This is especially the case with respect to many family violence restraining orders that are obtained by consent without admissions by the person against whom the order is made.

State and territory courts exercising family law jurisdiction have the power to modify or revoke a contact order under the *Family Law Act* to give effect to a family violence restraining order. Such power, however, is rarely used. This is partly because magistrates may be unaware of the existence of the contact order or may be reluctant to vary orders made by a superior court.[6] As a matter of practice, many magistrates avoid potential inconsistency by making family violence restraining orders subject to any contact permitted by an order made under the *Family Law Act*. This standardised approach to family violence restraining orders increases the potential for the risk of violence to be masked. This problem is exacerbated by the practical reality that proceedings for family violence restraining orders in some jurisdictions have been found to be very brief, rarely receiving particularised attention from magistrates. Rosemary Hunter's study concluded that the median hearing time for all proceedings for family violence restraining orders in magistrates' courts in Victoria was three minutes.[7]

Triggering intervention

A key issue is that the rules of engagement for triggering legal intervention in cases of family violence vary among the states and territories. Whether protective family violence restraining orders under family violence legislation can be deployed to protect victims from future acts of violence will depend on: the parameters of the varying definitions of 'family violence' across the state and territory jurisdictions; whether the victim is in a defined relationship with the alleged perpetrator, and varying legal tests for the activation of the order. For example:

- ◇ Some jurisdictions do not expressly include sexual assault as a type of family violence.
- ◇ Only four jurisdictions expressly include kidnapping or deprivation of liberty as a form of family violence.
- ◇ All jurisdictions except Tasmania specify damage to property as constituting a form of family violence.
- ◇ Victoria is the only jurisdiction where causing a child to witness or otherwise be exposed to the

effects of family violence itself constitutes family violence—although some other jurisdictions expressly allow for the making of orders to protect children from such exposure.

While the family violence legislation of some jurisdictions—such as Tasmania and South Australia—provide protection to a relatively narrowly defined group of people, other jurisdictions adopt a broader approach. For example, the Queensland legislation recognises that Indigenous persons may have an extended concept of family, and it includes in the definition of 'relative' *any* person whom the relevant person reasonably regards as a relative. It also extends protection to informal care relationships.

Understanding precisely what constitutes family violence in each jurisdiction is a fundamental prerequisite to considering whether and how, in any particular matter, family violence laws interact with the *Family Law Act*—which has its own definition of family violence.[8] Family violence is especially relevant in the context of relationship breakdowns. Significantly, the Family Violence Strategy of the Family Court of Australia acknowledges that the definition of 'family violence' in the *Family Law Act* is too narrow to meet the objectives of the Strategy.

The *Family Law Act* contains a number of provisions guiding the Court's discretion. These include that the Family Court and any court exercising jurisdiction under the Act must have regard to the need to ensure safety from family violence.[9] Insofar as the Family Court has to decide what is in a child's best interests it has to consider as a primary consideration the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.[10] The Court must also consider as an additional consideration any other fact or circumstance that the Court thinks is relevant.[11]

An issue which the ALRC will explore is whether, in practice, the differences in the definitions of 'family violence' across family violence legislation and the *Family Law Act* are causing gaps in protection or preventing relevant evidence or information about family violence from being put before the Family Court. In particular, the ALRC will inquire whether the combined effect of the Family Court's broad discretion and the guiding principles in the *Family Law Act* operate at a practical level to surmount definitional constraints.

Understanding the definitions of family violence in each jurisdiction is also critical to assessing whether and how those laws interact with the criminal law in any particular matter. For example, where family violence is defined by reference to specific criminal offences—as it is in the family violence legislation of New South Wales[12]—there is clear potential for overlap between civil and criminal redress. The same conduct can form the basis for a protection order as well as a prosecution for a criminal offence, although the latter will require a discharge of the criminal burden of proof—beyond reasonable doubt. In all jurisdictions breach of a protection order is a criminal offence. In other cases, definitions of family violence will include examples of conduct—such as emotional abuse—which do not attract the protection of the criminal law, although they form the basis for the obtaining of a civil family violence restraining order. The Victorian legislation, for example, explicitly provides that 'to remove doubt it is declared that behaviour may constitute family violence even if the behaviour would not constitute a criminal offence'.[13]

Timetable for the Inquiry

The Australian Law Reform Commission (ALRC) and the New South Wales Law Reform Commission are working on a joint consultation paper, which will outline the scope of the Family Violence Inquiry and seek community feedback on relevant issues.

It is anticipated that the consultation paper will be released in March 2010. The commissions will embark on an intensive round of consultations, before submitting a final report to the Attorneys-General of Australia and New South Wales at the end of July 2010.

The report will be publicly available once it is tabled in the Australian and NSW parliaments.

Register an interest

The ALRC website allows people who are interested in the progress of the Family Violence Inquiry to register an interest to receive email updates and copies of the consultation paper, once it is released.

www.alrc.gov.au

Whether a victim will have the armoury of the criminal law for particular forms of abuse may also be jurisdiction-dependent. For example, while some jurisdictions recognise economic abuse as a form of family violence, only the Tasmanian legislation makes economic abuse a criminal offence.[14]

The way forward?

What strategies and legal machinery are needed to combat family violence? The flow of accurate and timely information is critical to survival in war—and this is no less applicable to the war at home. Courts should be aware of pre-existing orders affecting the parties before them, especially when those orders may impact on safety. The ALRC will be exploring measures to ensure that the flow of information between courts, and between courts and relevant state departments and agencies is optimal.

Should there be single rules of engagement in the form of model family violence laws across the jurisdictions—as was proposed by a Domestic Violence Legislation Working Group in 1999? Should family violence matters be heard in specialist family violence courts—as is the case in some jurisdictions—and, if so, what model should be adopted? Is there a place for therapeutic jurisprudence? How can the legal armoury be strengthened or tailor-made to assist particular groups of vulnerable victims of violence—such as Indigenous women, the mentally ill, and women from linguistically and culturally diverse backgrounds?

When people take marriage vows 'for better or worse' and 'til death do us part'—they do not bargain for the worst outcome of death or severe injury at the hands of their spouse—or that their children will be targets of violence from their spouse. The law can only go so far to address family violence but it is important that it goes as far as it possibly can.

Endnotes

1. Australian Bureau of Statistics, Personal Safety Survey, ABS Cat No 4906.0, 2005, cited in *Background Paper to Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children*, 16.
2. Victoria Health, *The Health Costs of Violence: Measuring the Burden of Disease Caused by Intimate Partner Violence: A Summary of Findings*, 10.
3. The National Council to Reduce Violence Against Women and their Children, *The Cost of Violence Against Women and their Children*, (March 2009), 34.
4. The NSW Law Reform Commission has received identical Terms of Reference and will be working jointly with the ALRC on this Inquiry.
5. Kearney McKenzie & Associates, *Review of Division 11* (1998) 26. This approach was supported by the Family Law Council.
6. Ibid, 18–19.
7. R Hunter, *Domestic Violence Law Reform and Women's Experience in Court*, 81.
8. The workability of any proposal to have a national registration of family violence orders may be compromised by multiple definitions of family violence, especially where those definitions are in conflict on particular aspects.
9. *Family Law Act 1975* (Cth) s 43(1)(ca).
10. Ibid s 60CC(2)(b).
11. Ibid s 60CC(3)(m).
12. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 4, 11.
13. *Family Violence Protection Act 2008* (Vic) s 5(3).
14. *Family Violence Act 2004* (Tas) s 8.

2009 Kirby Cup

Congratulations to Rebecca Zaman and Ella Kucharova from the University of New South Wales, winners of the 2009 Kirby Cup.

The Kirby Cup Law Reform Competition is a unique opportunity for Australian law students to gain recognition for their vision for law reform. The Kirby Cup is organised and sponsored by the Australian Law Reform Commission (ALRC), in collaboration with the Australian Law Students Association (ALSA).

To enter, teams of two students must provide a written submission on a topic of law reform set by the ALRC. Based on written entries, up to three teams are invited to participate in an oral advocacy round.

The topic the 2009 entrants were asked to consider drew on the theme presented in *Reform* 91 'Animals':

> What are the key issues that arise from the present federal regulatory framework for animal welfare? In considering appropriate law reform recommendations, assess whether Codes of Practice for animal welfare provide a reliable & satisfactory mechanism for regulating animal welfare; or whether a national Animal Welfare Act or harmonisation of state/territory legislation would be more appropriate.

This year's final oral advocacy round was held in conjunction with the 30th annual ALSA conference, co-hosted by Griffith University and the Queensland University of Technology, in Brisbane in July. Three teams presented their proposal to an expert judging panel consisting of Justice Berna Collier (Federal Court and part-time ALRC Commissioner), Professor Rosalind Croucher (ALRC Commissioner and Professor, Macquarie University), Mr Steven White (Griffith University) and Mr Jonathan Dobinson (ALRC Research Manager). Ms Zaman and Ms Kucharova were declared the winners, based on a combination of their written submissions and the oral advocacy round.

Thank you to all entrants for participating in the competition, and special congratulations to finalists:

- ◇ James Dawson and Michael Jones (Australian National University); and
- ◇ Fiona Graney and Laura Costello (University of Sydney).

The following article is an edited extract of the written submission entered by Ms Zaman and Ms Kucharova.[1]

Endnotes

1. See <www.alrc.gov.au/kirbycup> for an unabridged version of the winning submission.

Animal welfare legislation in Australia

The federal regulatory framework

By Rebecca Zaman and Ella Kucharova

Animal welfare has become a concern that cuts across all social sectors of the Australian community. The issue is also receiving increasing international recognition, with 27 European Union states having voted in favour of the provisional draft *Universal Declaration on Animal Welfare 2007* (UDAW). The draft UDAW calls on signatories to

> '[recognise] that animals are living, sentient beings and therefore deserve due consideration and respect'.[1]

However, although the importance of animal welfare is socially recognised, and Australians generally treat *companion* animals very well, there exists a significant discrepancy between Australian attitudes towards animal welfare and the way the vast majority of animals are actually being treated in Australia.[2]

The existing law

There is no accepted head of power under which the Commonwealth may legislate with respect to animal welfare. Thus, the states and territories each have their own laws on this subject.[3] The typical model of animal welfare law enforcement imposes a negative duty on owners to refrain from inflicting cruelty on animals (we note, however, that some recent laws, such as s 17 of the *Animal Care and Protection Act 2001* (Qld), impose a positive duty on a person to require them to take reasonable steps to meet an animal's needs).[4] Although as a criminal offence these laws can be enforced by police, the burden of enforcing the law in relation to companion animals falls largely to the RSPCA.[5]

But these laws do not protect farm animals at all. The treatment of farm animals is 'exempted from the overarching cruelty and duty of care standards included in animal welfare legislation'.[6] Instead, farm animals are supposed to be treated in compliance with Codes of Practice, which vary between states and territories but are based broadly on the Commonwealth Scientific and Industrial Research Organisation (CSIRO)'s Model Codes of Practice for the Welfare of Animals (Model Codes).[7]

The Codes are detailed and wide-ranging, and they are 'revised on a regular basis' to take account of changing standards.[8] However, some of them 'would not meet a general cruelty standard'.[9] For example, the intensive farming of pigs has led to an industrial standard of confining pregnant sows in cramped stalls, which inflicts physical and psychological stress on the animal.[10] Yet under the state and territory legislation, it is a defence to charges of animal cruelty or breach of duty to show that the treatment was in compliance with a Model Code.[11] Clearly, the issue of how the Code is determined and whether the development process adequately considers the impact on animals is a pressing one.

