Dear Friend,

Welcome to the latest newsletter of the Gilbert + Tobin Centre of Public Law. The past six months have been an especially busy time for the Centre with a number of major events and a brace of new arrivals to our ranks.

2011 began with our annual Constitutional Law Conference – this year’s being the tenth, a very significant milestone for an event which is now an established fixture in the public law calendar. The program offered delegates a very stimulating discussion of recent cases and developments, including research on minority government, constitutional change and executive power. Much of the credit for the program goes to Professor Theunis Roux who, as Acting Director in the last half of 2010, played a major role in its construction. The conference dinner was fortunate to have as our distinguished guest speaker, Chief Justice Patrick Keane of the Federal Court of Australia. Just a few weeks later, the Federalism Project hosted a ‘Mechanisms of Federal Reform’ roundtable over two days in March that was enormously successful in generating very focused and applied consideration of the ways in which Australia’s system of government is able to develop for the better. There were some familiar faces from our earlier 2008 workshop but also plenty of new ones as well and no shortage of lively and friendly debate. Paul Kildea, Director of the project, did a masterful job in the organisation of the workshop and a full report, as for all these events, is found inside.

There have been two particularly significant aspects to life at the Centre over the last six months. The first has been the great pleasure we have had in collaborating with the Faculty’s Indigenous Law Centre under the directorship of Prof Megan Davis. The catalyst in this regard has been the Prime Minister’s undertaking to hold a referendum on the constitutional recognition of Indigenous Australians by the time of the next federal election. Long-time readers of these newsletters will remember Megan as the very first Director of our Charter of Rights Project in the early years of the last decade. It has been great to work closely with her once more, capitalising on the undeniable strength of expertise across the G+T Centre and the ILC in public and indigenous law in order to contribute to academic and community debate on this important issue. On 1 July the Centres welcomed an impressive array of expertise from other leading law schools in the country to discuss the constitutional issues underpinning the major options being floated for change. Earlier in June, the two Centres partnered to provide a workshop on constitutional change to delegates at the inaugural meeting of the National Congress of Australia’s First Peoples. We look forward to continue to work with each other as the public debate about this topic intensifies in coming months.

The other notable feature of recent months has been the addition of new Centre members. In particular, we welcomed Dr Fergal Davis and Greg Weeks. Fergal has
been appointed to the ARC Laureate Fellowship Project on Anti-Terrorism Laws directed by Professor George Williams and comes to us from the University of Sheffield where he has built a reputation for his research on trial by jury, the UK's Human Rights Act and parliamentary protection of rights, as well as anti-terrorism. Greg has taken up a position in the Faculty and will be primarily engaged in the teaching and research of Administrative Law, and with this expertise he clearly fills a gap created by Edward Santow’s departure from the Centre towards the end of last year. It is fantastic that both gentlemen were so enthusiastic about working in the Centre and they have already made themselves greatly valued members of the team.

Lastly, congratulations are due to our Foundation Director, George Williams who was made an Officer in the Order of Australia in this year’s Queen’s Birthday Honours list for his ‘distinguished service to the law in the fields of anti-terrorism, human rights and constitutional law as an academic, author, adviser and public commentator’. This is a wonderful recognition of George’s energetic contribution across a range of areas – all of which he manages while being an unfailingly generous and supportive colleague to all who work with him. Well done!

Andrew Lynch
Director

CENTRE ACTIVITIES

2011 Constitutional Law Conference

On 18 February 2011 the Centre, with the support of the Australian Association of Constitutional Law, hosted its annual constitutional law conference. This year was a particularly special occasion being the tenth anniversary since the event was first held.

The opening speakers on the day, Professor George Williams and the Hon Justice Nye Perram, reviewed the key themes of 2010 constitutional law decisions in, respectively, the High Court and the Federal and State Courts. Professor Williams presented the paper on behalf of himself and Centre Director, Andrew Lynch, the two having worked together on the survey of last year’s cases after the withdrawal of Debbie Mortimer SC as presenter early in the year.

As always, the session after morning tea focused on recent cases of particular note. The Hon Justice Rachel Pepper spoke on decisions affecting water rights, Assistant Professor Sarah Murray discussed the case The Getup of Rowe v Electoral Commissioner and Professor Jeremy Gans brought a criminal lawyer’s perspective to the ramifications of Dickson v The Queen.

After lunch, Professor Tony Smith addressed the highly topical issue of minority government while Professor AJ Brown revealed findings from
his project on constitutional values (as well as shamelessly plugging his current bestselling biography of Michael Kirby!). Associate Professor Anne Twomey wrapped the session with a 21st anniversary reflection on lingering questions about the *Australia Acts 1986*.

Maintaining the momentum all the way through the day, the final session of the conference featured rigorous scrutiny on the Executive, by Professors Simon Evans and Peter Gerangelos and the Hon Duncan Kerr SC.

Proceedings were followed by dinner at NSW Parliament House. The guest speaker at the dinner was the Hon Justice Patrick Keane, Chief Justice of the Federal Court of Australia who spoke on *Originalism: Founders, Judges and Modesty*. A copy of Justice Keane’s speech plus a selection of other papers presented on the day as well as an audio recording of all four sessions can be found on the Centre’s website at: [http://www.gtcentre.unsw.edu.au/events](http://www.gtcentre.unsw.edu.au/events).

### 2011 Federalism Roundtable

On 24-25 March 2011 the Federalism Project hosted a major research roundtable. It was on the theme ‘Mechanisms of Federal Reform’ and brought together leading Australian academics in law, political science and economics, as well as senior officials from government departments. The roundtable focused on the processes and institutions that contribute to change in Australia’s federal system. Its aim was to prompt an interdisciplinary discussion among academics and practitioners about how change occurs (or might occur) in the federal system, rather than to talk about the merits of specific reform priorities.

