

# Civil Liberty

## Journal of the New South Wales Council for Civil Liberties Inc

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*Thank you for your valued support.*

### **JOURNAL DEADLINE DATES**

Material Deadline: February 15<sup>th</sup> 2003

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

## **PRESIDENT'S REPORT**

The last year has been a difficult year, particularly for the cause of civil libertarians. In the aftermath of September 11 we have seen, across the world, an unprecedented attack upon our basic rights and liberties. Australia, and New South Wales in particular, have been no exception in this regard.

In the past year we have seen the commonwealth government attempt to give itself powers to ban organisations and individuals because of their ideological, political or religious views. They also attempted to reduce the rule of law and principles of natural justice by creating new offences of terrorism and reversing the onus of proof.

The New South Wales Council for Civil Liberties has been at the forefront in the fight against these powers. Members of our council have written detailed and extensive submissions and given compelling evidence at a range of parliamentary inquiries on bills such as the Security Legislation Amendment (Terrorism No 2) Bill, the Espionage and Related Offences Bill, The Suppression of Terrorist Bombings Bill, and of course the ASIO Amendment (Terrorism) Bill.

In all of these areas of law we have been able to argue for and convince government to make significant changes that do protect our civil liberties and human rights.

***The ASIO Bill is a particularly nasty piece of legislation that is clearly targeted against people who are not terrorists or even suspects in terrorism. It is targeted against ordinary, innocent members of the Australian Community.***

This bill would allow people to be arrested by ASIO and held indefinitely without charge, incommunicado and in most cases without even access to legal representation. It can also be used against children over 10 years old.

The recent tragic events in Bali have given a new impetus to these draconian proposals and the ASIO bill is still pending, but it has been referred to a third parliamentary committee for report and hopefully that is the last we will see of it.

***In other moves we have seen a significant increase in the return of censorship in both traditional communication and online content.***

*contin page 2*

*President's Report contin..*

Many will remember the banning of the film *Baise Moi*, after it had been screening for over 6 weeks. There is currently a campaign over the banning of Internet websites that are being archived by the National Library that NSWCCCL is involved in.

In NSW we have seen an unprecedented removal of our liberties which will only get worse in the lead up to the state election next March. The Carr government has announced the opening of 5 new prisons to cope with an expected increase of the prison population to over 10,000 in the next few years. We have had various pieces of legislation passed in this state that, amongst many others, removes the onus of bail and increases penalties for both minor and serious crime, and mandatory sentencing has been implemented for certain offences.

At the same time the government has either reduced or eliminated the ability of people to sue in civil law for public liability, workers compensation, and a range of other areas.

Despite all of these reductions in liberty the last twelve months have also contained some significant wins. After many years work by various members of this council but particularly former President Kevin O'Rourke we now have an agreement in place that allows prisoners prosecuted in Thailand and other countries to serve out their sentences in Australia.

Almost entirely due to the work of CCL and the Redfern legal centre we have taken the war on drugs to a whole new level with our successful [snifferdogalert.com](http://snifferdogalert.com) website. This was the first action of its type ever and probably the greatest step forward in the so-called "War on Drugs" in the last fifty years.

Finally, I wish particularly to thank two retiring members of the executive committee for their enduring work over many years. This New Year will see an executive without Joan Locke, or Ken Buckley whose experience and commitment has been tremendous and invaluable for a long time.

I am certain that Jeremy Styles and Susan Cleary will continue the good work done by Ken and Joan and I welcome them to the executive. Ken of course will be remaining on the Committee and hopefully we will still have access to his vast experience and knowledge there. I am encouraged also by the great interest and enthusiasm displayed by University of NSW CCL students who have already demonstrated their commitment to this cause and have provided invaluable research advice and assistance on many matters.

Over the next twelve months it is imperative that NSWCCCL not only continues its great work to protect our liberties in this difficult environment but also works to strengthen our foundations, increase our membership and increase our effectiveness as an organisation.

