

Civil Liberty

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ASIO Legislation Amendment (Terrorism) Bill 2002

by
Cameron Murphy, President

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This legislation goes against the grain of every basic liberty that we hold dear in Australia. It has no place in our nation. What sets us apart in Australia from oppressive, undemocratic regimes is the value we place on principles such as human rights, liberty, natural justice and judicial independence.

This bill seeks to remove all of those basic principles and, if successful, will see that our nation is no better than apartheid South Africa, communist Russia, Pinochet's Chile and other regimes that have no regard for rights, liberty or the rule of law. This legislation is reminiscent of Argentina's 'missing people', or the Malaysian Internal Security Act.

A lot of claims have been made by government, even by ASIO recently, that these powers are necessary, but there has been no evidence provided to substantiate those claims. To the contrary, the government has consistently reassured the Australian public that there is no direct or indirect threat to Australia from terrorists. When you are proposing to severely restrict or remove basic human rights and liberties in the way that this bill does, the onus of proof must be on the government to demonstrate that it is both necessary and useful. It is unreasonable to expect that we should be giving up fundamental liberties and rights for nothing more than the mention of September 11. There has been no case presented yet that these powers will help to prevent future events like those of September 11. In fact, there is a strong argument that they will do exactly the opposite.

People held against their will, without contact with family or a lawyer, under threat of imprisonment if they do not cooperate, will ultimately say anything – even a lie and even if it incriminates them – to please their jailers and set them free. This process will encourage people to say whatever ASIO want to hear in order for them to obtain their freedom. This power is not only unprecedented in Australia's history but also dangerous.

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JOURNAL DEADLINE DATES

Next issue is: 14/8/02

Only email or disk documents and digital images will be accepted
Articles no longer than 1500 words and letters 100 words.

ASIO Legislation Amendment

contin

There is no power anywhere else in Australia that would allow a person to be arrested and held indefinitely without charge, without legal representation and without outside contact.

It is more dangerous to give this power to an agency that is secretive and, in many regards, above the law. Our intelligence agency is already the subject of a litany of complaints over search warrants, interviews and other matters that demonstrates its incompetence in assuming any sort of policing role. Indeed, one only has to remember the disgraceful events of the Sheraton Hotel in Melbourne in 1983 for a concrete example of the way in which our intelligence agency's powers can be misused and abused. The form demonstrated by ASIS in its antiterrorism exercise is the last thing we would like to see the repeat of. No agent of ASIS has ever been charged or convicted of a criminal offence arising out of that episode.

ASIO has obtained a position of privilege in Australian society due to its role as an intelligence gathering and reporting agency. Its privilege has placed it above the law in many respects. Agents of ASIO are protected from identification, ASIO warrants are not reported and there is a lack of accountability of ASIO compared to other government agencies. These powers will fundamentally change the nature of ASIO from its current intelligence role to that of a secret police force in many ways resembling the KGB. By its very nature, the information that ASIO relies upon is dubious, and intelligence is a misnomer. It is often nothing more than unreliable and unconfirmed innuendo, speculation and rumour.

The bill will create a two-tiered legal system in Australia. Someone could be arrested without charge, denied legal representation and held indefinitely and in secret by ASIO. But, if they happen to be arrested by Constable Plod of the New South Wales Police Force for exactly the same offence or to get the same information, they will retain all of their rights. They will be afforded legal representation, contact with their family and they cannot be held without charge. This will create a subjective and selective process that is above the law and where, if you are a target of ASIO, you may be hounded by them without redress.

History shows us that these sorts of laws have been used most effectively and unfortunately against legitimate activists. Amongst others, Nelson Mandela, Gandhi, Xanana Gusmao and Daw Aung

San Suu Kyi have all been held without charge and have all been considered to be terrorists. In Australia, we should not make the same mistake in an era of uncertainty and insecurity of setting up the mechanisms now that are going to be misused in the future. It is inevitably activists, dissidents and agitators that are going to be the targets of this legislation in the future, not terrorists. If we are going to be interviewing people in relation to terrorism then we must use an appropriate body to do so. The Australian Federal Police are experienced and they are more than capable of interviewing suspects and obtaining relevant information under existing laws. They are readily identifiable and they are infinitely more accountable when they breach the law.

We must also give those interviewed protection from prosecution to ensure that the evidence they provide to us is accurate and reliable and, above all, we must ensure that there is a process that retains basic liberties. No-one should be detained without charge indefinitely or otherwise, which this bill will allow. The worst thing we could do to combat terrorism in Australia is to set up a system that removes the cornerstones of our democracy and weakens it by doing so. If we remove the value we place on our liberty, we are doing nothing more than destroying our democracy in order to protect it. Benjamin Franklin once wrote in his historical review of Pennsylvania:

Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety.

If we pass this legislation in Australia, we are going down exactly that path that he warns of.

Cameron Murphy

Obituary

With great regret, we report the passing of Greg Barter. He was a long-term member of the CCL and a member of our Committee for a number of years up to the time of his death.

Greg was a modest, unassuming man – a solicitor by profession. He had a keen sense of social justice and was an active contributor to CCL work in areas such as privacy. We shall miss him.

Committee of the NSW Council for Civil Liberties

CIVIL LIBERTY

Journal of the New South Wales Council for Civil Liberties Inc

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Views expressed in this journal are not necessarily those of the editor or of the New South Wales Council for Civil Liberties Inc.

COMMITTEE MEETINGS

Meetings are usually held at 6.30pm on the fourth Wednesday of the month, at the Council's office, 149 St Johns Rd, Glebe. Members are welcome to attend as observers.

SUBCOMMITTEE MEETINGS

Fundraising & Finance –

Convenor: *Joan Kersey*
Members: *Ken Buckley, Cameron Murphy, Susan Cleary*

Refugees/Asylum Seekers

Convenor: *Ken Buckley*
Members: *David Bernie, Susan Cleary, Sol Encel, Joan Kersey, Eloise Riches*

Sniffer Dogs

Convenor: *Cameron Murphy*
Members: *Timothy Moore*

ASIO/Increased Police Powers

Convenor: *David Bernie*
Members: *Ken Buckley, Cameron Murphy, Pauline Wright*

Complaints –

Convenor: *Daniel Brezniak*
Members: *Joan Kersey, Jeremy Styles*

Subcommittees usually meet monthly. For further information please contact the Executive Secretary who can tell you when your subcommittee meets or put you in contact with the relevant Convenor.