The roundtable began with two sessions examining recent developments in intergovernmental machinery. Mary-Ann McQuestin from Griffith University analysed the Rudd government’s reforms to federal financial relations, and reflected on the Gillard government’s approach to federalism in its early months. Professor Alan Fenna (Curtin University) presented a paper on the growing importance of intergovernmental benchmarking in federal systems, and Professor Geoff Gallop gave a first-hand account of the achievements and challenges of the COAG Reform Council in its benchmarking role in Australia.

Subsequent sessions focused on a variety of institutions and mechanisms, each of which contribute to the continuing evolution of Australia’s federal system in different ways. Professor A J Brown (Griffith University) spoke about the nuanced nature of public attitudes to federal reform, Paul Kildea (UNSW) looked at the merits of increasing calls for greater transparency and accountability in intergovernmental relations, and Professor Nicholas Aroney (University of Queensland) explored how popular ratification of State constitutions might prompt fundamental changes in the federal system. Rich case studies were also presented on the topics of violence against women and childcare, and water reform. The roundtable concluded with a session looking at prospects for federal reform through formal constitutional amendment. Professor George Williams (UNSW) looked at the specific challenges involved, while other papers explored the possibility of amending section 128 to allow State initiation of referendums, and the promise of deliberative approaches in advancing successful change.

[Image - The Hon Justice Mary Finn at the 2011 Constitutional Law Conference]

Alarmist predictions about the numbers of people on the move may negatively impact on the careful creation of principled and appropriate legal and policy responses.

The highlight of the day-and-a-half was the wide-ranging discussion that took place across all topics and papers, often in unexpected directions. If one theme was dominant, it was that Australia's federal system is constantly shifting and evolving, even if, on the surface, the text of the Constitution remains frozen. Another theme that prompted detailed discussion was the apparently inevitable movement towards uniformity in federations like Australia where there are no sharp cultural, linguistic or other distinctions between jurisdictions.

The papers from this event will soon appear as an edited collection called *Tomorrow’s Federation*, to be published by Federation Press in 2012. A full list of the roundtable papers and presenters is available on the Centre website.

Constitutional Workshop for National Congress of Australia’s First Peoples

On 8 June, the Centre, in partnership with the Indigenous Law Centre at UNSW, delivered a Constitutional Reform Workshop at the Inaugural Meeting of the National Congress of Australia’s First Peoples. In light of the government’s commitment to hold a referendum at or before the next federal election on the constitutional recognition of Aboriginal people and Torres Strait Islanders, the National Congress was keen to engage its membership on this issue. In particular, it wanted to provide delegates to the meeting with some essential information about the options for reform and the factors that affect the successful outcome of a referendum.

The workshop was preceded by a joint presentation by Professor Megan Davis (Director, ILC), Sean Brennan (Director of this Centre’s Indigenous Legal Issues Project) and Dylan Lino (ILC) canvassing the history and value of indigenous activism on constitutional issues as well as possible ideas for change in respect of the preamble to the Commonwealth Constitution, the races power in s 51(xxvi), and section 25 which recognises the possibility of excluding people from the franchise by reference to race. Professor George Williams then gave delegates pragmatic advice on ensuring the prospects of achieving a ‘Yes’ vote at a referendum.

A major part of the workshop was the use of small groups to foster frank discussion of the topic. Delegates spent much of the afternoon engaging with each other, exploring the different options and merits of constitutional reform, with facilitators from the two Centres on hand to answer any queries about law or process. The other members of the workshop team were Paul Kildea, April Long, Andrew Lynch and Peta MacGillvray. The groups then reported back to the entire delegation on their opinions on the priorities and strategies of constitutional reform, followed by questions and comments from the floor. At the conclusion of the workshop, Sean Brennan and Paul Kildea offered a consolidation of the key themes of the discussions before participants were surveyed on their individual views, which will supplement an online questionnaire issued to the broader membership of the Congress.

The Centres have prepared a final report on the workshop for the National Congress which will hopefully assist it as the momentum continues to build towards the constitutional referendum on indigenous peoples.
Constitutional Reform and Indigenous Peoples – Research Workshop

The prospect of a referendum on constitutional reform respecting Australia’s indigenous peoples has created a need for high quality contemporary research on the merits and implications of various options that might be put to the Australian electorate for approval. With that in mind, the Centre was very pleased to co-host with the UNSW Indigenous Law Centre a research event on 1 July that gathered leading experts from the fields of indigenous and public law to present and discuss work on this important and pressing topic. Megan Davis and Andrew Lynch (respectively, the Directors of the ILC and the G+T Centre) were assisted enormously in the organisation of the event by Dylan Lino, a research associate in the ILC.

The topics covered at the workshop and their various presenters included preamble reform (Associate Professor Anne Twomey, University of Sydney), a provision supporting agreement-making by government and indigenous peoples (Professor Geoff Lindell, University of Adelaide), the races power of s 51(xxvii) (Dr Sarah Pritchard, NSW Bar), the addition of an equality or non-discrimination provision (Professor Hilary Charlesworth, ANU), the power to compulsorily acquire property on just terms in s 51 (xxxi) (the Centre’s own Sean Brennan), land rights (Margaret Stephenson, University of Queensland), constitutional interpretation (Professor Adrienne Stone, University of Melbourne) and the politics of constitutional reform (Professor Marcia Langton, University of Melbourne). An impressive range of scholars also fulfilled the role of commentators on these papers in order to lead off discussion, including Dr Rosalind Dixon (University of Chicago) and Associate Professors Shaunnagh Dorsett (UTS) and Andrea Durbach (UNSW).

