

GILBERT+TOBIN

CENTRE
OF
PUBLIC
LAW

Newsletter

July 2010



2011 Constitutional Law Conference and Dinner

Our next Constitutional Law Conference and Dinner will be held on 18 February 2011. Our special guest speaker for the Conference Dinner is Chief Justice Patrick Keane of the Federal Court of Australia.



2010 Constitutional Law Conference first session panel: Professor Gerard Carney, Dr Melissa Perry QC and Centre Director, Andrew Lynch

Dear Friend

Welcome to the second newsletter for the Gilbert + Tobin Centre of Public Law in 2010, letting you know what activities and research Centre staff, students and visitors have been engaged in over the last six months.

As usual, the year began with our annual Constitutional Law Conference, returning to the Art Gallery of New South Wales after a temporary change of venue in 2009. The day attracted many familiar faces, plus a few new ones, from the judiciary, government, the private profession and academia. Our thanks go to all speakers and chairpersons for making this event such a success. A full report is found inside and papers and webcast are available through the Centre's website.

Since the last newsletter, the Centre has established two new projects. The first is the Public Law and Legal Theory Project directed by Dr Ben Golder. This project draws on Ben's strengths in contemporary political theory, legal philosophy and legal theory to develop connections with the fundamental public law concerns of the Centre. He outlines the project's aims inside as well as the details of a very impressive line up of speakers for the project's inaugural seminar series to be held at the Law School over the next six months.

The second project is co-directed by Professor George Williams and Paul Kildea and is dedicated to research on referendums as a mechanism for constitutional reform in Australia. The project is obviously timely given that both major political parties have recently voiced their intention to hold referendums on various issues. A book on the history of referendums in Australia, co-authored by George Williams and Centre Associate David Hume, is due out in a few weeks from UNSW Press.

Other projects are in the process of change. For instance, the Centre's previous High Court Project has been renamed the Judiciary Project to better reflect its wider interest in issues of judicial appointment, complaints and removal, though it will continue as a site for much of the Centre's work on the High Court itself.

More significantly, the Centre's Terrorism and the Law project has reached the conclusion of its initial five years of funding by the Australian Research Council. Since its establishment in 2005, this project has been

There are legitimate concerns about people travelling on sometimes unseaworthy boats to seek asylum. However, freezing processing does not affect the root causes of movement or deter people whose lives are at risk, in the same way the so-called Pacific solution did not address the fundamental reasons for flight, either. However frustrating it may be for governments, refugee solutions do not work to election timetables.

Jane McAdam and Kerry Murphy, 'Refugee Processing Freeze Breaches International Law' *The Australian* (14 April 2010)



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an extraordinarily successful part of the Centre's research program. It has supported the production of four authored or edited books – including the just released *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010), co-edited by Nicola McGarrity, George Williams and myself. Additionally, the project has resulted in seven book chapters, 26 refereed journal articles (and a further 17 non-refereed articles and notes), over 90 conference and seminar papers, 87 opinion pieces and countless other contributions to public debate through the media. Various members of the Centre made 25 submissions to independent and parliamentary inquiries examining draft laws prior to enactment or reviewing existing ones in operation. We were invited to give oral evidence to many of these inquiries. In our written submissions and oral evidence, we tried to suggest how Australia might develop anti-terrorism laws which simultaneously protect the community from the harm threatened by terrorism while respecting foundational principles such as the rule of law and the protection of human rights.

This work goes on. The Centre's most recent submissions include those made to the Senate Committee on Constitutional and Legal Affairs' Inquiry into the National Security Legislation Amendment Bill 2010. The Centre questioned the assertion that more substantial reform was hindered by the scope of State referrals of power in the area, challenged the limited nature of the reforms that were attempted given the more ambitious range of the earlier government Discussion Paper and was critical of the insufficient attention given to civil liberties considerations and international human rights obligations in formulating the Bill.

The Centre's project will continue, and is now linked to the major Laureate Fellowship on Anti-Terror Laws and the Democratic Challenge obtained by Professor Williams in 2009. But as the first phase of the project draws to a close and we move to the next, it is appropriate to recognise with gratitude the involvement of Dr Ben Saul (now Co-Director of the Sydney Centre for International Law), Dr Ben Golder and Edwina MacDonald in the early years of the project and, in more recent times, that of Dr Christopher Michaelsen and Nicola McGarrity. Nicola, as Project Director since 2008, deserves particular thanks for her energy and enthusiasm – she has been integral to the Centre's work in this field and we are delighted that she is staying on for the project's next exciting chapter.

Associate Professor Andrew Lynch Director



Chief Justice
Robert French,
dinner speaker
at the 2010
Constitutional
Law Confer-
ence Dinner

CENTRE ACTIVITIES

2010 Constitutional Law Conference



2010 Constitutional Law Conference

On 19 February 2010 the Centre, with the support of the Australian Association of Constitutional Law, hosted its ninth annual constitutional law conference.

The opening speakers on the day, Dr Melissa Perry QC and Professor Gerard Carney, reviewed the key themes of 2009 constitutional law decisions in, respectively, the High Court and the Federal and State Courts. Sustained attention was then given to a trio of the High Court cases – *Wurridjal v The Commonwealth*, *Clarke v Commissioner of Taxation* and *Lane v Morrison*.

As has become customary, the pace after lunch changed with the third session given over to more speculative discussions about current constitutional issues. The future use of privative clauses, the challenge of States' claims of constitutional rights to water and the scope of the marriage power to support same-sex unions were all under the spotlight.

The final session of the day was a panel discussion between Mr Bryan Pape, Ms Gabrielle Appleby and Senator George Brandis SC on arguably the major High Court decision of 2009, *Pape v Commonwealth*. The lively and frequently amusing session was presided over by Sir Anthony Mason AC KBE as chair.

The day's proceedings were followed by dinner at NSW Parliament House. The guest speaker at the dinner was Chief Justice Robert French of the High Court of Australia who spoke on 'Theories of Everything and Constitutional Interpretation'. A copy of Justice French'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>.

Between the conference and dinner, attendees toasted the launch by the Hon Michael McHugh QC AC of the fifth edition of Tony Blackshield and George Williams' *Australian Constitutional Law and Theory*. From the first edition in 1996, this textbook has enjoyed critical acclaim and strong support from across Australian law schools and the profession. And for those that missed the launch – yes, there was a Blackshield song to mark the occasion!