NEWS NEWS

2002 BILL OF RIGHTS CONFERENCE

A major conference on Bill of Rights issues will be held on Friday 21 June at the New South Wales Parliament House Theatre at Macquarie Street, Sydney.

This event will mark an important point in the ongoing debate over an Australian Bill of Rights, and more generally on questions about legal protection for human rights in Australia.

Speakers include Attorney General Daryl Williams, Shadow Attorney General Robert McClelland, Democrats Attorney General Spokesperson Senator Brian Greig, Justice Sir Kenneth Keith of the New Zealand Court of Appeal, Dr Sev Ozdowski, Human Rights Commissioner, Professor Larissa Behrendt of the Jumbunna Indigenous House of Learning at UTS, Professor Hilary Charlesworth, Chair of the ACT Bill of Rights Inquiry and of ANU, Elizabeth Evatt AC and Bret Walker SC, President of the NSW Bar Association.

The registration fee for the full day (including lunch) is \$99 (or \$55 for full-time students and concessions).

To register, or to receive the full conference brochure (with a registration form and credit card payment option), please email

gtcentre@unsw.edu.au, contact Belinda McDonald on (02) 9385 2257 or see www.gtcentre.unsw.edu.au.

THE OUSTING OF PETER RYAN

The removal from office of Police Commissioner Peter Ryan is gratifying to the CCL. At our AGM in October 2001, a motion was carried that the CCL "has no confidence in the ability of Police Commissioner Ryan to control or manage the NSW Police Service. He should resign or be dismissed."

The motion was moved by Ken Buckley, recorded by Mary McNish. Buckley described Ryan as an intelligent and experienced police officer, very articulate. "He is a great showman, a ringmaster who excels in selling himself. **Unfortunately, he has not been able to control the clowns, let alone the criminals.**"

Serious objections to Ryan's policies and actions were expressed notably with reference to civil liberties. This included the systematic failure to deal satisfactorily with complaints by members of the public about police behaviour.

It was also noted that the Ombudsman's office is managed sloppily and cannot be relied upon for effective oversight of complaints against police.

Reinstatement of a civilian Police Board is highly

desirable, but is unlikely while the major political parties are obsessed with changes aimed at imposing yet more restrictions upon civil liberties in the name of law and order.

Ken Buckley

Dogs Vs Trains Developments in the shaggy dog story

In response to this ruling by the Magistrates Court the NSW Government rushed legislation through the State Parliament in December last year that will allow the dogs to be used for random searches.

The Police Powers (Drug Detection Dogs) Act [NSW] allowed the government to zone certain areas by regulation such as sporting events, concerts, public transport, and streets where the dogs could be used for random searches. Areas that are not zoned require a warrant to be obtained to use the dogs.

We believe that this legislation contravenes many of our basic liberties and international obligations under the Covenant on Civil & Political Rights.

We intend to assist cases that will challenge the validity of the legislation in the High Court.

Sniffer dogs contin

In the latest development, The Police Minister and Attorney General announced in early May this year, that they had regulated for the first zoned public transport area.

Instead of targeted policing – the Ministers announced that the dogs would be used on virtually the entire metropolitan Sydney rail network.

Yet again the government seems to be content to carry on with this inefficient, unsuccessful and invasive policy.

They are now targeting the entire rail using public – the vast majority who have done nothing wrong. This approach is nothing more than a media stunt for the government and police, rather than intelligence based policing that targets those at the top of the drug sales pyramid.

Cameron Murphy

SUBCOMMITTEE REPORTS

Refugees / Asylum Seekers

Members of the subcommittee have been busy over the past three months.

Eloise Riches prepared the submission to the Human Rights & Equal Opportunity Commission Inquiry into Children in Immigration Detention which has been adopted by the Committee and forwarded. One of a number of major issues taken up in the submission is that of guardianship for unaccompanied children.

There are no specific procedures for children either in respect of visa applications and reviews or as to care whilst in detention. The CCL has proposed, in accordance with the provisions of the UN Refugee Convention and the UN Convention on the Rights of the Child, that minimum requirements for children's applications as refugees should include:

(a) provision of a guardian primarily concerned with the

child's welfare if unaccompanied;

(b) provision of legal advice and assistance at all stages of the refugee process, whether the child is accompanied or not (ie even if a child's application is attached to the parent's application);

(c) child friendly procedures with appropriately trained persons;

(d) child's best interest a primary consideration in decision making;

(e) child to have the ability to participate in the procedure.

The CCL deplors the detention of children. Detention of child refugees, especially unaccompanied minors, breaches Australia's obligations under international law. Minimum legal safeguards are denied.

The Migration Act 1958 has been subject to numerous amendments that remove the Australian legislative position further from international refugee law. Australia's commitment to human rights is questionable whilst ever Australia chooses to ratify UN conventions without enacting them as domestic law.

CCL policy on Refugees and Asylum seekers has been reviewed. Sol Encel reviewed this policy and has prepared statements on key issues such as:

The rights of refugees and asylum seekers / Is there a difference between asylum seekers and jails? / Limitations on rights / The treatment of children / How do we compare with other countries?

This document, in full, will be available on the website at www.nswccl.org.au.

Susan Cleary
Convenor (Acting)

Fundraising

The NSW Council for Civil Liberties is always in need of funds to carry on its valuable work and this year we are arranging some functions that will enable us to hear from some of the leading minds on the burning issues of the day.

Some of these will be luncheons in the delightful President's Private Dining Room at Parliament House, Macquarie Street, Sydney at \$65 per head.

