A-KHAVARI, AFSHIN
Environmental Principles, Social Constructivism and the Work of International Courts and Tribunals

There are many varied examinations of the legal status and function of environmental principles in the work of international judicial and arbitral tribunals. This work considers this topic from a social constructivist perspective in international relations. It argues against the instrumental nature of politics that often drives conceptions of environmental principles and their normative functions in governance regimes and dispute resolution in particular. It highlights how there are varied and multidimensional expressions of normativity in submissions to international courts and tribunals as well as in the actual judgments and decisions handed down by them. It studies how international judicial and arbitral bodies interpret the political relationships of actors when they are engaging with environmental principles and resolving their environmental disputes. It also examines the role they see environmental principles playing in defining how the conduct of actors needs to be modified.

This work is concerned with two questions in the context of judicial and arbitral tribunal work: whether judicial and arbitral bodies construct principles with abstract and open-textured qualities for particular purposes; and whether they ascribe versions of normativity to environmental principles that can be analysed within a framework that does not prioritise neorealist and neoliberal ideas of how actors form preferences and engage with each other. It aims to argue that the variable and multidimensional role and function of principles is often ignored in assessing the work of these bodies. This is because of the focus of international lawyers on consent, obligation, state practice and opinion juris as the basis upon which actors act normatively and against whom a cause of action can be developed for failure to comply with the norms.

Afshin A-Khavari is a Senior Lecturer with the Griffith Law School.

ABDULLAH, NURJAANAH
Freedom of Religion: Legislating Faith in Malaysia?

Malaysia being a multi-racial and multi-religious country faces constant challenges in the matter of conversion, particularly if it relates to Islam, the official religion of Malaysia. There have been numerous cases before the courts in Malaysia, both the civil courts and the Syariah courts, seeking resolution and remedy. In recent years, these cases have attracted the interest and attention of not only the authorities but also the general public, rightly so as it involved members of the general public. The difficulties arise from the dual legal system in Malaysia. The Muslims are under the jurisdiction of the Syariah courts whereas the non-Muslims are under the civil courts. The issue of conversion carries with it the issues of maintenance, custody, guardianship, property, education and even burial. In short, the question of who has the right to do what arises. The matter comes before the court when the parties cannot resolve these issues. Unfortunately, the law is somewhat unclear, according to some of the judges. The speaker proposes to address the issue of conversion in Malaysia by donning the legal cloak and addressing it strictly from the constitutional and jurisdictional perspectives. The relevant constitutional and statutory provisions will be highlighted. A review of decided cases which span over the last fifteen years will be discussed and analysed. Finally, several proposals will be put forth for consideration and discussion.

Nurjaanah Abdullah is a Lecturer with the Faculty of Law, University of Malaya, Kuala Lumpur, Malaysia.
AGGARWAL, NOMITA
Trafficked Victim's Rights: Indian Scenario
Trafficking and trading in human beings and their exploitation in varied forms by traffickers is one of the most despicable forms of violation of human rights. Irrefutable is the fact that trafficking in women and children, an obscene affront to their dignity and rights, is a gross commercialization of innocent human lives, indulged in by organized criminals. Trafficking violates all known canons of human rights and dignity. In this world of tragic and complex human abuse, women and children form a particularly vulnerable class. In the existing social scenario in India, vulnerability is a product of inequality, low status and discrimination as well as the patriarchal and captivating authority unleashed on women and children, especially the girl child.

Nomita Aggarwal is Dean of the Faculty of Law, University of Delhi.

ALAM, SHAWKAT
The Interface Between Globalisation, Trade & Sustainable Development: Implications For the Development Prospects of the South
The 1987 Brundtland Report and its declaration of the need to strive for both inter- and intra-generational equity has persisted as the foundation of contemporary sustainable development. Beyond its oft-cited definition, the Brundtland Report was also revolutionary in acknowledging the importance of making trade, environmental and social considerations mutually supportive. Through an examination of the provisions of numerous multilateral agreements spanning a range of issues at the trade and environment interface, this paper aims to evaluate the practical success of such an integrative approach in enhancing the development prospects of the South. It is almost universally accepted that free trade based on the equal treatment of all nations constitutes a key tenet of globalisation. However, both the WTO/GATT regime and key international agreements such as Agenda 21 and the Johannesburg Declaration, acknowledge that due to the vastly unequal basis from which developed and developing countries can attempt to engage world markets, special treatment of the latter group is essential if sustainable development through trade is to be achieved. Despite their increasing recognition in discretionary, non-binding treaty clauses and the rhetoric of WTO negotiations, this paper concludes that the principles of preferential treatment for developing countries are typically ignored and in some cases, directly contradicted. This disturbing trend is particularly evident through an array of “green” protectionist measures that have been implemented as a product of the grossly unequal bargaining power asserted by certain developed countries at various trade negotiations. It is concluded that unless a widespread reversal of such disturbing practices occurs, the achievement of intra-generational will remain utterly elusive.

Shawkat Alam is a Lecturer, Centre for Environmental Law, Macquarie University.

ALBURY, REBECCA AND DEBBIE JENSEN
Recent Australian Abortion Debates: Protection and Shame
Abortion holds an ambiguous place in political discourse and social practice. An increasing number of Australians support continuing access to abortion services while at the same time reporting disquiet with the number of terminations in any particular year. Yet the debate rages about the role of the law in the regulation abortion practice. What is at stake in assigning abortion to a particular area of legal regulation – as a part of the crimes act, a part of the health act, a procedure in need of special administrative accountability processes. In this paper we will explore the public commentary raised by the politician-inspired abortion debates of 2004 and 2005. The debate has continued through 2006 with the Therapeutic
Goods Amendment (Repeal of Ministerial responsibility for approval of RU486) Bill 2005 which passed in February 2006 and the on-going discussion of funding for pregnancy counseling services. A recurrent theme in this phase of abortion debates has been an appeal to the politics of shame which has shaped the speaking positions available to participants.

Rebecca Albury is an Associate Professor, School of History and Politics, University of Wollongong, and has a long history of scholarship and activism in women’s health and reproduction politics and policy. Debbie Jensen is a BA(Hons) graduate, Faculty of Arts, University of Wollongong, and is currently a research assistance preparing to begin doctoral studies in Politics.

ALBURY, REBECCA AND LINDA NELSON
Debating Ru486: Deploying Scientific Expertise
In 2006 the Commonwealth parliament reversed a decade old piece of legislation that politicised access to the drug RU486. The debate that preceded the vote in the parliament, a Senate community affairs committee inquiry and public media forum, turned in part, on the protective role of the law. There were several perspectives highlighted in the debates: women’s rights to bodily integrity, doctors’ mandate to practise medicine, the safety of drugs and the fight of all foetuses to life in the context of abortion campaigns. The paper is an exploration of the use of arguments deploying notions of science and scientific expertise in the main arguments used in the debates. Media and policy analysts in the field of science and technology studies argue that science is used to justify either support or opposition for a particular issue. This paper will examine how science was used in the debate to appeal to not only emotions, but to rational thinking.

Rebecca Albury, Associate Professor, School of History and Politics, University of Wollongong. Linda Nelson is a BA(Hons) student in the Faculty of Arts, University of Wollongong, and was a Congressional Intern in the United States during January/February 2006.

ALLAN, GREGOR
A War Of Words: The Freedom/Security Battle in the ‘War On Terror’
At 10:53pm on 28 September 2001 — within two weeks of September 11 — the United Nations Security Council passed resolution 1373, exhorting all member states to, inter alia, ensure that “any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice”. It further mandated that such terrorist acts be established as “serious criminal offences” in domestic laws. Member states responded. So too did human rights groups, alleging widespread exploitation of the security mandate and a concomitant erosion of fundamental human rights. The freedom/security debate thereby sparked has tended to be marked by volleys of provocative epithets, with governments meeting vacant denunciations of new security measures with palliative reassurances and refreshed vilifications of terrorists. This paper will examine not only the issues at stake in the freedom/security debate, but specifically, how the battle itself is being waged. Both security proponents and rights advocates tend to wage battle by engaging in emotive rhetoric. However, whilst powerful language might help recruit popular support, it stymies the critical thinking essential to considered debate. This paper examines the rhetoric that attends counter terrorism discourse, identifies its major themes and comments on obvious weaknesses. In particular, it questions the commonly espoused notion of a “trade-off” between security and freedom — a notion that conjures some simplistic, metaphorical set of scales in which the costs and benefits of counter terrorism measures can be nicely weighed. Also examined is rights literature that (often implicitly) dismisses the trade-off metaphor by asserting that fundamental rights and freedoms are integral to security. This paper will question whether such doctrinaire approaches are
appropriate or whether the counter terrorism battle can be meaningfully waged only in a defined context. Finally, it will be asked whether it is possible to ascertain what may or may not be acceptable intrusions into civil rights without first considering what, exactly, a "right" is. Here in Australia, this issue has come strongly to the fore as a result of recent academic opinion that torture — including torture of the innocent — might well be morally justifiable. Due to the absolute prohibition against torture at international law, this particular debate nicely distils the ethical collision between human rights advocates on the one hand and security protagonists on the other. In assessing the propriety of counter terrorism measures, can “deontology” supply an alternative to “consequentialism” as an evaluative framework?

Gregory Allan is a Senior Lecturer and Head of Prosecutions Programme, Centre for Transnational Crime Prevention, Faculty of Law, University of Wollongong.

ANTHONY, THALIA AND TIM ROWSE
Repositioning Land Rights: The Ongoing Conflict of the Pauper and Property
This paper is part of a research project in which we are documenting the connections between legislated regimes of Indigenous property and assumptions about the political and moral personality of the Indigenous property holder. Our working hypothesis is that every governmental recognition of Indigenous land rights has been legitimised by a discourse about the moral and political characteristics of the title-holders. While the diverse postulated characteristics of propertied Indigenous people have generally been ‘positive’ and ostensibly respectful of cultural difference, they have also been regulatory. Our story begins with the discourse about Aborigines as people without property. Aborigines, as propertyless people, were assumed to be ‘paupers’, and this made them targets of philanthropy and distrust. The series of Aboriginal (protection) Acts across Australia from the early twentieth century institutionalised the Aboriginal pauper. When governments granted land rights in Australia, governments found substitute concepts about Aborigines (as we will show by a case study of justifications for land rights in South Australia) but were arguably reluctant to relinquish fully their roles as protectors of paupers. The land rights regimes since the 1960s have therefore included accountability mechanisms. Accountability gathered pace in the early 1990s, and when native title was recognised, Indigenous claimants were required to form government-regulated organisations. Most accountability mechanisms have postulated a communal title-holder. With the Federal government’s breakdown in confidence in Aboriginal communal capacities, the current approach is couched in ideologies of individual responsibility. It has repositioned the official view away from recognising the culturally distinct nature of Aboriginal land rights.

