



Centre for
Comparative
Constitutional
Studies



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Centre for Comparative Constitutional Studies Newsletter

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Welcome to the first issue of the Centre for Comparative Constitutional Studies Newsletter, a guide to news and events at the Centre and a spotlight on issues in constitutional law nationally and globally.

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Upcoming events

★ **LLB Student Forum – Talking to Seven Judges: Arguing constitutional cases in the High Court – Associate Professor Kris Walker (18 April 2007, 1pm, Melbourne Law School, room 102)**



Kris Walker will be discussing some of her recent appearances in the High Court of Australia. She will cover the process of taking a case to the High Court, starting with the commencement of proceedings and finishing with oral argument. She will also discuss the challenges and joys of presenting oral argument to seven judges. For further information please see the CCCS [website](#). This presentation is intended for Melbourne LLB students only.

★ Cultural Wars and Constitutional Law: Australia and the United States Compared – Amos Jones (9 May 2007, 1pm, Melbourne Law School, room 222)



Amos N Jones is a 2006-07 Fulbright Postgraduate Scholar currently visiting the Centre for Comparative Constitutional Studies. In this seminar, he will present the principal observations of his work on how political culture has influenced the legal development of Bills of Rights and social reforms proposed in Australia. Amos Jones is a graduate of Harvard Law School and the Columbia University Graduate School of Journalism. His scholarship focuses on the law of racial discrimination, the development of international human rights, and the role of religion in lawmaking.

★ Law Week Oration: Does Australia need a Bill of Rights – The Hon Michael McHugh AC (5.30pm drinks, 6.15-7.30pm lecture, 15 May, Melbourne Law School)

Former High Court Justice, the Hon Michael McHugh AC will give the Law Week Oration on the topic “Does Australia need a Bill of Rights”. Mr McHugh had a distinguished career as a barrister, including being President of the New South Wales Bar Association from 1981-1983. He was appointed to the Court of Appeal of the Supreme Court of New South Wales in 1984 and to the High Court in 1989. After his retirement from the High Court he was appointed as one of the non-permanent Justices of the Hong Kong Court of Final Appeal. In this oration, which is being jointly organised with the Law Foundation, the Victorian Bar and the Human Rights Forum, Mr McHugh will address the question of whether a Bill of Rights is necessary at Commonwealth level. RSVP to Marina Loane by 8 May on 8344 0074 or email m.loane@unimelb.edu.au with Oration in the subject.

★ **The Kable Principle: Ten Years on and After Forge – Jonathon Redwood (23 May 2007, 1pm, Melbourne Law School, room G29)**



This seminar will examine the scope and limits of the High Court's decision in *Kable v DPP* (1996) 189 CLR 51, which imported a limited, one-sided separation of powers from the Commonwealth Constitution to the States. Since that decision the case has been consistently misunderstood and marginalised. Properly understood and applied, however, the principle is a fundamental one with genuine constitutional work to do. The recent decision of *Forge v ASIC* (2006) 80 ALJR 1606 (the acting judges case), while not invalidating the legislation in that case, may be seen as breathing some life into a principle that had seemed somewhat of a “dead letter” and confined to extreme facts of the type in *Kable* itself.

★ **Protecting Human Rights Conference (25 September 2007, 9am-5pm, Melbourne Law School)**



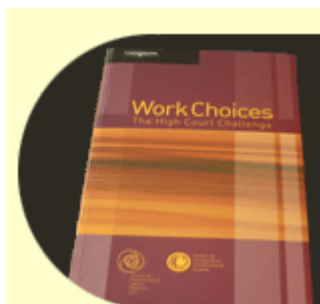
This one day event will discuss developments in the protection of human rights by Australian charters and human rights acts. The conference provides an important opportunity to examine the Victorian Charter of Human Rights and Responsibilities, the ACT and other bills of rights. Leading Australian and international speakers will also address the future of the protection of human rights, such as economic, social and cultural rights, in Australia and other countries. The day is aimed at both a legal and non-legal audience. Further details and the conference registration forms are available from the CCCS [website](#) or email law-cccs@unimelb.edu.au.

Recent activities and publications

★ **Seminar- 'The Rule of Law in Blair's Britain', presented by Professor Adam Tomkins Tuesday 20 March.**

In this seminar, Professor Tomkins examined the changing contours of the rule of law in British constitutional law since the coming into force of the UK's Human Rights Act in 2000. Tomkins, who has held the John Millar Chair in Public Law at the University of Glasgow since 2003, posited that the British constitution is currently at a crossroads and faces a series of hard choices as to how the relationship between the political/parliamentary and the legal/judicial elements of the constitution should now develop. The seminar was well attended and Professor Tomkins was an interesting and generous speaker. No paper is available for this seminar at present.