Seats are limited so it would be advisable to book early by completing the enclosed booking forms. We should also like to hold some informal functions where civil libertarians can get together to exchange views. If you have any bright ideas regarding speakers or venues, we should be glad to hear from you.

We hope you can join us on 14th June at 12.30 pm at a luncheon in the President's Private Dining Room with guest speakers Professor George Williams, Anthony Law, UNSW and Director Mason Professor of the Gilbert & Tobin Centre of Public Law. Professor Williams will speak on 'Australia's Legal Response to September 11: New Terrorism Laws'.

On 5th August at 12.30 pm we will be joined by guest speaker Mr Kevin Rudd, Shadow Foreign Minister, who recently wrote in the Herald 'Australia is making a name for itself on the world stage, but not in the way that

John Howard thinks'. We shall be interested to hear more on this subject as well as his personal impressions of the current situation in Afghanistan and Labor's policies for Australia's involvement in the region. This luncheon will, once again, be held in the President's Private Dining Room at Parliament House. We hope to see you there.

We would like to take this opportunity to thank the Hon. Dr Meredith Burgmann MLC for her support of the NSW Council for Civil Liberties. Without her assistance these events, offering opportunity for discussion of these topical and important issues, would not be possible.

Joan Kersey
Convenor

Sniffer Dogs
(refer article page 9)

Timothy Moore has been a wonderful asset to the NSW CCL in the many years that he has worked with us on the Committee. His knowledge in the areas of drug law and drug law reform is second to none.

We are going to miss his expertise as he heads to Melbourne for his new job. We wish him all the best and hope he can have the same impact down there that he's had working with us.

Committee of the NSW Council for Civil Liberties

ASIO

Cameron Murphy and David Bernie appeared before the Parliamentary Joint Committee on ASIO, ASIS and DSD on 1st May regarding the review of the ASIO Legislation Amendment (Terrorism) Bill 2002.

Submissions

Recent written submissions by the NSW CCL include:

*Children in Immigration Detention / *Human Rights & Equal Opportunity Commission Inquiry*

*Provisions of the Migration Legislation Amendment (Procedural Fairness) Bill 2002 & of the Migration Legislation Amendment Bill (#1) 2002 / *Senate Legal & Constitutional Legislation Committee Inquiry*

*Criminal Code Amendment (Espionage & Related Offences) Bill 2002 / *Senate Legal and Constitutional Legislation Committee Inquiry*

*Security Legislation Amendment (Terrorism) Bill 2002 / *Senate Legal & Constitutional Legislation Committee Inquiry*

*Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 / *Parliamentary Joint Committee on ASIO, ASIS and DSD Inquiry*

Submissions contin..

contin..

Cameron Murphy and David Bernie also appeared as witnesses at hearings on the Espionage, Terrorism and ASIO Bills.

Dr R Martin Bibby and Mr Erle B Robinson, both NSW CCL members, also sent individual submissions to the Inquiry relating to ASIO, ASIS and the DSD.

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Book Reviews

Australian Constitutional Law & Theory 3rd edition by Tony Blackshield and George Williams
Federation Press, Sydney.
2002 rrp \$99.00 (incl.GST)

Blackshield and William's new edition is a comprehensive guide to Australian constitutional law. Its real value, distinguishing it from similar texts, lies in its comprehensive coverage of Constitutionalism, Constitutional History, Sovereignty and Government. Further, the third edition introduces or expands material directly addressing issues of Human Rights, the Bill of Rights debate and Reconciliation.

From a libertarian perspective, the contextual material which this book brings to the study of substantive constitutional law is essential. The chapters on Constitutionalism, History, Sovereignty and the Common Law all underscore the structure of government, and the powers held by organs of government which are crucial to the prevention

of human rights abuses and the protection of individual freedoms.

The material included by Blackshield and Williams on the structure of government and on the external affairs power is important to the manner in which the Australian Government relates to the international community. This material on the power of government is essential to the question of Australia's responsibilities under international human rights instruments.

Australia bears an international obligation to uphold and protect the individual rights of members of the Australian community. Unfortunately (and obviously due to no fault of the authors) the material on "constitutional freedoms" exhibits starkly the minimal number of substantive rights or freedoms which members of the Australian community may enforce against the government.

"Australian Constitutional Law and Theory" enlivens the debate on human rights in Australia. It provides an invaluable background resource for all things constitutional and governmental and provides a useful introduction to possible developments in the area of human rights and civil liberties. The third edition is a timely resource for Civil Libertarians who have an involvement in the processes of government, particularly those involved in the ongoing campaign to protect human rights and fundamental freedoms.

Reviewed by Jeremy Styles



Future Seekers: Refugees and the Law in Australia by Mary Crock and Ben Saul

Federation Press, Sydney,
2002. rrp \$24.95 (incl. GST)

There is a critical crisis of conscience in Australia. From being a country with a good reputation for its treatment of immigrants and compassion towards refugees, we have swung sharply to an attitude of hostility and lack of humanitarian concern in relation to asylum seekers from overseas.

This has been manifested in recent legislation, policies and practices. Thus there is the mandatory detention (without trial) of people in centres such as Woomera, accompanied by harsh treatment. Repressive legislation was highlighted by the Federal Border Protection Act of 2001, following the Tampa ship affair. Though sponsored by the Liberal party in government, this Act was accepted by the Labor opposition.

As these events suggest, most Australians have supported official policy, including the forcible diversion of asylum seekers to such inhospitable shores

as Nauru. There is general acceptance of the official agreement as to the need to exercise strict control over immigration. It is a spurious argument, because virtually nobody advocates complete freedom of immigration. The real contention concerns the number of immigrants to be accepted and how to select them.

The federal government initially won the argument in the heat of an election campaign, and was aided by allowing virtually no media access to the affected refugees. Informed sympathy for them was taboo: xenophobia was dominant. The main task now for those Australians – probably a minority – who are sickened by the tragic situation is to strive to swing public opinion around.

The book under review here makes an important contribution towards this. Its authors are lawyers who not only know the subject but are able to write clearly and concisely about it. The facts and arguments concerning refugees/asylum seekers are laid out starkly in this book of 134 pages.

