2010 Constitutional Law Conference and Dinner

Tickets for our next Constitutional Law Conference and Dinner to be held on 19 February 2010 at the Art Gallery of New South Wales and NSW Parliament House are selling fast! To register, see http://www.gtcentre.unsw.edu.au/events.

2009 Protecting Human Rights Conference: Dr John Tobin (University of Melbourne), Father Frank Brennan AO and Centre Director Andrew Lynch

Dear Friend

Welcome to the latest newsletter of the Gilbert + Tobin Centre of Public Law, letting you know of the activities and research of Centre members in the last six months.

Undoubtedly the major development since the last issue has been the delivery by the National Human Rights Consultation Committee, headed by Fr Frank Brennan AO, of its final report to the government. The major recommendations of the Committee are set out by Edward Santow in his report here as Director of the Centre’s Charter of Human Rights Project. In that capacity, Ed has been closely involved in many aspects of the ‘charter debate’ that unfolded over 2009. But his contribution to this area in two very significant respects should be expressly noted here.

First, he was the driving force behind the organisation of the 2009 Protecting Human Rights Conference, held in early October at the Art Gallery of New South Wales. This annual conference is co-hosted by the Centre with the Regulatory Institutions Network (ANU) and the Centre for Comparative Constitutional Studies (Melbourne Law School), and this was the first year it was held in Sydney. The conference has a dedicated planning committee but Ed had the responsibility of its day-to-day organisation – and the success of the event on 2 October demonstrated his initiative and hard work. More details about the conference are found inside.

Second, Ed authored the Centre’s central submission on the issues covered by the Brennan Committee’s wide terms of reference. This major piece of scholarship was extensively cited and discussed by the Committee in its report and will stand as a pivotal resource for those researching and debating human rights protection in this country for quite some time yet. Additionally, it should be noted that Centre members made five other separate submissions that also featured in the Committee’s discussion of the issues surrounding human rights in Australia.

In other news, Jane McAdam’s long-standing expertise in complementary protection was highlighted by her submission and evidence to a Senate Committee Inquiry examining the Commonwealth’s new Bill introducing this concept to Australian immigration law. Jane has written a brief comment on the Bill and its strengths and deficiencies for this issue of the newsletter.
Congratulations are due to Centre postgraduate student Leon Terrill on two fronts. First, Leon took out the Best Speaker prize at the UNSW Indigenous Research Showcase for his paper on township leasing and Aboriginal land reform in the Northern Territory. Second, he has just been awarded the highly prestigious Lionel Murphy Scholarship to support his research program under the primary supervision of Sean Brennan.

In September, I attended the International Association of Law Schools Constitutional Law Conference in Washington. The conference was an extremely valuable opportunity to meet and exchange ideas with constitutional scholars from around the globe and there was a great deal of interest from many of delegates with whom I spoke about the Centre’s work. I was also fortunate enough to have time for meetings with researchers at York University, the University of Toronto and New York University, as well as practitioners in Canada, to discuss issues of mutual interest such as the use of special advocates in terrorism matters, constitutional protection of rights, and the reform of federal systems. I am grateful for the hospitality and intellectual generosity of the many academics and lawyers I spoke with on this trip.

Associate Professor Andrew Lynch
Director

CENTRE ACTIVITIES

ARC Laureate report

In June 2009, George Williams, Anthony Mason Professor of Law and Foundation Director of the Centre, was awarded an Australian Research Council Laureate Fellowship for a project entitled ‘Anti-Terror Laws and the Democratic Challenge’. The fellowship runs from 2009 to 2014 and comes with funding of $2,770,891. The project will be housed within the Gilbert + Tobin Centre of Public Law.

The Laureate project represents the next phase in public law research on the anti-terrorism laws enacted in this decade. Anti-terrorism laws can no longer be cast as a transient, exceptional legal response to the events of 11 September 2001 and later attacks in, for example, Bali, London and Madrid. Whether or not the laws are justified as a matter of legal policy – a subject of great contention – they are, in one form or another, clearly here to stay.

The overarching aim of this project is to answer the question of how democratic nations (especially 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 democratic challenge posed by anti-terrorism legislation will be addressed through two complementary research objectives.
First, the project will provide detailed, comparative legal analysis of the scope and operation of the anti-terrorism laws across a range of democratic nations. This is a vital aspect of the project because, despite the volume of literature, much about the laws in nations such as Australia and India, and especially the comparisons between them, remains to be examined and understood. This research is also necessary because the anti-terrorism laws are far from static.

Second, the project will answer specific questions of public law theory and institutional design central to the democratic challenge posed by anti-terrorism laws. These questions include:

- Do the public law systems of the selected nations have human rights mechanisms sufficient to provide an adequate check on such laws? Given their relative effectiveness, what does this say about those mechanisms and the anti-terrorism laws?

- Do the public law systems of the selected nations have other public law and institutional mechanisms sufficient to provide an adequate check upon such laws (for examples, through institutions such as parliament and the courts and principles such as the rule of law, the separation of powers, federalism and judicial review)? Given their relative effectiveness, what does this say about those mechanisms and the anti-terrorism laws, and have the latter reshaped those mechanisms?

- Do the public law systems of the selected nations contain sufficient oversight and review mechanisms to ensure the proper operation of such laws, such as that they operate within legal bounds and that the laws continue to be monitored so that they reflect the changing threat level?

- To what extent have exceptional aspects of the anti-terrorism laws become normalised or applied elsewhere? Is there a ‘new normal’ after September 11 such that the exceptional has become acceptable? To what extent are such laws constrained by time limits such as sunset clauses, and to what extent should they be? Where have exceptional features of the laws (for example, new evidence gathering techniques or restrictions on the grant of bail) ‘leaked’ into other areas of law? Or, where have traditional values been reasserted despite the open-ended nature of the threat of terrorism?

- How have international norms and rules been adapted or not through reception into domestic law? Why has a more coherent and consistent response to the problem of terrorism not yet emerged in democratic countries?

- Has there been a fundamental, historic shift in democratic public law systems? What will be the long-term impact on democracies of anti-terrorism laws? Is this impact acceptable from the perspective of public law policy and design, and if not, are legal changes required to secure both the protection of the community from terrorism and the future health of democratic systems?