Thalia Anthony, Lectuer, Faculty of Law, University of Sydney. Tim Rowse, Senior Fellow, History Program, Research School of Social Sciences, Australian National University.

BARTKOWIAK-THÉRON, ISABELLE AND MURRAY LEE
Modelling Risks and Levels Of Vulnerability: Legal Implications
Who does the law protect? Who needs law’s protection? In the emergence of what is called by some the “risk society”, all branches of the criminal justice system have developed laws, guidelines and protocols specifically directed at the protection of the most vulnerable people or at populations at risk. Some academic disciplines, legislation, policies and procedures fail to make the distinction between the concepts of vulnerability and “at risk” and both expressions are more often than not used as synonyms. However, a clear distinction should be made between the two. This paper first portrays a model which establishes a clear distinction between both concepts, making one the consequence of the other. The model helps refine the assessments of risks and resulting levels of vulnerability, therefore uncovering ‘new’ vulnerable populations which have not been identified as such in the past. The presentation of this model is followed by the legal repercussions of the emergence of these new populations. We will present case studies within which the model not only helps...
identify new security protocols or pinpoints breaches in protection or defence mechanisms, but also insists on how the law affects levels of vulnerability according to specific political and social criteria. We will conclude in answering the questions of who society tries to protect, how public policy influences this choice and if indeed, law succeeds in protecting everyone in society.

Isabelle Bartkowiak-Théron and Murray Lee are both from the School of Policing Studies, Charles Sturt University.

BEATTIE, SCOTT
No Place For Two Mums: Censorship, Community and the Governance of Public Place
Leading up to the 2004 Australian Federal Election, one of the surprise (if short lived) political skirmishes involved the representation of a same sex couple on children’s television. Preschoolers’ program Playschool featured a film segment where a girl visited a park with a friend and two women, described in her voice-over as “my mums.” It surprised many that, in the twenty first century, politicians from both government Coalition and opposition Labor parties would argue for the right of parents to choose to conceal the existence of lesbians from their children and therefore to argue for the erasure of lesbian and gay parents from the public sphere. It was less surprising that the language of inclusion and multiculturalism was under threat from concepts derived from the regulation of media space – ideas of classification and the governance of public space (both real and media space) which flow directly from censorship law.

Scott Beattie, Victoria University Law School, and Research Associate, Institute for Community Engagement and Policy Alternatives.

BERG, LAURIE
Spheres of Justice in a Borderless World: How the Rule of Law Fails to Protect Undocumented Migrants in Australia
In a world of ever increasing international movement of goods and services, the migration of people across borders remains tightly controlled. Indeed, the prospect of free passage of people across open borders seems a naïve pipedream, or an impracticable nightmare, depending on who is asked. Nevertheless, people continue to cross borders, often living or working without legal authorisation, and courts and law-makers continue to struggle to deal with the consequences. This paper reviews some recent attempts by migrants working without visa authorisation to assert their employment rights in the courtroom. Faced with a contest between an unlawful worker and an unscrupulous employer, Australian courts have arrived at a range of results. Very often, though, the outcome seems to err against the migrant worker, finding the employment contract void for illegality on the basis that the migrant was working in violation of immigration law. This paper then considers the work that is done by the ‘Rule of Law’ in judicial determination of these cases. It seems that the discourse of rule of law is readily deployed alongside a discourse stressing the imperative of border control. Together these discourses are used to justify denying legal protection to undocumented migrants in Australia. The propensity of rule of law arguments to elide with anxiety about Australia’s territorial sovereignty has the result, ironically, of creating a gap in employment law: legal immunity for employers of undocumented migrants and a failure of legal redress for undocumented migrants who are exploited or injured in the workplace.

Ms Laurie Berg is a PhD Candidate at the School of Law, University of Sydney (under the supervision of Associate Professor Mary Crock and Professor Ron McCallum), and a Lionel Murphy Postgraduate Scholar.
BOREHAM, KEVIN
Maintaining Justice in the War on Terror
The objective of this paper is to demonstrate that the courts in all the common law jurisdictions most affected by the ‘war on terror’ have dealt with terrorism cases with objectivity and fairness, observed proper limits on their role, and ensured that justice is done on matters before them even during ‘wartime’ circumstances. The paper will examine primarily the judgment of the US Supreme Court in Hamdan v Rumsfeld which found that the military commissions established by the US Administration to try some detainees at Guantánamo Bay were unlawful. The paper will analyse the reasoning of the majority in Hamdan to demonstrate that it was conventional and limited to the appeal it had to decide, although it has significant implications for the situation of all the Guantánamo Bay detainees. The paper will extend this analysis to the legislative outcome of the negotiations between the White House and the Senate to put in place a revised scheme of military commissions, to show (hopefully, depending on what that outcome is) that the Supreme Court was more in tune with general public opinion on what constitutes a fair trial than were the architects of the original unlawful scheme. The paper would compare the Hamdan judgment with three judicial decisions in the UK and Australia regarding suspected terrorists: R v Thomas [2006] VSCA 165; Abbasi v Foreign Secretary [2003] UKHRR 76; Bisher Al Rawi & Ors v Foreign Secretary [2006] EWHC 972 (Admin). These decisions show that whatever injustice judges may perceive, they will correct it if they should and restrain themselves when they cannot. These decisions show that the inbuilt constraints of the common law produce just outcomes whatever the external pressures on the courts. They should be supported, not subject to uninformed and subjective abuse.

Kevin Boreham is from the College of Law, Australian National University.

DALLA-POZZA, DOMINIQUE
Securing Democratic Traditions and Processes? Some Vital Statitics of the Australian Approach to Enacting Counter-Terrorism Law
The Federal Attorney-General has indicated that the “democratic traditions and processes” central to the Australian way of life are part of what his Government is striving to protect with the suite of counter-terrorism laws passed since 11 September 2001. On its face such a claim is unsurprising; a rhetorical flourish from a Government committed to enacting unprecedented (and often controversial) laws. However, it does provide a standpoint from which to assess the success of legislative activity in an area previously untouched by federal law: the extent to which the counter-terrorism laws have been enacted in accordance with the democratic traditions and processes the Government itself claims the laws are intended to protect. In this paper I present statistical data I have collected so as to analyse the Australian approach to enacting counter-terrorism legislation from this perspective. Over 30 pieces of counter-terrorism legislation have been passed by the Federal Government in the 5 years since the attacks on the United States in 2001. My study focuses on the way in which two specific democratic processes have been deployed in their enactment: the length of debate for each piece of legislation and the extent to which parliamentary committees have been involved in the enactment process. The results give some indication of the changes to the way Australian counter-terrorism law has been enacted over the first five year period. Moreover, the practical experience of making counter-terrorism laws demonstrates that while commitment to maintaining Australia’s democratic tradition makes for pleasing rhetoric, there is no room for complacency about the security of our democratic processes when faced with the difficult task of using law to counter terrorism.

Dominique Dalla-Pozza is a PhD Candidate, G +T Centre of Public Law, Faculty of Law, University of New South Wales.
DEVA, SURYA
Free Market for Corporate Sexual Advertising: Where does law stand?
Irrespective of inconclusive, and debatable, role that sexual advertising plays in selling products, corporations persistently and in innovative ways use sex in their advertisements. Does corporate sexual advertising then do something more than facilitating the sale of products and services? The paper draws on advertisements and contemporary advertising trends to demonstrate how advertising has become a site where the body, image, identity, sexuality, habits and behaviour of women are controlled, constructed and exploited by corporations. The most striking feature of this process is the corporate (mis)appropriation of feminist discourse to achieve no-feminist results: the language of women’s empowerment is invoked to disempower them. Among others, the “Hot Hips” advertisement campaign of Sloggi briefs for women is taken to illustrate how women’s choices are conditioned and how corporate advertising controls the control that women do or should have over their body and sexuality. The paper also investigates how law in a free market economy could balance, if at all, the conflicting expectations of different stakeholders in this regard. In particular, whether corporate self-regulation of sexual advertising is an effective alternative? The paper draws some inferences from the last five years’ working of the Advertiser Code of Ethics administered by the Australian Advertising Standards Bureau.

Surya Deva, Lecturer, School of Law, City University of Hong Kong, Hong Kong; PhD Candidate, Sydney Law School, Australia.

DIXON, MEGAN
‘Speak Softly and Carry a Big Stick’: A New Paradigm for Australia’s Anti-Discrimination Regulatory Framework
It is forty years since Australia first proscribed discrimination in the Prohibition of Discrimination Act 1966 (SA). This trailblazing legislation, which made it a criminal offence to commit an act of racial discrimination, had a short lifespan because of difficulties associated with its enforcement. Following this initial experiment, the 1970s which heralded a new zeitgeist of social reform, also brought with it a new regulatory model for discrimination laws. The new model was directed at civil rather than criminal sanctions for discrimination. It also introduced an individual complaint-based ‘enforcement’ process with a focus on confidentially ‘conciliating’ (rather than litigating) complaints about discrimination, under the auspices of a state anti-discrimination agency. Since then, all Australian jurisdictions have essentially adopted this regulatory model with only minor variations. While the widespread enactment of anti-discrimination laws has had some symbolic effect in promulgating the message of anti-discrimination within Australian society, there is mounting evidence that the regulatory model adopted above is ineffective in achieving its key regulatory goal, that of eliminating discrimination. While overt forms of discrimination may be on the decline since the advent of the legislation three decades ago, covert and complex forms of discrimination have not be effectively tackled. Eliminating discrimination today requires a more sophisticated regulatory approach that has the ability to tackle complex organisational structures and institutionalised cultures that beget under-representation, harassment and exclusion. In this paper, which draws on doctoral research that I am currently undertaking, I will discuss the key deficiencies of the current regulatory framework, and argue that the model above is unsustainable if the legislation is to deliver the types of systemic and lasting outcomes that go toward eliminating discrimination. In doing so, my focus will not be on the deficiencies in the substantive definitions of discrimination in the legislation (although there are many), but rather the regulatory architecture for preventing discrimination and securing compliance (or better) with its terms. I will draw upon lessons from other countries, and more importantly lessons from other areas of regulation (such as occupational health and safety) in proposing a more ‘responsive’ form of regulation – one that is proactive and encourages ‘self-generating efforts’ to bring about equality, while being underpinned by appropriate
accountability measures, particularly an effective enforcement regime that strategically deploys tailored sanctions.