Buy or borrow it, read it and tell your friends about it!

Reviewed by Ken Buckley

In the Shadow of the Law: The Legal Context of Social Work Practice 2nd edition
by Phillip A Swain

Federation Press, Sydney.
2002 rrp \$49.50 (incl.GST)

The papers making up this collection are essentially aimed at professionals, but are here reviewed by a layman..

The book offers twenty-three contributions by experienced and qualified people working in the areas dealt with. The topics are diverse and are approached sometimes in very different ways. Some are doctrinaire and tendentious, like Kate Gilmore's on Violence Against Women, others prefer to relate experiences and facts in a way that illustrates the complexities faced by social workers. John Wilson, writing of his work with remote indigenous communities, and Loula Rodopoulos on Culture and Linguistic Entanglement are two like this.

In his essay on confidentiality, the volume's editor, Phillip Swain, points out that the social worker cannot accept information offered on the basis of "I'll tell you if you promise to keep it just between you and me". A social worker is compelled in many circumstances to divulge extremely private information. This is one of the most obviously confronting interactions of the law with social work, and one of interest to Civil Libertarians.

Jan Breckenbridge's work on Child Sexual Assault, where some sympathy is shown for positions arising from the

current popular frenzy on this subject, which would take away most of the rights of the accused, including a presumption of innocence (although this response is not as hysterical as that to 'terrorism', taking away all rights of the accused, or even of the suspected).

Those concerned with overall justice tend to think that when evidence cannot be tested by confrontation and cross-examination, a conviction based on this evidence alone is inherently suspect. They say, by all means try to minimize the trauma undergone by child witnesses, but the reduced probability of a conviction must then also be accepted. Breckenbridge comes across as too concerned to see punishment handed out, although she claims to give priority to the needs of victims. How highly should the perpetrator's punishment be rated amongst a victim's needs? It is usually justified by those who differentiate justice from revenge as having deterrent value.

Many people who are attracted to social work do not have a high inclination towards academic and analytical reasoning. Factual information and the critical discussion of it should be able to increase their effectiveness, however, and few would find reading some or all of this collection a waste of time.

Reviewed by
Doug Nicholson

Legislation

Moving towards a Totalitarian State More amendments to the *Migration Act*

The government's *Migration Act (Procedural Fairness) Bill 2002* and *Migration Legislation Amendment Bill (No 1) 2002* have been referred to the Senate Legal and Constitutional Legislation Committee, which is due to report on the bill on 15 May 2002.

The NSWCCCL recently made a submission to the Committee opposing the first Bill and one aspect of the second Bill. The submission was supported by the Victorian CCL.

The Bills are examples of an increasingly common pernicious style of legislation which erodes the rule of law, and thus attacks the foundation for our civil society. This erosion and attack creates the legal environment in which an executive government can engage in activities which are characteristic of a totalitarian regime. The legislation is inconsistent with a system of government which derives its legitimacy from affording individuals proper legal rights in relation to the operations of the executive arm of government.

The impetus for the first Bill is a High Court decision¹ that certain "codes of procedure" in the *Migration Act* did not

¹ *Re Minister for Immigration and Multicultural Affairs; ex parte Miah* [2001] HCA 22

exclude the operation of common law principles of natural justice.

Totalitarian State contin...

Without the safety net of common law natural justice, Mr Miah's application for refugee status would have been determined by the Minister's delegate on the basis of information not known to Mr Miah and to which Mr Miah would have had no opportunity to respond. Specifically, the Minister's delegate relied on information concerning a change of government in Bangladesh to support his rejection of Mr Miah's application for a protection visa which had been based on fears related to the former Bangladesh government.

The first Bill will result in the "codes of procedure" specified in the *Migration Act* becoming an exhaustive statement of the process applicable to various dealings in relation to visas and reviews of decisions by the Migration Review Tribunal and Refugee Review Tribunal, to the exclusion of the common law principles of natural justice. The second Bill renders the rules of natural justice inapplicable to certain declarations of the Minister to ban certain individuals or classes of persons who hold "special purpose visas" from travelling to, or remaining in, Australia.

The Bills can be criticised on 3 broad grounds:-

- (a) Linguistic
- (b) Humanitarian
- (c) The Rule of Law

The Bills cannot be criticised on financial grounds – the government concedes that they will have minimal financial impact. In other

words, the reduction in rights brought about by the Bills will not achieve any measurable cost savings.

Linguistic criticism

The title of the first Bill could well have been devised by an Orwellian Ministry of Truth. The Bill does not promote procedural fairness – it reduces it.

The Minister says that the "codes of procedure" state the requirements of natural justice or procedural fairness hearing rule. That statement is misleading. The "codes of procedure" state requirements which provide a substantively lesser standard of fairness than the common law principles of natural justice.

Humanitarian criticism

The Bills are directly concerned with the rights afforded to people facing potentially severe risks to their lives and physical safety in their dealings with the Australian bureaucracy. Australia has voluntarily accepted international obligations of a humanitarian character to such people. The Bills are inconsistent with Australia's international obligations.

Abrogation of The Rule of Law

The rule of law is a guarantee that individuals will not be subject to arbitrary injustice at the hands of the State or others. The Bills derogate from the rule of law.

Miah's case exposed a standard of public administration which was less than desirable², in which an individual was subject to arbitrary injustice at the hands of the State. *contin...*

² per Kirby J at [155]

Human Rights contin..

Institutions

The United Nations, constituted in the UN Charter, currently has one hundred and ninety (190) members⁴, and represents the interests of the community of nations. The breadth of membership and the inherent commitment to Human Rights are significant support for the proposition that Human Rights are Universal.

The most important Charter-based body dealing with human rights in the UN is the Commission on Human Rights (UNCHR). Originally established to draft the International Bill of Human Rights, it remains the forum where the evolution in the treatment of human rights norms continues – with mixed results.

The Treaty Bodies are Committees created under the six (6) human rights instruments⁵. The Committees operate in a quasi-judicial fashion making comments on mandatory reports submitted to them by States Parties and also on individual complaints submitted to them by citizens of their members. The most significant of these is the Human Rights Committee, which relates to the ICCPR.

