

RECENT DEVELOPMENTS

*Alice Mantel**

Make a date for the AIAL National Administrative Law Forum

The theme for this year's National Forum is 'Reforming Administrative Law' and recent developments in State and Federal legislation and policy changes in areas such as FOI, privacy, whistleblower protection and immigration are expected to be topics under scrutiny. The conference will be held in Canberra on 6 and 7 August and proposals for papers should be sent to Conference Director, Stephen Argument by 6 April 2009.

Law Council welcomes new President's order to close Guantanamo Bay

The Law Council has welcomed newly-inaugurated US President Barack Obama's swift moves to close detention facilities at Guantanamo Bay.

In one of his first official actions as President, Mr Obama has ordered that the Guantanamo Bay prison be closed within one year and there be a review of the cases of all detainees.

Welcoming this historic development, Law Council President John Corcoran urged the Australian Government to lend its support. 'The detention facility at Guantanamo Bay has become symbolic of the erosion of fundamental individual's rights that has occurred at the hands of Governments around the world in the name of the 'war on terror'. The Law Council looks forward to the Australian Government supporting these important moves to restore respect for human rights principles when combating terrorism,' Mr Corcoran said.

During the review, the US administration will take steps to ensure that current military commission hearings against detainees are suspended and no further hearings are commenced. The review will look at options for releasing detainees or transferring them to other countries or US facilities. It will also look at the option of court prosecutions. It has been reported that the President has made a commitment to end the use of abusive techniques when interrogating terrorist suspects.

Mr Corcoran said the Law Council had long advocated for the closure of Guantanamo Bay, which has symbolised the US administration's violation of the principles of international law. These violations include detaining suspects for years without charge, torturing prisoners, denying access to US Courts and trying prisoners, including Australian David Hicks, in military commissions which failed to meet fair trial standards.

23 January 2009

Consultation a watershed opportunity to protect human rights says AHRC President

The President of the Australian Human Rights Commission, Catherine Branson QC, said the national consultation into human rights, announced by the federal Attorney-General was an

* *Editor, AIAL Forum*

important opportunity for Australians to give consideration to what these rights mean to them and whether their rights are adequately protected.

Attorney-General Robert McClelland marked the 60th Anniversary of the Universal Declaration of Human Rights by launching the National Human Rights Consultation to seek the community's views on human rights in Australia.

The Consultation will be conducted by a Committee of four eminent Australians:

- Father Frank Brennan SJ AO (Chair)
- Mick Palmer AO APM
- Mary Kostakidis, and
- Tammy Williams

'Sixty years ago today the Universal Declaration of Human Rights came into existence, and Australia not only assisted in its drafting, but had earlier helped found the United Nations itself – so it is a matter of some surprise that, almost a decade into the 21st Century, human rights continue to remain inadequately protected in our own country,' President Branson said.

Ms Branson said she was particularly conscious that Australia is the only liberal democracy in the world without a charter or bill of rights. 'Our daily work at the Commission reveals laws and policies that inadequately protect rights, and every day we hear from individuals who feel that their rights have been breached.'

Ms Branson said the Commission will draw on its considerable expertise in the promotion and protection of human rights, not only to assist Australians to take part in the consultation, but also to make its own contribution to the consultation by proposing new strategies for improving human rights protection in Australia. The Committee will report to the Government by 31 July 2009. Information and materials about a charter of rights and how to participate in the national consultation are available on the Commission website at www.humanrights.gov.au/human_rights/charter_of_rights/index.html.

9 December 2008

Charities and not-for-profits face major overhaul

The Senate Standing Committee on Economics has released its report into the governance, accountability and transparency of Australia's charities and not-for-profit organisations. After receiving submissions from 183 organisations and individuals, the Committee has recommended sweeping changes to the regulation of not-for-profit organisations designed to increase transparency and accountability in the use of public and government funds.