Proposed reform

We consider the status quo to be an inadequate means of protecting animal welfare. We dismiss as unrealistic any suggestion of an Animal Bill of Rights. We also dismiss suggestions that animals can be adequately protected through common law remedies.

We propose a reform that recognises the importance of protecting animal welfare and considers how best to balance human and economic interests with animal welfare, that furthermore considers how to develop institutions that can achieve that balance, and finally that incorporates an appropriate means of enforcement. For the purpose of this section, we assume the validity of a national *Animal Welfare Act* under the external affairs or state referral power. However, if the constitutionality of a federal Act were in doubt, a similar scheme could be implemented using uniform legislation and state institutions.

Licensing

The cornerstone of our reforms is the implementation of a mandatory regulatory scheme for animal welfare that links adequate protection to agricultural licensing. A principal

Animal Welfare Act would provide that any person, natural or body corporate, using animals for commercial purposes must hold a licence. It will also state that, under the Act, regulations may be made setting out Codes of Conduct and providing for breaches of the Code. Pursuant to the Act, to obtain a licence, a person must comply with the regulations and Codes of Conduct. The Codes of Conduct for various animals would appear as schedules to the Act. A person suspected of failing to comply with the Codes may be issued with a 'notice to show cause' why their licence should not be revoked. Decision makers would also have the authority to cancel, suspend, vary or impose conditions on licences. As an administrative decision, this would be reviewable by a relevant body such as the Administrative Appeals Tribunal under a federal Act, or Administrative Decisions Tribunals under a state or territory Act.

Greater procedural fairness in development of proportionate Model Codes

Our proposal recognises that the content of the Model Codes and their ability to reconcile animal welfare with the interests of the broader community is critical. The composition and conduct of the body creating these Codes is thus extremely significant.

One approach is to urge government to establish a department, distinct from agriculture and fisheries, with a special minister for animals.[12] This is viable given the significant and overlapping role of animals in issues of bio-security, quarantine, food safety and environmental protection. Such a department would provide a unified and streamlined approach to issues involving animals. It would be politically accountable and, of necessity, attuned to the interests of its portfolio. A Committee within this department would be obliged to seek and hear submissions from all relevant stakeholders and create a proportionate animal welfare policy. An alternative approach would be to create an independent statutory authority—an Australian Commission for Animals—that was tasked with these same duties and enforcement of the licensing scheme.

A third approach, and that taken in the United Kingdom, is to establish an independent advisory council to investigate, advocate and report on behalf of animals.[13] This approach is weaker, as there is no enforcement mechanism involved, but it does emphasise the importance of having an independent body reviewing animal welfare. Therefore, at minimum, an independent animal welfare body should be established in Australia, with the power to investigate, report and educate the community about animal welfare.

Better enforcement

By making compliance with Codes of Conduct a necessary requirement for using animals for commercial purposes, these regulatory norms would be better enforced as compliance would become a precondition for doing business.

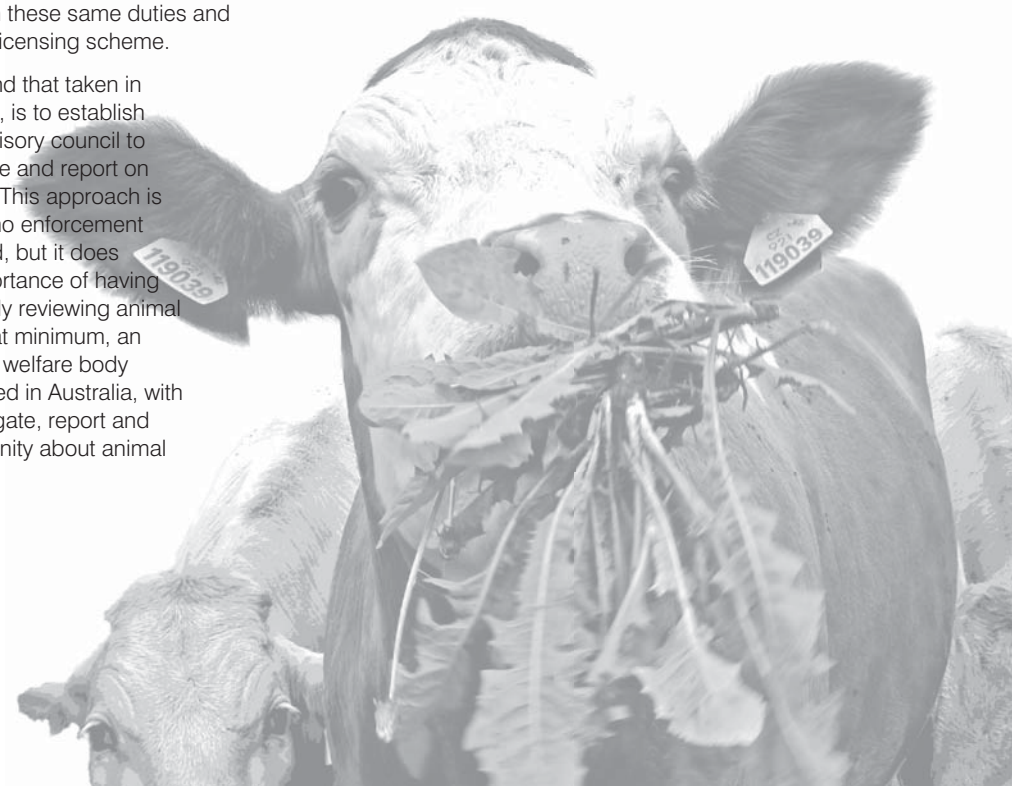
Additionally, our proposed licensing scheme would exist harmoniously alongside the criminal offence of cruelty to animals. As it stands, the provisions in all Australian jurisdictions provide that it is an exemption to cruelty to animal charges to be acting in accordance with industry Codes. This would remain under our system.

Our proposed *Animal Welfare Act* would also impose a disclosure regime on corporations who use animals for commercial purposes. As a 'soft' reform, the threat of negative publicity and the benefits of being seen to engage in corporate social responsibility may encourage profit-cutting in favour of better treatment of animals.

Requiring disclosure would also aid in other methods of 'soft' reform such as education and 'trustmarks'. These approaches attempt to influence consumer behaviour and provide economic incentives for companies to act in a particular manner. Trustmarks, such as the 'certified organic' logo, allow consumers to choose to support companies that produce organic products. A similar logo marking high ethical conduct could be created for companies that treat their animals humanely.

Conclusion

The regulation of animal welfare in Australia requires the intricate balancing of interests. As living, sentient beings, animals have a legitimate interest in avoiding pain and suffering. On the other hand, the Australian economy, farmers and consumers require industry practices that allow for the production of efficient and competitive animal products. In a system that unjustifiably prefers human interests over animal welfare, reform is

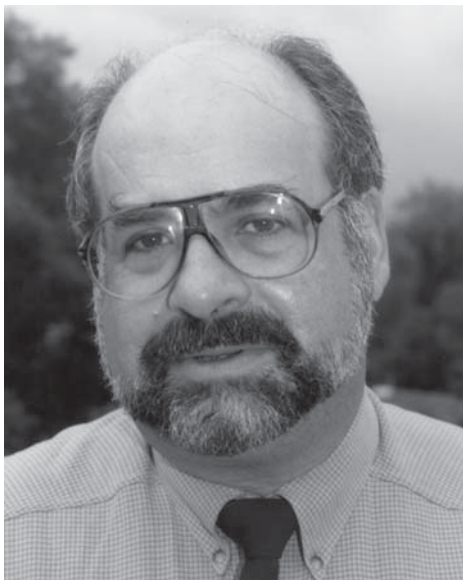


needed. Our proposed licensing system would reform the way in which the substance of the Codes of Conduct is developed, and would also provide an appropriate, consistent and effective means of enforcement.

Endnotes

1. World Society for the Protection of Animals, *Universal Declaration on Animal Welfare* (2005) <www.udaw.org/gov/> at 16 September 2009.
2. S White, 'Regulation of Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform?' (2008) 35 *Federal Law Review* 347, 351–357.
3. See *Animal Welfare Act 2002* (WA); *Animal Care and Protection Act 2001* (Qld); *Animal Welfare Act 1993* (Tas); *Prevention of Cruelty to Animals Act 1985* (SA); *Animal Welfare Act* (NT); *Prevention of Cruelty to Animals Act 1979* (NSW).
4. S White, 'Regulation of Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform?' (2008) 35 *Federal Law Review* 347, 351.
5. Ibid, 352.
6. Ibid, 354.
7. Ibid.
8. See, eg, NSW Department of Primary Industry, *National Model Codes of Practice for Animal Welfare*, <www.dpi.nsw.gov.au/agriculture/livestock/animal-welfare/codes> on 16 September 2009.
9. S White, 'Regulation of Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform?' (2008) 35 *Federal Law Review* 347, 356.
10. Voiceless, *From Paddocks to Prisons—Pigs in New South Wales*, Australia: Current Practices, Future Directions (2005), 14-19.
11. S White, 'Regulation of Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform?' (2008) 35 *Federal Law Review* 347, 359.
12. R Pollard, 'Animals, Guardianship and the Local Courts: Towards a Practical Model for Advocacy' (2007/2008) 91 *Reform* 48, 49.
13. See the Farm Animal Welfare Council, <www.fawc.org.uk> at 16 September 2009.

In Memoriam: Judge John Goldring (1943–2009)



By David Weisbrot

It is with great sadness that we must report that Judge John ('Jack' to all) Goldring passed away on 6 October 2009, at age 66, after a lengthy battle with cancer.

Jack was one of Australia's finest lawyers, with a sharp and inquiring mind, a breadth of knowledge crossing many disciplines, great wit and creativity, a commitment to social justice, and a passion for his work that he readily passed on to generations of students and colleagues.

Jack burst onto the Australian scene as one of the famous radio 'Quiz Kids' of the 1950s. Jack was educated at North Sydney Boys High School and the University of Sydney (from which he graduated with a BA and an LLB), and then earned an LLM from Columbia University in 1969 (when that was not such a common thing for an Australian lawyer), which he attended as an Australian–American Educational Foundation Fellow.

Jack's distinguished academic career was characterised by innovation, energy and accomplishment, and spanned two countries. He was present at the birth of legal education at the University of Papua New Guinea, serving in the Faculty of Law from 1970–1972. Many of his students from that era went on to become major figures in law and government in PNG, and they still speak of Jack with great respect and affection.

Back in Australia in the mid-1970s, he joined and rose through the ranks of the faculty at the Australian National University. He was an important supporter of the community legal services movement at that time, and one of the founders of its principal academic organ, *The Legal Service Bulletin*.