CENTRE COMMENT

Health Reform and Federalism

The developments in health reform over recent months are an interesting example of when short-term politics starts to drive policy at high



Centre Director, Andrew Lynch



acceleration. While in some instances, the firm and decisive prosecution of a new approach may provide the necessary thrust to shift policy forward from an impasse, it may just as likely upset a carefully considered reform process that is already in train and expected to yield benefits over the long-term. The former Prime Minister's aggressive and substantially successful (characteristically, Western Australia remains obdurate) pitch for major reform of Australian hospitals and healthcare in April this year is an example of this phenomenon. It was striking how little attention was given in that recent debate to the existence of the 2008 National Healthcare Agreement and how it aims to lift the health of Australians within a generation.

The outcome of the Council of Australian Governments (COAG) meeting in April whereat the Commonwealth assumed the primary responsibility for health funding, largely through retention of 30% of the GST revenue it would normally pass on to the States was certainly a game-changer, though hardly in the momentous sense of the Obama administration's victory in finally securing public health insurance in the United States. Despite attempts to beef up the rhetoric about this 'historic' and 'very, very big' reform, it seems fair to say that the deal done at COAG was not what many in the public thought Rudd meant when he talked about 'taking over' health and hospitals as part of ending the 'blame game' in the 2007 election campaign. Although the injection of immediate funds to the hospital system was undeniably welcome, much of this was but a sweetener in order to obtain State agreement to the conditions upon which the Commonwealth was to become the dominant funder (60%) of public hospitals. The benefits of altering the underlying financial arrangements in this way were perhaps not as readily apparent as the Prime Minister would have liked.

The Federal Opposition and several commentators insist that the changes will do little in promoting actual improvements to healthcare in this country. Indeed, the objective of ending the 'blame game' seems poorly served by a plan in which not only do the States still bear substantial funding responsibilities but also play a role in the management of the seven separate National Health and Hospitals Networks, one in each state or territory. The addition of another tier of decision-making – that of Local Hospital Networks – compounds the sense in some quarters, that this is a complicated, overly bureaucratic scheme. The Commonwealth's generally limited experience of efficient service delivery, relative to that of the States, is also given by many as a reason for pessimism.

As has been pointed out by several commentators, Rudd brought much of this on himself through raising expectations before winning office and then failing to resist opposition pressure for health reform on an artificial timetable. For despite the sudden urgency with which the Prime Minister raised the issue earlier this year and his bullying of the States with the threat of a referendum (but on what question no one was precisely sure), the Rudd government put in train a sober, comprehensive and co-operative health agenda in its earliest days in power which is only now coming into its own. The Intergovernmental Agreement on Federal Financial Relations (the IGA) made in late 2008 reduced over 90 existing Commonwealth specific purpose payments (SPPs) to the States to just five, which were tied to national agreements in key policy areas including health, education and skills. The National Healthcare SPP was by far the largest. Unlike earlier funding models, the new SPPs allocate money to the States not encumbered by conditions as to how they are to be spent but on the achievement of



Centre staff and PhD Students at the Book Launch



Book Launch by the Hon Michael McHugh of the new edition of Blackshield and Williams *Australian Constitutional Law and Theory*



specific outcomes. Success in meeting these targets is to be measured by the COAG Reform Council (the CRC) which reports back to the governments on progress.

Significantly, the first baseline report on the performance of the States under the National Healthcare Agreement was released by the CRC on 30 April, just days after the new health reforms were settled at COAG. Although the CRC acknowledged those changes in its report and it retains the same reporting function pursuant to the Agreement, it seems strange that major changes in health funding were pushed by the Commonwealth before even the first cycle of the 2008 IGA could be reported on. The Commonwealth’s new role as the major direct funder of core areas of health-care and the way in which the National Health and Hospitals Network is to operate also has implications for the capacity of the States to experiment and innovate to develop best practice, which had been the intention behind the 2008 Agreement.

Interestingly, the Prime Minister made no reference to the way in which his government had worked with the States since 2008 to construct a funding framework tied to specific targets so as to improve the health of Australians over the longer term. Presumably that method of governance lacks the dramatic spectacle that we saw instead in April. It certainly unfolds over a much longer period than a single electoral cycle, which may account for its unattractiveness in a political sense.

However, it is arguable that Australia’s federal system demands that reform be in just this style and of this pace. Rather than seeking to end the ‘blame game’ through yet further centralisation – which is rarely comprehensive in any case, the solution instead is to accept the division of constitutional powers and expect that all Australian governments will work co-operatively with each other in the national interest. The 2008 IGA was a shining example of this very thing – a truly ‘historic’ moment in Australian federalism - but in April it was by-passed by an approach to reform that involved piecemeal release of policy detail and appeared premised on confrontation. The outcome of the latter fails to capitalise on the strengths of policy innovation and diversity that are the indicia of an optimal federal system. Even worse, in consenting to the loss of a third of the GST revenue, the majority of the States have allowed a precious covenant to be broken – threatening the financial certainty the Howard government granted them in 1999.

As ever, discussions about problems with Australia’s federal system inevitably return to the difficulty of vertical fiscal imbalance between the Commonwealth and the States. The need for health reform was driven by the States’ forecast inability to carry their present load of the funding as costs blow out. It was ironic that a solution was being sought at the same time as a review of taxation in this country. That a major shake-up of the taxing powers of the two tiers of government, freeing up avenues of independent revenue to the States, might have furnished the solution to the underlying problem of funding Australian healthcare into the future was something no one was prepared to raise.

Some federal reform appears just too ‘very, very big’ to contemplate.

Andrew Lynch

CENTRE PEOPLE

Centre Visitors

Denise Meyerson – Macquarie University



Centre Visitor Denise Meyerson

It has been a pleasure to be attached to the Gilbert + Tobin Centre during a semester of Outside Studies leave from Macquarie University and I would like to thank Andrew Lynch for hosting me as a visitor. I spent the first three months of my time at the Centre finishing a book entitled *Jurisprudence*, which will be published by Oxford University Press in 2011. I spent the following month in the United States and Germany, where I gave two public lectures, one entitled 'Human Rights and Religion: Conflict or Convergence?' and the other entitled 'Confining Dangerous People: Why the Interest in Liberty Should not be Balanced against the Interest in Public Safety'. I also gave a class on comparative human rights protection to human rights students at the Valparaiso Law School and contributed to a colloquium on the challenges in legal education, where I addressed the issue from an Australian perspective.