Key recommendations include:

- the creation of a single independent national regulator for not-for-profit organisations modelled on UK laws and responsible for:
 - administering a compulsory register for not-for-profit organisations which would provide key facts and figures about the work and finances of each organisation;
 - securing compliance with relevant legislation;
 - investigating complaints;
 - developing best practice standards;

- educating the public about the role of not-for-profit organizations.
- a single, mandatory, specialist legal structure be adopted for not-for-profit organisations to replace the current use of different legal structures such as companies limited by guarantee, incorporated associations, trusts, co-operatives, statutory corporations;
- an examination of taxation measures affecting not-for-profit organisations to be included in the ongoing Henry Review of Australia's future taxation system including the rules governing the award of public benevolent institution (PBI) and deductible gift recipient (DGR) status;
- the development of national fundraising legislation to replace the current inconsistent State and Territory regulatory systems;
- the adoption of a reporting and disclosure system with differing levels of disclosure related to revenue thresholds and an emphasis on narrative and numeric reporting to properly inform the range of stakeholders in such organisations.

The recommendations are intended to simplify, co-ordinate and make consistent the complex legislation and regulation affecting not-for-profit organisations throughout Australia and would improve transparency and confidence in, and increase funding to, the sector.

Not all groups in the not-for-profit sector are supportive of the proposed reform and it has been suggested that such proposals may seriously disadvantage small organisations which may not have the resources to comply with more onerous disclosure and reporting requirements. The Committee also recommended the establishment of a Taskforce to implement its recommendations.

ICAC recommends changes to RailCorp to combat corruption

The NSW Independent Commission Against Corruption (ICAC) has made 40 recommendations to combat corruption at RailCorp after one of the largest investigations in the Commission's history.

The investigation uncovered almost \$19 million in improperly allocated contracts that were awarded to companies owned by RailCorp employees, their families and/or friends in return for more than \$2.5 million in corrupt payments.

In the eighth and final report on its *Investigation into bribery and fraud at RailCorp*, the Commission says that the investigation has exposed an 'extraordinary extent of public sector corruption. Corrupt employees appeared to be confident that they would not be caught or if they were, that not much would happen to them.'

'Corruption in RailCorp is not a few "bad apples",' ICAC Commissioner the Hon Jerrold Cripps QC says in the report. 'The very structure of the organisation and the way it operates allows and encourages corruption. The Commission is of the opinion that the decision to outsource the provision of certain goods and services in an environment of dysfunctional markets, a lack of internal firewalls within procurement positions, the inability of management to effectively manage the procurement process, and the weak oversight of the RailCorp Board of an activity fraught with corruption risks, worked in concert to allow the widespread corruption to develop,' the report says.

'The investigation and findings entitle the Commission to infer that the type of corruption exposed extends beyond those individuals identified in this investigation,' the report notes. 'Therefore the conclusions have applications throughout RailCorp and for other agencies involved in procurement.'

The report described record-keeping at RailCorp as 'shambolic' and that its form of contracting, process design, reporting arrangements, management competence, culture and oversight arrangements all contributed to endemic corruption in the organisation. The ICAC identified four critical areas for reform, recommending that RailCorp:

- reduce procurement risk by ensuring that it buys only what it can adequately monitor;
- create firewalls that remove end-to-end control of procurement by single individuals;
- improve overall managerial effectiveness in the Asset Management Group (the focus of this investigation);
- improve oversight, especially by ensuring that corruption risk management strategies are implemented.

The report said that since 1992 the Commission had conducted six previous major investigations into RailCorp, all of which found corruption. 'Much of the corruption found previously was similar in nature to that exposed in this investigation'.

'All the recommendations (in this report) need to be implemented if RailCorp is to reduce corruption. Beyond the Asset Management Group, it is clear that the importance of preventing corruption in RailCorp was not a priority for the senior executive team or part of the standard oversight framework of the organisation,' the report says.

'Ultimately, responsibility for preventing corruption in this critical public organisation is shared by RailCorp's CEO, the RailCorp board and the Minister for Transport,' the report said. 'It is incumbent on them to break with past practices and improve oversight and action regarding corruption prevention.'