“Australia’s federal system not only lends itself to bad outcomes, it makes reform much harder. This has become obvious in areas such as health, education, childcare and water policy. Federalism is too often the elephant in the room, with governments preferring to respond to its flaws with expensive work-arounds rather than addressing the faults as part of the solution.”

Protecting Human Rights Conference 2009

On 2 October 2009, the Gilbert + Tobin Centre of Public Law co-hosted the annual Protecting Human Rights Conference with the Regulatory Institutions Network (ANU) and the Centre for Comparative Constitutional Studies (Melbourne Law School). This was the first time the conference had been held in Sydney, and over 150 people attended.

The Conference considered the recent National Human Rights Consultation process. In addition to hearing from Father Frank Brennan AO and Mary Kostakidis from the Consultation Committee, delegates were addressed by others such as the Hon Keith Mason AC, Phil Lynch from the Human Rights Legal Resource Centre and Associate Professor Andrea Durbach of the Australian Human Rights Centre who offered their assessments of the Consultation from a variety of perspectives – including, in some cases, opposition to the enactment of a Human Rights Act. The conference was also fortunate to hear from Professor Stephen Gardbaum visiting from the University of California, Los Angeles, who provided an extensive comparative study on the form of human rights protection now prevalent in some jurisdictions in the British Commonwealth.

Additionally, other speakers provided reports on human rights developments in specific States while others looked to the future in greater and more meaningful protection of indigenous, disability and health rights.

A podcast of this event, and selected papers, can be found on the Centre website, www.gtcentre.unsw.edu.au/publications.

Terrorism Research Roundtable 2009

On 6-7 July, the Centre convened an intensive research event as part of its Terrorism and the Law Project. Taking as its theme the view that post-9/11 counter-terrorism laws in Australia and other Western jurisdictions are just part of a broader trend towards what Professor David Garland foretold as an emerging ‘culture of control’, the roundtable brought together practitioners and academics in the areas of public and criminal law to discuss the impact which a focus on the pre-emption of crime, restrictions on the right to liberty of non-suspects, limited public access to information and increased community surveillance have had on legal systems beyond the immediate context of national security.

The program included sessions examining changes to criminal procedure in the shadow of terrorism and the rhetoric of ‘war’; the intrusion of intelligence and those agencies who collect it into the sphere of law enforcement; access to information and the logic of pre-emption. The normalisation of extraordinary measures – starkly demonstrated in Australia by the use of terrorism laws as a model for the proscription of motorcycle gangs and the application of control orders for their members – was a particularly dominant topic, as was the adequacy of legislative and judicial review mechanisms.

The roundtable benefitted from the presence of strong national researchers from both the public law and criminal law streams of the security issue.
Additionally, we were very pleased to welcome to Sydney the following international experts as participants: Dr Fergal Davis (Lancaster University), Mr John Ip (University of Auckland), Dr Lawrence McNamara (University of Reading), Professor Kent Roach (University of Toronto) and Professor Charles Weisselberg (Berkeley Law, University of California).

Many of the papers presented at this Roundtable will be published by Routledge-Cavendish in a volume entitled *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* in mid-2010.

**Occasional Seminars**

**Vicki C Jackson**

On 3 August, the Centre was delighted to host a lunchtime seminar with Professor Vicki C Jackson, Carmack Waterhouse Professor of Constitutional Law at the Georgetown University Law Center in the United States. Professor Jackson’s presentation was titled, ‘Engaging the Transnational: Older Constitutions, Universal Reason and Democratic Legitimacy’. In her lucid and entertaining paper, Professor Jackson considered the practice and legitimacy of comparative constitutionalism as an aid to the interpretation of well-established national constitutions and drew on her extensive knowledge of judicial decisions from an array of jurisdictions, including Australia. The session ended with a lively conversation between Professor Jackson and her audience.

**David Bilchitz**

On 24 November the Centre hosted a seminar presented by Dr David Bilchitz, Director of the South African Institute for Advanced Constitutional, Public Human Rights and International Law (SAIFAC). David used some of the main arguments in his book, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (OUP, 2007) as a basis to critique the Brennan Commission’s recommendation, in its report on the National Human Rights Consultation, that socio-economic rights should not be included in any future federal statutory bill of rights.
Protection for victims of torture and cruel, inhuman or degrading treatment

In September 2009, the Federal Government introduced a Bill into Parliament to extend Australia’s refugee protection framework to others fleeing serious human rights violations. In doing so, the Migration Amendment (Complementary Protection) Bill 2009 implements Australia’s obligations under a number of international treaties that prevent the return of people who risk being arbitrarily deprived of their life, including through the imposition of the death penalty, as well as to people who face a substantial risk of torture or other cruel, inhuman or degrading treatment or punishment. This is a welcome and long-awaited outcome which follows numerous recommendations in parliamentary and UN reports that Australia adopt a system of ‘complementary protection’ – protection that is complementary to Australia’s obligations under the Refugee Convention, based on its expanded non-refoulement (non-removal) obligations under human rights law. The introduction of complementary protection finally brings Australian legislation into line with comparable provisions in the European Union, Canada, the United States and New Zealand, not to mention international law. It is also worth noting that regional treaties in Latin America and Africa extend protection to a wider concept of ‘refugee’ than is applied in Australia.

The absence of a codified system of complementary protection in Australia has meant that for many years, Australia has been unable to guarantee that people who face serious human rights abuses if returned to their country of origin or habitual residence, but who do not meet the refugee definition, will be permitted to stay and will be granted a legal status. There has been no mechanism for having claims based on a fear of return to torture, a threat to life, or a risk of cruel, inhuman or degrading treatment or punishment assessed, except via the ‘public interest’ power of the Minister for Immigration and Citizenship under section 417 of the Migration Act 1958 (Cth). This is a cumbersome, unpredictable and lengthy process, which can only be invoked once a person has been denied refugee status by the Immigration Department and subsequently the Refugee Review Tribunal. Furthermore, whether or not a section 417 claim is even considered by the Minister, and whether or not a visa to remain in Australia is granted, is wholly discretionary and non-reviewable. (This option remains open for people who wish to remain in Australia on purely compassionate or humanitarian grounds.)