*Megan Dixon is a PhD student at Griffith Law School.*

**DUNCANSON, IAN**

*Is Sovereignty the Root of All Evil?*

Like good Whigs the revolutionary Americans decided that, insofar as it was possible, ultimate authority would reside nowhere in the polity. Heirs to the common law heritage of free-born Englishmen, with its anti-authoritarian commitment to change in accordance with the practices and customs of its people, they enacted a constitution that would live consistently with that inheritance. Like the radical Whigs of the 1688 Convention, they believed that government derived from the (dis)agreements of the people, institutionally expressed in dedicated public space. As good Tories, Australians committed themselves to a Master, Parliamentary sovereignty, rejecting a bill of rights in light of a sentiment expressed by more than one founding Father, that it would protect “Chinamen”, much as the US 14th Amendment was supposed to protect “niggers”. The Law of the Father, of the Lacanian Big Other, has seldom not prevailed in Australia, has been only partly relinquished in the UK, and seems to have infected the US in its wars against labor, drugs, communism and terrorism. For Eichman, as Arendt records his Jerusalem interrogation, his “Pontius Pilate moment” came at Wannsee, when his social superiors assumed responsibility for the Final Solution to the Jewish Question. For Howard and his Pacific Solution, the moment was that of the ordinary Australian’s rejection of humanity toward asylum seekers. For Bush, Guantamo and the sub-contracting of torture and terror, it was Terror, conceived in perfect isolation from any Anglophone provocations. My first question is this: how are such totalitarian moves acceptable in what are complacently termed liberal democracies? In looking for tentative answers, the parallels and intersections of education and legality seemed to me fruitful. Sovereignty is clearly incoherent. None of its proponents has made either an empirical or conceptual case for it. In both its imperial and domestic manifestation, the British have attempted both rule by law, which has no ultimate justification, and the rule of law, which can have a basis only in the early American “agreement of the people”. Making Indians honorary Englishmen through education was followed by making the working class and women honorary Englishmen in the metropole. Both were abandoned, in India after the insurrection of 1857, in Britain with Thatcher more than a century later. In turning government into a war against its subjects with rule “by” law and in converting education into a production of yet more servile subjects, Australia may have manufactured an antipodean regime of Il Duce. My second question is, what is to be done?

*Ian Duncanson, Research Associate, Institute of Postcolonial Studies, Melbourne; Adjunct Associate Professor, Centre for Socio-Legal Studies, Griffith University.*

**EASTEAL, PARTRICIA and SUSAN PRIEST**

*Employment Discrimination Complaints at the ACT Human Rights Office: Players, Process, Legal Principles and Outcomes*

*The ACT Discrimination Act* (1991) differs both substantively and in process from its Commonwealth and State and territory counterparts. For instance, unlike the Human Rights and Equal Opportunity Commission (HREOC), the ACT Human Rights Office has a low threshold for accepting complaints and investigates all those that are initiated with the Office. As distinct from the other States, the ACT Commissioner does not have power to make determinations. And, the Act does not, unlike other discrimination legislation, invite a comparison between the way in which a person who has a particular attribute is treated compared with a person without that attribute or who has a different attribute. Instead, a person must show that they have suffered a substantial detriment and a link must be shown between that unfavourable treatment and the protected attribute. Therefore the role of the
Office is to investigate all complaints and make a decision whether a case is conciliable or should be dismissed. One other difference in the ACT is that if conciliation does take place, the goal is not investigative but resolution. How do such differences actually translate into practice for individuals who file a complaint of workplace discrimination? On a day to day level, what is the legal response to individuals in the ACT who feel that they have been discriminated against in their employment? To answer these questions, the researchers looked at 106 complaints that were lodged at the HRO between 2001-2005 that included the grounds of age, ‘motherhood’ and sexual harassment. We also held a roundtable discussion with staff and surveyed past and current workers and individuals from the ACT Discrimination Tribunal and Women’s Legal Centre. The paper will provide the results of these paths of inquiry. We will describe the nature of the complaints and which background, workplace, evidentiary and personal variables correlate with dismissal, withdrawal of complaint or with conciliation and what type of complainant ends up with what type of conciliation agreement terms since these vary from an apology to $45,000. We will also provide the perspective of those who work with the Act and their perceptions concerning both the legislative differences in the ACT and access to justice for those who have experienced discrimination.

Patricia Easteal, Adjunct Professor, Faculty of Law, University of Canberra; Susan Priest, Associate Lecturer, University of Canberra; PhD candidate, Macquarie University.

EDMOND, GARY
Science in the Lawyer’s Office: Reconsidering Lawyer-Expert Relations in the Preparation of Expert Reports
In recent years senior judges in a variety of adversarial jurisdictions have commented on the participation of lawyers in the preparation of expert reports for litigation. Much of this commentary has been critical of the roles played by lawyers. A highpoint was the suggestion by the US Supreme Court that scientists should do their work in laboratories rather than lawyers’ offices. More recently, several senior courts in other jurisdictions have expressed views on the production of expert reports which recognise a role for lawyers; albeit limited to the ‘organisation’ and ‘form’ of the expert report. ‘Content’ it would seem remains the province of the experts. This paper examines the preparation of an expert report used in recent litigation in Australia. It suggests that many of the judicial expectations (and a raft of recent reforms) seem to be predicated upon unrealistic images of expertise. These expectations and associated procedural reforms have the potential to compromise (or conceal) meaningful, and perhaps necessary, interactions between experts and the lawyers who engage them.

Gary Edmond is a Senior Lecturer in the Faculty of Law, University of New South Wales.

FALLAH, KATHERINE
Terrorism and the Rule of Law: How American Exceptionalism in Guantanamo Undermines the Protection of Private Military Contractors in Iraq
The Geneva Conventions and their Additional Protocols are an important statement of the fundamental international legal principles governing the conduct of hostilities, otherwise known as international humanitarian law. In its treatment of detainees at Guantánamo Bay, the Bush Administration has not sought to deny the legitimacy of international humanitarian law. Instead, it has adopted a rhetorical strategy of applying the law ‘in the exception’. It claims the Guantánamo detainees are not entitled to the protection of international humanitarian law because they are what it calls ‘unlawful combatants’. A primary justification for this construction of the law is that terror suspects are not attached to state forces. I will interrogate this construction of international humanitarian law in terms of its implications for the protection of non-state actors in armed conflict. In particular, I will
demonstrate that when the Bush Administration undermines international humanitarian law in Guantánamo Bay, it undermines the protection of allied private military contractors in Iraq.

Katherine Fallah is a PhD candidate at the University of Sydney, currently working as a Research Associate to the Judges of the Federal Court of Australia.

FARRELL, IAN
No Hadam? An Analysis of the US Supreme Court’s Reasons for Declaring Military Commissions Illegal in *Hadam v Rumsfeld*

The United States Supreme Court held in *Hamdan v. Rumsfeld* (2006) that the military commissions set up to try Hamdan, a Yemeni national captured as an enemy combatant by the United States in Afghanistan, lacked authority. This was hailed by some as recognition by the Supreme Court of the binding force of international norms on domestic U.S. law, and criticised by others for exactly the same reason. A close analysis of the Court’s reasoning, however, is that the decision deserves neither such praise nor such condemnation. I propose to outline the Court’s rationale on both the jurisdictional and substantive issues with which they were faced, demonstrating that the decision was based on a conservative and traditional application of familiar rules of statutory interpretation. Not only will this be interesting and informative in its own right, it will serve as a useful foundation or grounding for a wider-ranging discussion of the issues surrounding legal responses to terrorism.

Ian Farrell, Lecturer, Faculty of Law, University of Wollongong.

FOLEY, TONY
Doing Legal Justice Differently

This paper reports on research currently being undertaken about the nature of legal justice. It examines the quality of justice being delivered in legal proceedings – specifically in the growing use of restorative justice processes as part of a response to criminal wrongdoing. The paper asks whether there something unique or distinctive in the quality of the justice response which informs and underpins these processes. The research questions the underlying assumption that the protection afforded by law necessarily delivers justice. The paper traces the indicia of legal justice – the rule of law, formal equality and rights protection – and compares the primacy given to these elements with the descriptions of justice provided by practitioners when they articulate the ‘justice’ of their restorative justice processes. The theoretical analysis is informed by a series of interviews conducted with practitioners involved in court-annexed restorative justice programs in NSW, the ACT and New Zealand. The focus of this paper is on whether the quality of the justice delivered in these processes is different from that provided in traditional legal justice processes. The paper suggests these descriptions of ‘doing justice differently’ may contribute in some way to the restoration of law’s currently waning claims to do justice.

Tony Foley, College of Law, Australian National University.

GARCIA, GABRIEL
Developing Countries Stability Under Attack: IMF Programs in the 1990s and Their Effect on the Notion of the Rule of Law

Since September 11th 2001, the debate about the use of exceptional measures and its effects on the principles of rule of law has been principally focused on aspects closely related to violent situations such as the war against terrorism, racial riots and the protection of human rights. That debate has overshadowed in some way the discussion about the rule of law (ROL) and exceptional powers in the economic realm (e.g. how both notions are related in the world of international financial institutions). This aspect is critical for developing countries, particularly because in many cases, in the economic arena,
governments assume actions that have vital economic and social consequences for common people. Perhaps, the lack of an Asian or tequila or ‘caipirinha’ crisis and the relatively global economic stability has prevented international financial institutions (e.g. International Monetary Fund and the World Bank) to launch relevant lifesaver packages like those designed in the 1990s. Due to this apparent calm, it has not been possible to completely test changes allegedly adopted by the IMF in the way in which it designs and executes programs in developing countries. Those changes have been adopted as a response to global criticism about the form in which that institution pushes governments to implement programs that are doubtfully legal or democratic. In this paper, I will review how the ROL concept was incorporated into the IMF programs in the 1990s. Furthermore, I will study how the application of those packages led governments to assume ‘fast track mechanisms for economic reforms’ putting pressure on a modern, democratic and pro-development notion of ROL. Finally, I will discuss the future perspective of the ROL promoted by the IMF reviewing more recent participations of this institution in developing nations and some of the new changes agreed on the IMF annual meetings held in Singapore as well as tentative legal national mechanisms to prevent international financial institutions abuses.

Gabriel Garcia is a PhD student in the Faculty of Law, University of Wollongong.

GILLESPIE, ALISDAIR
Legal Framework of ICT-Based Sexual Exploitation
There has, in recent years, been a social revolution inspired by the Internet and its related resources (frequently grouped by the terms Information & Communication Technologies). The Internet has transformed the way that we undertake research, business and even social activities. The benefits to the Internet are immense but it undoubtedly creates challenges for the definition and application of laws. A particular area of concern has, for some time now, been the issue of sexual content on the Internet. The “adult industry” has certainly been renewed by the Internet. As video (then DVD) replaced adult cinemas, so now the Internet has replaced these mediums. The growth in “live” entertainment has been immense but this raises both social and legal issues. Whisnant (2004) argues that ICT has blurred traditional understanding of sexual exploitation, in particular the distinction between pornography and prostitution. She questions why it is that if a man sits at a computer and instructs a woman to perform a sex act in front of a webcam this is pornography and yet if he was physically present it would be considered prostitution. This demonstrates that our understanding of regulatory laws relating to the Internet and to the sex industry (both online and offline) has had to adapt to meet technological advances. The global nature of the Internet causes further challenges to a legal regulatory environment. Perhaps the area of more concern is in respect of the challenge the Internet has in respect of children. There are a number of threats that exist to children on the Internet (Gillespie (2002)) and although the primary threat are often considered to be child pornography and child grooming (where an adult befriends a child on the Internet seeking to exploit that child sexually at a later date), there are also serious issues in respect of sexual exploitation (Palmer (2004)), with the Internet facilitating child prostitution and child grooming. There is also the difficulty of potential self-exploitation and this raises social issues that need to be discussed. What should the role of the law in respect of regulating sexual conduct on the Internet? Should there be governance of these issues? How does one differentiate between voluntary participants and exploitative abuse? In respect of children where there is probably a better acceptance of the need for governance, what limits should be placed on the law to ensure that children and young persons are not alienated?