⁴ East Timor will be number 191 after independence on 20 May 2002.

⁵ The two covenants and four conventions. ICCPR ICESCR CRC CEDAW CAT CERD.

A number of other Intergovernmental Organisations have some involvement in questions of Human Rights: The new International Criminal Court (ICC) is founded to hear cases of “Crimes against Humanity” which are, in effect, gross violations of Human Rights; The International Labour Organisation (ILO) is involved in the improvement of Labour Rights, which are often co-extensive with Economic and Social Rights. Further, there are a number of regional international bodies, which are related to regional Human Rights Instruments. Such bodies exist in Europe, Africa and the Americas.

Civil Society

It is noted that the vast bulk of civil society organisations, be they global or local, are in favour of Human Rights. Although there are some disagreements about the value of rights and the content of these rights, particularly amongst “old” civil society organisations such as churches and representative trade organizations, “New” civil society institutions are often focused directly on issues which sound in the Human Rights arena. The biggest “movements” in new civil society are constituted by organisations lobbying and acting in the areas of: Civil and Political Rights, Women’s Rights, Labour Rights and the Environment, (which is related to issues of development, discussed below⁶). These non-

⁶ The issue of environment is directly related to rights to

governmental organisations perform three important functions in the international arena: service provision, research and advocacy.

Business

The International business community is involved in questions of human rights through its interaction with development in a global economy, through the ILO on issues of Labour and Human Rights, and more recently through the UN Secretary General’s Global Compact (1999). The Global Compact and corporations involved with it are interested in a series of key Human Rights, which relate to commercial activity⁷.

Development

The question of development is of pivotal importance. In 1999 the World Bank announced the Comprehensive Development Framework, which integrates approaches to development across a series of Commercial and Intergovernmental Organisations. From a Human Rights perspective the Framework holds important issues of: self-determination (or ownership) of development by nations; Structural and Institutional development, which relates to political rights; and Social and Human Rights which *contin..*

health (Art 14 (2)(b) ICESCR).

⁷ Cf the example of Freedom of Religion; and the stance of some employer groups on a “freedom to trade”.

Human Rights contin..
appear to be a combination of rights present in both covenants.

Development and Telos

The importance of development is that, ultimately, analysis of 'development' precipitates a teleological question: "Why economic development?" If economic development is seen as an imperative to be applied universally⁸, then the answer to this question is to be seen as an improvement in living conditions, the betterment of individual position. This *telos* of development is, at its most basic, a suggestion that the Human Rights of the individual within globalised society are fulfilled. This question of a right to development can, on this basis, be seen as the nexus between Human Rights and Globalisation.

Hence, the interrelation of globalisation and human rights is apparent. Unfortunately, the global scope, or universality, of Human Rights is running second to the globalisation of economics at this point in history when considered on measures of enforceability political pressure and rhetoric. It is hoped that the future evolution of both globalised economics and human rights becomes more closely interrelated, so as to allow human rights standards

⁸ Rather than the morally unjustifiable proposition that economic development of the "south" is for the benefit of the "north" through exploitation

to be an important consideration in any question regarding economic development and market reform.

Jeremy Styles

Criminal Law: Sniffer dog snuffed out by magistrate by Phillip Gibson

Phillip Gibson is a partner at Nyman Gibson and Co. and an Accredited Specialist in criminal law.

Evidence obtained after a search by a police sniffer dog was ruled inadmissible by Deputy Chief Magistrate Mary Jerram in *Police v Darby*, [1] on 21 November 2001. The magistrate had earlier ruled that the dog had conducted a form of search and that the search was illegal.

The defendant was in a group of approximately 40 people who had come out of a nightclub in Oxford Street Sydney. Plain-clothes police were at the scene with 'Rocky' the police dog. Rocky indicated the presence of illegal substances and performed certain actions identifying the defendant as being apparently in possession of those substances.

Under the Drug Misuse and Trafficking Act 1985 (DMTA) a member of the police may "...stop, search and detain"

"(a) any person in whose possession or under whose control the member reasonably suspects there is,

in contravention of this Act, any prohibited plant or prohibited drug; or

(b) any vehicle in which the member reasonably suspects there is any prohibited plant or prohibited drug which is, in contravention of this Act, in the possession or under the control of any person."

The first question to be decided by the magistrate was whether the dog had performed a search and if so whether that search was legal. The magistrate determined that Rocky had performed a search of the defendant and that the search preceded and indeed created the formation of the reasonable suspicion required under s.37(4)(a) of the DMTA for the police officer to stop, search and detain the defendant for prohibited drugs. In the view of the magistrate the search was illegal.

The next decision for the magistrate was whether the evidence should be admitted pursuant to s.138 of the Evidence Act 1995 (NSW). Under this section improperly obtained evidence is not to be admitted unless "the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained." The Act sets out a number of considerations the court is to take into account in deciding whether or not to admit the evidence. These are:

- the probative value of the evidence; and

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Suicide and the law

On 24 March 2002, Kep Enderby QC, CCL Committee Member, gave the following address to the NSW Voluntary Euthanasia Society.

My speech to you today will be about death, suicide, assisted suicide, and the law.

By another name, assisted suicide is known as euthanasia. Euthanasia means "a good or gentle and easy death", something we all hope to have. In the context of suicide, it means an assisted suicide.

It is largely because of the misunderstanding and deliberate obfuscation that exists about the true meaning of the word euthanasia that many people wrongly believe that it has a totally different meaning--- that it means in some ill defined way, the intentional killing of unwanted people.

Politicians unfortunately react to that wrong belief and keep in place laws that prohibit euthanasia by making it a crime. They believe that that is what people want. In order to try and overcome that misunderstanding, people supporting legalisation of euthanasia try to give emphasis to the idea of its essential voluntarism, by referring to it as voluntary euthanasia.