The changes proposed by the Bill are therefore very important because they codify Australia’s international protection obligations and create a mechanism by which people can articulate their protection claims at the outset. Furthermore, they ensure that every protection applicant who does not meet the refugee definition (well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group) automatically has his or her claim assessed against Australia’s non-refoulement obligations under international human rights
law, and, if found to have a protection need, is granted the same legal status as a Convention refugee.

People who are regarded as representing a security threat to Australia (who would, if they were refugees, be caught by the exclusion provisions in the Refugee Convention) are not eligible for a protection visa on the complementary protection grounds. However, because the prohibition on removal to torture and the other specified grounds is absolute, with no exceptions, such people cannot be returned home. The way the Bill deals with this is to refer such cases to the Minister to personally determine the outcome. Most other domestic legislation in other countries does not adequately deal with this issue either: while there is recognition that people cannot be returned to the harm they fear, there is no consistent practice on how they are subsequently treated. At a bare minimum, there is a requirement that Australia does not, in the way it deals with such people, subject them to inhuman or degrading treatment. Keeping them in detention or on rolling temporary visas with minimal rights would arguably breach this duty.

The final form of the legislation is yet to be determined. Although the Bill was rushed through Parliament and a Senate Committee Inquiry — which cited its reporting deadline as an excuse for not adequately investigating certain concerns that had been raised in numerous submissions — it has not yet made it back on to Parliament’s agenda. A number of small but important amendments would make the Bill much more workable, better facilitate its protective purpose, and sit more comfortably with international and comparative law. As it currently stands, it makes the Australian system of complementary protection far more complicated, convoluted and introverted than it needs to be. This is because it conflates tests drawn from international and comparative law, formulates them in a manner that risks marginalizing an extensive international jurisprudence on which Australian decision-makers could (and ought to) draw, and in turn risks isolating Australian decision-making at a time when greater harmonization is being sought. Since the purpose of the Bill is to implement Australia’s international human rights obligations based on the expanded principle of non-refoulement, it seems only sensible and appropriate that Australian legislation reflect the language and interpretation of these obligations as closely as possible. This would also enhance the international value of Australian complementary protection jurisprudence.

Jane McAdam
Centre Fellow
Monica Betancourt, University of Chicago Law School

I am a JD candidate at the University of Chicago and under its International Human Rights Fellowship, I was a Visiting Fellow at the G+T Centre for June and July, working with Andrew Lynch and Paul Kildea on human rights regimes in the other two common law federations, the United States and Canada. I researched how federal bills of rights interact with the various state and provincial bills and constitutions, and how the state/provincial and federal courts interact over conflicts in rights protection.

In the United States and Canada, a federal and constitutional charter or bill of rights does not lead to a monolithic coverage of rights in all the states and provinces. On the contrary, there is a variety of rights protection schemes across those federations, notably in the areas of employment discrimination and the right to bear arms. These gaps and patchworks are not a bug of federations, but a feature. Some federal rights may apply to the states, and some may not. Some states may use the federal bill as a minimum standard, and choose to build in even stronger protections in state statutes and the state constitution, and other states may not. That is the very essence of federalism, and not an argument against a national charter or human rights bill for Australia.

In addition to working with Paul and Andrew, I tried to explore New South Wales as much as I could. This was my second time in Sydney - I was here on holiday two years ago - and I love it here, even in winter! This picture of me was taken in the Blue Mountains, on a beautiful day of hiking. I also attended a few operas and plays at the Opera House, explored lots of museums, attended a rugby union test against France, and most importantly tried to wander around all the great neighbourhoods. One of the highlights of my stay here was attending the Human Rights Consultation hearings at the Commonwealth Parliament in Canberra with Centre members, Edward Santow and George Williams.

My thanks to everyone for being so welcoming to me, and from whom I have learned so much.

Postgraduate Student Report
Soula Papadopoulos

I work for the State government drafting legislation. I have a particular interest in the best means of communicating the content of the law to members of the general public - in a way that allows them to understand, and contribute to, the final form that legislative proposals take – so I have long been an admirer of the G+T Centre's educative role, in providing a running plain-English commentary on major legal issues and making laws
understandable by and relevant to the public. I also have an obvious interest in constitutional issues and in the evolution of federalism, in particular what possible continuing role there is for States (and State public servants). For these reasons and more, I was delighted (and a little intimidated) to join the Centre as a part-time postgraduate student.

My research is about co-operative legislative schemes, where the States and Territories, or the Commonwealth and the States and Territories, cooperate to achieve uniform laws or laws of uniform application. I have three supervisors: Professor George Williams, Associate Professor Andrew Lynch and Andrew Lynch's fine-tooth comb. I am really enjoying working with two of them!

Initially, the focus of my research was on the constitutional issues that co-operative legislative schemes raise and on the High Court's support, or lack of support, for such schemes. With characteristically gentle encouragement from George and Andrew, I have changed the scope of my project to consider the broader implications that co-operative scheme legislation has for things that I hold dear. I'm interested in the quality of drafting of the legislation that makes up such schemes – particularly the subordinate legislation, which most scholars overlook – and the ability of interested people to find and understand that legislation. Also, as more jurisdictions adopt human rights charters, I am interested in examining whether, in the drafting of national scheme laws, the need to be uniform trumps the protection of those human rights and responsibilities. Since major decisions about the content and administration of uniform national laws are made by the Prime Minister and Ministers at COAG or in Ministerial Councils, which are not democratically elected or accountable or subject to public scrutiny, I'm also interested in the challenges that co-operative legislative schemes pose for Parliaments to make any meaningful input into legislation – by scrutinising legislation before it is passed and subordinate legislation after it is made and by holding Ministers to account for action taken under legislation once enacted – as well as the ability of citizens to challenge decisions made under co-operative scheme legislation and to find out about its administration.

Social Justice Intern Report

Ben Teeger

I am very grateful for the opportunity to have been the Centre's Social Justice Intern during semester 2, 2009. During my thirteen weeks at the Centre, I had ‘hands on’ experience in a diverse range of public law areas and acquired skills that I would not have been exposed to in the classroom. This semester was a particularly opportune time to undertake the internship as a number of parliamentary inquiries were being held and governmental reports released, which meant that Centre members were kept busy with submission-writing!