Alisdair Gillespie, Reader in Law, De Montfort Law School, Leicester, United Kingdom.

HADAD, DINA
Emergencies are definite to transpire during the lifetime of any society or state government. While it is certain that they will occur, their nature, character, intensity and frequency fluctuate substantially from one society to another and from one period to another. International terrorism after the attacks of 9/11, 2001 combined with the responses of Anti-Terrorism policies to these attacks, prompted a contemporary form of emergency challenging the main characteristic features of emergencies under International Law. Terrorism is not a new phenomenon. In fact, terrorists’ acts can be traced far back into recorded history. However, since 11 September 2001, terrorism has become an almost household word. Never before has there been a wide degree of interest in terrorism, which has become in our times one of the most pressing political and legal problems, nationally and internationally. Moreover, since 11 September 2001, responses to terrorism have themselves been dramatic, and often undertaken with a sense of panic or emergency. There, still exist, in fact a ‘close-to-panic’ reaction in much of the political and legal activity relating to terrorism and of course ‘close to panic’ reactions can have serious implications on international law and human rights protection. It is a time marked by a general feeling of increasing urgency regarding not only the manifestations of terrorism, but also regarding the adequacy and the appropriateness of the responses to it, and the conformity of national and international measures adopted and applies while countering terrorism with international law human rights and humanitarian law norms. Human rights treaties do acknowledge that states may be faced with situations in which they will be unable to fulfil all their obligations and therefore permit derogation from certain rights. That said human rights law does not cease to apply during armed conflicts or other public emergencies. However, even during such periods, there remain certain fundamental rights that are not subject to reservation (non-derogable). With few exceptions, most of these rights are considered customary international law. The restriction of human rights by states in the name of national security and counter terrorism policies alienates a number of sections in society and ultimately leads for greater insecurity. While the international community has to respond to the attacks of September and the general war on terrorism, states must continue to address the balance between the rights of individual and the national security. This research discusses current states of emergency in the years following the attacks of 9/11, 2001. It will focus mainly on the questions of whether, to what extent and how the fight against terrorism has encroached upon fundamental rules of Human Rights Law and how the multifaceted responses of states in the ‘War on Terror’ strain established international human rights norms and interpretations.

Dina Hadad is a PhD Student in the Law Department, University of Wales, Aberystwyth.

HADLEY, JOHN
Ethical and Legal Aspects of Animal Rights Extremism
Attacks on persons and property associated with animal research are now commonplace. The FBI recently reported that actions by so-called “eco-terrorists” have caused over 110 million dollars worth of damage. In response to such attacks, US lawmakers have introduced special legislation that effectively casts animal rights extremism as terrorism, even though no person has ever been physically harmed in such attacks. In the UK a campaign of harassment and intimidation against animal testing laboratories prompted the government to review laws pertaining to criminal damage and to increase penalties for malicious communication and harassment. After widening its statute definition of terrorism to include animal rights extremism, the Blair government boasted, “Animal rights extremists…. should not be surprised to find themselves treated as terrorists.” In this paper I seek answers to a number of questions concerning the recent phenomenon of animal rights extremism. Is third-party self-defensive violence on behalf of an animal against a person engaged in a legal sanctioned practice ever justified? Should attacks on property and making threats be considered terrorism? What are the implications of recent legislative changes on freedom of speech and political protest? I argue that while almost all instances of animal rights
extremism are unjustified, we should be reticent to label the phenomenon as terrorism. Drawing on recent debates in the ethics of terrorism, I argue that reserving the label ‘terrorism’ for an altogether different brand of politically motivated violence better reflects our commonsense views about the seriousness of political violence and the moral status of nonhuman animals.

John Hadley, School of Communications, Charles Sturt University.

HEAD, MICHAEL
Sedition and the Long War on Terror
This paper will examine how the 2005 anti-terrorism legislation radically extended the law of sedition, with chilling implications for dissent, particularly anti-war dissent. These implications are particularly serious, given the indefinite duration of what has been officially referred to as the “long war” on terrorism, and the recently announced plans of the Howard government to expand the military and police forces to intervene pre-emptively in the Asia-Pacific region. Sedition now includes ‘urging disaffection’ against the government, promoting ‘feelings of ill-will or hostility between different groups’ or urging conduct to assist an organisation or country engaged in armed hostilities’ against the Australian military, whether or not a state of war has been declared. Moreover, ‘recklessness’ has been added as a seditious state of mind. That is, anyone can be guilty of sedition even without intending their remarks to create disaffection, ill-will or armed resistance. Those convicted face up to seven years’ jail. Organisations that support such sentiments can be declared ‘unlawful associations,’ also exposing their property to seizure and their members, supporters and donors to imprisonment. Most notably, these laws could allow for the criminalisation of any sympathy or support for resistance to the growing range of Australian military interventions, including the occupations of Afghanistan and Iraq or operations in the Asia-Pacific region, such as the dispatch of troops to the Solomon Islands, Papua New Guinea, Indonesia or the Philippines. These sedition offences are currently under review by the Australian Law Reform Commission, whose discussion paper has suggested some modifications, including dropping the term sedition but retaining offences of treason. These proposals will also be examined. Of course, the Howard government’s response remains to be seen.

Michael Head, Senior Lecturer, Coordinator, Community Law Programme, University of Western Sydney.

HENDERSON, EMMA
Australia’s Treatment of Asylum Seekers
How we deal with asylum seekers is one of the tests of our civilisation. It is always more difficult and more controversial to take responsibility for looking after people who come from elsewhere and the issue often engenders irrational, primeval instincts about difference and alienation and causes politicians, the media and the public to overact and become overly defensive. The passage of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 through the House of Representatives in August marked a new low in Australia’s commitment to the international protection regime for asylum seekers. The Minister for Immigration argued that it would be lawful, and acceptable under the Refugee Convention, to process all asylum seekers who arrive in Australia by boat (and not just those who arrive at an excised location) in processing centres in foreign countries, without the protection of the Australian legal system. At the same time that this Bill was being debated in Australia, the NZ Minister for Immigration released the Immigration Act Review Discussion Paper 2006, proposing significant changes in the asylum protection regime which are argued to be in line with the New Zealand Bill of Rights Act (1990). This paper focuses on the different construction of the ‘asylum seeker’ in parliamentary debates within the two countries, and questions what role the Bill of Rights Act (1990) has played in New Zealand’s apparent construction of the asylum seeker as rights-bearer both within legal and political discourse.
The paper comes out of a larger body of research in which I am examining, by comparing the Australian regime to those of the UK, Canada and NZ, whether a domestic Bill of Rights makes a substantive difference to a state’s protection of asylum seekers.

Emma Henderson, School of Law, La Trobe University.

HONIG, BONNIE
The Time of Rights: Emergent Thought in an Emergency Setting
The paper begins with Bill Connolly’s reading of Rousseau’s paradox of founding as a paradox of politics. The paradox of politics (which comes first, good law or good [wo]men?), which recurs daily, and is unresolved, invites a new line of critical reflection on contemporary deliberative democrats such as Jurgen Habermas and Seyla Benhabib, each of whom stages a reflection on democracy and rights by taking up a political paradox and rendering it manageable by embedding it in a linear time sequence. Unlike Rousseau, (as Connolly reads him), these thinkers do not try to confine the paradox of politics to a distant past. They locate the paradox in the present (soon to become the past) while positing a future in which the paradox can be worked out by way of present political practices which Habermas calls “tapping” and Benhabib called “iterations”. In brief readings of Habermas and Benhabib I discuss their respective solutions to the paradox of constitutional democracy, and the paradox of bounded communities in the new Europe. The acknowledged assumption in Habermas and Benhabib of linear times secure what I call a chrono-logic in relation to which new rights are assessed: new rights claims are judged by these deliberative democrats in terms of the rights’ amenability to being subsumed under existing constitutional or universal categories. I look in detail at how Connolly’s focus on new rights claims in the moments of their unstable and insecure emergence points to a different orientation toward rights and a different register of temporality. I develop the argument about rights and temporality with reference to two rights claims to which Connolly repeatedly returns in his work: gay rights and the right to doctor assisted suicide. I focus not on the rights, pre se, nor on the claimants, but on the worlds potentially opened or closed by these rights. I worry about how a focus on rights is encouraged by a law-centered view of world and distracts our attention from common goods, the generation of which is the glue of democratic life. And I suggest that rights tend to privilege or postulate the linear temporarily Connolly want to get away from. I highlight some of the larger issues surrounding doctor-assisted suicide, noting its possible implication in the bio-politics in which Giorgio Agamben says we are mired. And I find in Wittgenstein a critique of something like a chrono-logic of meaning, which usefully deepens my critique of the chrono-logic of rights. Finally, I turn to a relatively new movement, called Slow Food, to illustrate the sort of political actions that might arise out of an alternative to established chrono-logical understandings of rights. Slow Food’s agenda, I argue, gently presses upon us an awareness in particular of one of the remainders of the rights-centered human universe: animal life, whose existence under current food production conditions rises surely to the level of emergency and which cannot be best remedied by a further expansion of rights. The needed encounter with animality points beyond the chrono-logic of rights. It calls for a different orientation, one lodged in the paradox of politics, and pitched on the plural tempos theorized by Connolly and inhabited by Slow Food at its best.

Bonnie Honig is Professor of Political Science at Northwestern University, Evanston, IL and Senior Research Fellow, at the American Bar Foundation, Chicago.

HOWELL, NICOLA
Regulating the Cost of Credit: Protecting Vulnerable Consumers from Exploitation or an Example of Unnecessary Consumers and Ineffective Paternalism?
Consumer protection regulation that restricts the types of products and services offered to consumers can be inconsistent with ideas of consumer empowerment and freedom of choice. In the financial services and consumer credit sector, pre-contractual disclosure and
financial literacy are dominant features of the current consumer protection landscape in Australia. Few limits are placed on the cost and types of products that are sold. Instead, regulatory and policy initiatives are largely directed to encouraging financial literacy and mandating pre-contractual disclosure, so that consumers can shop around to find products that meet their own individual preferences. In general, anything goes in terms of product terms and costs, as long as product providers disclose. In Queensland, it is therefore legal to offer short-term loans with an effective annual interest rate of 240% or more, as long as the credit provider complies with the various disclosure obligations. However, a number of other Australian jurisdictions do place limits on the cost of credit that can be provided to consumers, and contracts that exceed the specified interest rate ceiling are unenforceable. Such restrictions, it is argued, protect vulnerable consumers from exploitation by ‘loan sharks’ and from entering into 'debt traps'. However, others argue that such approaches are paternalistic. Advocates of this position contend that there is a real demand for these types of loans and consumers should be able to access high cost credit if it meets their needs. According to this approach, interest rate ceilings leave some consumers without access to consumer credit at all, even though access to short-term consumer credit is essential to participation in economic and social life. This paper will use the results of recent qualitative research on the merits of interest rate ceilings to explore some of these tensions between consumer protection and consumer empowerment, and to identify whether there are circumstances in which the need for protection might be greater than the merits of facilitating unfettered consumer choice.