In Australia, Jack is probably best known for his periods as Dean and Professor of Macquarie University Law School from 1981–1987, and then as Foundation Dean of Law at the University of Wollongong from 1990–1995. Jack deserves enormous credit for his successful efforts in making that new law school a critical part of the local community and the local profession, as well as putting it on the map nationally due to the quality of its academic programs and its commitment to community service. It is perhaps no surprise, then, that a disproportionate number of the legal staff at the Australian Law Reform Commission were Jack's students at that time, benefitting from his teaching, his scholarly rigour and his incredible willingness to find the time to mentor promising young lawyers.

Sandwiching his Foundation Deanship at Wollongong, Jack also carved out a second career as a distinguished law reformer, serving as a Commissioner of the ALRC full-time from 21 December 1987 until the end of 1990 (and part-time until December 1992), and later

as a Commissioner of the New South Wales Law Reform Commission from 1997–1998.

At the ALRC, building upon his recognised expertise in consumer protection law, Jack headed up the reference on Product Liability, carried out in conjunction with the Victorian Law Reform Commission, and culminating in the final report *Product Liability* (ALRC 51, 1989). Jack also made important contributions to a range of other ALRC reports prepared during his time as a Commissioner, including *Grouped Proceedings in the Federal Court* (ALRC 46, 1988), *Multiculturalism and the Law* (ALRC 57, 1992), *Choice of Law Rules* (ALRC 58, 1992), and *Personal Property Securities* (ALRC 64, 1993).

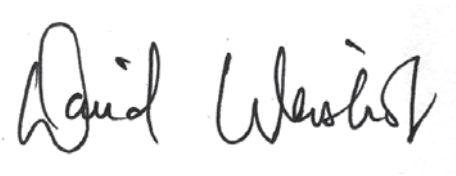
In 1998, Jack was appointed a Judge of the District Court of New South Wales—again, a rare move in Australia and a rare honour for a career academic to be appointed to a famously busy trial court. Even more bravely, Jack sought out and soon excelled at handling criminal trials, with all their added pressures and the special need for evidentiary and procedural precision.

When the Australian Academy of Law was founded in 2007, as an attempt to foster dialogue, cohesion and high standards in the Australian legal professions, a group of people were selected to become the Foundation Fellows, with a premium placed on those with expertise and experience across a range of modes of legal practice: as academics, legal practitioners, judges and law reformers. Not surprisingly, Jack was chosen as one of those 36 Foundation Fellows—indeed, he was one of the exemplars. The Academy was an initiative of the ALRC, recommended in the *Managing Justice* report (ALRC 89, 2000), which also proposed the establishment of the Judicial College of Australia (JCA). And again, not surprisingly, Jack became a member of the Council of JCA, nominated to represent the District and County Court Judges across Australia.

Despite this later judicial career, I suspect Jack will be best and most fondly remembered as an inspiring and innovative teacher and scholar (and, critically, a scholar who cared very deeply about teaching) and, throughout, as a great friend and mentor to so many of us. All of this activity was informed by his keen sense of social justice, as manifested in his pioneering socio-legal research and writing on the social cohort of Australian lawyers and law students—first prepared for the Pearce Committee's national review of legal education in 1986, and later replicated during his time at Wollongong—which led to new programs and policies to support equal opportunity entry into the profession for Indigenous students and those from disadvantaged backgrounds, but still presents unresolved issues.

It is a sign of the high esteem in which Jack was held (as well as the nature of the modern online world) that the news of Jack's passing travelled quickly around the globe and back, with many people contacting me with reminiscences. And, so, I feel entrusted to mention, in no particular order, 'Jack's famous pipe'; his warmth; his laconic sense of humour; his organisation of cultural tours to India, marrying his love of travel and interest in other cultures; and the devilish, irrepressible chuckle that bubbled out of him from time to time.

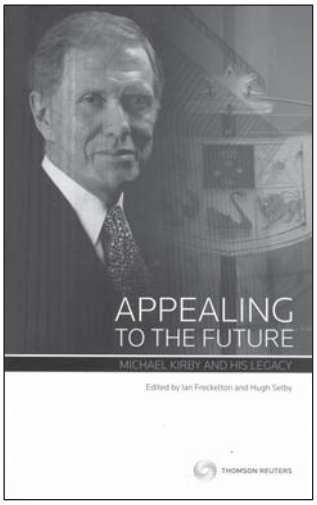
Jack Goldring will be greatly missed. Our warmest wishes and condolences go to his partner, Sue Kirby.



My thanks to the Hon Michael Kirby, Carolyn Kearney, Jonathan Dobinson, Les McCrimmon, Rosalind Croucher, Luke McNamara, George Zdenkowski, Ian Ramsay, Bruce Ottley, Denise Tchan, Anne Rees and AbdulHusein Paliwala for providing comments or material used in the preparation of this article.

Appealing to the Future—Michael Kirby and his Legacy

Edited by Ian Freckelton and Hugh Selby
Reviewed by Rosalind Croucher



Appealing to the Future—Michael Kirby and his Legacy

Edited by Ian Freckelton and Hugh Selby, Thomson Reuters (Professional) Australia, 2009

RRP: $84
($160 Hardcover)

This mega-tome was published to coincide with the 70th birthday of the Hon Michael Kirby AC CMG on 2 February 2009, the day he retired from the High Court of Australia. Co-edited by Ian Freckelton and Hugh Selby, the book contains 35 chapters, preceded by an introductory chapter as well as a preamble; a prefatory tribute; notes about each of the 43 contributors; a lengthy index; an extensive bibliography; and eight pages of photographs.

The book's intended audience is a broad one, and its object, as Selby remarks, is to present Justice Kirby and his ideas 'through many lenses'. Selby's preamble begins: 'None of us can be all things to all men but a select few can set an example that inspires the rest of us. Michael Kirby is such a man.'[1] With such an opening there may be an anticipation that one was about to read a collection in the style of a hagiography—the life of a saint. As the co-editor, Freckelton, says in his introductory chapter, rather that they had 'done [their] best to avoid the adulatory and the sycophantic', while also acknowledging that 'there are many in this volume who are unfeigned admirers of Kirby'.

The preamble provides a guide to reading the edited essays. Given the daunting task of having to review the collection—because of its size, its subject, and the aura which surrounded the timing of its appearance—I was rather glad to see 'sat-nav' like directions as to how to proceed. This I followed dutifully, except that two chapters were not referred to at all.[2] The arrangement of the chapters puzzled me nonetheless and it was only when I had almost finished this review that I realised—of course, it was alphabetical! On reflection, perhaps the chapters could have been grouped differently, so that one could read sequentially, or in themed sections.

There are included in the contributors—as many authors freely admit—many fans. But many chapters do include a critical eye, especially the large set of chapters that examine Kirby J's judgments in particular areas of law. These chapters, in the main, exhibit a clear, critical, albeit often still affectionate or admiring, eye and form the core of the book. While the chapters examining various slices of 'Kirby jurisprudence' are quite formal, as would be expected, the style of others, in contrast, is more anecdotal, or interlaced with amusing stories.

Kirby's contributions to law reform—he was the foundation Chair of the Australian Law Reform Commission from 1975 until 1984—are a recurring theme and highlighted in particular in the impressive chapter by David Weisbrot (the current President of the ALRC), 'Law Reform, Australian-Style';[3] Murray Wilcox's short reflective note on 'The Law Reformer';[4] in CG Weeramantry's chapter, 'The Internationalist';[5] and in the section of Freckelton's introductory chapter dubbed 'Kirby the Reformer'.[6]

What is clearly evident through the pages of this vast work are the many intersections that Justice Kirby has had with so many people, in so many walks of life, over his lifetime, and his great courtesy and its effect on individuals and institutions. The impact Kirby had as President of the Court of Appeal of New South Wales is particularly mentioned in David Ipp's chapter on 'Intermediate Appellate Judges'[7] and in Ian Barker's witty chapter on 'Judicial Practice' and his celebration of 'the phenomenon of tea and raisin toast' as a means of building collegiality and consensus among his fellow judges.[8]

There are a few typos in the book, mostly forgivable in a work of this size and its obviously immovable publication deadline. The repetition of certain elements of Michael Kirby's life and judgments is also not surprising for the same reasons. A case table is a useful addition in this regard so that the reader can find each occasion an author has reviewed or mentioned the same case.

The book is written and titled as an 'appeal to the future', the nature of which is captured in Julian Burnside's concluding comments:

> 'Kirby's thinking is guided by an unshakeable conviction that human dignity and human rights are the gravitational centre of any civilised society; and that a legal system which escapes the insistent pull of human rights will produce law without justice. Kirby is writing for a future which honours that role of law in society.
>
> 'His appeal to the future ages will come … from that central idea. His place in history will depend in part on whether or not we acknowledge the centrality of human rights in our system of law. That idea provokes hostility in some quarters and indifference in others. It is by no means certain that we will end up with a legal system based on the notion that law should produce a just result consistent with the principles of human rights.
>
> 'If Michael Kirby writes for the future, it is a future I would wish to share. It may be difficult to attain. But he has shown us the way, and he has shown that it is worth striving for.'[9]

In so far as the editors seek to present 'Michael Kirby and his ideas' through many lenses, they have accomplished their goal with great distinction. It is a monumental achievement and the book is indeed a rich read. It will provide an excellent resource particularly for those fascinated by the jurisprudence of the High Court, on which it provides a very distinct and distinctive lens.

Professor Rosalind Croucher, Commissioner

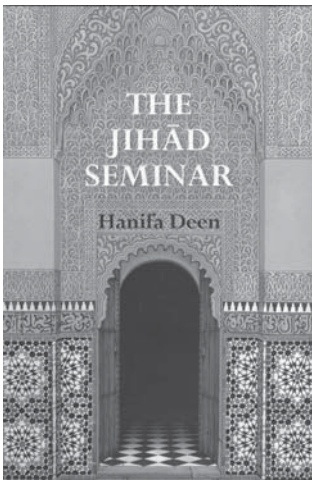
This review is an abridged version of one that was originally published in the UNSW Law Journal. Professor Croucher is a Commissioner of the ALRC. The views expressed in this book review are those of the author and not the ALRC.

Endnotes

1. H Selby, 'Preamble'in I Freckleton and H Selby (eds), *Appealing to the Future: Michael Kirby and his Legacy* (2009), x.
2. J Burnside, 'Final Thoughts', in I Freckelton and H Selby (eds), *Appealing to the Future: Michael Kirby and his Legacy* (2009), 887–895; and D Weisbrot, 'Law Reform, Australian-Style', in I Freckelton and H Selby (eds), *Appealing to the Future: Michael Kirby and his Legacy* (2009), 607–638.
3. Weisbrot, above n 2.
4. M Wilcox, 'The Law Reformer', in I Freckelton and H Selby (eds), *Appealing to the Future: Michael Kirby and his Legacy* (2009), 639–642.
5. CG Weeramantry, 'The Internationalist', in I Freckelton and H Selby (eds), *Appealing to the Future: Michael Kirby and his Legacy* (2009), 549–562.
6. I Freckelton, 'Introduction: Appealing to the Future' in I Freckelton and H Selby (eds), *Appealing to the Future: Michael Kirby and his Legacy* (2009), 9–16.
7. D Ipp, 'Intermediate Appellate Judges', in I Freckelton and H Selby (eds), *Appealing to the Future: Michael Kirby and his Legacy* (2009), 521–528.
8. I Barker, 'Judicial Practice' in I Freckelton and H Selby (eds), *Appealing to the Future: Michael Kirby and his Legacy* (2009), 565–566.
9. J Burnside, above n 2, 895.