★ New CCCS and CELRL Publication - Workchoices: The High Court Challenge



Work Choices: The High Court Challenge published in March by Thomsons includes a comprehensive analysis of the constitutional and workplace implications of the decision by experts from the University of Melbourne's Law School including CCCS members Professor Cheryl Saunders, Associate Professor Simon Evans and Megan Donaldson. The other authors are CELRL Director Colin Fenwick and Joo-Cheong Tham. This publication, which also includes the decision itself with headnote and summary of argument, will be a very useful resource for practitioners and students of industrial relations and constitutional law. [Further information.](#)

★ Recent presentations and articles

- Carolyn Evans, “[State Charters of Human Rights: The Seven Deadly Sins of Statutory Bills Of Rights Opponents](#)”, presented at the Gilbert+Tobin Centre of Public Law 2007 Constitutional Law Conference
- Kristen Walker, “Federalism and the WorkChoices Case”, presented at the Gilbert+Tobin Centre of Public Law 2007 Constitutional Law Conference
- Kristen Walker, “The Same-Sex marriage Debate in Australia” (2007) 11 *International Journal of Human Rights* 109-130

Project updates

★ Parliaments and the Protection of Human Rights

A major research focus of some Centre members continues to be the ARC funded project on Australian Parliaments and Human Rights (Chief Investigators Carolyn Evans and Simon Evans). This project investigates all the existing parliamentary and pre-parliamentary mechanisms for ensuring that proposed legislation is compliant with rights. In most jurisdictions these mechanisms include a parliamentary scrutiny committee with primary responsibility for checking legislation against (often vague) rights criteria. The project combines a review of the parliamentary records of selected Australian parliaments with interviews of key parliamentary stakeholders. It aims to identify the capacity and effectiveness of Australian parliaments and, through a comparative study, to compare their performance with world’s best practice. More recently, the project has included detailed study of the Victorian Charter of Human Rights, as a rights-instrument that aims to improve attention to human rights issues in the law-making process. Recent project publications include:

- Carolyn Evans and Simon Evans, ‘Evaluating The Human Rights Performance Of Legislatures’ (2006) 6(3) *Human Rights Law Review* 545-569 (OUP, UK) (11,500 words)
- Simon Evans and Carolyn Evans, ‘Legal Redress under the Victorian Charter

of Rights And Responsibilities' (2006) 17 *Public Law Review* 264-281 (13,000 words)

- Carolyn Evans and Simon Evans, 'Scrutiny Committees and Parliamentary Conceptions of Human Rights' [2006] *Public Law* 785-806 (11,500 words)
- Simon Evans, 'Improving Human Rights Analysis In The Legislative And Policy Processes' (2005) [2006] 29 *Melbourne University Law Review* 665-703 (18,700 words)
- Simon Evans, 'Should Australian Bills of Rights Protect Property Rights?' (2006) 31 *Alternative Law Journal* 19-24 (5,700 words)
- Simon Evans, 'Constitutional Property Rights in Australia: Reconciling Individual Rights and the Common Good' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate 2006) 197-222

Member profiles

CCCS members are active researchers and teachers across a broad range of public law issues. Many are available to give presentations or to consult on public law projects, particularly contributing a comparative perspective to domestic issues. They are also interested in talking with students interested in undertaking research projects in the LLB or at postgraduate level.



Associate Professor Simon Evans (Director) focuses on constitutional rights (especially property rights and socio-economic rights) and mechanisms for government accountability. Since 2005, he has been engaged with Carolyn Evans in a major ARC funded research project on Australian Parliaments and Human Rights. More information: [CCCS profile](#); [faculty profile](#).

Professor Cheryl Saunders (Founding Director) is presently working on two major projects: an account of the Australian Constitution written from a comparative constitutional perspective and a text on comparative constitutional law. More information: [CCCS profile](#), [faculty profile](#).





Associate Professor Kristen Walker (Deputy-Director) teaches Constitutional Law and Law and Sexuality in the LLB program and, in the graduate program, Principles of Public and International Law. Kristen's research interests are in constitutional law, law and sexuality, and international law, particularly human rights and refugee law. [CCCS Profile](#), [faculty profile](#).

Associate Professor Carolyn Evans (Deputy-Director) is currently engaged in an Australian Research Council funded discovery project on Parliaments and the Protection of Human Rights with Dr Simon Evans. Carolyn is also engaged in research on many aspects of religious freedom and the intersection of Church and State including an ARC funded project with Beth Gaze on the tension between religious freedom and non-discrimination law. More information: [CCCS profile](#), [faculty profile](#).



Ms Katy Le Roy (Assistant Director CCCS) is doing her doctoral research on constitution making in the Asia Pacific, looking specifically at constitution making processes in Fiji and the Solomon Islands, and democratic participation in constitution making. Katy has been working as a consultant for the United Nations Development Program since April 2006, coordinating the constitutional review process in Nauru. Katy worked with the Nauru Constitutional Review Commission which has just completed its report and recommendations for constitutional amendment, and Katy will be advising the Nauru Constitutional Convention that will begin on 23 April 2007. Katy is also working with Professor Thomas Fleiner of the Institute of Federalism in Fribourg, Switzerland, on the translation from German to English of Professor Fleiner's book "A General Theory of State – Constitutional Democracy in a Multicultural and Globalised World" (co-written with Lidija Basta Fleiner).