Nicola Howell is the Director of the Centre for Credit and Consumer Law, Griffith Law School.

HOWARD-WAGNER, DEIRDRE
Self-determination provided the basis for the establishment of a separate statutory authority with the intent of ensuring maximum participation of Indigenous peoples in future policy development and the administration of Indigenous affairs. Indigenous cultural difference and the inherent rights of Indigenous Australians were also recognised through the passing of Federal legislation, such as the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth), the Native Title Act 1993 (Cth) and, even to a degree, the Council for Aboriginal Reconciliation Act 1991 (Cth) (Altman, 2004). ATSIC, native title, Indigenous cultural heritage protection and reconciliation were influential and iconic institutions of Indigenous Australia (Altman, 2004: 307). Since 1996, these influential and iconic institutions have been restructured, destabilised or abolished. The focus of paper is on the problematisation of Indigenous legislation and how this problematisation provided the basis for the recasting of Indigenous rights within a neo-liberal model of governance through the development of the Hindmarsh Island Bridge Act 1997 (Cth), the Native Title Amendment Act 1998 (Cth), the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998, Aboriginal and Torres Strait Islander Commission Amendment Act 2005 (Cth), and the Aboriginal Land Rights (Northern Territory) Amendment Act 2006 (Cth). In doing so, I evidence how legal/judicial rules become powerful sites for resituating the social in terms of economic enterprise.

Deirdre Howard-Wagner, Senior Lecturer, Socio-Legal Studies, Department of Sociology and Social Policy, School of Philosophical and Historical Inquiry, University of Sydney.

HOSEN, NADIRSYAH
Three Models of Anti-Terrorism Laws
Terrorism is an evil which now affects a growing number of countries on a regular basis. The response to the 11th September terrorist attacks has had an important impact on human rights protection. Tensions between the need for an effective policy against terrorism, and
respect for human rights and fundamental freedoms are very real. The proposed paper is to contribute to the debate by examining a variety of models from different regions as to their effective in fighting terrorism whilst not abusing human rights. I have examined the situation in six countries: Singapore, Malaysia, the Philippines, Indonesia, Australia and New Zealand. I have found three different models of how these countries implement counter-terrorism measures.

Nadirsyah Hosen, Postdoctoral Research Fellow, Centre for Public, International and Comparative Law, TC Beirne School of Law, University of Queensland, and adjunct fellow of the Key Centre for Ethics, Law, Justice and Governance at Griffith University.

JAICHAND, VINODH
Rights on the Money
Like most things, human rights also cost money. Despite the international community’s great emphasis on human rights, when it comes to paying for it some states cannot put their money where their obligation is. Indeed, why bother to ratify international treaties if the state intends to avoid its obligation, or use it as a bargaining chip. In my presentation, firstly, I attempt to answer why states enter into multilateral treaty obligations on human rights when they present so many hurdles for them to meet. Secondly, I examine briefly the constraints under which the United Nations through the Office of High Commissioner for Human Rights operated by examining one example of a proactive measure in its programme of action. Thirdly, I question whether the funds allocated for these activities reflect a serious attempt to address human rights issues. Finally, I conclude with attempting to answer the question: “What is the cost of human rights?”

Vinodh Jaichand is the Deputy Director, Irish Centre for Human Rights, National University of Ireland, Galway.

JARRETT, STAN
A Fraction Interaction: An Aboriginal Perspective on Cultural Relativeness, Community Engagement Systems and the Law
This paper is presented from an Aboriginal perspective drawing on my experience over many years of working in public and community sector to address the continuing appalling status of Aboriginal disadvantage in NSW and indeed Australia. I will review relevant history, outline the current state of Aboriginal affairs, and propose steps for the thought processes that are necessary to address Aboriginal disadvantage.

Stan Jarrett is an Aboriginal man of warrior status in his Clan the Punthamarra people of North-western NSW and south-western QLD. He has worked for 13 years in and around the Criminal Justice System, including time with the Aboriginal Legal Service Nowra, Juvenile Justice, Local Courts Attorney General’s of NSW and the Judicial Commission of NSW.

JEANJEAN, HENRI
The French and Their Minorities: The Legal ‘Linguicide’ Arsenal
French Government policies to exclude, silence or outlaw regional minority languages date back as far as the 16th century and are clearly manifest in the nation’s legislation. Despite this, marginal languages have continued to survive and in some cases have experienced notable revivals. Perhaps to combat this resistance, a stronger arsenal was developed by the dominant culture in the 1990s—in particular through an amendment of Article 2 of the Constitution and the Toubon Law—in order to ensure the eradication of regional languages. These changes can be understood in a wider context of legislation that increasingly and punitively seeks to police minority interests, such as the outlawing of Islamic veils in schools. These modern laws have their origin in the idea of what the citizen should be, first
enunciated during the French Revolution and through the foundational concept of “Republicanism”. This latter view, shared by the major political parties, allows no space for minority differences—either regional or migrant—in the nation state. This paper explores connections between recent extreme responses to centralist policies—bombs in Corsica, riots in the suburbs of French major cities—and what can arguably be viewed as a longstanding and systematic manipulation of the legal system to produce a dangerous uniformity.

Henri Jeanjean, Senior Lecturer and Convener of European Studies, University of Wollongong.

KARIYAWASAM, KANCHANA
 Terminator Technology as a Technical Means of Forcing Intellectual Property in Plant Germplasm: Its Implications for Developing Countries

It is the intention of this paper to investigate how the ‘genetic use restriction technologies’ (GURTs), works and explore the potential implications — both advantageous and disadvantageous — which it may have on sustainable development. This paper also looks at legislated moves to exclude them, the basis for those moves and their likely impact. This is a technology which is welcomed by multinational seed companies, but it is also a technology that developing countries do not unequivocally embrace. It is imperative, in this respect, that the legitimate rights of commercial plant breeders be protected. Equally, it is also essential that the interests and rights of those farming communities in developing nations also be safeguarded. The issue then would seem to be one of effecting an appropriate compromise between these two competing considerations. In short, a proper equilibrium needs to be reached between taking adequate account of the legitimate interest of the seed developers and (alternatively) considering the equally significant interests and rights of the users of plant varieties. In this respect, this paper draws attention to both positive and negative impacts that terminator technology may have on agriculture, biodiversity, as well as traditional farming systems.

Kanchana Kariyawasam, Postdoctoral Research Fellow, Australian Centre for Intellectual Property in Agriculture (ACIPA), TC Beirne School of Law, University of Queensland.

KELLY, ANDREW
 Urban Amenity and Biodiversity Conservation at the Local Government Level: Can Both Work Together?

This narrative critically explores, in a socio-legal context, two significant local government issues: (i) enhancement of neighbourhood amenity and (ii) conservation of local biodiversity. Assumptions frequently surface that the concepts can operate easily side-by-side if not together. The National Local Biodiversity Strategy, for instance, places ‘scenic and amenity values’ at the top of its list of biodiversity benefits. But is such an assumption reasonable? Amenity enhancement is a longstanding premise that dates back to the English garden city movement and Britain’s first planning legislation. It soon became embedded in Australian planning policy and practice. In NSW, legislation for ‘planting and preserving trees and shrubs’ was introduced in 1867. Regulatory control over private land commenced in 1906. Tree preservation orders became a popular tool for maintaining attractive landscapes, especially in wealthier urban areas. Arguably, amenity enhancement remains as a traditional function serving local property interests. Biodiversity conservation is a far more recent phenomenon. It derives from international debate and agreements that embrace inter-generational concern and global anxiety. In Australian legislation and policy, it is entrenched as a scientific sub-principle of ESD. The ‘subsidiarity principle’ ensures local government plays a key role in conserving biodiversity. This is despite its potential parochialism and politics of ratepayer influence. The concentrates on both the environmental service and land-use planning functions of local government, particularly in NSW. It is argued that despite the
rhetoric, the two concepts do not sit together comfortably at all. In order to achieve worthwhile biodiversity conservation at the municipal level, stronger legal instruments and hard decisions are mandatory.

Andrew Kelly, Senior Lecturer, Institute for Conservation Biology and Law & Faculty of Law, University of Wollongong.

KENYON, ANDREW
Conversing, Speaking, Debating?
Public speech is typically seen as central to democratic practice. However, re-examining common analyses of free speech has gained urgency as many countries develop legal restrictions related to concerns such as national security and intellectual property. Here I consider another area of legal control, defamation, and its relationship with journalism to suggest how conceptualisations of speech could be reworked using the notion of the counterpublic. The paper explores ideas about law, journalism and speech by drawing on empirical research into defamation litigation and news production practices in England, the US and Australia. The research is used to suggest how professional understandings of the value of speech, from within law and journalism, could be reconsidered through recognising the role of speech in creating publics in order to reconfigure what is seen to be at stake in speech and its control.

Andrew Kenyon, Director, Centre for Media and Communications Law, Associate Professor, Faculty of Law, University of Melbourne.

KNIGHT, DEAN
State of the (Civil) Union: Gay and Lesbian Protections in New Zealand after the Civil Union Act
The Civil Union Act 2004 – and its less high-profile but more powerful companion, the Relationships (Statutory References) Act 2005 – marked one of the high points of gay and lesbian reform in New Zealand. The reforms created a state mandated relationship registration scheme, allowing gay and lesbian couples to formally register their relationship in an almost identical manner to straight couples. The reforms also largely harmonised the benefits, protections and responsibilities for married, civil union, and de facto couples, providing near equality for all couples before the law. While the celebrations amongst gay and lesbian people continue, both politically and personally, an obvious question remains: what is left for gay and lesbian reform in New Zealand? How fully did the civil union reforms achieve equality? What was missed? What still remains? What about equality rights other than relationship equality? This paper surveys the state of gay and lesbian protections in New Zealand following the civil union reforms and assesses the degree to which the law currently protects gay and lesbian people. It audits the recent achievements for gay and lesbian rights, recording what was accomplished but, more importantly, what was left behind or jettisoned in the reforms. It concludes by identifying and examining some of the major remaining tasks left for gay and lesbian law reform in New Zealand.