The research in these papers will be made available shortly through publication in a special issue of the *Australian Indigenous Law Reporter*.

2011 Seminar Series

There have been three well-attended ‘Public Law and Legal Theory’ seminars this semester. Professor Stuart Elden from Durham University spoke about ‘The Birth of Territory’, Dr Dimitris Vardoulakis from the University of Western Sydney spoke about ‘Sovereignty and its Discontents’ and, finally, Dr Daniel McLoughlin from the University of Adelaide spoke about “After the Failure of Peoples”: Agamben on the Camp, the Nation-State, and Political Nihilism. These seminars are designed for staff, postgraduate and upper level undergraduate students in the Faculty interested in the interdisciplinary engagement of traditional public law concerns (sovereignty, statehood, the rule of law, democracy, and so forth). Future seminars are planned on the topics of free speech and Aboriginal sovereignty. If you have a suggestion for a speaker or want further information about the seminars, please contact Dr Ben Golder (Project Director) on b.golder@unsw.edu.au

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The Challenges Faced by Australia’s Independent National Security Legislation Monitor

Since the September 11 terrorist attacks in Washington and New York, the Australian Parliament has enacted more than 45 anti-terrorism laws. These laws were, especially in the period between 2001 and 2005, enacted in great haste. It is therefore unsurprising that many of them deviate from fundamental principles of criminal justice and make significant (and arguably disproportionate) inroads into civil liberties. The lack of considered parliamentary debate and the extraordinary nature of the laws makes it extremely concerning that, to date, there has been no holistic post-enactment review. A number of parliamentary and independent bodies have reviewed particular aspects of the legislation. However, some of the most concerning aspects, such as the offences for membership of, and association with, a terrorist organisation in Division 102 of the Criminal Code Act 1995 (Cth) and the overturning of the principle of open justice by the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth), have not been the subject of review.

Furthermore, even where reviews have been conducted, Australian governments have frequently ignored or selectively adopted any recommendations for improvement of the anti-terrorism laws. The decision whether to adopt recommendations must, of necessity, always be the prerogative of the Australian government. However, the absence of a permanent office with the mandate to conduct ongoing reviews of Australia’s anti-terrorism laws has clearly facilitated the dismissive response of Australian governments.

In March 2010, the Australian Parliament enacted the Independent Monitor of National Security Legislation Act. The role of the Monitor is to consider, either on his own initiative or in relation to a Ministerial reference, whether the anti-terrorism laws are effective, contain appropriate safeguards for protecting the rights of individuals, are proportionate to the threat of terrorism, and remain necessary.

The idea of establishing an office to review the anti-terrorism laws on an ongoing basis was not a new one. Since 2005, three parliamentary and independent inquiries in Australia had strongly endorsed the need for improvement of the anti-terrorism laws. The decision whether to adopt recommendations must, of necessity, always be the prerogative of the Australian government. However, the absence of a permanent office with the mandate to conduct ongoing reviews of Australia’s anti-terrorism laws has clearly facilitated the dismissive response of Australian governments.

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The Australian office undoubtedly contains some improvements on its United Kingdom predecessor. In particular, it will have considerable teeth. The power of the United Kingdom’s Independent Reviewer over intelligence agencies and individuals depends on nothing more than ‘naming and shaming’ in the annual reports. By contract, in Australia, it is a criminal
offence (carrying a possible jail term of six months) to fail to assist the Monitor.

The Australian office is, however, far from perfect. In submissions to parliamentary inquiries prior to the Act being passed by the Australian Parliament, the Gilbert + Tobin Centre of Public Law expressed concerns about the office’s resourcing (both human and financial). In order for the office to successfully fulfil its task of engaging in ongoing and holistic review, the Centre recommended that the Monitor consist of a panel of three persons with different areas of expertise.

The most difficult challenge that is likely to be faced by the Monitor is ensuring the actual and perceived independence of the office. The Act specifies that the office is to be located within the Department of Prime Minister and Cabinet, and the Monitor must present draft reports to the executive for comment before the final report is tabled in parliament. The United Kingdom experience reveals that the person selected as the Monitor will be critical to the public’s confidence in the independence of the office. That jurisdiction’s Independent Reviewer for the last 10 years, Lord Alex Carlile, has been frequently criticised as being too accommodating of the government’s case for extreme measures. Despite the Act having been in place for more than a year, it was not until 21 April 2011 that Bret Walker SC (a former President of the New South Bar Association and counsel for the Finks Motorcycle Club in the High Court case of *Totani v South Australia* (2010)) was appointed as Australia’s inaugural Monitor.

It is not yet possible to judge how effective and valuable the office of the Monitor will be. However, the sheer number of Australia’s anti-terrorism laws and their extraordinary nature makes the task of conducting ongoing review a daunting one.

Nicola McGarrity

CENTRE PEOPLE

Greg Weeks

Greg Weeks joined the Centre at the start of 2011, having previously worked at UTS and practised as a litigator at Corrs Chambers Westgarth. Greg teaches administrative law and is completing a PhD thesis entitled ‘When Government Breaches its Soft Law: Australian Remedies’. Greg’s research interests are focused mainly on judicial review but extend to cover other forms of remedies available against public actors. His most recent publication examined the availability of relief in equity where an estoppel is raised against a public authority (see Vol 4(3) *Journal of Equity* 247).
Centre Member Greg Weeks

On September 16, the Centre will host a seminar on Administrative Law and Human Rights in Australia which Greg is organising. Confirmed speakers include Dr Melissa Perry QC and Associate Professor Matthew Groves and the seminar will be chaired by the Commonwealth Solicitor-General, Stephen Gageler SC. The seminar represents a continuation of the Centre’s interest in human rights issues, as well as marking the first time that the Centre has hosted an event which is explicitly focused on administrative law.