The Commission recommended that the responsibilities of the proposed RailCorp Advisory Board, the RailCorp CEO and the Minister for Transport be reviewed to determine whether there needs to be a restructure to better ensure financially responsible management that would limit the opportunity for corruption. Other recommendations include:

- a skill profile for the proposed Advisory Board as a whole be developed;
- that management position descriptions be revised to help prevent corrupt conduct;
- the contract of the CEO should be revised to incorporate performance targets relating to corruption prevention that can be independently audited, and the achievement of performance targets be linked to consequences.

The Commission will monitor the implementation of the recommendations made as a result of this investigation.

15 December 2008

New High Court Justice appointed

Justice Virginia Bell has been appointed as a Justice of the High Court of Australia with effect from 3 February 2009.

Justice Bell will be the fourth woman appointed to the High Court since Federation. Her Honour's appointment will follow the retirement of the Hon Justice Michael Kirby AC CMG after 13 years of outstanding service to Australia's highest court.

Justice Bell will join two current women judges in the High Court – Justices Susan Crennan and Susan Kiefel. Beginning her legal career at the Redfern Legal Centre in 1978, Justice Bell practised as a lawyer for over 20 years before being appointed a Judge of the NSW Supreme Court in 1999 and then appointed as a judge of Appeal of the NSW Supreme Court. Her Honour's time in practice included service as a Public Defender, as Counsel Assisting the Royal Commission into the NSW Police Service, and as a part-time Commissioner of the NSW Law Reform Commission. Most recently her Honour has also served as President of the Australasian Institute of Judicial Administration.

15 December 2008

Referees may provide expert assistance to Federal Court

Attorney-General Robert McClelland has introduced legislation to assist judges to reduce the cost and length of trials for litigants.

The Federal Justice System Amendment (Efficiency Measures) Bill (No. 1) 2008 contains a range of reforms to improve the efficient operation of the federal courts and tribunals. One key measure gives the Federal Court the power to refer questions arising in proceedings to a referee for inquiry and report.

The measure will allow Federal Court judges to refer all, or part, of a proceeding in the Court to an appropriately qualified person for inquiry. That person would then provide a report to the Court on the matter. This will assist cases where technical expertise is required and it is neither a cost effective, nor an appropriate use of a judge's time to gain the necessary in-depth expertise in a particular science or trade.

The Bill also amends the Federal Court Act to allow a single judge of the Court to make interlocutory orders in proceedings that would otherwise be required to be heard by the Full Court. This will allow the Court to more efficiently manage cases and avoid unnecessary delay for litigants.

3 December 2008

New report focus on accountability in business

The Administrative Review Council has released a new report, *Administrative accountability in business areas subject to complex and specific regulation*.

The report investigates the increasing complexity of regulatory regimes which apply to Australian business and proposes a set of guidelines to ensure accountability and transparency in the application of business rules. It covers regulation by government agencies, as well as self-regulation by industry bodies and other non-government entities.

Launching the report, the Attorney-General, Mr McClelland said, 'The report provides a useful framework for those involved in drafting and making decisions on the basis of business rules. If followed, it should help bureaucrats from both the business and public sector become facilitators. The administrative law values of lawfulness, fairness, rationality, openness and efficiency should be elements of all business rules, not only those housed in legislation applied by government agencies.' Copies of the report may be obtained by calling the Council's Secretariat on 02 6250 5800 or on the Council's website at: <http://www.law.gov.au/arc>.

28 November 2008

Native title discussion paper released

Attorney-General Robert McClelland and Minister for Indigenous Affairs Jenny Macklin have released a Native Title discussion paper that examines options for improving the native title system. The paper canvasses legislative and non-legislative proposals to make better use of payments to Aboriginal communities under mining and infrastructure agreements and includes specific options for making more effective and sustainable agreements as well as more general alternatives for the role of government and the resources industry.

Ms Macklin said that 'Properly structured property rights to land should be key for expanding commercial and economic opportunities in Indigenous communities. The Government wants to find ways to harness the economic benefits to native title for the long-term benefit of communities and generations of Indigenous communities.'