The Jihad Seminar

By Hanifa Deen
Reviewed by Bruce Alston



The Jihad Seminar

Hanifa Deen, University of Western Australia Press, 2008

$29.95

In March 2002, an evangelical Christian group, Catch the Fire Ministries, held a seminar entitled 'Insight into Islam'. While the title might sound like an invitation to inter-faith understanding, the seminar became the subject of prolonged litigation under newly enacted Victorian anti-vilification legislation after opinions were expressed about Muslim beliefs and conduct, including that Muslims are violent, terrorists, demonic, seditious, untruthful, misogynistic, paedophilic, anti-democratic, anti-Christian and intent on taking over Australia.

The Islamic Council of Victoria took a complaint to the Victorian Civil and Administrative Tribunal (VCAT) claiming that the organisers of the seminar had breached s 8 of the *Racial and Religious Tolerance Act 2001* (Vic) (the RRTA). The RRTA states that a person must not 'on the ground of the religious belief or activity of another person or class of persons engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons'.

This book by Hanifa Deen provides an informed and entertaining account of the background to the legal wrangling. By examining the motivations and understandings of those engaged in the dispute, her account paints a much fuller picture of what the parties thought was at stake than can be obtained simply by reading the legal material.[1]

Briefly, in 2003, VCAT (Higgins J) found the Islamic Council's complaint to be substantiated and that statutory exemptions for conduct engaged in 'reasonably and in good faith' were unavailable in the circumstances. In reaching this latter conclusion, VCAT found that the 'unbalanced' presentation of the seminar evidenced an absence of good faith, whether viewed subjectively or objectively.

The fact-finding process in VCAT involved evidence from religious experts as to the accuracy of a Christian pastor's statements concerning Muslim religious beliefs. Matters traversed included the meaning of the term 'jihad', practices in Muslim conversion, the legal framework in Shari'a law for the treatment of non-Muslims, the prevalence of extremist views within Islam, and the role of holy texts and their interpretation in understanding religions generally.

In a 2005 determination on remedies, Higgins J ordered that the respondents, Catch the Fire Ministries, publish a series of prominent advertisements reporting that they had breached the RRTA and admitting that the seminar was 'essentially hostile, demeaning and derogatory' of Muslims, Allah and the Prophet Muhammad.[2] The respondents were required to provide undertakings to desist from making such statements in future.

For the outside observer, legal fact-finding about religious beliefs may verge on the nonsensical—an argument about the nature of respective 'invisible friends'. Whatever view you take of religion, however, the case raised important issues concerning the desirability and effectiveness of religious anti-vilification laws. At present, only Tasmanian, Queensland and Victorian legislation makes religious vilification unlawful.[3] Human Rights Australia has in two separate reports in 1998 and 2004, recommended the introduction of a federal law rendering vilification on the ground of religion or belief unlawful.[4]

In this case, the respondents appealed. In 2006, the Victorian Court of Appeal upheld the appeal and ordered that the case be reheard in the VCAT. The Court found that VCAT had decided that the seminar contravened s 8 of the RRTA because Higgins J was satisfied that the speaker was moved or caused by the religious beliefs of Muslims to make the statements which he did at the seminar, and that an ordinary reasonable person would be inclined by the statements to hate Muslims. The Court of Appeal considered that this was not the question which needed to be decided. Rather, the question was whether, having regard to the content of the statements and to the nature of the audience, the natural and ordinary effect of what was stated was to encourage the hatred of Muslims based on their religious beliefs.

Many people, especially those unfamiliar with the refined art of judicial statutory interpretation, would find distinctions such as these rather incomprehensible. Perhaps the

law had its revenge on religion by displaying its own ability to count angels on the head of pin?

Following the appeal, after attempting conciliation and exhausted by their legal and theological sparring, the parties finally settled in a confidential out-of-court settlement, bringing the legal marathon to a close. Deen notes that the case, originally expected to be over in three days, took almost six years before petering out with the key question still unanswered: was the conduct complained of vilification under the RRTA? In the end 'the wisest course for both sides was to publicly accept a draw and return home to tell their supporters they had won'.

It is problematic to limit free speech in relation to beliefs except by reference to actual urging of force or violence—rather than incitement of contempt, ridicule or even hatred. Laws such as the RRTA, from this perspective, come uncomfortably close to establishing redress for 'defamation of religion' as a human rights violation. Such an approach was supported by a November 2008 (non-binding) resolution of the United Nations Human Rights Council, which many fear could be used to justify restrictions on freedom of speech in Muslim countries.

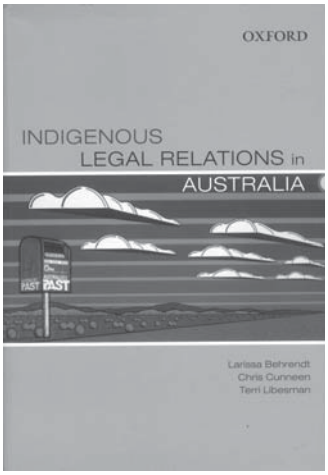
The importance of Deen's account is to place the dispute in its full cultural context and to explain something about the motivations of the personalities involved. She is open about her own standpoint—after hearing accounts of the seminar she was in no doubt that Australian Muslims had been vilified in her understanding of the term. On the other hand, she says, 'was it really worth getting worked up about?' Should anyone really care about what ill-informed fundamentalist Christians might say about contemporary Islam? The Islamic Council certainly did, and were entitled to seek redress through the law—but may not have anticipated the unpredictable legal and media reactions.

Bruce Alston, ALRC Senior Legal Officer

Endnotes

1. See *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2003] VCAT 1753; *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2004] VCAT 2510; *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207.
2. See *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2005] VCAT 1159.
3. *Anti-Discrimination Act 1998* (Tas) s 19; *Anti-Discrimination Act 1991* (Qld) s 124A; *Racial and Religious Tolerance Act 2001* (Vic) s 8.
4. Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief* (1998), Rec 5.3; Human Rights and Equal Opportunity Commission, *Isma—Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians* (2004), 6, 129.

Indigenous Legal Relations in Australia



Indigenous Legal Relations in Australia

Larissa Behrendt, Chris Cunneen and Terri Libesman, Oxford University Press, 2009

$85

By Larissa Behrendt, Chris Cunneen and Terri Libesman
Reviewed by Anna Dziedzic

Indigenous Legal Relations in Australia discusses how key legal issues faced by Indigenous peoples are informed by the social and historical context of the dispossession, discrimination and disadvantage experienced by Indigenous peoples.

Written by legal academics and aimed primarily at law students, the book is a good overview of a range of legal issues that affect Indigenous peoples. The legal issues are bound together by common themes of history, racial discrimination, and the political struggle for recognition and self-determination. In some cases, international human rights principles and comparative law are used to discuss alternative approaches to legal problems.

The book is divided into four parts. The first part, 'Law of the Colonisers', examines how the past legal and social treatment of Indigenous peoples has affected their legal rights today. Past injustices such as the forced removal of children, stolen wages and assimilation are linked to current issues relating to poverty, criminalisation and child welfare.

The second part, 'Equality before the Law: Criminalisation', examines the disproportionate impact that the justice system has on Indigenous peoples. The authors present a holistic overview of Indigenous peoples' contact with the criminal justice system, including discretions in policing, bail and sentencing, to interrogate why Indigenous peoples are grossly over-represented in Australian prisons and the criminal justice system.

The importance of land rights to Indigenous peoples, and the political and legal struggles for recognition of those rights, are discussed in part three, 'Law, Land and Culture'. This part also includes a chapter by Robynne Quiggin, which discusses the inadequacy of western intellectual property law to protect Indigenous cultural heritage.

Finally, part four, 'Law, Rights and Governance', provides an overview of Commonwealth racial discrimination legislation and also discusses the drive for constitutional change and a treaty (or progressive treaty making) to recognise Indigenous peoples, and the use of these rights to deliver practical outcomes. This section also takes a critical look at the issue of self-determination in the context of Indigenous peoples' aspiration for self-governance and decision-making power.

Indigenous Legal Relations in Australia is designed to be an introduction to the legal issues facing Indigenous Australians. Each chapter includes discussion questions and case studies to provoke critical reflection on options for social and legal change. However, it is not a 'cases and materials' textbook. Rather, *Indigenous Legal Relations in Australia* identifies and discusses issues in a general way without necessarily providing a comprehensive overview, or extracts, of the law. While the case studies note the content and significance of a number of court cases, students will need to look to primary sources such as legislation, case law and parliamentary and historical documents to gain a comprehensive understanding of particular legal issues.

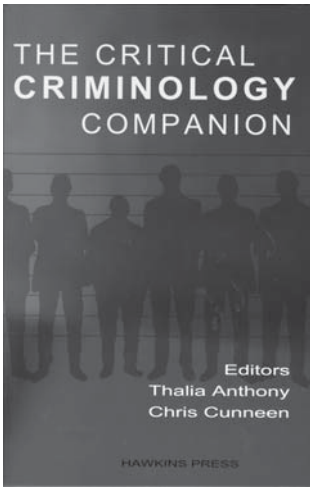
In this context, the main strength of *Indigenous Legal Relations in Australia* is its examination of the way that law and legal institutions form part of the broader social experiences that shape the everyday lives of Indigenous peoples. So, for example, the discussion of the over-representation of Indigenous children in child welfare not only covers family and welfare laws, but looks at the effects of paternalism and interference by the state with Indigenous families, the intergenerational effects of the stolen generations and poverty, and considers the importance of Indigenous self-determination and community development in solving these issues. This approach informs the view that the law alone cannot solve the legal and social problems facing Indigenous peoples, and that perhaps the best answers to these issues lie beyond the legal arena.

The book has been written during what is hoped to be a time of change in Indigenous legal relations in Australia. The federal Government's apology to the stolen

generations, endorsement of the United Nations *Declaration of the Rights of Indigenous People* and consultation on a new representative body perhaps signal a renewed interest in relationships between Indigenous and non-Indigenous Australians. However, *Indigenous Legal Relations in Australia* highlights the legal and social issues that continue to contribute to Indigenous disadvantage in Australia. As such it is a good introduction for anyone wishing to understand the legal, social and historical factors that influence Indigenous peoples' experiences of the law in Australia.

Anna Dziedzic, ALRC Legal Officer

The Critical Criminology Companion



The Critical Criminology Companion

Thalia Anthony and Chris Cunneen, eds., The Federation Press, 2008

$64.95

Edited by Thalia Anthony and Chris Cunneen
Reviewed by Christopher Beshara

$64.95

The 'critical' in this book's title is not a buzzword unthinkingly added by the publisher as the manuscript went to press. Rather, it characterises a radical approach to the study of crime control and social policy advocated by this compilation's manifold contributors. Whereas administrative criminologists at the coalface of criminal policy formulation are often insensitive to just how politicised and value-laden their vocation is, these self-styled 'critical' criminologists are anything but disengaged.