Dean Knight, Lecturer, Faculty of Law & (Acting) Co-Director, New Zealand Centre for Public Law, Victoria University of Wellington.

LEIBOFF, MARETT
Reality TV and the Reality of Law
Big Brother, and other reality television programs that place participants into manipulated environments, confound the notion that its participants are in fact behaving as idealised liberal legal subjects who exercise choice by their own free will. In these programs, participants, who are also described as ‘cast members’, give up their ability to live all or part
of their lives to others, to be recorded and, through the editing process or tasks they carry out, have their conduct manipulated. They will be unaware that the conduct will be constructed in this way. At the same time, consumers of these programs are also affected by manipulations of content. This paper will examine assumptions behind the law that so-called reality TV exposes, in particular, those of choices of individuals as participants, and choices of consumers that these programs are allowed to be party to. The popularity of these programs, in a sense, is also confounding given their replication of events in the real world, where loss of choice is not freely given. Participants willing give up freedom for fame or notoriety, but will not necessarily be seen the way they hope. As such, the content of these programs mirrors real world events, where public opinion may be based on a concoction of events. This paper will ask whether law needs to re-examine assumptions about choices and freedom of action in a closed world, like a filmed television program, that may act as a laboratory for realities in which no choices can be made.

Marett Leiboff, Law School, Queensland University of Technology.

LUKER, TRISH
Theories of the formation of the subject tend to focus on the subject of subjection, rather than the powerful subject and interrogation of the formation of the judicial subject has received minimal attention. In this paper, I will begin an interrogation of the production of judicial subjectivity, specifically as racialised embodiment, through an examination of the decision in Cubillo v Commonwealth. The figure of the father and of the father as law has significant agency in the narrative of the judgment in Cubillo. I will argue that in Cubillo, a hermeneusis can be discerned in which the concepts of paternity and legality function to efface the significance of race, and specifically of whiteness.

Trish Luker has recently completed a PhD at La Trobe University.

MAGUIRE, AMY
Law Protecting Rights: Restoring the Law of Self Determination in the Neo-Colonial World
Under international law, human rights are regarded as universal because they need not be recognised or respected in order to exist. Thus, all peoples possess the right to self-determination; that is, the right of peoples to freely determine their political, social, cultural and economic destiny. However, all peoples need law’s protection if they are to achieve all that the right promises. It is unfortunately clear, however, that the law of self-determination has not been capable of protecting the right for all peoples. Indeed, in recent years, many states and several commentators have advocated the restriction of self-determination in the present day, arguing that the de-colonising mission of the right has been exhausted, and that ‘security’ in this ‘age of terrorism’ must be enhanced by the suppression of secessionist movements. However, the claims to self-determination made by Indigenous Australian peoples, and by Irish nationalists, demonstrate that many peoples continue to live the experience and/or the legacy of colonialism in the present day. The needs of such peoples to have their rights protected by law are not being met, not only because of state opposition to self-determination, but due to problems within the international law which governs the right’s scope and application. This paper argues that the right of self-determination can be restored, in a way which enables its de-colonising potential, through the expansion and clarification of the international law of self-determination. This development would also restore the law of self-determination to the place it ought to take in the social realm; that is, the place of emancipation and liberation.

Amy Maquire, PhD candidate, School of Law, University of Newcastle, and Researcher, School of Sociology and Social Policy, Queen’s University, Belfast.
MAGUIRE, AMY
Law and the Protection of Women’s Security
Research with women in post-conflict societies strongly suggests that contemporary ‘security’ policies, and the laws through which they are implemented, fail to adequately protect women’s security. This paper explores the direct testimonies of women living through ‘peace processes’ in Lebanon, Northern Ireland, and South Africa, and argues that laws – at both the international and domestic levels – could and must do much more to protect women’s security and enhance their social and political participation. A ‘bottom-up’ approach to developing and legislating security strategies would demonstrate that the security needs which women themselves identify and emphasise, vary greatly from the ‘security’ which powerful states seek to impose in the current global political climate. Whilst statistic considerations dominate, laws dealing in women’s security and participation will fail to match up to what women demand from them, namely the provision of a holistic conception of security, and a framework through which social transformation may be achieved following periods of violent conflict.

Amy Maquire, PhD candidate, School of Law, University of Newcastle, and Researcher, School of Sociology and Social Policy, Queen’s University, Belfast.

McCALLUM, DAVID and JENNIFER LAURENCE
Has Welfarist Criminology Failed? Juvenile Justice and the Human Sciences
In the present context of ‘get tough on crime’ and ‘back to justice’ campaigns that continue to dominate political agendas throughout Australia, critics point to the inadequacy of ‘welfarist’ criminological and sociological theories that have informed interventions in the past, and reinforce the need for ‘justice’ models of penal policy. This paper examines historical evidence on the role of the human sciences in juvenile justice administration during the 1940s, a formative moment when psychiatric, psychological and social work expertise came together in the form of the Children’s Court Clinic in Victoria. The paper suggests that contemporary critique about a failure of a welfare model of juvenile justice inadequately captures the historical functioning of expertise in justice administration and the extent to which the welfare model involved actual rehabilitative interventions.

David McCallum, Associate Professor, School of Social Science, Victoria University. Jennifer Laurence, School of Social Science, Victoria University.

MERCER, DAVID
Expertise About Science: Epistemology ‘On the Line’ in ‘Creation Science’ Litigation
The recent US litigation involving the teaching of Intelligent Design (‘Kitzmiller v Dover Area School District’ 2005) raises many issues of interest to social science and humanities scholars. This presentation (which draws upon a recent paper co-written with Gary Edmond) explores the immediate legal and broader academic responses to the ‘testimony’ provided in the case by well known philosopher and sociologist of science Steve Fuller. ‘Kitzmiller’ is not the first time a philosopher of science has testified in a ‘creation science’ case, for example, more than 20 years ago Michael Ruse appeared in ‘McLean v. Arkansas Board of Education’(1982). Ruse provided testimony in support of the proposition that ‘creation science’ lacked the characteristics of true science. Ruse’s involvement sparked debate about what role should/ can philosophers and sociologists of science play in legal settings, and what are some of the factors that may shape the legal reception of their claims. In particular, critics worried that Ruse had traded philosophical subtlety/ integrity for legal impact. Similar concerns about the legal reception of science studies has continued in the wake of the influential 1993 case of ‘Daubert v Merrell Dow’ which cited a number of science studies figures (Popper, Hempel, Jasanoff and Ziman) and more recently again, through the
attempts made by Simon Cole (who has written a widely acclaimed history of fingerprinting) to testify as an STS expert as a defense witness in trials involving fingerprint evidence. Fuller’s appearance in ‘Kitzmiller’ has recharged these debates but with the added “twist” that his testimony did the “unthinkable” for many in the science studies and scientific community of supporting the scientific pretensions of the proponents of Intelligent Design.

David Mercer, Associate Professor, Science, Technology and Society Program, School of Social Sciences, Media & Communication.

MILWARD, DAVID
Restless Spirits in the Land: Finding a Place in Canadian Law for Aboriginal Civil Disobedience
The proposed paper will explore the idea of allowing Aboriginal protestors to claim civil disobedience as a legal defence against criminal charges within justified circumstances. Aboriginal protestors have sometimes engaged in acts of civil disobedience in protest against incursions upon their interests, such as their land claims and sacred burial sites. These acts of civil disobedience have typically been answered with criminal prosecutions. Judges have always denied Aboriginal legal arguments based upon civil disobedience as a protest against injustice. One decision recognized that civil disobedience was justified against British rule of India, and during the Black civil rights movement, but decided that Aboriginal civil disobedience was not similarly justified.

David Milward is a PhD student in the Faculty of Law, University of British Columbia.

O’DONNELL, MARCUS
Larrikin or Threat? Putting the Jihad into Jack Thomas
Jack Thomas says he chose the name “Jihad” when he converted to Islam because it meant fighter and evoked for him the classic Aussie battler. Now dubbed by the media “Jihad Jack” he has become the most prominent Australian terrorist suspect apart from David Hicks. But unlike Hicks who has been incarcerated at Guantanamo Bay, Jihad Jack Thomas has played out his story at home in full glare of the media. I will argue that the production of “Jihad Jack” by the media and the courts can be better understood through the heuristic device of myth. Specifically the paper will deploy the concept of multimodal mythic clusters as a device for understanding journalistic and legal narratives. The Jihad Jack story has evolved under the mythic themes of hero, villain, victim and trickster. This paper will consider these themes particularly as they relate to notions of border/boundary crossings and border/boundary protection.

Marcus O’Donnell, Associate Lecturer, School of Journalism and Creative Writing, University of Wollongong, and PhD candidate, UTS.

O’SULLIVAN, SIOBHAN
Animal Protection Legislation, Animal Advocates and the Problem of Low Visibility
Animal protection legislation is inconsistent. It does not protect all animals from all forms of harm under all circumstances. Inconsistencies have tended to function to protect the economic interests of the animal industrial complex. However, new evidence suggests inconsistencies are not only economic in nature, they also reflect the extent to which some animals are publicly visible and some are not. The more highly visible an animal, the stronger the statute protection they receive. Since the advent of modern animal protection legislation the animal protection movement has played a pivotal role in increasing the visibility of animals who would otherwise be socially invisible. However, in many cases the task of raising an animal’s visibility status requires advocates to engage in illegal activity
such as trespass, property damage and theft. In an environment increasingly unsympathetic to political activism, this paper seeks to reflect on what increased penalties for animal advocates may mean for low visibility economically productive animals.

Siobhan O’Sullivan, Government and International Relations, University of Sydney.

PETTERS, TIMOTHY
Allusions to Theology: *I, Robot, Universalism and the Limits of the Law*
In today’s world of over-legislation and hyper-regulation, of hystericalised legal responses to terrorist attacks and legal paranoia about technological development, it should come as no, but also the greatest, surprise that the message proclaimed by Saint Paul is returning. Such a message calls us “beyond the law”, overcoming its limits, and inviting us to step outside the differences its “letter” institutes. For the Pauline “good news” is one that announces a universalism, sublating both the law and difference, and, in so doing, enabling true freedom.

In this paper I will argue that the film *I, Robot*, despite being a text as far from the Pauline Epistles in time and space as it is in content, gives rise to questions that have concerned both theology and legal theory for centuries: questions of the place and constitution of law in society, its role in regulating human behaviour, and its ability to institute difference between (and within) people. I will discuss such questions with reference to both Badiou and Zizek’s reading of Saint Paul, and of course, Saint Paul himself, arguing that, under the conditions of postmodernity, the concerns of high theory (theology, jurisprudence, psychoanalysis, Marxism) mesh with, intersect in, and are rendered explicable by the representations of popular culture (Asimov, science fiction, *I Robot*).

Timothy Peters, Socio-Legal Research Centre, Griffith Law School.