The majority of my time was dedicated to the Terrorism and the Law Project. I assisted with submissions on the Anti-Terrorism Laws Reform Bill 2009 (Cth) and the Commonwealth Attorney-General’s National Security Legislation Discussion Paper (2009). The specific topics assigned to me were the proposed amendments to the definition of a ‘terrorist act’ as contained...
I was fortunate to attend the public hearings of the Commonwealth Senate Legal and Constitutional Affairs Committee’s Inquiry into the Anti-Terrorism Laws Reform Bill 2009 (Cth).

I also spent considerable time working on a submission on the Marriage Equality Amendment Bill 2009 (Cth). This private members bill, introduced by Greens Senator Sarah Hansen-Young, proposed to repeal the current heterosexual definition of marriage in the Marriage Act 1961 (Cth) and replace it with a definition that is gender non-specific. Our submission took the view that nothing less than the ability to enter into a legal union which equates to marriage will be effective in the removal of discrimination against same-sex couples, whether this discrimination occurs in the areas of inheritance, taxation, social security or work-related entitlements.

Finally, I assisted with a submission on the Commonwealth Government’s Electoral Reform Green Paper: Strengthening Australia’s Democracy (2009). Our submission examined a number of areas of Australian electoral law in need of reform including: limiting the franchise to ‘British subject’ voters and extending it for Australian expatriate voters, looking at ways to increase voter enrolment, relaxing the eligibility criteria for election to Federal Parliament and truth in political advertising issues.

I would like to thank the Centre’s staff, in particular Andrew, Nicola, Ed, Sean and George, who made the experience as rewarding as it was enjoyable. I would strongly recommend the Social Justice Internship at the G+T Centre to students who are interested in public law.

Research Assistant

Rebecca Welsh

I have joined the Terrorism Project at the Centre as a Research Associate – reacquainting myself with the world of terrorism law. I will be in this role until March when I start my PhD on Preventative Detention, Control Orders and Chapter III, with the kind guidance and patience of George Williams and Andrew Lynch as supervisors. I am coming to the Centre from DLA Phillips Fox where I was part of the Insurance litigation team, so my time at the Centre so far has been a reunion with my old friends: academic writing and the Australian Guide to Legal Citation! With fingers crossed, I hope to settle in over summer with two papers on ASIO’s ‘special powers’ provisions before launching into my thesis – which has me thoroughly excited.

My undergraduate degree was completed at the University of Wollongong, with a brief stint at ANU, and it is great to be back at a University by the ocean. Whilst I’ve considered myself a dedicated ‘terror-nerd’ for some years now (for better or worse), my travels have taken me through other areas, including psychology, personal injury litigation, and work with the native title unit and security law branch of the Commonwealth Attorney-General’s Department. It is absolutely brilliant to be part of a Centre I have admired for so long.
On 8 October 2009, the Australian Government released the final report of the National Human Rights Consultation, chaired by Father Frank Brennan AO (the Brennan Committee Report). The key recommendations include:

- the enactment of a national Human Rights Act;
- enhancing a human rights culture in the Australian public service and more generally in the Australian community;
- making other laws more compliant with Australia’s international human rights law obligations;
- improving parliamentary scrutiny of human rights; and
- addressing acute disadvantage experienced by groups such as Indigenous people.

The headline recommendation was, of course, for a Human Rights Act. While there remains a broad spectrum of views on this issue, the Committee identified strong community support for a Human Rights Act, with 27,888 submissions — or 83% of all submissions — favouring this reform. The Brennan Committee also commissioned independent opinion polling on the Human Rights Act question, which showed 57% in favour, 14% against and 30% neutral. More generally, over 40,000 people participated in the Consultation, making this the largest public inquiry in Australian history.

The Act proposed by the Brennan Committee would have the following main elements:

- It would be an ordinary Act of Parliament, not constitutionally entrenched;
- It would contain a list of judicially-enforceable human rights, consisting mainly of civil and political rights. Economic, social and cultural rights would be listed but not be justiciable;
- It would impose an obligation on Commonwealth ‘public authorities’ (principally, Ministers, public servants, departments and agencies) to comply with these protected human rights in decision-making and other conduct;
- It would require other legislation to be interpreted consistently with the protected rights, subject to parliamentary intent. This means that Parliament would be able to legislate inconsistently with the Human Rights Act;
• Where a court finds that a law is incompatible with a protected right or rights, the impugned law would not be invalidated. Instead, the High Court would have the power to issue a declaration that notifies the government of the incompatibility. However, it would remain Parliament’s absolute discretion to decide whether or not to amend the impugned law; and

• The Act would establish a new parliamentary committee to scrutinise the impact of draft legislation and policy on human rights.

The Centre contributed a number of submissions to the Consultation, and these were cited heavily in the Brennan Committee Report. The Centre’s submissions, and further information about the Consultation process, are available at www.gtcentre.unsw.edu.au/projects_partners/projects/cohr/.

On 22 October 2009, shortly after the Report’s release, the Centre co-hosted its third Human Rights Act Roundtable with the Australian Human Rights Commission. This event brought together a large number of human rights experts from around Australia, and discussed how to contribute to the eventual implementation of the Brennan Committee Report’s recommendations. The Centre also co-hosted the 2009 Protecting Human Rights Conference in Sydney. A report on this Conference appears elsewhere in this Newsletter.

Federalism Project

Project Director: Paul Kildea

Among the issues considered in the final report of the National Human Rights Consultation Committee are the potential difficulties of introducing a national Human Rights Act in a federal system. The report examines the various constitutional, political and practical obstacles that would complicate the introduction of a national Human Rights Act which sought to apply uniformly across the federation. It also outlines potential options for resolving these difficulties, but did not express a firm view on the question of whether a national Human Rights Act should apply to the States. In addressing these issues, the Committee drew extensively on a submission by Paul Kildea and Andrew Lynch. In their submission to the Committee, Paul and Andrew recommended that a national Human Rights Act confine its operation to federal laws and public authorities, but include a mechanism for the States to voluntarily ‘opt in’ to the national law and its procedures.