The editors' stated intention is twofold: to showcase the intellectual ferment of critical and theoretically informed criminologists among cutting-edge academics in Australia and New Zealand, and to expose students and experts alike to compelling policy alternatives to run-of-the-mill criminology.

What, then, is critical criminology? For good reason, the editors of this compilation are loath to limit an inclusive field of study by constructing an exclusionary definition. Nonetheless, it would be fair to say, as Robert van Krieken points out in his own chapter, that what sets 'critical' criminology apart from its garden-variety equivalent is a turn to social theory and its constituent discourses. This is something to which *the Critical Criminology Companion* certainly aspires.

Each of the 26 essays contained in this work is grouped under one of five distinct themes: 'Theories and Methodologies of Critical Criminology', 'Critical Theory in Action', 'Broadening Definitions of Crime and Criminology', 'Responses to Crime', and 'Future Directions in Critical Criminology'. As these broad thematic concerns indicate, the editors are conscious of the mutually reinforcing relationship between theory and practice. While intellectually driven, the *Companion* retains its relevance beyond the confines of the ivory tower.

Among other things, these essays grapple with gendered and racialised understandings of crime, the uncertain place of international criminal law in a politicised world order, the intractability of populist 'law and order' politics, the deleterious effects of excluding Aboriginal customary law from the mainstream criminal justice system, masculinised subcultures within law enforcement agencies, the potentialities (and limitations) of restorative justice, and the revivification of class analysis in criminological discourse. Collectively, these essays are nothing short of an intellectual tour de force.

What makes this compilation truly unique, however, is its willingness to turn its critical gaze onto its own deep-seated assumptions. By virtue of this hypercritical approach, the contributors eschew the constraints of dogma and ideology in favour of open-ended inquiry and rigorous scholarship.

A few examples will suffice. In his broadbrush analysis of social theory as it applies to criminology, van Krieken suggests that critical criminologists might seriously consider as an object of critique not just the omnipresence of state oppression, but also the paucity of social control and government regulation in risk-laden spheres of activity. In her re-evaluation of feminist criminologies, Kerry Carrington suggests that sexual assault prevention campaigns must move beyond simplistically typecasting all men as depraved perpetrators-in-waiting and all women as choiceless damsels in distress. On the international front, Mark Findlay argues that the legitimacy accorded to global institutions—too often considered a 'good thing' by progressives and internationalists—is marred by the overt politicisation of international criminal law, which in turn makes it practically impossible to keep global governance just. This is just a small selection of the many path-breaking and provocative insights to be found in this book.

Like all good works of critical theory, these essays are unapologetically erudite. At times, their well-considered use of jargon and specialist terminology can be overwhelming. While the editors of *the Companion* contend that newcomers to the field of criminology have much to learn from the essays therein, this is a work whose insights can only be fully appreciated by criminologists with a sound grasp of their discipline's core principles.

On the other hand, there is much to be said for exposing students to critical criminology at an early stage of their intellectual development, before the anodyne assumptions of traditional criminology have come to be taken for granted. As the editors suggest, aspiring students will benefit from reading this stimulating work alongside an introductory text.

The Companion's editors and contributors are to be commended for their willingness to push beyond the boundaries of tried-but-not-so-true criminology. That their scholarship is self-avowedly radical and counter-discursive is unproblematic—indeed, the periphery has an uncanny habit of influencing the centre. When the next law and order auction rolls around, we would do well to take stock of their input.

Christopher Beshara, ALRC Intern

Reform Roundup

Articles in Reform Roundup are contributed by the law reform agencies concerned.

Contents

Entries to Reform Roundup are welcome. Please contact the Editor at

reform@alrc.gov.au

Administrative Review Council

Conduct guide

On 26 August 2009, the federal Attorney-General launched the Administrative Review Council's revised *Guide to Standards of Conduct for Tribunal Members*. The Guide, first published in 2001, has been updated to reflect the evolving role of tribunals and the changing public expectations of tribunal members. The Guide continues to focus on core administrative law values—respect for the law, fairness, independence, respect for persons, diligence and efficiency, integrity, and accountability and transparency. The publication is intended to assist and complement tribunal management in maintaining the high level of standards expected of tribunal members.

Reports on the ARC website

All of the Council's reports are now available for download from its website at www.ag.gov.au/arc. These reports cover a wide range of topics including: merits review tribunals; Government Business Enterprises; rule making by Commonwealth agencies; and environmental decisions and the AAT. Copies of Council publications also can be obtained by contacting the Council Secretariat via email at arc.can@ag.gov.au.

Alberta Law Reform Institute

Purchasers' remedies

In March 2009, the Alberta Law Reform Institute (ALRI) released Report for Discussion No 21 entitled *Contracts for the Sale and Purchase of Land: Purchasers' Remedies*. Recent case law from the Supreme Court of Canada and the Alberta Court of Appeal jeopardise two longstanding protections for purchasers of land. This report makes preliminary recommendations to restore those protections and explores different methods of restoration.

The first jeopardised protection is a purchaser's ability to obtain specific performance if the seller fails to convey the land. Traditionally, the law's position was that all land is essentially unique, so damages are almost never an adequate remedy for failure to transfer. Thus, a purchaser could easily obtain an order for specific performance. But recent cases have significantly narrowed the concept of uniqueness. Unless the purchaser's needs can be met only by transfer of the specific parcel of land and no other, damages will be considered a sufficient remedy and specific performance will no longer be available.

In ALRI's opinion, the remedy of specific performance should not be tied to concepts

of uniqueness or adequacy of damages. The appropriate remedy for failure to transfer land is the remedy which best meets the objectives of fairness, efficiency and effectiveness between the seller and purchaser. On these measures, specific performance should be available to purchasers who have met (or are ready, willing and able to meet) their obligations under the agreement. ALRI proposes to restore the ready availability of specific performance in this area.

The second jeopardised protection concerns a purchaser's ability to file a caveat against the title of the land subject to the agreement for sale. An inability to obtain specific performance means a purchaser will no longer have an interest in land necessary to file a caveat. If damages can compensate for failure to transfer land, the purchaser simply has a contract right against the seller and no caveat can be filed. The interest of a purchaser without a caveat has no priority over any subsequently registered interests of execution creditors or other purchasers or transferees of the land. The purchaser's claim is, therefore, vulnerable to easy defeat. ALRI proposes to restore a purchaser's ability to file a caveat.

Consultation on this report ended in mid 2009 and a report containing ALRI's final recommendations should be published by the end of 2009.

The Creation of Wills

After public consultation on an earlier report for discussion, ALRI released Final Report No 96, *The Creation of Wills*, in September 2009. ALRI's final recommendations include:

Dispensing power. ALRI reiterates a previously-made recommendation to enact a dispensing power enabling a court to validate a written will which does not comply with the statutory formalities of execution.

Testamentary capacity of minors. ALRI recommends that the age of testamentary capacity remain at 18 years. Current statutory exceptions should also be retained to allow minors to make a will if they are married, partnered, a parent or in the Canadian Forces. In addition, a new provision should allow any minor who wants to make a will to apply to court for validation of a specific will.

Statutory wills for persons without testamentary capacity. In Alberta (and most of Canada), a substitute decision-maker for a person without testamentary capacity is not allowed to make, alter or revoke a will on that person's behalf. Our consultation found little support for granting courts the power to make 'statutory wills' as permitted in New Brunswick, England, Australia and New Zealand. ALRI does not recommend that statutory wills be allowed in Alberta.

Oral wills and electronic wills. ALRI recommends no change to the current law which recognises only written wills. Oral wills should not be valid either in their own right or under the dispensing power. Similarly, the *Wills Act* should not recognise electronic wills as valid in their own right. However, the dispensing power should be amended to be wide enough to allow a court, in an appropriate case, to validate a will in electronic form despite its lack of compliance with the usual formalities. But 'electronic form' should be narrowly defined to prevent any possible recognition of videotaped or tape-recorded wills.

Exempt wills. Members of the Canadian Forces on active service, mariners and seamen at sea may make 'exempt wills' which do not comply with all the formalities. Taking into account concerns expressed on behalf of the Canadian Forces, ALRI does not recommend removing this exemption. A statutory provision allowing exempt wills provides guaranteed validity for such wills, whereas applying to validate a non-conforming will under a dispensing provision does not.

Holograph wills. The *Wills Act* should not enact a special provision addressing unwitnessed printed will forms with handwritten entries. Such problem wills should be validated by a court severing the handwritten entries and finding a holograph will or by a court making an order under the dispensing power.

The *Wills Act* should recognise holograph wills made in the testator's 'own writing' and define that as 'handwriting, footwriting, mouthwriting or writing of a similar kind'. The current undefined requirement of 'handwriting' is too narrow and could be viewed as discriminatory.

Will formalities. The Wills Act should continue to require that a will be signed by the testator at its 'end or foot', subject to the traditional saving provision to alleviate some of the main problems arising from a strict interpretation. We do not recommend change in this area because we do not think it wise to extend recognition, without the safeguard of court scrutiny, to anything written below a testator's signature.

ALRI recommends the retention of concurrent witnessing. However, the statute should allow a witness who previously signed the will in the other witness's absence to acknowledge their signature to the other witness when both are together, rather than having to actually re-sign the will. This recommendation overturns case law that renders such a will invalid.

Witnesses. ALRI recommends retaining the traditional saving provision which validates wills signed by an incompetent witness. We do not want to make witness competence a matter which must be proved in every application for probate. However, the *Wills Act* should disqualify as a witness any person who signs a will on behalf of and at the direction of the testator. No other express disqualifications should be stated.

ALRI recommends retaining the witness-beneficiary rule but offsetting its harsher effects by giving a court the discretion to prevent loss of the testamentary gift, if it is satisfied that the witness or spouse did not exercise any improper or undue influence on the testator.

In addition to the witness-beneficiary rule, ALRI further recommends that an interpreter and a person who signs a will on behalf of a testator should also be disqualified from receiving any benefit under the will. However, the interpreter's disqualification would not apply to any charge or direction in the will for the payment of appropriate remuneration for the interpretation services. An interpreter or proxy signer could also apply to a court to prevent loss of the gift on proof that no undue influence or fraud occurred.

Finally, if an executor or trustee acts as a witness to the will, it does not affect any trust provisions but does cause loss of any remuneration directed by the terms of the will. ALRI recommends that the *Wills Act* should provide that loss under the witness-beneficiary rule does not apply to a charge or direction in the will for the payment of appropriate remuneration, including professional fees, to an executor or trustee of that will.

Criminal jury trials

ALRI has published *Criminal Jury Trials: Challenge for Cause Procedures, Report on Consultation Memorandum 12.20*, which is the fourth in a series of interim publications on its inquiry into criminal procedures.

The report suggests that a consistent process be followed when a trial participant exercises the statutory right to challenge one or more prospective jurors for cause.

In particular, the report proposes that:

- ◇ notices of intention to challenge and opposition to a challenge be given in timely manner;
- ◇ challenge materials be as complete and informative as possible; and
- ◇ the roles of the trial judge, counsel and panel of triers be clearly defined.

It is anticipated that a consolidated final report containing all proposals in respect of criminal procedural rules will be published at the conclusion of the consultation effort.