I spent the rest of my time at the Centre working on other projects in the area of public law and its philosophical underpinnings, including a project on the concept of state neutrality and the justifications for it. I presented a paper on this topic to the Law Faculty staff seminar. I will also be speaking to postgraduate students on the use of a philosophical approach to public law at the Gilbert + Tobin Centre Postgraduate Research Student Conference in July. Last but not least, I have very much enjoyed attending the excellent seminars put on by both the Centre and the Faculty. Needless to say, the time has gone too fast but I look forward to fruitful interactions in the future between Macquarie Law School and the Gilbert + Tobin Centre.

Denise Meyerson

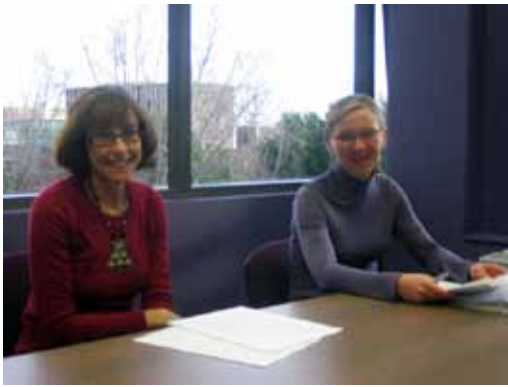
Svetlana Tyulkina – Central European University

First of all I want to thank the Gilbert + Tobin Centre for having me as a Visiting Fellow. I had a busy and very enjoyable time here. It was great and very inspiring for me to be part of the Centre's community and I look forward to having another chance to meet all the people again.

Currently I am working on a PhD dissertation which focuses on the concept of militant democracy. In my research project I attempt to widen the area of the application of the doctrine and argue for the possible application of the logic of militant democracy beyond its traditional boundaries. I claim that the 'war on terror' and problems with existing and developing religious fundamentalist movements could be more successfully addressed within the conceptual framework of militant democracy.

My stay with the Gilbert + Tobin Centre has been in order to investigate the Australian and Asia-Pacific region anti-terrorism policies and legislation to test my hypothesis about use of the militant democracy logic in the





Centre Visitors Denise Meyerson, Macquarie University and Svetlana Tyulkina, Central European University

so-called ‘war on terror’. Australia is widely criticized for its anti-terrorism regime for many reasons (though I was most interested in the areas of potential problems from a constitutional law perspective) and that is why this case study is extremely important and useful for my project. As a result of my research I am planning to write a separate chapter for my dissertation where I will argue that Australia could protect and defend its democratic regime better from terrorists if it follows the militant democracy logic. Democracy is a fragile item and it is easy to harm it from the inside (even while meaning to protect it). I do not argue that militant democracy is a universal panacea and once it is applied everything will change and go back on track overnight. But I believe that the militant democracy concept would help to address at least some of the serious concerns with Australia’s anti-terrorism regime and make it more consistent with the major democratic principles like the separation of powers, rule of law and strong human rights protection.

The Gilbert + Tobin Centre treated me wonderfully and I had an opportunity to meet and talk to the enthusiastic professionals from the field as well as a chance to attend Law School and Centre meetings and seminars. My research is still ongoing but I look forward to sharing with the Gilbert + Tobin Centre my findings and conclusions.

I am very grateful to the Centre and to the Law School for giving me a chance to come and stay here, do my research and meet people working at the Centre and discuss my project with them.

PhD Report

Wenwen Lu

Topic: Terrorism and National Security in Australia: International Human Rights Perspectives and Comparative Study with Other Asian Countries

In March last year, I was admitted as a Masters by Research student at UNSW and began to do my first research degree under the supervision of Professor Andrew Byrnes and Associate Professor Andrew Lynch.

Over the last thirteen months, I have spent my time writing my research thesis which is a comparative study of the laws of preventative detention in Australia, Malaysia and Singapore. Except for the Hilton Hotel bombing in 1978, Australia has not so far been subject to a successful terrorist attack carried out on its own soil by extremists. After 9/11, Australia, like much of the world, has been greatly unsettled by the several terrorist events, especially the tragedies in Bali and London. Since 2002, the Commonwealth Parliament has enacted more than forty counter-terrorism laws. Malaysia and Singapore, on the other hand, took a slightly different method, relying heavily on previous laws to protect national security which have been used for many years in combating domestic terrorism. Malaysia’s Internal Security Act and Singapore’s Internal Security Act have been used by both states as the most important weapon in countering terrorism which were both originally designed to protect Malaysia and Singapore from the threat of communism in times of emergency four decades ago. This thesis explores one of the options currently being taken by the four states: the use of ‘preventative detention’ to hold suspected terrorists. As a general



The White Paper discusses control orders and preventative detention orders in very positive terms but these are deeply invasive of rights and of negligible value (no Australian is subject to either order at present). These are not so much 'effective legal powers' as clear examples of superfluous controls introduced by the State under the cover of the terrorist threat. Their continued availability is itself a danger to liberal democracy in this country.

Andrew Lynch, 'Curious case of the white paper', *The Drum - Unleashed*, ABC Online (24 February 2010)

Centre PhD Student Wenwen Lu
with Centre staff Sean Brennan and
Nicola McGarrity



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rule in many jurisdictions, individuals should not be detained beyond an initial short period of time except after being convicted by a judge or as part of the judicial process, such as when a person is held in custody pending a bail hearing. By inserting the preventative detention scheme in the context of anti-terrorism laws, now terrorism suspects might be detained for a considerably longer period of time without any criminal charges. This represents a considerable derogation from the liberty principles that prevail in traditional legal regulation and are highly problematic in relation to fundamental human rights – the right to liberty and the right to a fair trial respectively. Despite the criticism, however, preventative detention schemes are upheld by governments as a justifiable and effective measure against the threat of terrorism. My thesis seeks to broaden the ongoing debate about 'preventative detention' by comparing the domestic policies of the three states at the horizontal level – the similarities and differences between them and also rethinking the 'preventative detention' scheme from an international law perspective. I will compare the domestic policies with an international standard which is distilled from international human rights conventions and customary international law. Having finished the description of the laws of preventative detention in the three states and the relevant international human rights laws applicable to these regimes, I am working towards finishing my first draft in August and submitting the final version later this year.