More than 60 per cent of mineral operations in Australia adjoin indigenous communities. This provides an important opportunity for governments, industry and traditional owners to address entrenched economic and social disadvantage suffered by indigenous Australians.

The release of the discussion paper coincides with the publication of a report conducted by the Government's Native Title Payments Working Group. The Working Group, comprised of experts from the indigenous community, mining industry, academia and the legal profession, has made important recommendations on how native title payments can be better harnessed to support Indigenous Australians.

The Native Title Working Group report, discussion paper, and information on how to make submissions and comments on the discussion paper are available at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenoulawandnativtitle_Nativetitle_DiscussionPaper-OptimisingbenefitsfromNativeTitleAgreements and http://www.fahcsia.gov.au/internet/facsinternet.nsf/indigenous/programs-native_title_discussion_paper.htm.

Historic same-sex laws passed

Attorney-General Robert McClelland has welcomed the passage through Parliament of historic legislation that will remove same-sex discrimination from a wide range of Commonwealth laws. The legislation removes discrimination in areas including superannuation, social security, taxation, Medicare, veteran's affairs, workers' compensation, and educational assistance.

Mr McClelland said 'The changes provide for equality of treatment between same-sex and opposite-sex de facto couples. I think that the general feeling within the Australian community is that these reforms are appropriate and should have been introduced a long time ago.'

In areas such as social security and taxation, the reforms will be phased in to allow time for couples to adjust their finances and for administrative arrangements to be implemented. All changes are expected to be implemented by mid-2009.

Commonwealth Acts that are amended by the legislation are:

Attorney-General's Department

- *Acts Interpretation Act 1901*
- *Administrative Decisions (Judicial Review) Act 1977*
- *Age Discrimination Act 2004*
- *Australian Federal Police Act 1979*
- *Bankruptcy Act 1966*
- *Crimes Act 1914*
- *Crimes (Superannuation Benefits) Act 1989*
- *Customs Act 1901*
- *Family Law Act 1975*
- *Federal Magistrates Act 1999*
- *High Court Justices (Long Leave Payments) Act 1979*
- *Judges (Long Leave Payments) Act 1979*
- *Judges' Pensions Act 1968*
- *Law Officers Act 1964*
- *Passenger Movement Charge Collection Act 1978*
- *Proceeds of Crime Act 2002*
- *Service and Execution of Process Act 1992*
- *Sex Discrimination Act 1984*
- *Witness Protection Act 1994*

Department of Agriculture, Fisheries and Forestry

- *Australian Meat and Live-stock Industry Act 1997*
- *Farm Household Support Act 1992*

Department of Broadband, Communications and the Digital Economy

- *Australian Postal Corporation Act 1989*
- *Broadcasting Services Act 1992*
- *Telstra Corporation Act 1991*

Department of Defence

- *Defence Force (Home Loans Assistance) Act 1990*
- *Defence (Parliamentary Candidates) Act 1969*
- *Defence Force Retirement and Death Benefits Act 1973*
- *Defence Forces Retirement Benefits Act 1948*
- *Royal Australian Air Force Veterans' Residences Act 1953*

Department of Education, Employment and Workplace Relations

- *Education Services for Overseas Students Act 2000*
- *Higher Education Support Act 2003*
- *Judicial and Statutory Officers (Remuneration and Allowances) Act 1984*
- *Safety, Rehabilitation and Compensation Act 1988*
- *Seafarers Rehabilitation and Compensation Act 1992*
- *Student Assistance Act 1973*

Department of Families, Housing, Community Services and Indigenous Affairs

- *Aboriginal Land Grant (Jervis Bay Territory) Act 1986*
- *Child Support (Assessment) Act 1989*
- *Child Support (Registration and Collection) Act 1988*
- *Corporations (Aboriginal and Torres Strait Islander) Act 2006*
- *A New Tax System (Family Assistance) Act 1999*
- *A New Tax System (Family Assistance) (Administration) Act 1999*
- *Social Security Act 1991*