Fergal Davis

Fergal Davis joined the Anti-Terror Laws and the Democratic Challenge project within the Centre in February. Originally from Ireland, Fergal has a MA (Criminal Justice) from the University of Leeds where he was supervised by Professor Clive Walker – an old friend of the Centre – and a PhD from Trinity College Dublin. Fergal has published widely on trial by jury and anti-terrorism laws in the UK and Ireland and he is developing that work in the context of recent developments in trial by jury in New Zealand.

More recently Fergal has been exploring possible means of controlling executive power in the context of ongoing emergencies – such as the ‘war on terror’. He favours broad political and popular democratic controls, alongside judicial means, as a way of effectively securing civil liberties in times of terrorism. As a result Fergal is very interested in constitutional and political institutional design as a way of ensuring that Parliament and the people actively seek to protect rights rather than passively assuming that courts will do this for them. Offices such as the Independent National Security Legislation Monitor provide an interesting model for how we might ensure that human rights issues remain on the political agenda.

Fergal’s work employs a mix of legal theory, public law, comparative constitutional law and legal history and he is looking forward to contributing to the broader Centre as well as the Laureate project and overlaps between general questions of public law and questions more specifically focused on anti-terrorism.

PhD Report

Leon Terrill

Topic: Aboriginal land reform in the Northern Territory.

I joined the Centre in 2009, shortly after moving to Sydney and starting postgraduate research at UNSW. For the previous five years I had been working as a lawyer with the Central Land Council in Alice Springs. It was during this period that the Australian Government began making a series of reforms to Aboriginal land ownership in the Northern Territory. Those reforms have now become the subject of my PhD thesis.

The original impetus for the reforms was a public debate about the introduction of individual or private ownership onto Aboriginal land. The Australian Government argued that communal ownership of Aboriginal land was preventing home ownership and economic development. This
led to the introduction of township leasing in 2006, which was followed in 2007 by a wider set of reforms as part of the Northern Territory Emergency Response. Those legal reforms have been accompanied by policy changes, and in particular new rules governing the ownership of infrastructure in remote communities.

In addition to examining the combined impact of these reforms, my research also places them in an international context. One of my arguments is that the debate which preceded the Australian reforms was the wrong debate. The use of terms such as communal, individual and private ownership has proved limiting, and after five years there is still a great deal of confusion about what the reforms actually do. Research from other countries instead uses terms such as formalization, tenure security and alienability. Applying those terms to the Australian reforms provides a far clearer picture of what has occurred, and what issues have arisen as a result.

In addition to clarifying the effect of the recent reforms, my research also explores the alternatives. As a result of the Australian Government’s heavy-handed approach to land reform, there is now some hostility towards land reform in remote Aboriginal communities. This makes the situation more difficult, however there are alternative approaches available. These include providing greater support for informal arrangements in some circumstances, allowing a more gradual shift to formalization, and removing some of the external government pressure for reform so as to instead allow formalization to occur more endogenously. Consideration of these alternatives requires a more explicit discussion of governance issues, and in particular the role of centralized governments in the management of remote communities. This is an issue that has implications beyond land reform.

My research is supervised by Sean Brennan, who is the Project Director of the Indigenous Legal Issues Project, and Megan Davis, who is a Centre Associate. I have been grateful to receive the support of a postgraduate scholarship from the Lionel Murphy Foundation. I have presented at several conferences, including the National Native Title Conference, and continue to publish my findings in peer reviewed journals. I aim to submit my thesis in mid-2012.

Social Justice Intern Report
Robert Woods

It was my pleasure and privilege to work with the Gilbert + Tobin Centre as its social justice intern during the first semester of 2011. This opportunity to reflect briefly upon my internship is particularly timely in light of the Curriculum Review currently taking place within the Law School, which has included some discussion of the appropriate role of experiential learning in legal education. Consciously setting aside any logistical issues and acknowledging the anecdotal limits of my own perspective (and perhaps qualifying to the point of triviality, too), I can vouch for the value of an internship within the structure of a law degree. My own participation in the programme has helped to contextualise the skills and knowledge gained over the last several years, often in unexpected ways.
The majority of my time at the Centre was spent working on two projects: the Federalism Project, supervised by Paul Kildea; and the International Refugee and Migration Law Project, supervised by Jane McAdam. I was assigned a variety of tasks for each, including gathering resources, conducting research, and assisting in drafting submissions to parliamentary inquiries.

With Paul and Andrew Lynch, I worked on a submission concerning the adequacy of parliamentary scrutiny of federal funding agreements. The granting of conditional funding to the states has been instrumental in driving the evolution of Australian federalism and the expansion of the Commonwealth’s political influence in areas traditionally the responsibility of state governments. While the rationalisation of these arrangements over the last few years has yielded greater clarity, the fact that a typical funding agreement is negotiated at an executive-to-executive level and presented to legislatures for ratification as a *fait accompli* gives rise to a considerable democratic deficit and undermines the constitutional principle of responsible government.

With Jane, I worked on a submission in relation to proposed amendments to the *Migration Act 1958*, which, if passed, would greatly expand the scope of ministerial discretion to refuse or cancel a grant of asylum on the basis that a person has committed ‘an offence’ while in immigration detention. In addition to contravening Australia’s obligations under international human rights and refugee law, such changes would redundantly impute a punitive purpose to the migration regime more appropriately the province of the criminal law, and, given the potentially grave consequences of exclusion, allow a punishment entirely out of proportion with the original crime.