British Columbia Law Institute

Unfair contracts relief

The law of contracts in British Columbia (BC), similar to several other common law jurisdictions, is rooted in centuries old principles, such as freedom of contract, which assumed that contracting parties had equal bargaining power. The modern reality, however, is that in many situations, contracts involve a stronger party imposing terms on a weaker party. Contract terms that are unfair may negatively affect individuals or groups who are more vulnerable, such as consumers and small businesses. In times of financial instability and economic downturn, such as the current North American recession, consumers or small businesses are even more likely to be victimised by predatory or unfair contract terms and left without viable remedies.

While the financial aspects of unfair contracts have been the subject of extensive commentary, there has been much less discussion with respect to what the law can do to provide protection from unfair contracts. In October 2009, the British Columbia Law Institute (BCLI) commenced a two-year legal research and law reform project to study these issues related to unfair contract terms in BC. The Unfair Contracts Relief Project draws, in part, on previous work of the Institute on the subject of unfair contract terms and predatory lending. The goals of this project include:

- ◇ carrying out comprehensive legal research, investigation, consultation and analysis of issues relating to unfair contracts in BC, and addressing whether changes in practice or reform of BC's law of contracts are necessary to ameliorate the effects of unfair contract terms;
- ◇ providing legal education and information resources relating to issues arising from the imposition of unfair contract terms; and
- ◇ publishing a final report with recommendations for best practices and law reforms in BC to address law reform to prevent or provide relief from unfair contract terms.

The project is being carried out with the assistance of a volunteer project committee, made up of members with expertise in contracts and lending issues. The BCLI aims to publish a consultation paper and hold an extensive public consultation before publishing its final report, which will include recommendations for law reform and commentary, in September 2011.

Assisted living

Supportive housing or assisted living (AL) is often called a 'middle option' of health/housing, which lies at the centre of a seniors' housing continuum, bookended by independent living at one end and high care long-term residential facilities at the other. AL is often broadly described as a type of independent living that includes some form of personal and health care services.

AL is already a significant concern to Canadians, and with the impending 'age wave' will only be more so in the future. It is clear that Canadians will need to find legislative and regulatory systems that make sense to users and providers of AL.

In October 2009, the Canadian Centre for Elder Law (CCEL) commenced a three-year legal research and law reform project to review and revise British Columbia's legislation associated with assisted living. The Assisted Living Project draws on previous work of the CCEL, which identified notable deficiencies and inconsistencies in several areas of legislation relating to AL in British Columbia.

The goals of the project include:

- ◇ carrying out thorough legal research, investigation, consultation and analysis of issues relating to AL in BC, and proposing concrete and specific law reforms as appropriate;
- ◇ publishing a final report with proposed draft legislation/drafting instructions; and
- ◇ conducting outreach activities to increase government, professional and public understanding of the issues and recommendations.

The project is being carried out with the assistance of a volunteer project committee comprised of legal experts, persons experienced in dealing with AL and observer representation from the government. The BCLI aims to publish a final report, including proposed draft legislation/drafting instructions and commentary, in September 2012.

Law Reform Commission of Western Australia

Problem-oriented courts and judicial case management

Following the release of the Commission's consultation paper, *Court Intervention Programs*, and a lengthy submissions period, work has been completed on the final report and recommendations for this inquiry. At the time of publication of *Reform*, the Commission was awaiting tabling of the final report in Parliament.

Once tabled, the report will be available in hard copy and in electronic format from the Commission's website at www.lrc.justice.wa.gov.au.

Jurors

Work is continuing on the Commission's reference to examine and report upon the operation and effectiveness of the system of jury selection. The matter was referred to the Commission as a result of concerns raised about the growing number of people who apply for, and are granted, exemptions from jury service, or who are disqualified or ineligible to participate on a jury. The consequent effect of these exemptions and disqualifications from jury service is that juries become less representative of the community. In addition to this, those who remain eligible for jury service then carry a greater burden to fulfil this important civic duty. The Commission anticipates the release of a detailed discussion paper in late 2009.

Coronial practice in WA

Throughout 2008, the Commission undertook an extensive consultation process on its review of coronial practice in WA, meeting with all relevant and interested agencies and organisations associated with the Coroner's Court. A significant amount of preliminary research and analysis was also undertaken. Work has commenced on the drafting of a comprehensive discussion paper that will address the issues raised during the consultation process and identify the role and responsibilities of the Coroner in a contemporary world. It is envisaged the project will take several years to complete, with the discussion paper expected in early 2010.

Community Protection (Offender Reporting) Act

The Commission has received a new reference to examine and report upon the application of the *Community Protection (Offender Reporting) Act 2004* (WA). The Act is primarily aimed at monitoring paedophiles and other serious sex offenders. The scope of the reference is very narrow, with the Commission being asked to consider:

- ◇ how the Act applies specifically to reportable offenders who are children; and
- ◇ reportable offenders who are over the age of 18 and commit the offence in circumstances which are exceptional, for example consensual sexual activity with a person the offender honestly and reasonably—but mistakenly—believed to be of or over the age of 16 years.

This reference was initiated as a result of concerns raised about the number of children sentenced in the Children's Court for reportable offences who are required to comply with the reporting requirements of the Community Offender Protection Register. Because of the mandatory nature of the Act, there is no mechanism or discretion to enable the Court to deal with young offenders in a manner that reflects the low end of the scale of seriousness of the offence, or that indicates that the juvenile is not a sex offender of the type for which the register originally came into force.

The Commission is in the preliminary stages of the reference, with foundation research still being undertaken. It is anticipated that the Commission will be in a position to release a discussion paper some time in 2010.

E-news

The Commission has an e-news subscription service which informs subscribers when reports and papers are released as well as keeping subscribers up-to-date with the Commission's activities. The Commission invites *Reform's* readers to subscribe to this service. Subscription is free and you can unsubscribe at any time—just follow the prompts at www.lrc.justice.wa.gov.au.

Manitoba Law Reform Commission

Waivers of liability for sporting and recreational injuries

This recently released report, *Waivers of Liability for Sporting and Recreational Injuries* (Report 120), provides an overview of civil liability for providers of

sporting and recreational activities for the personal injuries or death of consumers arising under three regimes of legal responsibility: The *Occupiers' Liability Act*, the tort of negligence and the law of contract. This report reviews Canadian case law on personal injury and fatality claims involving contractual waivers of liability and considers the approach in other jurisdictions in respect of the use of waivers of liability.

The report makes recommendations aimed at protecting the interests of consumers by prohibiting or alternatively by limiting the use of waivers of liability for personal injury or death resulting from negligence in sporting and recreational activities, while ensure that providers of sporting and recreational activities may still obtain acknowledgements and assumptions of inherent risks from consumers of these activities.

Private international law

The *Private International Law Report* (Report 119), released in 2009, deals with two matters arising out of the Supreme Court of Canada decision in *Tolofson v Jensen*; *Lucas v Gagnon*, namely choice of law for tort and the characterisation of limitation periods, and with jurisdiction simpliciter and the concept of real and substantial connection pertaining thereto.

The Commission recommends the enactment of legislation to codify the *Tolofson* general rule, with the greater specificity, and to empower Manitoba courts to apply a different law in exceptional circumstances. The Commission also recommends that *The Limitation of Actions Act* be amended to codify the *Tolofson* principle that limitation periods are substantive, rather than procedural.

In addition, the report deals with the establishment of the jurisdiction of the Court of Queen's Bench in cases where a defendant has been served with a statement of claim outside of Manitoba. Currently, the case law is in a state of uncertainty. The Commission recommends that Manitoba follow several provinces that have enacted the model legislation proposed by the Uniform Law Conference of Canada entitled the *Uniform Court Jurisdiction and Transfer Proceedings Act*.

Posthumously conceived children

The Commission's report, *Posthumously Conceived Children: Intestate Succession and Dependants Relief* (Report 118), released in February 2009, considers three matters respecting intestate succession—two are amendments to existing sections of *The Intestate Succession Act*, and the third is the question whether posthumously conceived children should be eligible to inherit from and through a deceased parent who dies intestate. There is also the issue of whether posthumously conceived children should receive dependants' relief.

The Commission recommends that *The Intestate Succession Act* and *The Dependants Relief Act* be amended to include posthumously conceived children in order to remedy the current discrimination and to avoid costly litigation. As well, the Commission recommends that *The Intestate Succession Act* be amended to require of survivors conceived before and born after the death of an intestate and of posthumously conceived children, the 15 day survival which is required of other survivors of the intestate. The Commission also recommends an amendment to provide for an equal sharing in an intestacy by maternal and paternal cousins of equal degree of kinship.

The Limitation of Actions Act

In recent years several Canadian jurisdictions have enacted—and the Uniform Law Conference has proposed—legislation that simplifies and rationalises the law of limitations. The Commission is currently considering recommendations as to whether and how Manitoba should modernise its legislation, including reform in relation to both personal and real property limitations.

A draft report was released in June 2009 and, after a period of community consultation, the Commission is now finalising this inquiry.

Improving administrative justice

Manitoba has approximately 160 administrative agencies, boards and commissions that operate outside the government departmental structure. The government relies on administrative agencies, boards and commissions to regulate, adjudicate, give advice, administer substantial financial and other assets and provide goods and services.

The Commission is examining the elements of the formal and informal mechanisms for appointments to administrative agencies, boards and commissions and considering recommendations for a new appointments process for Manitoba. It is currently preparing a report entitled, *Improving Administrative Justice in Manitoba: Starting with the Appointments Process*.

Pension benefits and marital breakdown

The Commission is carrying out research with respect to a possible gap in the law in Manitoba relating to the division of pension benefits between divorced spouses.

New South Wales Law Reform Commission

Jury directions

The Commission is in the final stages of its inquiry into jury directions in criminal trials.

In February 2007, the Attorney General requested that the Commission inquire into the directions and warnings given by a judge to a jury in a criminal trial. The Commission is required to have regard to:

- ◇ the increasing number and complexity of the directions, warnings and comments required to be given by a judge to a jury;

- ◇ the timing, manner and methodology adopted by judges in summing up to juries (including the use of model or pattern instructions);
- ◇ the ability of jurors to comprehend and apply the instructions given to them by a judge;
- ◇ whether other assistance should be provided to jurors to supplement the oral summing up; and
- ◇ any other related matter.

In December 2008, the Commission published a consultation paper (*Jury Directions*, CP 4) which looks at the instructions that judges currently give. It poses the question of whether the instructions are necessary for a fair trial and, if so, whether they can be presented to jurors in a more effective way.

Consideration is also given to the ways in which judges' oral directions can be supplemented by other materials, such as computer technology, written summaries, and flow charts setting out pathways to a verdict.

The Commission has received submissions from the public on all aspects of jury directions, including the ways in which they are delivered, and held a series of advisory committee meetings in 2009 ahead of preparation of the final report.

Privacy

The Commission has completed its reference into privacy, with the release of its report *Invasion of Privacy* (Report 120) in August 2009.

The Commission recommends that there should be an action for invasion of privacy and its report clarifies when an individual should be able to claim compensation and places limitations on the action.