Department of Finance and Deregulation

- *Commonwealth Electoral Act 1918*
- *Medibank Private Sale Act 2006*
- *Members of Parliament (Life Gold Pass) Act 2002*
 - *Parliamentary Entitlements Act 1990*
- *Parliamentary Contributory Superannuation Act 1948*
- *Superannuation Act 1922*
- *Superannuation Act 1976*

Department of Foreign Affairs and Trade

- *Australian Passports Act 2005*
- *Export Market Development Grants Act 1997*
- *Trade Representatives Act 1933*

Department of Health and Ageing

- *Aged Care Act 1997*
- *Health Insurance Act 1973*
- *National Health Act 1953*
- *Prohibition of Human Cloning for Reproduction Act 2002*
- *Research Involving Human Embryos Act 2002*

Department of Immigration and Citizenship

- *Australian Citizenship Act 2007*
- *Immigration (Education) Act 1971*
- *Immigration (Guardianship of Children) Act 1946*
- *Migration Act 1958*

Department of Infrastructure, Transport, Regional Development and Local Government

- *Airports Act 1996*
- *Civil Aviation (Carriers' Liability) Act 1959*
- *Navigation Act 1912*

Department of Innovation, Industry, Science and Research

- *Pooled Development Funds Act 1992*

Department of Prime Minister and Cabinet

- *Governor-General Act 1974*
- *Privacy Act 1988*

Treasury

- *A New Tax System (Medicare Levy Surcharge—Fringe Benefits) Act 1999*
- *Corporations Act 2001*
- *Financial Sector (Shareholdings) Act 1998*
- *Foreign Acquisitions and Takeovers Act 1975*
- *Fringe Benefits Tax Assessment Act 1986*
- *Income Tax Assessment Act 1936*
- *Income Tax Assessment Act 1997*
- *Income Tax (Transitional Provisions) Act 1997*
- *Insurance Acquisitions and Takeovers Act 1991*
- *Life Insurance Act 1995*
- *Retirement Savings Accounts Act 1997*
- *Small Superannuation Accounts Acts 1995*
- *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*
- *Superannuation Industry (Supervision) Act 1993*

Department of Veterans' Affairs

- *Defence Service Homes Act 1918*
- *Military Rehabilitation and Compensation Act 2004*
- *Veterans' Entitlements Act 1986*

27 November 2008

Former law dean takes up UN role

A former Dean of the Faculty of Law at the University of Sydney has been elected to the United Nations as one of 12 experts in the first monitoring committee for the Convention on the Rights of Persons with Disabilities.

Professor Ron McCallum AO, an expert in industrial law, won the position from a large pool of candidates and will take up the role at the UN's headquarters in New York. Professor McCallum will be the only Australian currently serving on a UN treaty body.

Human Rights Commissioner Graeme Innes said Professor McCallum's appointment was a great honour for Australia and will assist progress towards a national disability strategy to allow Australians with disability to have equal access to participate as full citizens in all aspects of life.

The Commissioner added that Professor McCallum was the first totally blind person to be appointed to a full professorship in any field, at any university in Australia and New Zealand. Still a law professor, Professor McCallum is also deputy chair of the Board of Directors of Vision Australia, chair of Radio for the Print Handicapped and president of the Australian Labour Law Association. He was awarded an Order of Australia for services to academia and Australia's disability sector in 2006.

Australia ratified the convention in July this year to acknowledge the need for specific human rights for the 600 million people around the globe living with disability.

19 November 2008

Commitment to women's rights reaffirmed

On the eve of the International Day for the Elimination of Violence Against Women, Australia has formally moved to become a party to the Optional Protocol to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

Although Australia has been a party to CEDAW since 1983, the previous Government declined to sign the Optional Protocol when it was adopted in 2000, despite countries such as the United Kingdom, Canada, New Zealand and a number of Asia-Pacific countries doing so.

Attorney-General Robert McClelland and Minister for the Status of Women Tanya Plibersek said that by becoming a party to the Optional Protocol, the Government is making a powerful statement that discrimination against women in any form is unacceptable.