The issues of federalism and human rights protection also featured at the annual conference of the Australian Political Studies Association (APSA) in September. Paul presented a paper entitled ‘Australian Federalism and a National Human Rights Act – Implications and Challenges’. The paper, co-authored with Andrew and Edward Santow, gave a detailed examination of the complexities of human rights protection in a federal system, drawing on perspectives from federal theory, comparative jurisdictions and international law.

In early December, the heads of the Commonwealth and State governments discussed a possible federal takeover of public hospitals at a meeting of the Council of Australian Governments (COAG) in Brisbane. This
followed the release in June of a report by the National Health and Hospitals Reform Commission which recommended that the Commonwealth assume responsibility for primary health care, basic dental care and aged care. Soon after the report’s release, George Williams wrote in the *Sydney Morning Herald* about the challenges that federalism poses for health reform, and argued that improving the delivery of basic health services may eventually require structural reform of Australia’s federal system.

### Indigenous Legal Issues

**Project Director: Sean Brennan**

Sean has continued writing and presenting about the intersection between constitutional law and indigenous property rights. In Hong Kong in October he presented a paper about the 1969 and 2009 High Court decisions, *Teori Tau v Commonwealth and Wurridjal v Commonwealth*, at an international conference on exclusions from constitutional law.

Earlier, in August, he contributed a paper on legal and policy aspects of the Northern Territory Intervention to the Tipstaff and Researchers Conference held at the NSW Supreme Court in Sydney, again including reference to the *Wurridjal* litigation.

Sean has also been working with the Centre’s postgraduate student, Leon Terrill, to build the Centre’s understanding and research capacity in the complex area of alcohol regulation, particularly as it affects Aboriginal communities in remote areas. Sean appeared as a panel member at the Open Forum on alcohol restrictions in Aboriginal communities, organised by the Indigenous Law Centre in September. Research continues in this important area of intersection between law and public health.

### International Refugee and Migration Law Project

**Project Director: Jane McAdam**

The Project Director, Jane McAdam, spent the past semester on sabbatical leave as a Visiting Fellow at Lincoln College at the University of Oxford. Having the luxury of time without teaching and administration enabled her to focus on researching, thinking and writing about the way in which international law does, could and should regulate the movement and legal status of people displaced by climate change. She finalized the manuscript on an edited book, *Climate-Induced Displacement: Multidisciplinary Perspectives*, which will be published by Hart Publishing, Oxford early next year. She also worked on her longer-term book project, which is a monograph on international law’s response to climate change and displacement, to be published by Oxford University Press in 2011. Research associate Emily Crawford provided invaluable assistance from afar. In addition to assisting with the edited book, Emily undertook research on a variety of topics related to the project, including a survey of debates surrounding the inclusion of the right to freedom of movement in the Universal Declaration of Human Rights from 1945 up until its adoption in 1948; and analysis of New Zealand’s immigration policy regarding Pacific Islanders from the 1960s through to the 1980s.

“...This provision seems intended to ‘close the floodgates’. It has no legal rationale, since international human rights law is not premised on exceptionality of treatment but prescribes any treatment that contravenes human rights treaty provisions. Indeed, a key purpose of human rights law is to improve national standards and not only the situation of the most disadvantaged in a society. At its most extreme, it could be argued that this provision would permit return even where a whole country were at risk of genocide, starvation or indiscriminate violence, which would run contrary to the fundamental aims and principles of human rights law.”

Jane McAdam, Submission to Senate Standing Committee on Legal and Constitutional Affairs’ Inquiry into the Migration Amendment (Complementary Protection) Bill 2009, 35 (cited in the Report (October 2009), 16)
In September, the Migration Amendment (Complementary Protection) Bill 2009 was introduced into Federal Parliament in Australia (see ‘Centre Comment’ earlier in these pages). This has been a principal area of Jane’s research over the past eight years: it was the subject of her doctorate, which was subsequently published as Complementary Protection in International Refugee Law (Oxford University Press, Oxford, 2007). Given her interest in the area, and the fact that this was a long-awaited legislative development in Australia, she was as involved as was possible from a distance in discussions with NGOs, academics and other interested parties at home about the Bill. On behalf of the Centre she prepared lengthy submissions to the Senate Inquiry that were cited throughout the Report. Jane has been engaged by the Refugee Review Tribunal to develop a comprehensive training manual on complementary protection for its Members, which places the Australian legislation in an international and comparative context. In this task she has been ably assisted by Matthew Albert at the University of Oxford.

In October, Jane presented Project work relating to environmental migration governance and small island States, as part of an international conference on Environmental Change and Its Impact on Human Societies at the Graduate Institute in Geneva. She was invited to present a seminar to the Law Faculty at the London School of Economics, but unfortunately had to cancel due to illness. That month she also attended a workshop at Harvard University with her collaborators on a jointly-held ARC grant on ‘Immigration Restriction and the Racial State’. In its first year, that project has produced a fully-searchable full-text database of 900 immigration-related statutes from over six jurisdictions from the mid-19th century through to the present day, which will eventually be made publicly available. In December, Jane was invited to deliver an evening seminar at the University of Essex and to take part in an expert a workshop at Oxford on ‘Survival Migration’. She also met with her co-collaborators on a grant from the Canadian Social Sciences and Humanities Research Council International Opportunities Fund.

**Terrorism and Law Project**

**Project Director: Nicola McGarrity**

The last six months have been an extremely busy period for the Terrorism and Law Project. In early July 2009, we held an Expert Terrorism Roundtable at the University of New South Wales. The Roundtable brought together approximately 25 academics and practitioners in the areas of criminal and public law to discuss the impact of the trend towards a ‘culture of control’ on legal systems beyond the immediate context of national security. Many of the papers presented at this Roundtable will be published by Routledge-Cavendish in a volume entitled Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11 in mid-2010. The editors of this book (Andrew Lynch, Nicola McGarrity and George Williams) would like to thank their research associate, Rebecca Welsh, for her invaluable assistance with the editing of this volume.