Under the Commission's proposals, the action is only applicable where an individual has a reasonable expectation of privacy that is not overridden by public interests such as freedom of speech. The Commission has advocated a common sense approach, whereby privacy interests are weighted against other important concerns such as the public's 'right to know' and the protection of national security. The report recommends that the new cause of action only be introduced as part of national law reform so that privacy law would be uniform throughout Australia.

FOI and privacy

The Commission received expanded terms of reference from the Attorney General in June 2009 'to inquire and report on the legislation and policies governing the handling of access applications for personal information of persons other than the applicant under the *Freedom of Information Act 1989* (or any successor legislation)'. The report was due in October 2009.

People with cognitive or mental health impairments

The Commission commenced two projects in early 2007 under its Community Law Reform Program relating to people with cognitive or mental health impairments coming into contact with the criminal justice system. The first was to review section 32 of the *Mental Health (Criminal Procedure) Act 1990* (NSW). This provision gives magistrates very broad powers—including diversion from the criminal justice system—when dealing with a defendant who is developmentally disabled, or suffering from a mental illness, or suffering from a mental condition for which treatment is available in a public hospital (but is not mentally ill within the meaning of Chapter 3 of the *Mental Health Act 1990*). The second project was to review the principles of sentencing offenders with cognitive or mental health impairments.

In September 2007, the Attorney General issued the Commission with new, expanded terms of reference. As well as the matters already being considered, the Commission is now also required to consider 'fitness to be tried' and the 'defence of mental illness'.

The Commission is planning the release of a consultation paper in late 2009, with a final report to follow.

Complicity

The Commission's inquiry on the law of complicity is reaching its final phase, with the preparation of a report for the Attorney General.

Complicity refers to rules that widen criminal liability beyond the main perpetrator of a criminal act to another person or persons who may have assisted the main perpetrator to commit an offence. The secondary participant can be held equally guilty of the crime committed. The concept is often referred to as derivative or secondary liability. The law of complicity in NSW is still based on the common law, unlike most states, territories and the Commonwealth, which have codified the relevant principles.

In January 2008, the Commission published a consultation paper on the law of complicity. The paper focuses on two types of complicity: extended common purpose, and accessorial liability. The third type, which is not considered in any detail, is concerned with joint criminal enterprise.

The paper outlines the criticisms which have been directed at these aspects of the law of complicity, particularly by the former High Court judge, the Hon Michael Kirby AC CMG, in a number of High Court cases.

Workplace deaths

The Commission is conducting a statutory review of provisions inserted in 2005 into the *Occupational Health and Safety Act 2000* (NSW), which created a new offence relating to workplace deaths.

The Commission has prepared an interim report for the Attorney General, which is yet to be made public.

Emergency medical care and the restricted right to practise

The Attorney General asked the NSW Law Reform Commission last year to review the *Medical Practice Act 1992* (NSW) to determine whether individuals whose legal right to practise medicine is restricted ought to be under any, and if so what, obligation to provide emergency medical care contrary to the restriction on their right to practise.

Practitioners whose right to practise is restricted may only be able to provide 'urgent' services if they act in breach of the restrictions imposed on their right to practise. If they abide by those restrictions, their conduct amounts to 'unsatisfactory professional conduct'. On the other hand, if they ignore the restrictions and provide the urgent treatment required, they are likewise guilty of unsatisfactory professional conduct under the Act for ignoring a condition attached to their registration. The Act does not resolve this difficulty.

The Commission made three recommendations designed to overcome these difficulties in its final report, *Emergency medical care and the restricted right to practise* (Report 121), published in May 2009.

Review of penalty notice offences

The Attorney General, in December 2008, asked the Commission to inquire into the laws relating to the use of penalty notices in NSW and, in particular, in relation to the level of penalties available, the methods by which offences are selected which attract penalties, and the methods by which penalties are set, as well as the categories of persons in relation to whom they should be available.

The Commission plans to publish a consultation paper by the end of 2009.

Family violence

The NSW Law Reform Commission is working with the Australian Law Reform Commission on its family violence inquiry. The NSW Law Reform Commission received terms of reference in July 2009 and is now calling for preliminary submissions.

The commissions are working on a joint consultation paper to be released early in 2010, with a final report due in July 2010.

(Editor's note: See the article on page 55 for further discussion on this inquiry.)

Queensland Law Reform Commission

Jury directions and warnings

In March 2009, the Queensland Law Reform Commission released an issues paper that examines a number of specific jury directions and warnings, and considers several options to improve jury directions generally. The paper also examines whether jurors can be assisted by the provision of other information, such as transcripts or other written aids.

The Commission is undertaking a research project with former jurors to investigate the extent to which they understood, and were assisted by, the directions, warnings, addresses and summing up given in their respective trials.

The Commission's final report is due at the end of 2009.

Uniform succession laws

In April 2009, the Queensland Law Reform Commission completed the final report on *The Administration of Estates of Deceased Persons*, which concluded the fourth and final stage of the Uniform Succession Laws Project. The report includes model legislation to facilitate the implementation of the National Committee's recommendations by the states and territories.

The project was an initiative of the Standing Committee of Attorneys General, and aimed to update and harmonise the succession laws of the states and territories. It was undertaken by the National Committee for Uniform Succession Laws, which included representatives from all states and territories, except South Australia.

In developing the recommendations contained in the report, the National Committee was guided by four objectives:

- ◇ the simplification of the law;
- ◇ the simplification of processes;
- ◇ the protection of persons with an interest in the estate of a deceased person; and
- ◇ recognition of the extent of informal administration.

Simplification of the law

As part of the simplification of the law, the National Committee sought to assimilate, to the greatest extent possible, the role of administrators with that of executors. For example, the National Committee recommended that the chain of representation, which presently passes through executors only, should also be able to pass through administrators. Where an administrator dies without having completed the administration of the estate, this recommendation will enable the executor or administrator of the deceased administrator to continue the administration of the original estate, and will avoid the need to obtain a further grant in relation to the original estate.

The National Committee also streamlined and clarified the statutory order for the application of assets towards the payment of debts in a solvent estate. This is an area of the law that has historically given rise to considerable uncertainty and litigation.

Simplification of processes

In addition to simplifying the law, the National Committee sought to simplify the processes for the administration of estates. The major reform proposed, in this respect, is the scheme for the recognition of certain Australian grants without the need for those grants to be resealed. Under the first stage of these proposals, if a person dies domiciled in an Australian state or territory, a grant made in that jurisdiction and bearing the required endorsement as to domicile will generally be effective in the other Australian jurisdictions. This avoids the need to obtain a grant, or the resealing of a grant, in each Australian jurisdiction in which there is property to be administered.

The protection of persons with an interest in the estate of a deceased person

The National Committee also recognised that the lack of information provided by some personal representatives is an issue that commonly gives rise to disputes in relation to the administration of estates. The National Committee clarified the duty of a personal representative to maintain documents about the administration of an estate, and provided beneficiaries and other specified persons with a mechanism to obtain access to the documents that must be maintained by a personal representative.

A second issue that gives rise to complaints about the administration of estates concerns the amount of commission charged by personal representatives (particularly under the provisions of a will). The National Committee recommended that the court have an express power to review the amount that is charged, or proposed to be charged, by a personal representative for administering an estate.

Recognition of the extent of informal administration

The National Committee also recognised the extent to which many estates are able to be administered without a grant, and included provisions to facilitate that course. For example, the National Committee recommended that:

- ◇ elections to administer should be able to be filed by the public trustee, a trustee company or a legal practitioner;
- ◇ the model legislation should clarify the liability of a person who administers an estate informally; and
- ◇ the model legislation should include a provision to facilitate the payment, by a person who holds money or personal property of a deceased person, of certain amounts without requiring the production of a grant.

Scottish Law Commission

Succession

The Scottish Law Commission has published its report and draft Bill on *Succession* (ScotLawCom No 215). It is a comprehensive review of the law of testate and intestate succession and recommends a thorough updating and simplification of the current succession rules.

The recommendations for the distribution of intestate estates form the heart of the reform. The Commission recommends that an intestate's surviving spouse or civil (same sex) partner should inherit the whole estate up to the value of a threshold sum (suggested to be £300,000). Any excess will be divided into two parts—one for the spouse or civil partner and the other for any issue of the deceased (children, grandchildren, etc). So, if the deceased leaves no issue, the spouse or civil partner will inherit the whole estate regardless of its size. If the deceased is not survived by a spouse or civil partner, the issue will inherit everything. For example, Ethel dies intestate leaving her husband, Harold, a daughter, Donna, and net estate of £340,000. Harold receives £320,000 (that is, the threshold sum plus half of the excess) and Donna £20,000. These reforms place the surviving spouse or civil partner in what the Commission considers to be their rightful position: as the main heir on intestacy. Also, the current distinction between heritable and moveable estate is largely eradicated.

Secondly, there are recommendations for the protection of certain close family members. If the deceased dies testate, making inadequate (or no) provision for the surviving spouse or civil partner, the recommendation is that the survivor should be entitled to a legal share of the estate, which is to be valued at 25% of what he or she would have inherited if the deceased had died intestate. The report makes two alternative sets of recommendations in relation to disinherited children. One is that the deceased's issue should be entitled to a legal share of the estate, also valued at 25% of what he or she would have inherited on intestacy. If, in our example, Ethel had left her entire estate to charity, Donna's legal share would be £5,000 and Harold's £80,000. The second, more radical, alternative is that protection should only be given to a deceased's dependent child, who is to be entitled to a capital sum from the estate. It is calculated by reference to his or her maintenance needs for the period between the deceased's death and the time when, had the deceased survived, his or her alimentary obligation to the child would have ceased (that is, at 18 or, if the child is in further education or training, by age 25). The capital sum is payable out of the whole estate other than any part which goes to a person who owes the child an obligation of aliment. So, if a father dies leaving a young child, any estate which devolves to the child's mother will be disregarded, on the basis that she owes the child an alimentary obligation. Under this scenario disinherited adult children would have no claim. Those who

responded to the Commission's earlier discussion paper on this inquiry were evenly divided between the two options, so the Commission considered it right to present both alternatives. The final decision is for the Scottish Parliament.

The report expressly provides that a person who has a right to a legal share may renounce it at any time. This may be appropriate, for example, where a widow wishes to leave her estate to her badly handicapped son and not to her well-off daughter, or where the testator's main asset is a business which would suffer a disproportionate loss if a part had to be sold in order to meet a claim for legal share.

The third set of recommendations relates to cohabitants. The current provision, in s 29 of the *Family Law (Scotland) Act 2006*, is to be repealed; instead, a cohabitant whose relationship is terminated by the deceased's death is to be entitled to an 'appropriate percentage' of the sum which he or she would have inherited had the couple been spouses or civil partners. This will apply in testate cases as well as on intestacy, so the survivor will receive a percentage of the legal share to which a spouse or civil partner would have been entitled or, alternatively, a percentage of the intestate succession entitlement of a spouse or civil partner. Prescribed factors are to be taken into account in determining the appropriate percentage: they focus exclusively on the length and quality of the cohabitant's relationship with the deceased. Factors such as the size of the estate, the existing means of the survivor, the identity of the other beneficiaries and so on will be irrelevant and cannot be considered. So, for example, a woman whose relationship lasted for 40 years and who brought up the couple's children might be entitled to a large percentage, say 95%, of what she would have received if married to the deceased. But the appropriate percentage for the survivor of a couple who had only been together for a few years, who managed their finances separately and whose household did not include children might be around 25% of a spouse or civil partner's entitlement.