Under the Optional Protocol, women in Australia will be able to make a complaint to the UN Committee on the Elimination of Discrimination Against Women about alleged violation of Australia's obligations under CEDAW. This can only occur after domestic legal options have been exhausted. The protocol also permits a UN investigation process.

The Optional Protocol will enter into force on International Women's Day, 8 March 2009.

Uniform statutory declarations initiated

The Standing Committee of Attorneys-General has announced a uniform approach to statutory declarations. The move will attempt to redress the fragmentation of the current

system, which has different forms in use across the country, and eight different legislative regimes regulating who can witness a statutory declaration.

Attorney-General Robert McClelland said it was imperative that jurisdictions agreed on a harmonised approach to statutory declarations, given the complexity of current arrangements. Under the new regime, a national uniform statutory declaration form will be developed. Attorneys-General also requested that a consolidated list of authorised witnesses be compiled for their approval at the next meeting.

19 November 2008

New report highlights immigration detention

Releasing the 2008 report on conditions in immigration detention, Human Rights Commissioner Graeme Innes called on the government to translate its 'new directions' for Australia's immigration detention system into policy, practice and legislative change as soon as possible.

'While it is true we have seen improvements in the way Australia treats immigration detainees, our report shows we are still seeing children being held in detention facilities, people being detained for prolonged and indefinite periods and dilapidated detention centres being used for accommodation, said Mr Innes, 'and now we also have the disturbing reality that the massive prison-like Christmas Island facility is open for business.'

Commissioner Innes said the major recommendations in the report include that:

- minimum standards for conditions and treatment of persons in immigration detention should be legislated ;
- the Migration Act should be amended so that immigration detention is the exception rather than the norm and the decision to detain a person is subject to prompt review by a court;
- detention of people on Christmas Island should cease;
- the recommendations of the national inquiry into children in immigration detention should be implemented by the government.

Mr Innes said he was particularly concerned that, while children are no longer held in immigration detention centres, they are held in other closed detention facilities on the mainland and Christmas Island and he called on the government to amend Australia's immigration laws to ensure they comply with the Convention on the Rights of the Child.

Commissioner Innes said he also had serious concerns that, despite the end of the so-called 'Pacific solution', asylum seekers are still being detained and processed on the very remote Christmas Island – 2600 km from the nearest Australian capital city.

The *2008 Immigration detention report* covers inspections of the immigration detention facilities around Australia, including Christmas Island, between June and September 2008. In addition to those listed above, the report contains a comprehensive set of recommendations about Australia's immigration detention system. The full report can be downloaded from www.humanrights.gov.au/human_rights/immigration/idc2008.html.

13 January 2009

ALRC revisits the legal rights of children and young people

The Australian Law Reform Commission (ALRC) has released *Reform* Issue 92, 'Children and Young People' which examines the current treatment of children and young people in the legal process, against the backdrop of the recommendations made in the ALRC and HREOC Report, *Seen and Heard: Priority for Children in the Legal Process* (ALRC 84, 1997).

A little over ten years ago, the ALRC and the Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission) released the landmark report *Seen and Heard* represented the culmination of a major two-year inquiry exploring how children and young people were treated by Australia's legal system and Australia's international obligations under the Convention on the Rights of the Child.

Articles in this edition of *Reform* address such issues as:

- the rights and life chances of indigenous children;
- the changes made to the Family Court and the family law system over the last decade and the positive outcomes for children and young people in family dispute resolution and legal proceedings;
- the changing legal framework for inter-country adoption;
- the effectiveness of the legal process in protecting children and young people as consumers;
- bullying and violence against young people in the workplace; and
- the legal, social and ethical issues associated with genetic testing of minors.

Reform 92 also explores the progress made by federal Governments since the release of the ALRC's Report and discusses youth participation in the democratic process and the 2020 Youth Summit; legal regulation of the work of children and young people; and children and the law in the Solomon Islands.

Copies of *Reform* Issue 92 Children and Young People are available for purchase from the Australian Law Reform Commission.