Another highlight of the last six months has been the Project’s submission to the Commonwealth Attorney-General’s Department in response to the major National Security Legislation Discussion Paper released in August 2009. This submission involved the largest collaborative effort of any in the Cen-
The minimalism of the proposals in the Discussion Paper stands in sharp contrast to the more radical reforms proposed in the Australian Greens’ Anti-Terrorism Laws Reform Bill 2009 (which was introduced into the Senate on 23 June 2009). The Terrorism and Law Project made a submission to the inquiry conducted by the Senate Legal and Constitutional Affairs Committee into the Bill, as well as giving oral evidence. Whilst our opinion of the Bill was not entirely favourable, we nevertheless believe that it should (at the very least) be considered by the Commonwealth Attorney-General’s Department – in particular, narrowing (or, in some instances, repealing) the preparatory and group-based offences in Divisions 101 and 102 of the Criminal Code Act 1995 (Cth) and repealing the ASIO questioning and detention regime.

The Terrorism and Law Project also made a submission and gave oral evidence to the Senate Finance and Public Administration Committee inquiry into the National Security Legislation Monitor Bill 2009. The Project Director (Nicola McGarrity) and Centre Director (Andrew Lynch) also wrote a number of opinion pieces in the electronic and hard copy media assessing the Bill. Given the generally positive response of the Committee to the Bill, it is likely to be enacted by the Commonwealth Parliament in early or mid 2010.

In October 2009, the Project Director travelled to Hong Kong to present a paper at a conference organised by the City University of Hong Kong. The depth of the Gilbert + Tobin Centre’s expertise in the area of counter-terrorism law is demonstrated by the fact that at this conference, three members of a five person panel on ‘Constitutional Guarantees amidst Counter-Terrorism Measures’ were from the Centre. The Project Director also travelled to Florence that month to participate in a workshop at the European University Institute about best practice in the work of intelligence agencies and their oversight bodies. This workshop was also the first meeting of a new research group (Constitutional Responses to Terrorism) established by the International Association of Constitutional Lawyers and chaired by Martin Scheinin, the United Nations Special Rapporteur on human rights and counter-terrorism.

Ironically, police appear unenthusiastic about actually using these laws. Only one declaration was made in SA and to date none has been sought in NSW, despite the legislation being enacted urgently. The Commonwealth’s terrorism control orders were only ever applied to two people, with none currently in force. Limited use of these laws does not make them harmless. Quite apart from their latent potential for misuse, they are highly corrosive of core legal values.”

Andrew Lynch, ‘Why South Australia bikie laws went too far’, The Australian (2 October 2009)
PUBLICATIONS AND PRESENTATIONS

PUBLICATIONS

Joint Publications


David Hume and George Williams, ‘Commonwealth Power over Industrial Relations: Evolution without a Referendum’ in HP Lee and P Gerangelos (eds), *Constitutional Advancement in a Frozen Continent* (Federation Press, 2009), 105;


Ben Golder


“It was not hard to create a new law targeting the individual drinker and the grog runner. Politically it is much more difficult to take on the questions of supply: taxing alcohol by volume, restricting certain products, curtailing trading hours, buying back takeaway licences. The evidence says these work to reduce alcohol-related harm.”

Paul Kildea


Jane McAdam


Nicola McGarrity


Christopher Michaelsen


Edward Santow


Leon Terrill


George Williams

‘Bringing Human Rights Home’ Australian Fabian News, Vol 49 No 2, November 2009, 9;


‘Innovations: Key Legislative, Committee and Parliamentary Achievements’ in *20th Anniversary of Self-Government in the Australian Capital Territory* (Legislative Assembly for the ACT, 2009), 82;

‘Listening not Talking’ (2009) 24 *Griffith Review* (online);


**PRESENTATIONS**

**Joint Presentations**

Paul Kildea, Andrew Lynch and Edward Santow, ‘Australian Federalism and a National Human Rights Act – Implications and Challenges,’ Conference of the Australian Political Studies Association, Macquarie University, Sydney, 28-30 September 2009;


Nicola McGarrity and George Williams, ‘When Extraordinary Measures become Normal: Pre-Emption in Counter-Terrorism and Other Laws,’ *Terrorism Roundtable: The ‘Culture of Control’*, University of New South Wales, 6-7 July 2009.

**Sean Brennan**

Past Scholar’s Address, delivered at Lionel Murphy Foundation Annual Lecture, NSW Parliament House, 2 December 2009;


‘Territory Residents and Indigenous Property Holders under the Australian Constitution: In or Out?’ *International Conference on Exclusions from Constitutional Law*, City University of Hong Kong, 28-29 October 2009;

Panel Member, ‘Alcohol Restrictions in Indigenous Communities,’ Indigenous Law Centre Open Forum, 22 September 2009;


Panel Member, Aboriginal Health Panel, Shalom Gamarada Aboriginal Art Exhibition, Sydney, 26 July 2009.

**Ben Golder**

‘Foucault and the Unfinished Human of Rights,’ Julius Stone Institute, University of Sydney, 24 September, 2009;

‘Foucault and the Unfinished Human of Rights,’ Annual Australian Society of Legal Philosophy Conference, Melbourne, 5-6 June 2009.
“Considered as a whole, this suite of proposals from the government is marked by its determination not to travel too far from the substance of the Ruddock era. Certainly the many specific amendments and clarifications to overcome long-recognised deficiencies or ambiguities in existing provisions is an improvement on the state of the laws. But in aiming to finish the job which the Howard government started, there has not been enough attention paid to the broader questions about how we should criminalise political violence appropriately and the extent to which that can justify departure from accepted norms in the investigation and prosecution of offences.”


Wenwen Lu

‘The Influence of Motive in the Definition of Terrorism: A Comparative Study of Australia, Hong Kong, Singapore and Malaysia’, *International Conference on Exclusions from Constitutional Law*, City University of Hong Kong, 28-29 October 2009;

‘Comparative Research of the Definition of Terrorism in Australia, Hong Kong, Singapore and Malaysia’, Law and Crisis Postgraduate Students Conference held in University of Sydney in 30 Oct 2009.