Given the academic nature of the Centre, I had assumed, going in, that my transition would be a relatively easy one. This proved to be misguided. The diversity of the work done at the Centre ensured I was constantly having to come to grips with new and often unfamiliar sets of issues. The importance of the Centre’s institutional legitimacy to its authoritativeness meant that I was required to develop my analyses strictly within the legal materials, without resorting to normative arguments. And drafting a submission calls upon a different set of skills than writing an essay; the need to present policy arguments cogently without descending into heavy-handed didacticism was something I grappled with.

I’m grateful to the Centre and its members for giving me the chance to work with them. In particular, I’d like to thank Andrew, Paul and Jane for their guidance and forbearance in supervising my work over the last several months.
The Australian Research Council Laureate Fellowship Project is examining how democratic nations (such as Australia, Canada, India, New Zealand, the United Kingdom and the United States) can best reconcile traditional democratic processes, institutions, principles and individual freedoms with the likelihood that anti-terror laws granting war-time powers will remain in place for the foreseeable future. The project runs until mid-2014.

With the full complement of the research team now appointed, the Laureate Project is hitting its stride. The team includes George Williams as the Laureate Fellow and Fergal Davis and Nicola McGarrity as the academic members of the project. A number of other members of the Centre and Faculty are involved with the project through postgraduate supervision and linkages with their own work, such as Centre Director Andrew Lynch and Ben Golder.

At the beginning of this year, the PhD students connected to the project were:

- Jennifer Norberry: ‘Law and National Security Crises – Contemporary Australian Experience’
- Tamara Tulich: ‘Courts and Anti-Terror Laws’
- Rebecca Welsh: ‘The Power to Restrain Liberty under Chapter III of the Australian Constitution: Control Orders and Preventative Detention Orders’

They are now being joined by two further students, both of whom have been successful in winning Australian Postgraduate Award scholarships:

- Keiran Hardy: ‘Developing a Counter-Insurgency Model of Anti-Terrorism Law’
- Sangeetha Pillai: ‘Citizenship and Anti-Terror Laws’

In addition, after a competitive process, Dr Jessie Blackbourn and Dr Svetlana Tyulkina have won scholarships to join the project as postdoctoral researchers from July.

The body of research being conducted by the project is very wide. The project website under the Centre banner gives a flavour of what is being dealt with, which ranges from questions of how the separation of powers affects control orders and preventative detention, through to analysis of a recent Indian anti-terror trial, through to how terrorism should be defined in democratic nations around the world.

The team meets each month, and runs a regular work-in-progress seminar series to comment on emerging research. We also host visitors to present on related topics, and have established a new lunchtime series to meet
A number of publications have already been achieved, with many others in the pipeline, such as the co-edited second edition of *Global Anti-Terrorism Law and Policy* (forthcoming by Cambridge University Press). Team members are preparing papers for domestic and international conferences and other events, including for the *Secrecy, National Security, and the Vindication of Constitutional Law* Conference at Bocconi University, Milan, and a PhD researchers workshop to be run in conjunction with Oxford University in December 2011.

**Federalism Project**

**Project Director: Paul Kildea**

On 24-25 March 2011 the Federalism Project hosted a major research roundtable. The theme for this roundtable was ‘Mechanisms of Federal Reform’, and focused on the processes and institutions that contribute to change in Australia’s federal system. The event brought together academics from law, political science and economics, as well as senior officials from government departments. The papers from this event will soon appear as an edited collection published by Federation Press. A full report of the event is presented elsewhere in this newsletter.

The Project has continued to contribute to public inquiries into water reform and intergovernmental relations. Paul Kildea and George Williams have made submissions to all three parliamentary inquiries into water reform (two in the House, one in the Senate), and in March gave evidence to the House committee on regional Australia chaired by Tony Windsor. Paul and George have focused their contributions on the constitutional issues arising from the creation and enforcement of a ‘Basin Plan’ under the *Water Act 2007* (Cth). They have noted that, due to the Act’s reliance on the external affairs power for its constitutional basis, the primary objective of any future Basin Plan must be to implement international environmental treaties. As a result, the Plan must give precedence to environmental considerations over social and economic factors. The Senate committee noted this opinion in their final report and recommended the creation of a panel of experts to further explore the constitutional issues surrounding the making of the Plan.

Paul, Andrew Lynch and Robert Woods also made a submission to the Joint Committee of Public Accounts and Audit on their inquiry into National Funding Agreements. The submission argued that existing arrangements for parliamentary scrutiny of national funding agreements are inadequate. It suggested three reform proposals to address these shortcomings: the creation of a public and complete register of funding agreements; the tabling of all funding agreements in parliaments of affected jurisdictions; and, the reference of funding agreements to joint parliamentary committees for review and report.
Indigenous Legal Issues

Project director: Sean Brennan

Project Director, Sean Brennan, was on study leave from the Faculty in the first half of 2011. This provided a welcome opportunity to continue work on a book about native title law in Australia.

Like other Centre members and colleagues at the Indigenous Law Centre (ILC), Sean has contributed to discussions about constitutional reform relevant to Aboriginal and Torres Strait Islander peoples. This included a joint presentation to the inaugural meeting of the National Congress of Australia's First Peoples, as well as individual presentations with a particular focus on land justice issues at the National Native Title Conference, held this year in Brisbane, and the workshop on constitutional reform staged by the ILC and the Gilbert + Tobin Centre of Public Law on 1 July.

International Refugee and Migration Law Project

Project Director: Jane McAdam

2011 marks the 60th anniversary of the Refugee Convention. This provides a point for reflection, as well as an opportunity to consider future challenges and responses. The work of the International Refugee and Migration Law Project is feeding into a number of such initiatives within Australia and internationally.