The result of that illegality is that many people who want to be helped have a good and gentle death can only get that help if it is given secretly, and often deviously and dishonestly. In order to have that good and gentle death they have to go into the closet, to go underground. A good death may be available to you there if you are lucky, and if your doctor is prepared to risk being sent to prison. It is an absurd, unnecessary and cruel state of affairs.

When we are young, we tend to believe that we are immortal. We hardly ever think of death, and that is completely natural. It is only when we become older and wiser that we occasionally think about death and realise that it is inseparable from life. Sad as it is, you cannot have one without the other. Death is part of life.

I was in far away Western Australia during the last week and apparently missed something that our Premier, Bob Carr, in the context of the NSW Ian Cohen private members bill, said about the subject. I gather from an article that appeared in the Australian on Wednesday that Mr. Carr indicated that, although the present legal situation was not likely to change, doctors at least should not worry because--- "scout's honour, we won't prosecute you". If that report is true, how hypocritical can you get.

If a law is bad, ignoring it only brings all law into disrepute. The correct and honest approach is to get rid of the bad law. For political reasons, that, the politicians are sometimes reluctant to do.

The title of my talk, "suicide and the law" would permit me to talk about a great many things. That is because there are a great many different factual circumstances which give rise to a person wanting to commit suicide. There are also a great many ways of ending a person's life. There is not time to day to go into every circumstance, so I will restrict myself to only a few. They will mainly relate to the Nancy Crick case.

As background, and before talking about some, but only some, of the cruel legal absurdities that hinder those who, justifiably and totally rationally, want to suicide, obviously the most important decision they have ever had to make in their life, let me begin with a few quotations.

As long ago as the 4th century BC, more than 2000 years ago, Aristotle reminded us that "a person committing suicide does so only to escape some ill".

The corollary of that was expressed by the great Roman poet, Horace, in his "Ars Poetica", again written well before the time of Christ, when he encapsulated the thought: "He who saves a man against his will as good as murders him." Depending on the circumstances, how true that is.

Probably because organised religion is the greatest opponent of suicide, attempted suicide and certainly assisted suicide, perhaps my favourite quotation is the statement of the famous Roman savant, Pliny the Elder, written after the death of Christ. Pliny wrote: "Amid the sufferings of life on earth, suicide is God's best gift to man". How attitudes have changed.

It is interesting to note that while organised religion opposes suicide and assisted suicide, some famous Christian writers have not only not condemned them, but in their theorising about what type of world, a perfect world would be, have provided for them.

Sir Thomas More in his famous Utopia, written in 1516, expressly provided for suicide and assisted suicide.

The last quotation I want to give you is a more amusing one. The famous American writer Emerson, wrote that the basic question about suicide was "whether it is the way in or the way out"!!

From those quotations it can be seen that the opinion that suicide is not wrong, and that assisted suicide is morally permissible, can be traced back to many of the great thinkers of the past: to Socrates, to Plato, to the Stoics generally. It predates the emergence of many of the present day great religions.

It was with the emergence, particularly of Christianity, that suicide came to be rejected. Christianity declared that it was only God who could decide whether and when a person should die, and whether that person should go to heaven or go to hell. It argues that both suicide and assisted suicide come within the prohibition of murder in the sixth commandment of the 10 commandments.

Returning to the law, let me cite some legal history taken from the work of one of Australia's greatest judges and criminologists, Sir John Barry. Back in 1965 he wrote a learned essay "Suicide and the Law".

He wrote of how, although suicide and attempted suicide had by 1965 ceased to be crimes in Australia, they had for many years before that, both in Australia and in England, been crimes. In the essay he describes how it came about that they became crimes in the first place.

He points out that the very word suicide only came into the English language as late as 1671. Even though it started to be used about then, the great Dr. Johnson still excluded it from his dictionary. Before then, killing oneself was called "felo de se". One who murders himself.

Justice Barry says that the history of the law relating to suicide is a fascinating illustration of the way in which a legal concept that has been devised for one purpose, but is not sharply defined, can be taken by lawyers and misapplied to a superficially similar but essentially different purpose.

He confirms what is well known, which is that although from early times suicide was regarded as impious and anathema by the Church, it had not always been a crime. Certainly attempted suicide had not always been a crime. He describes how the common law, the law made by judges, made it come about that suicide became a crime. A strange crime you have to admit, when you could not be punished for it.

In feudal times, the penalty for the serious crimes we know as felonies was death followed by what the law calls attainder. In those days, attainder was perhaps a more important part of the penalty for a felony than death, because it meant the extinction of all the civil rights and capacities of the felon. It extinguished the felon's right to hold property. The attainder occurred when judgment of death was recorded against a person convicted of a felony.

It wasn't long before, with some further judge made changes to the law, attainder came to mean the transfer of the felon's property to the King. It became a means of forfeiting property to the Crown. As an important purpose of the King's judges at the time was to enrich the King, it is easy to see how there was an incentive for the judges to make suicide a felony and thus a crime. If suicide was a felony it enriched the King!

Justice Barry's essay is well worth reading by anyone interested in how our law relating to assisted suicide eventually became so irrational, but there is not time to go into all that now.

So, what is the present state of our law? Again there is not time to give a full lawyer's account of all the complexities and uncertainties involved. Like so much in the law, much depends on the facts.

The absurdity of suicide being a crime had long been apparent. It was finally abrogated as a crime in NSW by the insertion of s 31A into our Crimes Act only a few years ago. Attempted suicide was abrogated at the same time.

Suicide pacts and the accidental killing of another during a suicide pact may still give rise to criminal liability. The criminal law in the various Australian States and Territories is not always the same. Some Australian States like Queensland have what are called Codes. Others like NSW merely express the common criminal law in statute form. The different approaches can produce different results. Generally however it can be said that neither suicide nor attempted suicide is today a crime anywhere in Australia.

I will use the word "assist" as a form of shorthand to sum up the longer expressions that are used in the various criminal statutes.