Andrew Lynch


‘Contemporary Challenges and the Strengthening of Executive Power: An Australian Case Study’, IALS Conference on Constitutional Law, American University Washington College of Law and Georgetown University Law Center, Washington DC, United States of America, 11-12 September 2009;


Jane McAdam

‘An International Law Critique of the “Disappearing State” Phenomenon’, Faculty of Law, University of Essex, 8 December 2009;


Invited workshop participant: ‘Immigration Restriction and the Racial State’, Harvard University, 28 October 2009;


Nicola McGarrity


Christopher Michaelsen

‘The Proportionality Principle, Counterterrorism and Human Rights: A German-Australian Comparison’, *International Conference on Exclusions from Constitutional Law*, City University of Hong Kong, 28-29 October 2009;
‘The Future of the UN’s Al-Qaeda and Taliban Sanctions Regime’, Australian National University, Canberra, 16 October 2009;


‘The Deportation of Terrorist Suspects: Diplomatic Assurances and the Principle of Non-Refoulement’, Staff Seminar Series, UNSW Law Faculty, Sydney, 22 September 2009;


Theunis Roux


Edward Santow


‘Should Australia have a Bill of Rights?’, Shine Lawyers Public Debate, University of Southern Queensland, 4 November 2009;


Plunkett Seminar on Human Rights Laws, Plunkett Centre for Ethics, Sydney, 11 June 2009.

Leon Terrill


“Unlike in every other western nation, the protection of human rights in Australia falls almost exclusively to the legislature. However, without a Bill of Rights, the political process is usually unconstrained by fundamental human rights principles. The lack of a domestic reference point for basic rights also means that it is difficult to determine the extent to which, if at all, rights and the rule of law should be sacrificed in the name of national security and in the fight against terrorism. When human rights protection is most needed in Australia, it is often absent.”

George Williams


‘Towards a Republic’; ALP Central Branch, Sydney, 23 November 2009;


‘An Entrenched Bill of Rights’; The Socratic Forum, Key Centre for Ethics, Law, Justice and Governance; Institute for Ethics, Governance and Law and Australian Research Council Governance Research Network (GovNet), Canberra, 13 November 2009;

‘An Australian Human Rights Act’; Family Court of Australia Judges Conference, Family Court of Australia, Melbourne, 9 November 2009;

‘What are we aiming to achieve and how might we get There?’; Human Rights Act Roundtable, Gilbert + Tobin Centre of Public Law and Australian Human Rights Commission, Sydney, 22 October 2009;

‘Anti-Terror Laws and the Challenge for Democracies like Australia’, Distinguished Scholars Speakers Series, UNSW, Sydney, 13 October 2009;

‘The Laws You Have When you Don’t have a Bill of Rights!’; National Young Unionists Conference, Canberra, 3 October 2009;


‘Drivers of Research Success’; Faculty Seminar, School of Law, University of South Australia, Adelaide, 24 September 2009;

‘The Republic’ Seminar, ANU Debating Society, 15 September 2009;


‘Anti-Terror Laws and the Democratic Challenge’, University of Tasmania Law Faculty, Hobart, 31 August 2009;


‘Is the Republic Really Inevitable?’ Australian Republican Movement, Sydney, 30 July 2009;


**MEDIA PUBLICATIONS**

**Joint Media Publications**

Andrew Lynch and Nicola McGarrity, ‘At last, an independent reviewer of terrorism laws’, *Inside Story* (16 July 2009);


**Andrew Lynch**

‘Why South Australia bikie laws went too far’, *The Australian* (2 October 2009);


**Nicola McGarrity**

‘Freedoms are losing out to fear’, *The Age*, (14 August 2009).

**Tessa Meyrick**

‘Pulling the public purse strings’, *Australian Policy Online* (13 October 2009);

‘Spirit matters’, *Australian Policy Online* (12 August 2009);


**Christopher Michaelsen**

‘Legal Duty, No, Moral Duty, Yes’, *Canberra Times* (18 November 2009);

‘Face the flaws – don’t choose the scaremonger path’, *Canberra Times* (17 August 2009).

**Edward Santow**


**George Williams**

‘Rudd Unlikely to be Trigger Happy’, *The Age* (1 December 2009);

‘Rudd is Unlikely to be Trigger Happy’, *Sydney Morning Herald* (1 December 2009);

‘League Tables Law is Simply Rank’, *Sydney Morning Herald* (17 November 2009);

‘Time for a New Debate on the Republic’, *Sydney Morning Herald* (3 November 2009);

‘The People Have Spoken – and They Want Protection’, *Sydney Morning Herald* (21 October 2009);

“[F]or the Foucaultian anti-humanist engagement with human rights ... the definitive encapsulation of the human – a metaphysical circumscription that appears in ritual question-begging form in most orthodox human rights texts in the mystifying form: “Human rights are the rights we have by virtue of being human” – represents not the proper ground of human rights but rather its terminal limit.”

"Attorney-General Robert McClelland has claimed that [the reforms contained in the National Security Legislation Discussion Paper] "propose a balance". But this is too simplistic. It is not good enough to consider the laws as a whole. Each change - especially one that strengthens the offences or gives new powers to law enforcement and intelligence agencies - must be rigorously scrutinised on its own merits. The most concerning proposed change would give the Australian Federal Police the power to conduct warrantless searches."

Nicola McGarrity, ‘Freedoms are losing out to fear’, The Age (14 August 2009).

'Show of Hands for Call to Arms', Sydney Morning Herald (6 October 2009);

'New Test Promotes Citizenship by Rote', Sydney Morning Herald (23 September 2009);

'Pyrrhic Victory May Help Stewart', Sydney Morning Herald (8 September 2009);

'How to Get Rid of Them', Sydney Morning Herald (3 September 2009);

'There are More Humane Ways to Die than Starving', Sydney Morning Herald (25 August 2009);

'Curbs on Campaign Ads Should not be Beyond Us', Sydney Morning Herald (11 August 2009);

'Health Reform Needs a Federal Fix First', Sydney Morning Herald (28 July 2009);

'High Court Casts Shadow on Canberra’s Lofty Vision', Sydney Morning Herald (9 July 2009);

'A Better Way to Choose Judges', Sydney Morning Herald (14 July 2009);

'One Man’s Rare Win for States’ Rights may Ring Hollow', The Age (9 July 2009);

'Time to Take Away their Right to Vote', Sydney Morning Herald (30 June 2009).