In February 2011, Project Director Jane McAdam was invited to the UN High Commissioner for Refugees' first Expert Meeting on Climate Change and Displacement in Bellagio, Italy, sponsored by the Rockefeller Foundation. This brought together 19 academics, government officials and policy experts to consider the sufficiency of existing legal and policy frameworks to respond to climate-related movement; to consider strategies to secure commitment on climate-related displacement; and to discuss a set of common understandings on responses to it. The Director authored one of the key background reports for the meeting, entitled ‘Climate Change Displacement and International Law: Complementary Protection Standards’, which was recently published online in UNHCR’s Legal and Protection Policy Research Series.

In March, the Director was one of a small number of migration experts invited to the International Organization for Migration’s International Dialogue on Migration 2011 in Geneva. This was a meeting of States to deliberate ways to build capacity around Climate Change, Environmental Degradation and Migration, and she spoke about building and strengthening frameworks and capacities for protecting and assisting environmental migrants.

In May, the Director presented at Columbia Law School’s ‘Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate’ conference in New York. In June, she was invited by the Norwegian government to address the Nansen Conference on Climate Change and Displacement in the 21st Century on ‘How to Address the Protection Gaps: Ways Forward’. This was a high-level meeting opened by the Crown Princess of Norway.
and attended by the heads of key UN agencies, such as UNHCR. The conference’s principal objective was to develop a set of recommendations for action by policymakers, stakeholders and humanitarian actors. The Director was also invited to present her research to the International Law Association (Norway) and the Nansen Youth Conference on Climate Change and Displacement. Trina Ng continues to provide outstanding research assistance to the Project.

Closer to home, the Director trained lawyers in New Zealand on the new complementary protection provisions of that country’s Immigration Act 2009. She addressed the annual conference of the Migration Review Tribunal–Refugee Review Tribunal in Victoria, and provided an information session for Legal Aid NSW on the Migration Act (Complementary Protection) Bill 2011. In June, she was invited by the St James Ethics Centre in Sydney to speak about the ethical questions posed by climate change-related migration. As an evening event for the UNSW Centre for Refugee Research’s Conference to commemorate the 60th anniversary of the Refugee Convention, she interviewed Dr Jeff Crisp, the Head of Policy Development and Evaluation Services UNHCR Geneva, on ‘International Refugee Protection: Reflections on the Role of UNHCR in the Context of the 60th Anniversary of the Refugee Convention’. With the able assistance of G+T Centre intern, Robert Woods, the Director made a submission to the Senate Legal and Constitutional Affairs Committee on proposed changes to the character test under the Migration Act, and compiled a website of complementary protection resources.

On 10–11 November, the Project will run an international conference at NSW Parliament House called ‘Climate Change and Migration in the Asia-Pacific: Legal and Policy Perspectives’. This will mark the end of the three-year ARC Discovery Grant on this subject.

Public Law and Legal Theory Project

Project Director: Ben Golder

The recent activities of the Public Law and Legal Theory project have been largely centred around the seminar series and visitors to the Faculty. In addition to this, two ongoing research projects that have been supported by the project are the forthcoming special issue of the *Leiden Journal of International Law* on ‘Foucault and International Law’ (due to be published in 2012) and the forthcoming edited collection, due to be published by Routledge in late 2012, of *Michel Foucault: Law, Government, Rights*. Both of these projects are, respectively, edited and co-edited by the Project Director, Ben Golder. Finally, and in collaboration with colleagues in Philosophy at Sydney University and UNSW, the project is in the planning stages of hosting a workshop on ‘Critical and Historical Approaches to Rights’, to be held at UNSW in 2012.

While a surrendering of control by the States is implicit in the use of s 51(xxvii) to produce what is a Commonwealth law, that can be neither total nor permanent if federal ‘co-operation’ is the guiding principle.

Referendums Project
Project Directors: Paul Kildea/George Williams

There have been a number of important developments in relation to referendum issues in the past several months. As reported in the last Centre newsletter, the Gillard government in November 2010 announced the creation of an expert panel to advise the government on options for constitutional recognition of Aboriginal and Torres Strait Islander peoples. On 19 May 2011 the expert panel released its discussion paper on the issue, and published a calendar of public consultations to be held around Australia. The expert panel is now accepting submissions from the public, and will report to the government at the end of the year on options for reform. On 21 June 2011 the government announced a separate expert panel to advise it on options for recognising local government in the Constitution. The Gillard government has committed to holding referendums on both issues in the life of this parliament, meaning that they will take place before the end of 2013.

The Centre has been engaged in a number of activities around these developments. In June 2011 the Centre collaborated with the Indigenous Law Centre (UNSW) to present an interactive workshop on the referendum to the inaugural meeting of the National Congress of Australia’s First Peoples. The two Centres also collaborated by holding a roundtable on the legal issues arising from the different options for reform. Paul Kildea and George Williams have also presented a number of papers about the proposed reforms, addressing both the substance of change and the challenges of achieving community engagement on the issues. Most recently, the Centre has joined a small coalition of organisations, including Australians for Native Title and Reconciliation (ANTaR) and Oxfam, working towards improving public education and giving people the tools to contribute to the expert panel’s process of community consultation.

When it comes to the forthcoming referendum on local government recognition, George Williams has been assisting Australia’s peak local government organisation, the Australian Local Government Association. This has involved advising on the options for reform and explaining to its members at events around the country how these options might work and the steps they need to take to give them the best chance of winning the referendum. This builds upon his earlier work with Nicola McGarrity on the options for constitutional change to recognise local government.

The just terms guarantee can apply to State extinguishment of native title and there are good reasons to believe that it extends to instances of suppression and partial extinguishment as well.