However, absurdly however, it is still a crime to "assist" another to commit or to attempt to commit suicide. The concept of "assist" or "help" or "aid" is variously expressed in the different jurisdictions. It can be a very vague concept. To an extent, how the concept is interpreted depends on how it expressed in the particular code or statute. In Queensland, for example, the requirement is that the accused "procure", "counsel" or "aid" another to commit suicide.

In NSW, on the other hand, liability is defined in terms of "aiding or abetting" or "inciting or counselling" the suicide or attempted suicide. Maximum penalties vary according to the whether the offence be "aiding or abetting" or "inciting or counselling". If consented to, charges can be dealt with summarily before a magistrate, in which case the maximum penalties are less. Generally, the concept of "assist" has a similar meaning to what is called being an accessory to an offence. The problem is how to decide whether, on the facts of a particular case, one person has "assisted" another person to commit suicide.

We can only look at the cases where similar questions have arisen to see how, bearing in mind the factual differences in each case, courts have decided such matters; how they have tried to lay down principles. Again because of time considerations, I can only mention a few, and then only in outline. None that I will mention deal with the question of assisting a suicide.

The reason that none deal with suicide or attempted suicide or "assist" suicide is that there are very few reported cases dealing with those types of cases. The reason is not that suicides and attempted suicides don't happen; we know that they do and quite often. The reason is that they are done in the closet; done discretely underground so to speak. In addition, police, and prosecutors generally, overlook what happens and take no action. That is what I understand Bob Carr was referring to in the reference I made earlier.

The first is an English decision of *The Queen v Coney and ors.* [1882 8 QBD 534]. It was a decision of 11 very senior English judges so extracting the ratio decidendi from it is not easy. At the time when *The Queen v Coney* was decided, prize fights were illegal in England. Not without some doubt, the case

seems to say that spectators at a prize fight can be guilty of what I have been calling "assist" in the commission of the crime of prize fighting.

Another case is that of *Wilcox v Jeffrey* [1951 1 AER 464]. A famous American jazz saxophone player was allowed entry into the UK on the condition that he not take any employment there, paid or unpaid. An admirer of the musician, an English journalist working for a jazz magazine knew of the entry and of the conditions attached to it. He also knew of a concert that was going to be held that night, which the jazz musician was going to attend as a member of the audience and that an arrangement had been made that the musician would be "spotted" in the audience and invited onto the stage where he would be welcomed but not perform. When the musician went onto the stage, he ended up playing a saxophone that was given to him. The journalist later wrote a praiseworthy account of the musician's performance. He was charged and convicted of "assist". An appeal was dismissed.

Another English case worth mentioning is *National Coal Board v Gamble* [1958 3 AER 203]. The relevant law was that it was an offence to drive an overloaded lorry on a public road. In this case, coal had been loaded onto a lorry in excess of what was permitted by the relevant regulations. The weighbridge operator knew this and told the lorry driver about the overload. The driver replied that he would risk it. The driver was later stopped by inspectors and charged. The employer of the weighbridge operator, the Coal Board, was also charged with aiding and abetting the offence. It was found guilty.

These cases are not binding in Australia of course but they do indicate how a court might approach the case of Nancy Crick. I do not practice law these days, so what I am saying is only a personal opinion. I know that it is also the opinion of learned senior counsel in Queensland.

The absurd situation is that anyone who attends and is present while some one commits suicide, even if only with the intention of giving comfort and support to that person, could well be found guilty of the crime of "assisting" that person to commit suicide; to do something that itself is not a crime, something which, as far as the criminal law is concerned, society permits. An absurdity if ever there was one.

If we apply it to the case of Nancy Crick, we find ourselves in a situation that is not only ridiculous but cruel and outrageous.

I have been told that since Nancy Crick's case began getting some publicity the police have been to see her and question her. I am told that she became quite upset. How cruel and insensitive can you get? Nancy Crick is exercising her right to die; to die at a time of her choosing and in a dignified manner chosen by herself, not by fate, not by someone else at a time and manner determined by someone else. She is doing what the law allows her to do.

She is also doing what amounts to a political act. That also is her basic right in a democracy. She wants that act to have some meaning; to be effective. For it to be effective it must be known to others, and her way of doing that is to have other persons present when she suicides. Sympathisers and persons who want to join with her in that political protest who also want to make a political protest. In its present state the law forbids that. The result is that the law, if it is obeyed, is taking away a political right not only from Nancy Crick but from all those others who want to support her and protest with her.

There is a thing in our law that we call a private prosecution. One can never foresee what opponents of Nancy Crick might do. The world is full of strange people. Think of Senator Heffernan. It is not enough for Mr Carr to say with a wink and a nod that "scout's honour "WE" wont prosecute" as has been reported.

What about some one else, some private individual, laying a private information with some magistrate and commencing a private prosecution against those who support Nancy Crick.

The uncertainty is such that it could even be worse than that. The very uncertain law of conspiracy could apply. Some private individual could allege that Nancy's supporters were guilty of a conspiracy; a

conspiracy to assist Nancy to commit suicide. Could there be anything more bizarre? By its very nature, what Nancy intends doing requires great courage. She is to be greatly admired. What she intends doing is the act of an intelligent and very courageous woman.

And yet, despite being such a person, those who want in effect to thank her and comfort her, in doing the very difficult thing she has decided to do, by being present when she dies will be putting themselves at risk of being charged with an offence that could put them in prison.

I hope it will be conveyed to her that, I for one, and I am sure that there will be many others who will say the same thing, not only sympathise with her in what will be a very courageous act on her part, but also that I completely support and comfort her in doing what she intends to do. If that makes me an "assister", an "aider or abetter" so be it.

How would a Director of Public Prosecutions, a DPP, react? DPP's are independent of Governments. Would a DPP take over such a private prosecution? If it did so, would he or she continue or discontinue it? What would happen? Who knows? It could lead to a process that would go on for a long time. The uncertainty would become cruel, chaotic lunacy.

The law, particularly the criminal law, should never be so uncertain. It should always try to be clear and unambiguous. The law relating to aiding or abetting, to assisting, as I have called it, when it relates to suicide is notoriously unclear and uncertain. As thinkers such as the great English utilitarian philosophers Jeremy Bentham and John Stuart Mill always said: we should only have criminal laws that address in some effective way some social mischief.