SUBMISSIONS

Joint Submissions

Ben Golder, Andrew Lynch, Nicola McGarrity, Christopher Michaelsen, Edward Santow, Ben Teeger and George Williams, Submission to Commonwealth Attorney-General’s Department ‘National Security Legislation Discussion Paper’ (24 September 2009);

Paul Kildea and George Williams, Submission to House Standing Committee on Legal and Constitutional Affairs ‘Inquiry into the Machinery of Referendums’ (9 October 2009);

Andrew Lynch, Ben Teeger and George Williams, Submission to Senate Legal and Constitutional Affairs Committee ‘Inquiry into the Marriage Equality Amendment Bill 2009’ (28 August 2009);

Andrew Lynch, Nicola McGarrity, Ben Teeger and George Williams, Submission to Senate Legal and Constitutional Affairs Committee ‘Inquiry into the Anti-Terrorism Laws Reform Bill 2009’ (14 August 2009);

Andrew Lynch, Nicola McGarrity and George Williams, Submission to Senate Standing Committee on Finance and Public Administration ‘Inquiry into the National Security Legislation Monitor Bill 2009’ (14 July 2009);
Nicola McGarrity and George Williams, Submission to Senate Education, Employment & Workplace Relations Committee ‘Inquiry into the Building and Construction Industry Improvement (Transition to Fair Work) Bill 2009’ (16 July 2009);

Ben Teeger and George Williams, Submission to Electoral Reform Secretariat, Department of the Prime Minister and Cabinet ‘Electoral Reform Green Paper: Strengthening Australia’s Democracy’ (19 October 2009).

**Jane McAdam**

Submission to Senate Standing Committee on Legal and Constitutional Affairs’ Inquiry into the Migration Amendment (Complementary Protection) Bill 2009 (28 September 2009).

**George Williams**

Submission to Parliament of New South Wales Joint Standing Committee on Electoral Matters, ‘Inquiry into Public Funding of Election Campaigns’ (9 December 2009);

Submission to ACT Legislative Assembly Standing Committee on Justice and Community Safety, ‘Inquiry into Campaign Finance Reform’ (8 December 2009);

Submission to Constitution Committee, House of Lords, United Kingdom Parliament, ‘Inquiry into Referendums in the UK’s Constitutional Experience’ (26 November 2009);

Submission to Senate Standing Committee on Foreign Affairs, Defence and Trade, ‘Inquiry into Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008 [No 2]’ (22 September 2009);

Submission to ACT Department of Justice and Community Safety, ‘Review of the Human Rights Act 2004 (ACT)’ (26 August 2009);

Submission to House Standing Committee on Procedure, ‘Inquiry into the Effectiveness of House Committees’ (22 June 2009).
Centre Staff at Christmas Party
Ten-Pin Bowling

CENTRE PERSONNEL

Director

Andrew Lynch, Associate Professor, LLB (Hons) LLM QUT, PhD UNSW

Administrator

Belinda McDonald, BA UNSW

Foundation Director

George Williams, Anthony Mason Professor, BSc LLB (Hons) Macq, LLM UNSW, PhD ANU

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Emily Crawford, Research Associate, BA (Hons) LLB PhD UNSW
Ben Golder, BA (Hons) LLB (UNSW) PhD Lond
Paul Kildea, Research Associate, BA (Hons) LLB UNSW
Jane McAdam, Associate Professor, BA (Hons) LLB (Hons) Syd, DPhil Oxon,
Nicola McGarrity, Research Associate, BA (Hons) Syd, LLB (Hons) Macq
Christopher Michaelsen, Research Fellow, Dipl.Jur. Hamburg, LLM UQ
Theunis Roux, Professor, BA (Hons) LLB (Cape Town) PhD (Cantab)
Edward Santow, Senior Lecturer, BA LLB (Hons) Syd, LLM (Hons) Cambridge
Rebecca Welsh, Research Associate, BA LLB (Hons) Wol
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Tony Blackshield, Adjunct Professor, LLM Syd
Megan Davis, Senior Lecturer, BA LLB UQ, LLM ANU
Arthur Glass, Associate Professor, BA LLB PhD Syd
Cassandra Goldie, B Juris LLB (Hons) UWA, LLM Dist UCL, PhD UNSW
Janice Gray, Senior Lecturer, BA LLB Dip Ed MA UNSW
Devika Hovell, PhD Program, Balliol College, BA LLB(Hons) UWA, LLM NYU
Jill Hunter, Professor, BA LLB UNSW, PhD Lond Syd
Garth Nettheim, Emeritus Professor, LLB Syd, AM Tufts
Richard Potok, Visiting Fellow, BComm LLB UNSW, BCL Oxon
Rosemary Rayfuse, Professor, LLB Queens, LLM Cantab, PhD Utrecht
Alex Reilly, Associate Professor, University of Adelaide, BA (Juris) UNSW, LLB (Hons) Adel, GDLP SA, LLM British Columbia
Ben Saul, Senior Lecturer, University of Sydney, BA (Hons) LLB (Hons) Syd, DPhil Oxon
Jeremy Webber, Visiting Professor, BA British Columbia, LLB McGill, LLM Osgoode

Postgraduate Students

Justin Carter, LLB(Hons) BLntBus (Griffith) BBusSt (Monash) GradDipLegPrc (College of Law)
Andrew Dahdal, BCom (Ec) LLB (Hons) Macquarie
Dominique Dalla-Pozza, BA (Hons) LLB (Hons) Syd
Jacqueline James, Jacqueline James, AMusA AMEB, LLB (Hons) JCU
Mitchell Landrigan, BA LLB (UNSW), SJD (Syd)
Katherine Lindsay, BA (Hons) MA LLB UQ, LLM Newcastle
Wenwen Lu, LLB SWUFE LLM (Distinction) City University of Hong Kong
Jennifer Norberry, BA(Hons) (Syd); LLB(Hons) (ANU), LLM (ANU)
Soula Papadopoulos, BEc LLB (Syd), LLM (UNSW)
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