I have also delivered several conference presentations over the last year. In two Postgraduate Research Students Conferences held by ANU and University of Sydney respectively, I discussed my thesis with other research students and presented thesis chapters concerning the definition of terrorism in international law and domestic jurisdictions. At the international constitutional law conference held by City University of Hong Kong in October last year, I gave a paper about how the intentional element in the definition of terrorism influences core rights and liberties in constitutional law. There, I compared four countries – Australia, Hong Kong, Malaysia and Singapore and unsurprisingly found that the intentional element as well as the quite broad domestic definitions of terrorist act might pose dangers to established constitutional rights.

Last year has been a wonderful time for me. Before arriving in Australia, I never thought I could have had such a good opportunity to know in depth the Australian legal system – as well as the lifestyle here. The path to my thesis has been an absolutely worthwhile experience.



Social Justice Intern Report

As the intern at the G+T Centre of Public Law for Semester 1 2010, I had the opportunity to engage in a variety of tasks on a number of different areas of public law with several of its academic staff members. It has been a challenging and rewarding experience that provided opportunities for research and writing that would not have been available in an ordinary undergraduate law course.

Much of my time at the Centre was spent assisting with a submission to the Senate Legal and Constitutional Affairs Committee on the National Security Legislation Amendment Bill 2010 (Cth). The Bill introduces numerous changes to many Acts concerned with terrorism and national security. My work involved comparing the Bill to the 2009 National Security Legislation Discussion Paper on Proposed Amendments and noting the differences between the two. I also had the opportunity to read the submissions made to the Attorney General's Department concerning the Discussion Paper, summarising the arguments made by various groups regarding several key areas.

I also co-authored a submission to the Legal and Constitutional Affairs Committee with Professor George Williams regarding the constitutional validity of the Wild Rivers (Environmental Management) Bill 2010 [No 2]. The Bill was introduced by Senator Nigel Scullion in response to the Queensland Wild Rivers Act 2005, which provides for the creation of conservation zones in the Cape York region. The Bill purports to ensure that declarations under the Queensland Act do not encroach upon the ability of Native Title holders to pursue economic development on their traditional lands.

In addition to assisting with submission writing, I worked with Paul Kildea on the Federalism Project and updating the resources on the Project's web page. It was a task that involved researching some of the basics of federalism, including the process of Federation in Australia and some of the strengths and weaknesses of federal systems of government, as well as looking at contemporary issues in Australian federalism, particularly the National Health and Hospitals Network Agreement on health and hospital reform reached at the most recent COAG meeting in April.

I have thoroughly enjoyed my time at the Centre. It has been an invaluable experience that has greatly enhanced my understanding of many important public law issues in Australia. I would like to thank the Centre staff for their guidance and feedback.



Centre Social Justice Intern Emily Collett



PROJECT REPORTS

Charter of Rights

Project Director: Edward Santow



The Hon George Brandis SC at the 2010 Constitutional Law Conference

In April 2010, the Australian Government released its long-awaited response to the National Human Rights Consultation Report. The Consultation, which was chaired by Father Frank Brennan AO, recommended the introduction of an Australian Human Rights Act, as well as reforms to administrative law and the improvement of human rights education.

The Government's response, the Human Rights Framework, deferred further official consideration of many of these recommendations until at least 2014. In particular, the Government opted not to introduce a Human Rights Act or Charter, on the basis that such a reform might prove divisive within the Australian community.

The Human Rights Framework outlines three main changes in the Australian Government's approach to human rights. First, the Government proposes to improve the system of pre-legislative scrutiny of Bills against human rights standards. At the centre of this new system will be a requirement to accompany each new Bill with a 'statement of compatibility', outlining the Bill's compatibility with the seven key human rights treaties to which Australia is a party. This system will be overseen by a new parliamentary committee of both Houses of Parliament, the Joint Committee on Human Rights.

Secondly, the Government will formulate a National Action Plan that will be designed to give greater priority to human rights in the public service, including through changes to training of public servants and amendments to the Australian Public Service Values or Code of Conduct. Thirdly, the Government will introduce new measures to improve how Australians learn about human rights, by making this part of the new national school curriculum and giving the Australian Human Rights Commission and non-government organisations additional funding to teach people about rights.

Academic and public responses to the Human Rights Framework have been mixed. While there is general support for the positive measures announced, there is a marked divergence of opinion over the decision to eschew a Human Rights Act or other such legislative reform. That divergence no doubt reflects the strong views expressed on both sides of this debate during the National Human Rights Consultation.

The Centre has remained active in this debate, with Centre members contributing numerous academic articles, speaking at conferences and public forums, and providing media commentary. In June 2010, the Centre co-hosted its fourth Human Rights Act Roundtable with the Australian Human Rights Commission. The roundtable brought together a large number of human rights experts to debate the Human Rights Framework with representatives of the Attorney-General's Department, and to consider how those supporting enhanced legislative protection of human rights should respond to the Government's announced position regarding a Human Rights Act.



Federalism Project

Project Director: Paul Kildea

Talk of independence by Western Australia comes and goes. However, it remains as likely to be achieved as another old chestnut of our Federation, namely, the idea that the States themselves should be abolished.

George Williams, 'Too Rich, Too Weak to Succeed Seceding' *Sydney Morning Herald* (11 May 2010).

Australia's federal structure continues to shape the way in which governments address major policy issues. This was no more evident than in the months leading up to the Council of Australian Governments (COAG) meeting on health reform in April. At that meeting all States except Western Australia agreed to transfer 30 per cent of their GST revenue to the Commonwealth, making the federal government the dominant funder of Australia's hospital system. They also agreed to a restructure of public hospitals that will see them managed by local hospital networks. The negotiations leading up to the meeting constituted a major test of the ability of Australia's century-old federal system to deal with significant contemporary issues, and Centre members contributed to a variety of print and broadcast media reports on the subject. The process also demonstrated the centralist tendencies of the COAG framework, a point picked up by Paul Kildea and Andrew Lynch in an opinion piece published at the time.