Sometimes a bad criminal law can produce and create more social mischief than that which it was intended to overcome. That is the case with s. 31C of the NSW Crimes Act and the corresponding parts of the criminal laws of the other states and territories.

The best known example of a bad law that produced a worse social mischief than that which it was intended to address was, I suppose, the law imposing prohibition and outlawing consumption of alcohol in the USA in the 1930's; the law that produced the greatest upsurge of violent crime in America's history.

Other examples could be given. The law relating to abortion as it once was. The law relating to homosexuals as it once was. I can remember a time when "Family Planning" advertisements were banned. There was much talk about us being on a "slippery slope" if the bans were removed. What nonsense!

Our laws prohibiting people, often doctors, wanting to assist people who are often their patients, people who justifiably want to die, and even prohibiting the giving of comfort and support to such people, may not come into the same category as say "prohibition" was in the USA but they are cruel and do cause great hardship to many. As the recent book, "Angels of Death" by Roger Magnussen confirms, they also bring the law into disrespect.

We are all sad when someone suicides, but, putting aside the discredited notion of some kind of "slippery slope", what social mischief is there in permitting someone who seeks help, some comfort and some dignity in suicide, to have that help, that comfort and that dignity. None. Death is part of life. The right to be allowed to die can be as important as the right to live.

In a mature, adult, sophisticated and democratic society, if for various reasons we want to die; if the means are available to us and if the circumstances justify it; we should have a right to a dignified, to a good and final gentle exit from that life. At the present, Australia's laws deny that to many people.

Some other countries have made some progress in overcoming the injustices that we in Australia still suffer from. The Netherlands, Switzerland and the State of Oregon in the USA come to mind.

My own preference is that Australia's laws should be much as they were in the Northern Territory where the Territory's law was working well until it was overturned by the Federal Parliament. In other words, that they should be much as the law in NSW would be, should Ian Cohen's private member's Bill someday become law.

Eds Note. Since this speech Nancy Crick took her life with 21 of her closest friends and family present. Her house is currently a crime scene and the police are yet to decide if the witnesses will be prosecuted.

Criminal Law: Sniffer dog snuffed out by magistrate contin....

- the importance of the evidence in the proceeding; and
- the nature of the relevant offence...and the nature of the subject matter of the proceeding; and the gravity of the impropriety

The magistrate dealt with each of these considerations. She found that the evidence was clearly highly probative and important because without the evidence there would be no case to answer. Her Worship quoted from *Bunning v Cross* (1978) 141 CLR 54 at 79; "to treat cogency of evidence as a factor favouring admission, where the illegality in obtaining it has been either deliberate or reckless may serve to foster the quite erroneous view that if such evidence be but damning enough, that will suffice to atone for the illegality involved in procuring it".

The prosecution had contended that the police did not go out with the intention that the dog would search anyone but would merely assist them. In the light of her findings the magistrate considered this suggestion to be nonsense.

Interestingly the magistrate also found the action of the police to be in contravention of Part III, Article 17 of the International Covenant on Civil and Political Rights. She was of the opinion that "...search of persons in public places in these circumstances, given the illegality, can be seen to create an "unlawful interference with...privacy...".

On December 2001 the Police Service lodged an appeal to the Supreme Court against the ruling of the magistrate. The appeal is likely to be heard in the first half of 2002.

In response to this case the New South Wales Parliament passed the Police Powers (Drug Detection Dogs) Act 2001. The Act was assented to on 14 December 2001. As at the date of writing it is yet to be proclaimed.

Section 4 of the Act confirms that a police officer may use a dog to search a person for drugs if the police officer is authorized to search the person for the purpose of detecting a drug offence. This may not have changed the position as it was in the case discussed above. A police officer must have the requisite authority before using a sniffer dog.

However, s.7 of the Act gives police specific authority to carry out "general drug detection" in specified areas. General drug detection is defined s.5; as "the detection of prohibited drugs or plants in the possession or control of a person, except during a search of a person that is carried out after a police officer reasonably suspects that the person is committing a drug offence".

Therefore the police can conduct searches of individuals without a reasonable suspicion that the individual is committing a drug offence".

Therefore the police can conduct searches of individuals without a reasonable suspicion that the individual is committing an offence in the circumstances set out in s.7, namely;

“(a) persons at, or seeking to enter or leave, any part of premises being used for the consumption of liquor that is sold at the premises (other than any part of premises being used primarily as a restaurant or other dining place),

“(b) persons at, or seeking to enter or leave, a public place at which a sporting event, concert or other artistic performance, dance party, parade or other entertainment is being held,

“(c) persons on, or seeking to enter or leave, a public passenger vehicle that is traveling on a route prescribed by the regulations, or a station, platform or stopping place on any such route”.

The Police Powers (Drug Detection Dogs) Act also gives the police power to conduct “general drug detection”, i.e. random searches under a warrant. These warrants can be issued by an authorised justice on the application of the police who have “reasonable grounds for believing that the persons at any public place may include persons committing drug offences...” (s.8).

The introduction of the new Act will stop random searches of people by sniffer dogs except in circumstances set out in s.7. The police will not be able to use sniffer dogs in the main suburban shopping centres as they have been in the past. However they will still be able to use the sniffer dogs on railway stations and outside nightclubs.

Practitioners with clients charged as a result of a drug sniffer dog search should examine the facts and circumstances of the search very carefully before giving advice. Even with the introduction of the new legislation there may be challenges to the use of drug sniffer dogs.

[1] In *Police v Darby* (unreported) the defendant was represented by Mr Philip Stewart, senior associate at Nyman Gibson and Co. and an accredited criminal law specialist.

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The matter discussed above goes to the Supreme Court on May 27th. From there the right of search question may be carried to the High Court for further examination. Activity on this issue by CCL and Redfern Legal Centre continues. Keep your ears pinned back, your nose to the wind and your eyes open and your mobile phone switched on for more developments in the future.

Timothy Moore