Publications

Joint Publications


- Paul Kildea and George Williams, ‘Australia’s Dysfunctional Federation’ Government: Business, Foreign Affairs and Trade (April 2011) 3-5;

- Jane McAdam and Ben Saul, ‘Displacement with Dignity: Climate Change, Migration and Security in Bangladesh’ (2010) 53 German Yearbook of International Law 233–87;


Andrew Lynch


- ‘The Legislative and Executive Branch vs The Constitutional Court and the Judiciary – Conflict or Co-operation?’ in Jurgen Bröhmer (ed) The German Constitution turns 60: Basic Law and Commonwealth Constitution; German and Australian Perspectives, Peter Lang Press, 163-80.

Jane McAdam

- Climate Change Displacement and International Law: Complementary Protection Standards (Division of International Protection UNHCR, Geneva, PPLA/2001/01.Rev1) (2011);


Managed migration pathways are better suited to respond to slow-onset climate change impacts, which are unlikely to trigger existing (or future) temporary protection mechanisms designed for sudden disasters.

Nicola McGarrity


Christopher Michaelsen


George Williams


Presentations

Joint Presentations

Christopher Michaelsen and Mika Hayashi, ‘Arms Control and International Norm Development: Is there a Role for Civil Society?’, 8th Asian Law Institute Conference, Kyushu University, Fukuoka, Japan, (27 May 2011);


Sean Brennan

‘Regulatory Takings and Acquisitions under State Law: Issues in the Compulsory Acquisition of Native Title on Just Terms’, Constitutional Reform and Indigenous Peoples Workshop, Indigenous Law Centre and Gilbert + Tobin Centre of Public Law, Sydney, 1 July 2011;

‘Ideas for Constitutional Reform’, National Congress of Australia’s First Peoples, Sydney, 8 June 2011;


Ben Golder

‘Limits to Critique’, Law and Culture Symposium, UTS Faculty of Law Sydney, 1 July 2011;


Paul Kildea


‘Making Room for Democracy: Towards Greater Transparency, Accountability and Participation in Intergovernmental Relations,’ Federalism Research Roundtable, Faculty of Law, UNSW, Sydney, 24-25 March 2011;


Andrew Lynch


Jane McAdam

‘The Ethical Questions posed by Forced Migration and “Climate Refugees”,’ St James Ethics Centre, Sydney, 30 June 2011;

Invited Speaker, International Law Association, Norwegian branch, Oslo, 8 June 2011;

‘What Protection Do “Climate Refugees” Receive Today?,’ The Nansen Youth Conference on Climate Change and Displacement, Oslo, 6–7 June 2011;

‘How to Address the Protection Gaps: Ways Forward,’ The Nansen Conference on Climate Change and Displacement, Oslo, 5–7 June 2011;

‘Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate’ conference, Columbia University, May 2011;


‘Climate Change Displacement and International Law: Complementary Protection Standards,’ UNHCR Expert Meeting on Climate Change and Displacement, Bellagio, Italy, 22–26 February 2011.

Soft law means different things to different people. As a generic term, there is an argument that ‘soft law’ conceals as much as it reveals, making it at best unhelpful and at worst a misleading simplification.

Nicola McGarrity


‘Setting a Dangerous Precedent: Australia’s Terrorism Trials’, Australian Lawyers for Human Rights Seminar, 31 May 2011;

‘The Role of Religion in Australia’s Terrorism Trials’, Staff Seminar, University of Wollongong, Wollongong, 25 May 2011;


‘Australia’s Terrorism Trials’, Guest Lecture, International Human Rights Law, University of New South Wales, Sydney, 22 March 2011;


Christopher Michaelsen


‘The UN, Counter-Terrorism and Human Rights since 9/11: A Decade of Missed Opportunities’, ILA Asia-Pacific Regional Conference, Taipei, Taiwan, 31 May 2011;

‘R2P: An Emerging Norm?’, UN Society of the University of Sydney, 19 May 2011;

‘Terrorism in Australia: An Inflated Threat’, Australian Defence College, Weston Creek, Canberra, Australia, 18 May 2011;

‘Terrorism and International Law’, Australian Institute of International Affairs & Law Society of NSW Young Lawyers, Sydney, Australia, 16 May 2011;


Theunis Roux


‘The Chaskalson Court’s Achievement’, McMaster University, Canada, 19 April 2011;

In native title work, the Constitution is important in a way that no other single legal document is. It counts at critical moments after big court decisions and every day it shapes how things are done and what is possible.

Unfortunately, the asylum seeker debate in Australia is more often fanned by fears than informed by the facts – which risk diverting us from core issue of drafting good legislation.

Jane McAdam, Opinion, ‘We Have a Duty not to Return Asylum Seekers to Harm’, National Times (24 March 2011)


George Williams

‘Constitutional Recognition’, National General Assembly of Local Government, National Convention Centre, Canberra, 22 June 2011;

‘Referendums to Alter the Constitution: What is Required to Achieve Change?’, National Congress of Australia’s First Peoples, Sydney, 8 June 2011;

‘Constitutional Reform – Can it Support Land Justice?’, National Native Title Conference 2011: Our Country, Our Future, Australian Institute of Aboriginal and Torres Strait Islander Studies, Brisbane Convention Exhibition Centre, 3 June 2011;

‘Constitutional Recognition’, Modernisation – It’s our Time: Shires Association of New South Wales Annual Conference 2011, Sydney, 1 June 2011;


‘Federalism and Service Delivery’, Public Sector Leadership 2011: Rethinking and Improving Service Delivery, L21 Public Sector Leadership Series, Sydney, 12 May 2011;

‘A Gala Wedding and the Prospects of a Republic: Have William and Kate made a Difference?’, Australian Institute of International Affairs, Sydney, 2 May 2011;