Contemporary issues also continue to drive the Project's research agenda. In March, Andrew Lynch delivered a public lecture at the ANU College of Law on the Commonwealth's use of the referrals power in the passage of the *Fair Work Act 2009* (Cth). This paper forms part of the Project's broader research into the operation of the referrals power, and the effectiveness of intergovernmental mechanisms in general. This wider research program includes an inquiry into the operation of COAG, and in particular whether it would function more effectively if its status and practices were more formally institutionalised, either in the Constitution or through some other arrangement.

The Project is also conducting research into the constitutional legal issues that arise in relation to debates about health reform and water management. In early June, Paul Kildea, Andrew Lynch and George Williams made a submission to the Senate Standing Committee on Environment, Communications and the Arts' inquiry into the Water (Crisis Powers and Floodwater Diversion) Bill 2010. This private members' bill, sponsored by Senators Nick Xenophon and Sarah Hanson-Young, seeks to invest the Murray-Darling Basin Authority with enhanced powers during times of 'extreme crisis'. The Project's submission focused on the constitutional issues arising from the Bill, and also sought to place it in the context of the cooperative arrangements currently in effect across the Murray-Darling Basin.

The Project also continues to collaborate with Professor Neil Warren of ATAX, whose research covers the fiscal side of intergovernmental relations, and addresses recent developments such as the Henry Tax Review and the review of the Commonwealth Grants Commission's assessment framework.

Indigenous Legal Issues

Project director: Sean Brennan

Work has continued on the intersection between constitutional law and indigenous property rights. In March, Sean presented a detailed paper to the Australian Association of Constitutional Law seminar series in Sydney, in a session chaired by former Chief Justice Murray Gleeson, with commentary





‘Forced Displacement, Protection Standards, and the Supervision of the 1951 Convention and 1967 Protocol and Other International Instruments’ conference, York University, Toronto, May 2010
(front row, L to R: Sharon Aitken, Barbara Harrell-Bond, James Simeon, Jane McAdam, Justice Tony North)



from Justices John Basten and Jayne Jagot of the NSW Supreme Court and Federal Court respectively.

The paper commenced with a review of four native title and land rights decisions from the High Court delivered in 2008-2009. It then expanded to a longer-range review of judicial decision-making in these two distinct but comparable bodies of law, distilling views that have developed over several years of research and teaching in these areas.

Sean has also continued postgraduate research student supervision in these areas, working with doctoral and LLM candidates on projects spanning from tenure reform under the Northern Territory land rights regime, to the tax treatment of Indigenous organisations, to customary property rights in Malaysia.

International Refugee and Migration Law Project

Project Director: Jane McAdam

Since the last report, there has been activity on a number of different aspects of the project. The project has benefited greatly from the dedication of a number of excellent research assistants. Over the past six months, Matthew Albert, Rebecca Zaman and Trina Ng have worked variously on climate change displacement, issues pertaining to freedom of movement, and complementary protection. As Project Director, I would like to thank each of them for their time and research. In particular, I would like to thank Dr Emily Crawford for her excellent work during 2009 as the Research Associate for this project. Her experience, commitment and skills were a tremendous asset, and I wish her all the best in her new role as a postdoctoral researcher in the UNSW Law Faculty.

Climate change displacement

The first book from the Australian Research Council grant ‘Weathering Uncertainty: Climate Change “Refugees” and International Law’ is currently in press. It is: Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing, Oxford, 2010). This is the first multidisciplinary book to consider the impacts of climate change on human movement and the challenges they present to law and policy. It brings together the work of researchers from a variety of disciplines – geography (political, economic and human), sociology, law, political economy, moral philosophy, public health, medical anthropology, epidemiology, psychiatric epidemiology, international relations and psychology – to identify the key issues that need to be considered in shaping domestic, regional and international responses. This includes consideration of the complex causes of such movement, the conceptualisation of migration responses to climate change, the terminology that should be used to describe those who move, and attitudes to migration that may affect decisions to stay or leave.

As Project Director, I will spend part of June in Bangladesh and India undertaking field work on this issue. Findings from this trip will form the basis

The calls in Western Australia for independence should be met with a renewed effort to produce a federation that better serves the needs of the people of every state.

George Williams, 'Too Rich, Too Weak to Succeed Seceding', *Sydney Morning Herald*, 11 May 2010.



of an article for the *German Yearbook of International Law*, to be published later this year. While away, I will present a lecture on climate change, displacement and international law to law students at BRAC University in Dhaka.

Australian asylum policy

In light of the recent changes to Australia's asylum policy, I commented on radio and in the print media about legal concerns relating to the freeze on processing of new asylum claims by Sri Lankan nationals for three months and by Afghan nationals for six months. In particular, I raised concerns about potential breaches of the principle of non-discrimination under international human rights law, the prohibition on arbitrary detention, and rights of due process.

I also recorded a podcast interview with Australia's Race and Disability Relations Commissioner, Graeme Innes, on Australia's international law obligations to refugees.

Bassina Farbenblum, who runs the Migrant and Refugee Rights Project at the Australian Human Rights Centre at UNSW, and I made a joint submission to the Senate Inquiry into the Anti-People Smuggling and Other Measures Bill 2010. The stated purpose of the Bill was to 'strengthen the Commonwealth's anti-people smuggling legislative framework' by ensuring 'that people smuggling is comprehensively criminalised in Australian law'. We argued that the Bill was so broadly drafted that it encompassed not only organized criminal people smuggling networks, but also individual asylum seekers and their families. In our view, the Bill overlooked that fact that 90 per cent of people smuggled into Australia are found to be Convention refugees, and that people smuggling responds to a gap in lawful migration pathways for those whose lives are at risk. The only way to stop the boats, and to stop smuggling, is to expand authorized avenues through which those refugees may obtain Australia's protection. Furthermore, we submitted that 'people smuggling' was defined in the Bill in such wide terms that it encompassed cases of rescue-at-sea (which ship captains have an obligation under international law to effect, in certain circumstances) and airlines that inadvertently transport undocumented passengers to Australia. Although our submission was frequently cited in the Committee's report, the Committee did not recommend substantial changes to the Bill.

International initiatives

I was one of 20 people invited by the United Nations High Commissioner for Refugees to attend a two-day expert meeting on the concept of 'statelessness' in international law, held in Prato in May. I was also engaged by the UK Ministry of Justice as a consultant on issues relating to migration and international protection.