PETTITT, ANNIE
Finding the Right Balance: Developing a Human Rights Impact Assessment Tool for Counter-Terrorism Policing
Since September 11 there has been a growing tension between the protection of human rights while countering terrorism and national security imperatives. There have been different approaches to the issue of how to balance national security and counter-terrorism strategies with adequate human rights protections. Human rights advocates have generally maintained the need to balance the protection of human rights with countering terrorism. Likewise, governments have argued that it is necessary to find the right ‘balance’ between guaranteeing public safety and respecting the rights of individuals suspected of being involved in, or having knowledge of, terrorist activities. But how do we know that we have got the balance right? How is the right ‘balance’ to be determined, by what criteria and by whom? This paper explores weather a shift away from a simple balance between rights and national security, and towards a focus on the existing in-built processes of the human rights framework can provide a valuable check on state power in the context of counter-terrorism law enforcement.

Annie Pettitt is a PhD Candidate, Department of Criminology, Monash University

RIX, MARK
The Australian National Security State and the Third Sector: Who is Really Protecting Australia’s National Security?

This paper will consider the implications of the Australian Government’s recent national security and anti-terrorism legislation for its relations with Australian citizens and with third sector organisations, like those comprising the community legal sector, that seek to promote and defend citizens’ civil, political and social rights. The series of bills enacted by the Australian Parliament since September 11 2001, the culmination of which has been the Anti-Terrorism (No. 2) 2005 Bill, removes many of the freedoms and rights that Australians have for many years been able to take for granted. The 2005 Bill’s detention and control orders, for example, degrade the importance of the role of formal trials and the production of credible evidence by the prosecution in the administration of justice in Australia. It also includes a newly-defined crime of sedition that empowers the Australian Government and the national security authorities to invoke the sedition provisions when they merely suspect a person of seditious intent to use or threaten the use of force. The 2005 Bill, and the many other national security and anti-terrorism acts, has placed a great burden of responsibility on third sector organisations which seek through their activities to enhance the inclusiveness and cohesiveness of the Australian community. They will increasingly be called upon, particularly by ‘suspect’ groups and individuals, to ameliorate the harmful social and psychological effects of intimidation, victimisation and persecution perpetrated by the authorities in the name of protecting Australia’s national security. At the same time, these organisations will have to deal with a society turned against itself in which differences of language, ethnicity and religion have become a frontier separating the included and protected from the excluded and feared. This paper will consider the impact of these trends and developments on third sector organisations committed to fostering a more tolerant, inclusive and cohesive Australian society. It will focus in particular on the likely implications of the national security legislation for the community legal sector and. The sector is characterised by its commitment to the objective of improving access to justice and ensuring equality before the law for all Australian citizens and residents. It thus plays an important but largely unheralded role in protecting Australia’s genuine national security from the potentially corrosive effects of the Government’s national security and anti-terrorism legislation.

Mark Rix is a Senior Lecturer in the Graduate School of Business at the University of Wollongong.

ROBINSON, KATHE
What is This Thing Called Law: Truth, Justice, Logic and Other Beliefs

‘The names of authors or doctrines have here no substantial value…the indicative value that I attribute to them is first the name of a problem’ (Derrida, Of Grammatology).

The language of classical metaphysics still structures the thinking of ‘western’ disciplines/discourses and is evident in the idea of ‘law’ where classical concepts are accepted as a legitimate and stable foundation on which to base legal procedures. Language appears to represent the way things are, and the underlying belief is that the thinking of a logical and rational subject, predicated on a proper understanding of the ‘rules’ of language, can make accurate, and therefore correct assertions, about ‘reality’. There are two forms of language underlying this traditional form of knowing. On the one hand special languages supposedly allow accurate and correct assertions to be made, if and only if, one knows the rules which govern a specific discourse/discipline. On the other hand, using ordinary language, without knowledge of the rules, makes it likely that incorrect assertions will be made. The inference here is that it is only the former who can determine the ‘truth’ of anything. Non-classical epistemology has stripped language of its a priori certainty, and positions its supposedly stable concepts within the dynamics of undecidability, a complex process whereby some of the central tenets of the enlightenment, truth, objectivity, rationality and even knowledge lose their epistemic security. Accordingly, all the ideas which turn on these concepts, including ‘ethics’ and ‘justice’, lose their prescriptive power and put in jeopardy universalistic ideals about human rights, equality, freedom and emancipation, all considered dangerously close to the dream world of what ought to be; what Derrida calls ‘white mythology’. A major
issue, therefore, is how the change from the substantialist projects of metaphysics to the theorisation of ‘process’ can be developed. It is a moot point as to whether non-classical, (philosophical) language–based theorisation of process can adequately grasp the (moving) conditions of a process which is not directed solely by a thinking subject.

Kathe Robinson was a PhD student and staff member of the University of Sydney. She has recently had an offer of collaboration from Aristides Baltas, University of Athens, to continue her PhD studies.

ROGERS, JULIET
Flesh and Free Speech: What cannot not be lost
The body that obeys and accedes to the sovereign will, the body that can be killed (not sacrificed), has become partial. In a Christian economy the whole body can be thought of as offered the sovereign, or not. The whole subject goes to heaven or hell. In a contemporary relation of subject to sovereign where the subject’s freedoms are being increasingly undermined and underwritten in the discourse of anti-terror the obedience of the whole body has become unpalatable to a liberal subject imagining itself sovereign. The remaining economy is of the circulation of a piece of the subject. This piece is as much speech as it is flesh. Jacques Lacan would have it both ways. I mean to read the particle exchanged with the sovereign as the political conflation of speech in and as flesh and the signification of freedom as the necessary collapse of the two. The flesh offered the sovereign is imagined, in a contemporary democracy, as not only what is not lost, but what, in fact, secures a melancholic pact of non-loss through its representation as “free speech”. The flesh lost cannot be mourned, the condition of freedom under threat from the sovereign cannot be thought about.

Juliet Rogers is currently lecturing and completing her PhD in the School of Law, and Department of Criminology, Melbourne University.

ROGERS, NICOLE
Terrorism and Black Magic in the trial of Faheen Lodhi
In 2006, Joseph Terence Thomas, also known as Jack Thomas or ‘Jihad Jack’, became the first person in Australia to be convicted under Australia’s anti-terrorism legislation. Thomas’ trial shares some common characteristics with other contemporaneous Australian terror trials in the ‘War against Terrorism’. The terror trials are pre-emptive in that they target hypothetical or non-specific acts of violence. The trials highlight the violence of the State in its treatment of terrorism suspects, and the racial and religious profiling of such suspects. They are extensively mediatised; however, paradoxically enough, the media’s coverage of the terror trials is restricted by legislation which provides for closed hearings. In this paper, I draw on the work of Stanley Cohen and Rene Girard in examining the functions and effectiveness of the terror trials. In the spectacle of the terror trial, terrorism, an otherwise uncontrollable phenomenon, is contained within the bodies of easily identifiable individuals. Furthermore, the terror trials play a critical role in supporting the ideological apparatus which underpins the government’s response to terrorism.

Nicole Rogers, Lecturer in the School of Law and Justice, Southern Cross University.

ROSENBERG, MELINDA
Terrorism, Security and Liberty: Negotiating a Mobile Army of Metaphors
This paper examines the potency of rhetoric over logic and reason. I will examine just how metaphors like the “war on terrorism” and the “fight for freedom” have convinced many Americans that there are sound reasons for sacrificing liberty for security. Is it worth disregarding and/or invalidating laws even though the country is not engaged in an actual
war? Perhaps, a small but headstrong contingent of lawmakers and jurists is beginning to oppose this Orwellian tide. One such person is United States District Judge Anna Diggs Taylor. She ruled this August that the National Security Agency’s warrantless electronic surveillance of suspected terrorists was unconstitutional. Even though the Fifth Amendment to the Constitution clearly forbids searching and seizing property without a warrant, the NSA elected to overlook any constitutional precedent and proceed with illegally monitoring emails and phone calls made by suspect persons, until a suit was filed by numerous libertarian groups. President Bush supported the surveillance. The judge wrote that “[t]here are no hereditary Kings in America and no powers not created by the Constitution. So all ‘inherent’ powers must come from the Constitution.” (06-CV-10204) New laws or procedures that ignore precedents cannot and should not be upheld. However the average American thinks differently. Why would anyone tolerate unconstitutional intrusions by the government? By all accounts, Americans appear to be willing to forgo many of their civil liberties for the sake of “national security”. No matter how improbable an attack on the United States seems, even the slightest possibility of an attack causes seismic fear and panic among Americans. We have a presidential administration that has skillfully played to those fears. The Bush administration has repeatedly teetered upon one constitutional crisis after the other since September 11, 2001. We are engaged in a metaphorical “War on Terror”, but how many established law must be overridden to protect our security? Is it too risky for Americans not to be under increased supervision? The “War on Terror” has seemingly accomplished but one thing - placing liberty against security. I will argue that “risk” and “liberty” are metaphors by which we should live. Risk and liberty respect the rule of law. “Fear”and “terror” are metaphors which do not and will not protect us. They give an overzealous government a pretext to breach a body of law they swore to protect.

Melinda Rosenberg is a Visiting Assistant Professor, Department of Philosophy, University of North Florida.

ROUNDTABLE:
Legally Authorised Intervention in Psychosis
A review of homicides committed during psychotic illness in NSW between 1993 and 2002 indicates that those in their first episodes of mental illness should be considered to be at greater risk of serious violence than those in subsequent episodes, raising the issue of whether, in the interests of both effective treatment and crime prevention, the threshold for civil commitment should be lowered.

Speakers: Danny Sullivan is a forensic psychiatrist. Robert Hayes is an Associate Professor, School of Law, UWS and co-director of the Centre for Mental Health Law. Discussants: Olav Nielssen is a forensic psychiatrist. Adam Payne is a Research Assistant, School of Law, UWS.

ROUNDTABLE:
Preventative Detention of Sex Offenders
A review of recidivism rates, the effectiveness of treatment, and the legal processes facilitating the preventative detention of sex offenders throughout Australia and New Zealand, raises the issue of whether the impact of sex offender legislation is irrelevant to any legitimate therapeutic or crime prevention goal, and ultimately corrosive of psychiatry, and the criminal justice systems through which the processes are administered.