‘What Would Evatt Do?’, Inaugural HV Evatt Memorial Dinner, Evatt Foundation, Katoomba, 30 April 2011;

‘Recognising Indigenous Australians: What the Constitution Should Say and How the Referendum Can be Won’, Flinders University and Fabian Society of South Australia, Adelaide, 28 April 2011;

‘Recognising Indigenous Australians: What the Constitution Should Say and How the Referendum Can be Won’, University of South Australia, Adelaide, 28 April 2011;


‘Recognition Implications of the AidWatch Case Political Charity? The Impact of the AidWatch Case’, Cosmopolitan Civil Societies Research Centre Public Forum, UTS, Sydney, 15 April 2011;
‘Advancing Recognition of Local Government in the Australian Constitution,’ Local Government Association of the Northern Territory 2011 Conference, Alice Springs Town Council, 1 April 2011;

‘Federal Reform by Way of a Referendum’, Federalism Roundtable, Gilbert + Tobin Centre of Public Law, University of New South Wales, 25 March 2011;

‘Recognition of Indigenous People in the Constitution: What Will it Take to Bring About Change?’, Indigenous Law Centre Open Forum, UNSW, 17 March 2011;


**Media Publications**

**Joint Media Publications**


**Jane McAdam**

Opinion, ‘We Have a Duty not to Return Asylum Seekers to Harm’, *National Times* (24 March 2011).

**Christopher Michaelsen**

‘On mere suspicion - Are the Security Council’s efforts to combat the financing of terrorism violating fundamental rights?’, *SCOPE magazine*, (9 May 2011);

‘Monitor must tackle Government over anti-terrorism laws,’ *Canberra Times*, (29 April 2011);

‘Security Council move will reach far beyond Libya’ *Canberra Times*, (21 March 2011).

**George Williams**

‘Plain Packaging Challenge Could Go Up in Smoke, But You Never Know’, *Sydney Morning Herald* (7 June 2011);

‘Chaplaincy Challenge Reveals Legal Failure’, *Sydney Morning Herald* (24 May 2011);
‘Labor Stalling May Anoint Charles III’, *Sydney Morning Herald* (11 May 2011);

‘Australia’s B+ Human Rights Record: Good but Must Improve’, *The Conversation* (27 April 2011);

‘The Female Factor Sets up a Right Royal Mess’, *Sydney Morning Herald* (26 April 2011);

‘Britain is Taking Another Look at its Anti-Terrorism Laws, So Why Can’t We?’, *Sydney Morning Herald* (14 April 2011);

‘O’Farrell Needs to Prove that States can do Things Better’, *Sydney Morning Herald* (29 March 2011);

‘Nothing to Fear but Timidity in Brown’s Bill’, *Sydney Morning Herald* (15 March 2011);

‘Law is no Hindrance to Locking up Children’, *Sydney Morning Herald* (1 March 2011);

‘Should Same Sex Marriage be Legalised?’, *Sydney Morning Herald* (26 February 2011);

‘COAG Needs to be Loved and Nurtured’, *Sydney Morning Herald* (16 February 2011);

‘Reform of Pokies Tests Gillard deal with Wilkie’, *Sydney Morning Herald* (1 February 2011);

‘Child Porn Decision a Bad Look for MPs’, *Sydney Morning Herald* (21 December 2010);

‘Bridle on Outspoken Charities was Wrong’, *Sydney Morning Herald* (7 December 2010).

**Submissions**

**Joint Submissions**

Rhonda Galbally, Andrew Gaze, Haddon Storey and George Williams, Submission to Victorian Parliament Scrutiny of Acts and Regulations Committee ‘Inquiry into the Charter of Human Rights and Responsibilities’ (7 June 2011);

Jane McAdam and Robert Woods, Submission to Senate Legal and Constitutional Affairs Committee on Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011 (31 May 2011);

Paul Kildea, Andrew Lynch and Robert Woods, Submission to the Joint Committee of Public Accounts and Audit on the Inquiry into National Funding Agreements (7 April 2011);

Paul Kildea and George Williams, Submission to Senate Legal and Constitutional Committee ‘Inquiry into Provisions of the Water Act 2007’ (16 March 2011);
Nicola McGarrity and George Williams, Submission to Australian Communications and Media Authority ‘Public Consultation on the Reform to the Anti-Terrorism Standards’ (11 February 2011);

Paul Kildea and George Williams, Submission to House of Representatives Standing Committee on Regional Australia ‘Inquiry into the impact of the Murray-Darling Basin Plan in Regional Australia’ (12 January 2011);

Paul Kildea and George Williams, Submission to Senate Standing Committee on Rural Affairs and Transport ‘Inquiry into the Management of the Murray-Darling Basin’ (12 January 2011);

Jane McAdam and Trina Ng, Submission to the Refugee Council of Australia’s Annual Submission on Future Directions and Current Challenges in Australia’s Refugee and Humanitarian Program (3 December 2010).

George Williams

Submission to Joint Standing Committee on Electoral Matters ‘Inquiry into the Funding of Political Parties and Election Campaigns’ (27 May 2011);

Submission to Senate Education, Employment and Workplace Relations Committee ‘Inquiry into the Tertiary Education Quality and Standards Agency Bill(s) 2011’ (8 April 2011);

Submission to Senate Legal and Constitutional Committee ‘Inquiry into the Wild Rivers (Environmental Management) Bill 2011’ (28 March 2011);

Submission to Legal and Constitutional Affairs Legislation Committee ‘Inquiry into Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010’ (3 March 2011);

Submission to Joint Select Committee on Gambling Reform ‘Inquiry into Pre-Commitments Scheme’ (8 February 2011);

Participants at the Indigenous Constitutional Reform Workshop, 1 July

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