As part of my collaborative international project with scholars from the UK, US and Canada, I attended the 'War Crimes and Refugee Status Research Workshop' at York University, Toronto on 17 May. That was followed by an international conference on 'Forced Displacement, Protection Standards, and the Supervision of the 1951 Convention and 1967 Protocol and Other International Instruments', also at York University, where I chaired a session on 'Judicial Experience in Supervising the 1951 Convention and its 1967 Protocol'.

We are very fortunate that three of the collaborators on the 'war crimes and refugee status' project will be visiting the UNSW Law Faculty in second semester—world-renowned refugee law scholars Professor Guy Goodwin-Gill from the University of Oxford, Professor Geoff Gilbert from the University of Essex, and Professor Kate Jastram from Berkeley. Details of events we will be hosting during their visit will be available on the UNSW Law and Centre websites closer to the time.

Public Law and Legal Theory Project

Project Director: Ben Golder



Ben Golder and Professor William MacNeil,
Griffith University

The Public Law and Legal Theory Project at the Centre is a new project which has just started this year. The aims of the project are to use the conceptual resources of contemporary political theory, legal philosophy and critical legal theory to examine some of the foundational concerns of the Centre's work in the area of public law – for example, sovereignty, democracy, human rights, counter-terrorism, the liberty/security balance, and many other areas. The intention is to link together with and to contribute to existing Centre projects (for example, the new Laureate Fellowship on Anti-Terror Laws and the Democratic Challenge; Terrorism and Law; Charter of Human Rights) by exploring their implicit concerns through theoretical reflection and inter-disciplinary dialogue.

One of the first events organised under the Public Law and Legal Theory Project is a Seminar Series which is to take place in Semester 2, 2010. All seminars will take place on a Thursday throughout the teaching semester, from 1.00pm-2.00pm in the Staff Common Room in the Faculty of Law (with lunch provided). The schedule, which features a mix of national and international speakers from a range of legal and extra-legal (history, sociology, philosophy, politics) backgrounds, is as follows:

Thurs 22nd July, 1-2pm: Dr Tom Poole (London School of Economics)
Thurs 29th July, 1-2pm: Dr Illan Wall (Oxford Brookes University)
Thurs 16 September, 1-2pm: Dr Fleur Johns (Sydney University)
Thurs 23rd September, 1-2pm: Dr Kevin Walton (Sydney University)
Thurs 30th September, 1-2pm: Dr Lisa Ford (University of New South Wales)
Thurs 7th October, 1-2pm: Dr Charles Barbour (University of Western Sydney)
Thurs 14th October, 1-2pm: Professor Gary Wickham (Murdoch University)

Any inquiries about the series, or expressions of interest in presenting in future seminar series from Semester 1, 2011 onwards, should contact the Project Director, Dr Ben Golder (b.golder@unsw.edu.au).

Referendums Project

Project Directors: Paul Kildea/George Williams

The Centre has created a new project exploring the holding of referendums in Australia. Referendums have long been important to the work of the Centre in areas like federalism and Indigenous legal issues, but have not themselves been the subject of sustained attention.



If the Human Rights Framework represents the end of the road for human rights reform in Australia, or if the Government were to continue to pick and choose which features of a Human Rights Act to introduce, the prospect of Australia achieving an effective and comprehensive human rights regime remains remote.

Edward Santow, 'The Act that dares not speak its name: The National Human Rights Consultation Report's parallel roads to human rights reform' (2010) 33(1) *University of New South Wales Law Journal* 8.



The project has been created to examine how Australia has held referendums in the past, whether at the federal, state, territory or local level, and whether those processes can be improved in the future. Australia's referendum legislation has remained mostly unchanged since 1912, with things like the Yes and No case booklets now overdue for revision.

Underlying the project is the notion that Australia's referendum machinery must be in good working order if important changes to the Constitution are to succeed in the future. The project will take no view on what changes to the Constitution might be required, only that the Australian people must be given the chance to vote on such proposals as part of an effective and assessable referendum process.

The first publication of the project was a joint article by Paul Kildea and George Williams on Australia's referendum machinery published in the *Alternative Law Journal*. It was developed out a submission by the authors to a 2009 House of Representatives Standing Committee on Legal and Constitutional Affairs' inquiry into the machinery of referendums. The Committee adopted many of the suggestions put forward in that submission, and delivered a landmark report advocating major reforms to the way that Australia goes about holding referendums in the future.

The next major publication of the project will be a book by George Williams and David Hume entitled *People Power: The History and the Future of the Referendum in Australia*. The book is currently in press and will be published early in the second half of 2010 by University of New South Wales Press. It will be Australia's first book dedicated to the subject, and will analyse the law, history and politics of Australian referendums. The book has been written both for a specialist audience of lawyers and political scientists, as well as for the general public.

Terrorism and Law Project

Project Director: Nicola McGarrity

From March 2002 until the election of the Rudd Labor Government in November 2007, 44 anti-terrorism laws were enacted by the Commonwealth Parliament. Since then, however, there has been a striking absence of anti-terrorism law-making. It was not until 18 March 2010 that another anti-terrorism law was passed by the Parliament.

The Independent National Security Legislation Monitor Act 2010 will create a new statutory office, located within the Department of Prime Minister and Cabinet, to review Australia's anti-terrorism laws on an ongoing basis. Whilst members of the Centre continue to be concerned about the actual and perceived independence of this office from the executive branch of government, its creation is nevertheless an important step forward in ensuring holistic review of Australia's anti-terrorism laws.

On the same day that the above Bill was passed by the Commonwealth Parliament, the National Security Legislation Amendment Bill and Parliamentary Joint Committee on Law Enforcement Bill were introduced. These Bills are the result of the public consultation on the National Security

The federal government has said that its new human rights framework will be reviewed in 2014. This provides the next, realistic opportunity for change. At that time, the case for a national human rights act will be even stronger.

George Williams, 'People with Power Don't Want to Give it up' *Sydney Morning Herald* (27 April 2010).



Legislation Discussion Paper commenced by the Commonwealth Attorney-General's Department in August 2009.