Dr Michelle Foster's teaching and research interests are in the areas of public law, international refugee law, and international human rights law. She is also Director of the International Refugee Law Research Programme in the Institute for International Law and the Humanities. More information: [faculty profile](#).

Associate Professor Beth Gaze teaches and researches in Anti-discrimination Law and Administrative Law. She is a member of the Victorian Mental Health Review Board, and a past member of the Social Security Appeals Tribunal. She is currently completing work on a study of the enforcement process under Australian federal anti-discrimination law. Ongoing projects include a study of the need for substantive updating of Australian anti-discrimination laws, and two ARC Discovery projects: a study of participant experiences of the Social Security Appeals Tribunal (with Professor Belinda Fehlberg), and a project on "Non-discrimination laws and religious freedom: current conflicts and future directions" with Associate Professor Carolyn Evans. More information: [faculty profile](#).



Dr Pip Nicholson's current projects include a study of Vietnamese attitudes to dispute resolution and an analysis of comparative law theory's applicability to empirical legal studies in Asia generally and Vietnam in particular. She currently consults on changes in transitional legal systems. More information: [CCCS profile](#), [faculty profile](#).

Glenn Patmore's principal fields of interest are democratic theory and practice, constitutional law and the Republican debate. He also researches into Labour Law. More information: [CCCS profile](#), [faculty profile](#).



Professor Adrienne Stone joined the Faculty and the CCCS at the end of 2006 from the Research School of Social Sciences at ANU. Her research interests lie in constitutional law, comparative constitutional law and constitutional theory. She has published extensively on Australian constitutional law, with a special focus on freedom of political communication, comparative constitutional law of freedom of speech and the legal and institutional questions surrounding bills of rights. More information: [faculty profile](#).

Dr Joo-Cheong Tham's principal fields of interest are labour law, anti-terrorism laws and political finance law. His writings in all three areas has been published in newspapers and international and Australian academic journals. His terrorism law research is presently devoted to an Australian Research Council-funded project on the financing of terrorism.

More information: [faculty profile](#).



Mr John Waugh researches and teaches in Australian constitutional law and history. More information: [faculty profile](#).

Visitors



Dr Dirk Hanschel (11 April 2007 to 11 June 2007)
Senior Research Assistant at the Chair of German and Comparative Public Law, International Law and European Law, University of Mannheim, Germany
Dr Hanschel will be conducting post-doctoral research on challenges to multi-level federalist systems.

Amos Jones (1 September 2006 to 31 May 2007)
Amos Jones is visiting the CCCS under a Fulbright Postgraduate Award, having recently completed his Juris Doctor degree at Harvard Law School. His work analyses how political culture is influencing the legal development of the Bill of Rights proposed for Australia.



Positions vacant

The Centre is currently advertising for a new administrator. Details are available from the University's [Human Resources Website](#).

Comparative constitutional law news

★ Human Rights – UK Parliamentary Committee Urges Changes

The UK Parliament's [Joint Committee On Human Rights](#) urges a legislative clarification of the meaning of 'public authority' – the bodies that are bound to comply with the Human Rights Act. Meanwhile, the proper interpretation of the existing provision is on its way to the House of Lords. The developing UK approach is of interest to those who work with the Victorian Charter of Human Rights and Responsibilities.

★ Compulsory Acquisition of Property – South African Constitutional Court on Criminal Forfeiture Laws and the Property Guarantee

[Mohunram and Another v National Director of Public Prosecutions and Another \(Case CCT 19/06, 26 March 2007\)](#), demonstrating just the kind of proportionality reasoning rejected out of hand in Australia in *Theophanous*.

★ Political speech – Canadian Supreme Court Upholds Election Blackout Law

The Supreme Court of Canada upheld s 329 of the Canada Elections Act in [R v Bryan 2007 SCC 12 \(15 March 2007\)](#) by a 5:4 majority and over spirited dissent. Section 329 effectively prohibits publication (in this case, on a website) of election results from eastern provinces until the polls close in the west.

★ Equality – Same-Sex Rights in the Supreme Court of Canada

[Canada \(Attorney General\) v. Hislop \(1 March 2007\)](#) upheld in part and invalidated in part the legislation that restricted access to pension benefits for the surviving partner of a same sex relationship. The Canadian court openly acknowledged that its 1999 decision on same-sex rights changed the law and that it would therefore be inappropriate to grant a remedy in relation to pre-1999 conduct that imposed a burden on government (absent unusual circumstances).

★ Effects of Invalid Laws – Canadian Supreme Court on Restitution of Invalid Taxes

[Supreme Court of Canada's decision in Kingstreet Investments Ltd. v. New Brunswick \(Department of Finance\) \[2007\] SCC 1 \(11 January 2007\)](#) decided (among other things) that remedy for payment of ultra vires taxes is available as of constitutional right, rather than under the law of unjust enrichment.

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