Speakers: Robert Hayes, Associate Professor, School of Law, UWS and co-director of the Centre for Mental Health Law. Olav Nielssen is a forensic psychiatrist. Discussants: Danny Sullivan is a forensic psychiatrist. Kristie Bayliff, School of Law, UWS.
ROUNDTABLE:

Animals are sentient beings who depend, in some circumstances, on humans and the law to safeguard their well-being. Yet the activities of humans are responsible for much of their suffering and, contrary to popular belief, the law with respect to animal welfare is seriously flawed. A prime example is the exemption of stock animals from key provisions of State anti-cruelty legislation, such as section 9 of the Prevention of Cruelty to Animals Act 1979 (NSW) which regulates the exercise of confined animals. The result is that animals such as pigs and poultry typically live in conditions which substantially fail to meet their needs. Because the intensive farming of animals occurs away from the public gaze, most people avoid having to confront the issues. This invisibility is reinforced by the complex regulatory structure which governs agricultural industry. State anti-cruelty statutes not only allow regulations with respect to such matters as the confinement of animals but expressly permit the regulations to adopt guidelines in the form of codes of practice. These codes are developed by federal/State Ministerial Councils dominated by industry interests; in the case of some State statutes, compliance with the code is evidence of compliance with the Act. The bizarre result is that keeping large numbers of stock animals cruelly confined is rendered legal under statutes which purport to have animal welfare as their object. The complexity of the regulatory structure also makes it difficult to ensure the high degree of scrutiny that the delegation of law-making power to the executive should always entail. At a broader level, the co-option of animal welfare law by industry shares some features with the ‘politicised abuses’ of law associated with very different contemporary issues. In a climate of fear, law may be used not as an instrument of protection, but to diminish rights. In the case of laws detaining alleged terrorists or asylum seekers, the mantra of physical security is invoked; in the case of factory farmed animals, economic security and biosecurity hold sway. In each case, the law helps to mask the exercise of power. Whether it be laws that seek to excise parts of Australia in order to ensure ‘offshore’ processing of refugee claims or animal ‘welfare’ codes that sanction cruelty, the paradoxical effect of law is evident. But animals face a particular difficulty in securing the protection of law: their legal status as property means that they are not accorded rights. This reflects the notion of speciesism, which privileges the interests of humans over animals. With the very idea of rights couched in terms of ‘human’, even advocates such as Amnesty International have, reportedly, expressed concern about the extension of basic legal rights to great apes. Yet the sentiments that drive support for the right of all humans to fully realise their capacities also compel many to advocate a change in the way animals are viewed. Instead of seeing a commitment to animals as inconsistent with human rights, there is a compelling case for making connections between progressive forces to effect shared goals. The aim of the panel is to raise awareness and promote discussion of relevant issues.

Fiona Borthwick is a Lecturer, Faculty of Arts, University of Wollongong. Elizabeth Ellis is a Lecturer, Faculty of Law, University of Wollongong. Katrina Sharman is Corporate Counsel, Voiceless: the Fund for Animals. Cybele Stockley is a member of the Executive Committee, Lawyers for Animals.

SEUFFERT, NAN
Sexual Citizenship, Immigration and National Identity in New Zealand: Shifting Sands in a Gathering Storm

In 1997 Professor Thomas Stoddard commented that from the perspective of a lawyer, law teacher and political activist for lesbians and gay men from New York, New Zealand’s laws made it seem like the “Promised Land.” Yet Stoddard was disappointed when he visited New Zealand, claiming that there was no underlying culture of gay liberation to match the progressive laws. Since 1997 New Zealand has passed the Civil Union Act 2004. At a time when New Zealand has arguably participated in the trend of belligerent democracy set by the United States and Australia (Povinelli 2005), tightening and whitening immigration
regulations more generally, it has also liberalised the requirements for immigration for same
sex couples to match those for de facto opposite sex couples. Simultaneously, the seeds of
a cultural, moral and political panic in relation to gays and lesbians can be identified. This
work in progress considers the creation, maintenance and policing of national boundaries in
an era of globalisation, belligerent democracy and demands for equality by lesbians and gay
men.

Nan Seuffert is an Associate Professor of Law, University of Waikato.

SIMPSON, BRIAN
Children as Monsters: Child Protection, Fear and Risk
A number of recently reported child deaths in various parts of the country have placed child
protection issues back on the agenda and in particular there have been calls for a ‘national
approach.’ These calls often identify the problem in terms of failing State government child
welfare departments, neglectful parents and predator paedophiles. In essence the complaint
is that not enough is done to protect vulnerable children while those who cause harm to
children themselves are protected. But is this debate flawed in its failure to recognise deeper
social anxieties about children? Are children in fact the monsters from whom we seek
protection, and the risk is, not simply that children may be harmed by the actions of others,
but also that society itself may be harmed by ‘monster’ children who are not tamed? In
particular, where in debates on the need to create uniform or national approaches to child
protection is mention of the rights of children to assert their own identity, to transgress norms
and to participate in decisions which affect them? Is it that those who call for more stringent
action on child protection issues are more concerned about the monsters that live ‘within’,
than the monsters that live ‘outside’?

Brian Simpson is from the School of Law, University of New England.

STUBBS, JUDITH AND MICHAEL STORER
Planning at the Margins? The Role of the NSW Planning System in Protecting
Affordable Housing
Affordable housing is viewed almost universally as one of the most serious issues currently
facing Australian society. Despite this, the failure of the market system to provide housing at
the lower end of the price spectrum, and increasing disengagement of the state in providing
or developing policy about low cost housing, have left those most vulnerable in the housing
market in increasing risk of homelessness. The inadequacies manifest in legislation
designed to maintain or increase the stock of affordable housing have failed to slow its loss
at the most affordable end through strata subdivision and redevelopment, including the
imminent loss of around 3,000 long-term places in caravan parks in NSW. Inadequacies in
legislation designed to protect private renters are likewise apparent. Such lack of legislative
‘muscle’ indicates an ambivalent NSW State Government, at best. In this context, those
concerned with the maintenance of affordable housing have sort increasingly to rely on the
planning system, and in particular appeals to the NSW Land and Environment Court. This
includes Councils concerned about these issues at the local level, as well as housing
advocates with broader concerns. As part of their strategy, they have enlisted the voices of
those most marginalised in the housing market, and particularly low-income tenants affected
by proposed urban redevelopment. Recent amendments to the Residential Parks Act 1998
(NSW) also place increased emphasis on the State’s planning system for protecting owner-
renters in caravan parks. These changes have the effect of giving the Court ultimate control
over the eviction of owner-renters, and indirectly, renter-renters in residential caravan parks.
However, those seeking to use the planning system to protect affordable housing face
particular obstacles flowing from increased streamlining of planning procedures, and
inherent limitations to standing under the Environmental Planning and Assessment Act 1979
(NSW). These reduce the ability of socially vulnerable residents affected by such planning
decisions to be heard, and severely limit the participation of residents and advocates, except in the most indirect way. Councils also face difficulties in using the planning system to maintain existing stocks of affordable housing. It is in this context that we explore a range of related issues. Is the NSW planning system effective to achieve such a social end, in this case, the protection affordable housing? What avenues are open to Councils and those concerned with the protection of affordable housing within the existing system? How should the law respond to the issues posed by the affordable housing 'crisis' in NSW? What issues arise in bringing the voices of those most marginalised in society into the forums where planning decisions that affect them are made? We examine these questions with reference to our work in NSW Land and Environment Court, and developing Environmental Planning Instruments for local government authorities. This includes discussion of two recent cases in which the authors were involved, where marginalised residents affected by proposed caravan park redevelopments were joined and actively participated in the proceedings.

Judith Stubbs is an Adjunct Professor, Australian Housing and Urban Research Institute, UNSW. Thomas Storer is a Senior Research Associate, Judith Stubbs and Associates.

TAIT, DAIVD
Judicial Rituals and Procedural Justice
Much of the empirical analysis of procedural justice has relied on consumer satisfaction measures derived from surveys. Do people feel they have been treated with 'dignity' and 'respect'? While subjective evaluations of justice processes are important, they need to be supplemented by approaches that examine more directly how the court processes are managed and performed. This paper, drawing on work by Garapon and Ricoeur, suggests a way of analyzing justice performances that goes beyond satisfaction measures, by looking at how space is transformed by ritual, and applies this to a comparison of murder trials in three different jurisdictions.

David Tait, Co-ordinator, Court of the Future Network, Law School, University of Canberra.

TOLMIE, JULIA
Domestic Terrorism and Police Negligence: Suing Police for Negligence in Domestic Violence Cases – Extrapolating from Canada to New Zealand
"The Justice Department reports that each day in the US, four women are murdered by their spouses or partners, and thousands more are maimed or severely injured. If foreign terrorists were killing four Americans per day, the F-16s would have long since been fired up and troops readied for battle. But when the terrorist is a current or former partner, the high court offers no assistance." (Buel, “Battered Women Betrayed” Los Angeles Times, 4 July 2005)
In Mooney v British Columbia (2004) BCCA 402 a woman sued the Royal Canadian Mounted Police for responding negligently to her domestic violence complaint. Bonnie Mooney alleged that their failure to respond properly meant that her violent ex-partner was able, six weeks later, to break into her house, shoot her best friend (who was attempting to shield her at the time) and her daughter, before setting fire to the house and shooting himself. Although she succeeded at first instance in demonstrating that the police owed her a duty of care which they had breached, she lost at this stage, and on appeal, on the issue of causation. This paper uses Mooney to canvas the legal issues faced by New Zealand women who might sue for negligent failure by the police to act on complaints of domestic violence or the breach of a protection order.

Julia Tolmie, Associate Professor, Faculty of Law, University of Auckland, New Zealand.
TOWNES O'BRIEN, MOLLY
Tribalism in Criminal Law: Exploring the Overrepresentation of Minority Populations in Prison
Incarceration rates around the globe are rising. Because many societies now keep data on the race or ethnicity of prisoners, it is now possible to discern a global tendency of each population to imprison a disproportionate percentage of its minority group members. African-Americans and Hispanics are disproportionately represented in American prisons. In Australian prisons, Aboriginals are disproportionately represented. Unequal imprisonment of minority groups has been documented in Spain, Japan, Britain, France and Germany. This work in progress will consider the overrepresentation of minority group members in prison as a global phenomenon, seeking to understand it as a problem of human society rather than as a problem of a single economic system, culture, or historical framework. It will hypothesize that group identification or 'tribalism' contributes to (1) the criminalization of minority group behaviour; (2) the disparate enforcement of criminal punishments against minority group members; (3) minority group disrespect for legal authority; and (4) decreased efficacy of enforcement measures. Finally, this paper may conclude with some thoughts on how a multi-ethnic society may reform law to minimize the negative effects of tribalism in criminal justice.

Molly Townes-O’Brien is a Lecturer, Faculty of Law at the University of Wollongong.

WELSH, REBECCA
Can the Government Really Do That! Preventative Detention and the Lim Immunity
Preventative detention orders are one of the most controversial of Australia’s counter-terrorism measures. What is a preventative detention order? How is it justified? What rights are being sacrificed to achieve this? The Commonwealth separation of powers has been described as an implied bill of rights. One principle emerging from the separation of powers is the implied immunity from involuntary detention. This principle is young, and has only been considered by the High Court in the context of asylum seekers. By tracing the evolution of this principle from its conception in Chu Kheng Lim to its consideration in obiter in Fardon v NSW Attorney-General and Baker v The Queen, it appears that it may hold the key to invalidating the Commonwealth Preventative Detention regime.

Rebecca Welsh is a BA/LLB student at the University of Wollongong.