Two aspects of the public consultation process and the Bills are particularly disappointing. First, the Bills can, at best, be regarded as tinkering around the edges of Australia's anti-terrorism laws. They do not, for example, make any amendments to the control order or preventative detention regimes, or seek to narrow the scope of the preparatory or group-based offences. Second, very few of the recommendations made by individuals and organisations during this public consultation have been included in the final version of the Bills. This is particularly evident in relation to the proposal in the National Security Legislation Amendment Bill to place a seven day cap on pre-charge detention. None of the 42 submissions available on the Attorney-General's Department website support this proposal. Instead, 16 of the submissions suggest that the cap should be in the order of one to three days.

These Bills are currently before the Senate Legal and Constitutional Affairs Committee. The Gilbert + Tobin Centre made a written submission to this Committee, and also gave oral evidence before it in May 2010.

The highlight of the year thus far for the Terrorism and Law Project is the release in late May of an edited book titled *Counter-Terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge, Oxford, 2010). This book was edited by Nicola McGarrity, Associate Professor Andrew Lynch and Professor George Williams and grew out of a research roundtable event held by the Centre last year with domestic and international experts.

From July to October 2010, Nicola McGarrity will be taking leave as Project Director. During this period, Nicola will be acting as junior defence counsel for one of five Somali men to be tried before the Victorian Supreme Court for terrorism offences.

PUBLICATIONS AND PRESENTATIONS

PUBLICATIONS

Joint Publications

Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, Annandale, 5th ed 2010);

Paul Kildea and George Williams, 'Reworking Australia's Referendum Machinery' (2010) 35 *Alternative Law Journal* 22;

Nicola McGarrity, Andrew Lynch & George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge, Oxford, 2010);

Andrew Lynch, Nicola McGarrity & George Williams 'The Emergence of a 'Culture of Control'' in N McGarrity, A Lynch & G Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge, Oxford, 2010);

Nicola McGarrity and George Williams, 'When Extraordinary Measures Become Normal: Pre-Emption in Counter-Terrorism and Other Laws' in N McGarrity, A Lynch and G Williams, *Counter-Terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge, Oxford, 2010);

Jane McAdam and Ben Saul, 'An Insecure Climate for Human Security? Climate-Induced Displacement and International Law' in A Edwards and C Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press, Cambridge, 2010) 357;

Francine Johnson and Edward Santow, 'How would an Australian Human Rights Act impact business?' (2010) 38(1) *Australian Business Law Review* 7.

Andrew Lynch

'Terrorists and Bikies: The Constitutional Licence for Laws of Control' (2009) 34 *Alternative Law Journal* 237.

Jane McAdam

'Seeking Asylum under the Convention on the Rights of the Child: A Case for Complementary Protection', reprinted in H Lambert (ed), *International Refugee Law* (Ashgate, Aldershot, 2010).

Nicola McGarrity

Nicola McGarrity, 'Testing Our Counter-Terrorism Laws': The Prosecution of Individuals for Terrorism Offences in Australia' (2010) 34(2) *Criminal Law Journal* 92.



2010 Constitutional Law Conference session 3 panel: Mr Nick Gouliaditis, Professor John Williams, Dr Dan Meagher and Justice Margaret Beazley



In too often making the States complicit in the diminution of their own power, COAG frequently undermines rather than invigorates Australian federalism.

Paul Kildea and Andrew Lynch, 'Healthy Cooperation', *The Drum*, 14 April 2010.



Christopher Michaelson

'A Decade of 1267 Sanctions: Increasing Liability or 'Essential Tool' for the UN's Counter-Terrorism Efforts?' (2010) 33 *Studies in Conflict & Terrorism* 448.

Edward Santow

'The Act that dares not speak its name: The National Human Rights Consultation Report's parallel roads to human rights reform' (2010) 33(1) *University of New South Wales Law Journal* 8;

'Reforming the ADJR Act: Impact on refugee and discrimination law' (2010) 17(3) *Australian Journal of Administrative Law* 118;

George Williams

'The Victorian Charter of Human Rights and Responsibilities' in H Sykes (ed), *Future Justice* (Future Leaders, 2010), 136-150;

'The Legal Silence Surrounding the Death Penalty' in J Healey (ed), *The Death Penalty* (Issues in Society, vol 306, Spinney Press, 2010), 25-26;

'Review: Peter Cane's *Administrative Tribunals and Adjudication*' (2010) 21 *Public Law Review* 44;

'Wisdom of Politicians is Frail Shield for our Rights' in J Healey (ed), *Issues and Opinions* (Vol 1, Spinney Press, 2010), 106.

PRESENTATIONS

Sean Brennan

'The High Court and Aboriginal Land 2008/09 – Constitutional Issues and the Strength of Aboriginal Property Rights', *Australian Association of Constitutional Law Seminar Series*, Federal Court, Sydney, 9 March 2010.

Ben Golder

'On Foucault and Human Rights', Socio-Legal Research Centre, Griffith University, 19 May 2010.

Andrew Lynch

'The Fair Work Act – The Referrals Power Comes to the Rescue Once More', ANU College of Law, Australian Labour Law Associations and Industrial Relations Society of the ACT, Australian National University, Canberra, 24 March 2010.

Nicola McGarrrity

'Constitutional Recognition of Local Government', Meeting of Local Government Managers Australia, Five Dock, 17 June 2010;

'Constitutional Recognition of Local Government', Local Government Association Education and Training Service Governance Seminar, Adelaide, 28 May 2010;



'Australia's Terrorism Trials', UNSW Staff Seminar Series, Sydney, 25 May 2010;

'The Role of the Media in the Counter-Terrorism Context', *Media and Security Culture Symposium*, Melbourne, 26 March 2010;

'What is Terrorism?', Marrickville Peace Group Public Forum, Marrickville, 25 March 2010;

'Intelligence services and law enforcement powers in Australia', Workshop on principles and best practices on the legal and institutional frameworks for intelligence and intelligence oversight in counter-terrorism, Switzerland, 2 March 2010.

Christopher Michaelson

'Banning the Burqa? A Human Rights Perspective', *46th Annual Congress of the Australian Federation of Islamic Councils*, Sydney, 16 May 2010;

'Human Rights and Counter-Terrorism in Theory and Practice', *51st Annual Convention, International Studies Association*, New Orleans, USA, 19 February 2010;

'The Authority of the Security Council to Sanction Individuals', *51st Annual Convention, International Studies Association*, New Orleans, USA, 18 February 2010.