The report makes other recommendations, many of which stem from recommendations in the Commission's *Report on Succession* in 1990 which have not yet been implemented. For instance, there is consideration of international private law issues, the rectification of wills and the revival of revoked wills. Apart from recommended reforms about caution, the report does not address matters relating to executors and estate administration. The Commission intends to review the law in this area in a future project, possibly to form part of its Eighth Programme of Law Reform.

South African Law Reform Commission

Statutory law revision

Work continues on the Commission's major investigation on statutory law revision (Project 25), which aims to establish a permanently simplified, coherent and generally accessible statute book.

An audit of all national legislation (excluding provincial and secondary legislation) by the Commission revealed that there are close to 3,000 statutes on the statute book, comprising Principal Acts, Amendment Acts, Supplementary or Additional Acts and Private Acts. Many of these Acts are not being applied anymore while others contain provisions that are in conflict with the *Constitution*. Redundant and obsolete provisions on the statute book are being identified and government departments are being consulted in order to verify these provisions.

With a view to increasing research capacity, the Commission identified advisory committee members for appointment by the Minister of Justice and Constitutional Development. In July 2008, 112 advisory committee members were appointed to 14 advisory committees. Initial meetings of these advisory committees were held to decide the way forward, and agree on a division of the statutes to be reviewed; time-frames of the first stage of the review; and the development of consultation papers.

Further meetings were held earlier this year to consider these consultation papers. Once approved, these consultation papers will be submitted to the departments concerned to consider and to comment on the preliminary findings and proposals.

In March 2009 a progress report and a Cabinet Memorandum detailing progress made in the project up to the end of February 2009 was submitted to Department of Justice and Constitutional Development. The Minister submitted the progress report to Cabinet for noting.

Discussion papers released as part of this investigation are available on the Commission's website.

Hindu marriages

The Commission is developing a discussion paper as part of its investigation into the recognition of Hindu marriages. The inquiry, which was approved for inclusion in the Commission's program in 2006, is part of Project 25 (discussed above).

South African law does not recognise marriages by Hindu rites; therefore all the legal consequences of marriage do not apply to such marriages in South Africa. Couples in a Hindu marriage for example need not use the court if they want to get divorced. Spouses also cannot claim any of the legal consequence of divorce, such as maintenance, after the relationship has ended. The aim of this

investigation is to look into the recognition of Hindu marriages in order to afford these marriages full legal recognition and the same status as marriages concluded in accordance with civil rites.

Privacy and data protection

The report on Project 124: *Privacy and Data Protection* was submitted to the Minister of Justice and Constitutional Development in February 2009 and publicly released in August. The Minister has subsequently sought and obtained Cabinet approval to submit the Protection of Personal Information Bill into Parliament.

The Commission's investigation covered all aspects regarding the protection of personal information in relation to the processing (collection, storage, use and communication) of the information by the State or another.

The Commission has recommended that privacy and information protection be regulated by a general information protection statute, which will be supplemented by codes of conduct for the various sectors.

The legislation is pro-active in nature, focusing on ensuring that proper systems are put in place instead of only policing encroachments.

The Bill applies to both the public and private sector; to paper records as well as those held on computers; and to identifiable natural and juristic persons. It will give effect to the following internationally accepted core information protection principles, and will provide that personal information must be:

- ◇ obtained fairly and lawfully;
- ◇ used only for the original specified purpose;
- ◇ adequate, relevant and not excessive to purpose;
- ◇ accurate and up to date;
- ◇ accessible to the subject;
- ◇ kept secure;
- ◇ destroyed after its purpose is completed;
- ◇ transferred only to countries that ensure an adequate level of information protection; and
- ◇ accounted for by the responsible party at all times.

Provision is made for exceptions to the information protection principles. Exclusions and exemptions are furthermore possible for specific sectors in applicable circumstances. Special provision has also been made for the protection of special (sensitive) personal information, such as information regarding children, religion, health and sex life, race, political persuasion and criminal behaviour.

The Commission recommends a flexible approach where industries will develop their own codes of conduct (in accordance with the principles set out in the legislation), which will be overseen by the regulatory agency. Codes of conduct for individual sectors may be drawn up for specific sectors on the initiative of the sector itself or of an Information Protection Regulator.

The Regulator will administer both the new *Protection of Personal Information Act* and the existing *Promotion of Access to Information Act*.

The recommendations and draft legislation are the result of a profoundly thorough consultation process. Should these recommendations be adopted by Parliament, the protection of information privacy in South Africa will be in line with international obligations in terms of requirements and developments.

Adult prostitution

The Commission is considering the responses it has received in its investigation into adult prostitution (Project 107: *Sexual Offences: Adult Prostitution*) after releasing a discussion paper for public comment earlier this year. The Commission also held a series of public workshops and opened on online questionnaire as part of consultation on the investigation.

The Commission is considering the need for law reform in relation to adult prostitution and identifying alternative policy and legislative responses that might regulate, prevent, deter or reduce prostitution. A secondary aim is to review the fragmented legislative framework which currently regulates adult prostitution and enhance alignment with international human rights obligations. Under current South African legislation, voluntary selling and buying of adult sex and all related acts are criminal offences.

The proposed four law reform options outlined in the discussion paper are:

- ◇ total criminalisation of adult prostitution (status quo);
- ◇ partial criminalisation of some forms of adult prostitution and prostitution related acts;
- ◇ non-criminalisation of adult prostitution; and
- ◇ regulation of adult prostitution and prostitution related acts.

All of the proposed options presuppose the criminalisation of under-aged and coerced prostitution and trafficking of people for the purpose of prostitution (the legislature has recently revised and severely sanctioned commercial sexual exploitation of children and trafficking of children and adults for sexual purposes). The criminalisation of coerced adult prostitution must be included in the option which is ultimately recommended in the report.

The Commission is preparing its report, which will contain the final recommendations of the Commission and will be accompanied by legislative proposals pertaining to adult prostitution.

Tasmania Law Reform Institute

Easements and analogous rights

This project reviews the current laws of easements and analogous rights in Tasmania to ensure that they meet community expectations and needs.

On 17 February 2009, an issues paper was released. The large response that has been received from members of the public (requesting copies of the paper and talking to the Institute about problems with the existing law) demonstrates that this is an area of public concern in Tasmania. Public comment received by the Institute indicates that there is a great deal of uncertainty about the rights and obligations of the owners of the dominant and servient tenements. The need for a low cost dispute resolution forum is another key theme in the responses received from the public.

Work is currently underway on the preparation of the final report. The report will make recommendations for reform in relation to the current legislative requirements in Tasmania for the creation, variation and termination of easements. Other important areas to be considered are the abandonment of easements, the recognition of novel easements, and the recognition of easements in gross.

Male circumcision

On 2 June 2009, an issues paper was released that examines the law relating to non-therapeutic male circumcision in Tasmania. The paper was written for the Board of the Institute by a postgraduate student enrolled at the Faculty of Law, Mr Warwick Marshall.

The particular focus of the paper is the criminal and civil liability of a person performing a non-therapeutic circumcision. For the purposes of the paper, a circumcision is regarded as non-therapeutic if it is performed for any reason other than remedying or treating an existing disease, illness or deformity of the body. Prophylactic circumcisions are included as non-therapeutic circumcisions.

The paper provides a brief review of the medical and non-medical background, examines the current legal situation in relation to criminal responsibility, family law, the legal responsibilities of circumcisers in the provision of their service and the relevant human rights law. It also describes the legislative regimes for circumcision that exist in some overseas jurisdictions, briefly outlines some options for reform and provides a list of questions to direct discussion.

After an examination of the law in Tasmania, the paper concludes that adults and children capable of consent can almost certainly provide consent for the procedure so that a circumciser can legally perform the procedure (subject to other duties the circumciser will have in the provision of their service). However, the paper also concludes that there is uncertainty as to whether parent's consent for the circumcision of their child is sufficient to allow a circumciser legally to perform the procedure.

The main purpose of the paper is to encourage, and provide the background for, deliberation about whether changes need to be made to the law in Tasmania. In particular the paper invites consideration of:

- ◇ the circumstances in which a person is criminally liable for performing non-therapeutic circumcision (punishable by either imprisonment, a fine, or other means);
- ◇ the circumstances in which a person is liable under civil law for performing a non-therapeutic circumcision; and
- ◇ the regulation of the commercial aspects of male circumcision.

Following consideration of all responses it is intended that a final report will be published, containing recommendations.

Victorian Parliament Law Reform Committee

Alternative dispute resolution and restorative justice

The Victorian Parliament Law Reform Committee (VPLRC) tabled its report on alternative dispute resolution (ADR) and restorative justice in May 2009.

The report contains 44 recommendations which aim to realise the potential of ADR services in Victoria, ensure high quality services and make ADR accessible to all members of the community. The recommendations include:

- ◇ reducing barriers to access for members of the community, including establishing more dispute settlement centres throughout the state, providing more assistance for people from non-English speaking backgrounds and developing culturally appropriate services;
- ◇ increasing the capacity of Victorians to resolve civil disputes themselves through education about conflict resolution and communications skills; and
- ◇ increasing the supply of ADR services, particularly by exploring the scope for additional industry ombudsman schemes and by undertaking research into the potential use of online ADR.

The report also contains 34 recommendations aimed at enhancing current restorative justice programs and making restorative justice more widely available in Victoria, including:

- ◇ improving the experiences of victims participating in the Youth Justice Group Conferencing (YJGC) Program, a restorative justice program operating in the Children's Court of Victoria, through increased provision of information and support to victims and more follow-up with victims after a group conference;

- ◇ increasing the quality and consistency of restorative justice services through the training and accreditation of providers; and
- ◇ expanding restorative justice programs in Victoria, including a staged rollout of restorative justice programs to suitable adult offenders, a pilot program using restorative justice for some more serious offences (but not for family violence and sexual offences) and a trial restorative justice program for suitable offenders after they have been sentenced by a court.

Members of Parliament (Register of Interests) Act

The VPLRC is currently reviewing the *Members of Parliament (Register of Interests) Act 1978* (Vic). The Act sets out a code of conduct for members of the Victorian Parliament. It also requires them to disclose certain financial and other interests that have the potential to conflict with their public duties, such as land and shareholdings, in a register.

The VPLRC has received 28 submissions to the review and held four public hearings between June and August this year. The VPLRC will table its final report to the Victorian Parliament in December 2009.

Powers of attorney

The VPLRC is conducting an inquiry into Powers of Attorney in Victoria. The terms of reference require the VPLRC to consider law reforms to streamline and simplify powers of attorney documents to enable more Victorians to plan for their future financial, lifestyle and healthcare needs.

The VPLRC has called for public submissions to the inquiry, and has received more than 60 submissions to date. Public hearings were held in October 2009 and more are planned for late 2009 and early 2010

The inquiry is due to be completed by 31 August 2010.

Further information about the work of the VPLRC, including copies of reports, terms of reference and information about how to make a submission, is available at www.parliament.vic.gov.au/lawreform, or by calling (03) 8682 2851.

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