Edward Santow

'Who's afraid of unelected judges? A positive case for increasing the judicial role in human rights protection', NSW Bar Association, *Constituting Law: Law's Dependence on Social Values*, Sydney, 1 June 2010;

'Human rights law in Australia', Public Interest Advocacy Centre seminar *Law for Non-Lawyers*, Sydney, 1 June 2010;

'Striking a balance between anti-terrorism laws and civil liberties', Future Summit 2010, Melbourne, 24 May 2010;

'Administrative decision making and the human rights lens', Excellence in Government Decision-making Course, University of Sydney, 22 March 2010;

'A Human Rights Act for Australia: religion and ethics', Sydney Atheists Group Forum, Sydney, 14 February 2010.

George Williams

'The Constitutional Recognition of Local Government', *2010 National General Assembly of Local Government*, National Convention Centre, Canberra, 16 June 2010;

'The Role of Legislative Support in Anti-Terrorist Policing' Law Week Breakfast, Sydney, 17 May 2010;

'The Communist Party Dissolution Bill and its Aftermath' *Symposium: The Communist Party Dissolution Bill – 60 Years On*, Australian Society for the Study of Labour History, Canberra, 8 May 2010;

The internal dynamic of the High Court at any point is, like most relationships, one which only the participants themselves can fully understand. But we know that when the chief justice changes, the court as an institution is altered.

Andrew Lynch, 'Why does court speak as one voice?', *The Australian*, (19 February 2010)



'Do We Need a Bill of Rights?' Burton & Garran Hall Academic Speaker Series, Canberra, 30 March 2010;

'Would a Bill of Rights Change your Life?' Politics in the Pub, Canberra, 9 March 2009;

'Why do Rights Matter?' *Think Rights Launch/Workshop*, Burwood Council, 2 March 2010;

'The Constitution and the Management of Water in Australia's Rivers' *Supreme and Federal Courts Judges' Conference*, Canberra, 25 January 2010.

MEDIA PUBLICATIONS

Joint Media Publications

Paul Kildea and Andrew Lynch 'Healthy cooperation', *The Drum – Unleashed*, ABC Online (14 April 2010).

Andrew Lynch

Curious case of the white paper', *The Drum – Unleashed*, ABC Online (24 February 2010);

'Why does court speak as one voice?', *The Australian*, (19 February 2010).

Jane McAdam

Podcast interview with Australia's Race and Disability Relations Commissioner, Graeme Innes, on Australia's international law obligations to refugees (for the Australian Human Rights Commission, 27 April 2010);

'Protection for Victims of Torture' *Online Opinion* (27 January 2010).

Christopher Michaelson

'Time for an objective approach to the terrorism threat', *Canberra Times* (26 February 2010).

Edward Santow

Interview on anti-terrorism laws and civil liberties, *Business Spectator* (25 May 2010);

'Human rights reform – an opportunity missed', *National Times* (23 April 2010);

'Presumption of innocence protected', *The Age* (20 March 2010);

'Bill of rights debate clouded by fog of war', *Australian Financial Review* (26 February 2010).

George Williams

Standards Start to Slip Without the Rule of Law' *Sydney Morning Herald* (9 June 2010);

Quite rightly, the Victorian Court of Appeal's decision in *Momcilovic* will provoke public debate in Victoria and elsewhere about how to combat drugs, and how far we're willing to go in winding back fundamental freedoms.

Edward Santow, 'Presumption of innocence protected', *The Age* (20 March 2010).



'Filtering by Computer Fails on Judgment' *Sydney Morning Herald* (25 May 2010);

'Too Rich, Too Weak to Succeed Seceding' *Sydney Morning Herald* (11 May 2010);

'People with Power Don't Want to Give it up' *Sydney Morning Herald* (27 April 2010);

'NZ-Oz Nation: Impossible Dream, or Natural Union?' *The Dominion Post* (New Zealand) (31 March 2010);

'A Nation Girt by Sea – and Divided by it' *Sydney Morning Herald* (30 March 2010);

'The Moral Quandary of Sterilising A Child' *Sydney Morning Herald* (16 March 2010);

'No Death Penalty, No Shades of Grey' *Sydney Morning Herald* (2 March 2010);

'Stuck in an Unfair Federal System' *Sydney Morning Herald* (16 February 2010);

'Change will Only Come if Leaders can Agree' *Sydney Morning Herald* (2 February 2010);

'The Price of Free Thinking' *ScienceHub Australia* (29 January 2010);

'Past Time to Cut Ties with the Monarchy' *Sydney Morning Herald* (20 January 2010).

SUBMISSIONS

Joint Submissions

Paul Kildea, Andrew Lynch and George Williams, Submission to the Senate Environment, Communications and the Arts Legislation Committee 'Inquiry into Water (Crisis Powers and Floodwater Diversion) Bill', 9 June 2010;

Emily Collett, Andrew Lynch, Nicola McGarrity, Christopher Michaelson, Edward Santow and George Williams, Submission to the Senate Legal and Constitutional Affairs Committee 'Inquiry into the National Security Legislation Amendment Bill', 30 April 2010;

Emily Collett and George Williams, Submission to Senate Legal and Constitutional Committee 'Inquiry into Wild Rivers (Environmental Management) Bill 2010 [No 2]', 17 March 2010.

Jane McAdam and Bassina Farbenblum, Submission to Senate Standing Committee on Legal and Constitutional Affairs, 'Inquiry into the Anti-People Smuggling and Other Measures Bill 2010', 16 April 2010.

the most recent land rights cases in the Northern Territory and unfolding legal developments over several decades show us perhaps a higher than anticipated capacity for Australia to accommodate strong-form Aboriginal property rights and decision-making jurisdiction in a legal and practical sense

Sean Brennan, 'The High Court and Aboriginal Land 2008/09', Australian Association of Constitutional Law Seminar Series, Sydney, March 2010.

Sir Anthony Mason and Bryan Pape at the 2010 Constitutional Law Conference



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Andrew Lynch

Supplementary submission to the Senate Legal and Constitutional Affairs Committee 'Inquiry into the National Security Legislation Amendment Bill', 3 May 2010.

Edward Santow

Submission to the Senate Standing Committee for the Scrutiny of Bills, 'Inquiry into the future direction and role of the Scrutiny of Bills Committee' 5 March 2010.

George Williams

Submission to Senate Standing Committee for the Scrutiny of Bills 'Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee', 5 March 2010.





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