**Cameron Murphy**

## ACTING SECRETARY'S REPORT

In giving a secretarial report, it appears appropriate to comment on the members of the Council who have contributed to the operation and work of the council over the past year.

I should first thank Joan Locke, for whom I act due to illness, for her hard work as Secretary over the last two terms. Her contribution to the Council has been more than significant as Secretary.

Our president Cameron Murphy deserves thanks for his tireless media work and particularly the profile which he has built for the Council in the community. His work on the Sniffer Dogs campaign has been an outstanding success in the work of the Council in the past year. Thanks should also be offered for his critical work on the ASIO-Security-Terrorism submission and related advocacy undertaken on the part of the council.

The Vice Presidents David Bernie and Pauline Wright deserve thanks for their work done on the Security Submissions along with Stephen Blanks whose work on the migration "border protection" inquiry was of extremely high standard.

Ken Buckley, Susan Cleary, Sol Encel, Eloise Riches and the refugee subcommittee deserve thanks for their outstanding work on the issues of refugees. Daniel Brezniak is thanked for his work on complaints and his contributions to the committee.

Joan Kersey should be thanked for the extremely competent manner in which she has organised the fundraising lunches over the year. Thanks are deserved for Morag White's work in getting the CCL Journal to the members.

Thanks should also go to all those whose contributions I have mistakenly (in haste and with apologies) failed to recollect, including to all of the regular contributors to the debate and operation of the Committee of the NSWCCCL.

Most importantly however, thanks are fondly offered to our fantastic Executive Secretary Susan Smith, without whom the current work of the Council would be effectively impossible.

Two important developments during the year should be reported as valuable to the future operation of the Council; They are, first, the formation of a legal panel with the aim of running high profile signature cases; and secondly, the re-generation of the University of New South Wales branch of the Council. The UNSW CCL has developed enough momentum to continue despite the moving-on of students. They have already this year been helpful and extremely competent in the assistance that they have offered the Council and the work they have done in their own regard.

I look forward to another productive year for the NSW Council for Civil Liberties.

**Jeremy Styles**

### Report on the progress of UNSW Council for Civil Liberties

One day, a group of first year grad law students (committed to social justice issues), found themselves huddled together, feeling desperately alone, surrounded by business students with a penchant for Mergers and Acquisitions. These law students had a dream. A dream of breaking through those young corporate minds and showing them other things, shocking things, things people don't want to know about. And thus (thanks to the pioneering work of Jerry Styles), the UNSW Council for Civil Liberties was reborn.

The last six months have been incredible and a huge learning curve for us. We organised our first seminar on Refugee Policy in Australia with Linda Bartolomei from the Centre for Refugee Research. Our second project was to launch the UNSW CCL newsletter covering a few topical issues and advertising our next seminar on the NSW Prison Population and Civil Liberties with guest lecturers Professor David Brown from UNSW and Cleonie Quayle from Tranby Aboriginal Cooperative College. Our final seminar for the year was jointly organised with Amnesty International on alternatives to mandatory detention with Eileen Pittaway from Centre for Refugee Research and Nicholas Poynder QC. ***In addition to our seminars, we have assisted CCL with legal research on a passport matter and written a joint submission with NSW CCL to the NSW Parliament's inquiry into an equal age of consent.***

Since working as the UNSW CCL, we have realised that we are not as alone as we believed. It may warm your hearts to know that there are many of us in the Law Faculty who are committed to advocating on civil liberties issues and, most importantly, working for change. Our membership has risen from six students to thirty-one. We are really excited to be involved with CCL and are looking forward to continuing our work with renewed vigour next year.

**Samantha Newman**

# ARTICLES

## Migration Legislation Further Border Protection Measures

The NSW Council for Civil Liberties, along with 44 other organisations and individuals, made a submission to the recent Senate inquiry into the Commonwealth government's proposal to excise from the Australian migration zone almost 4,900 Australian islands off the northern half of the Australian continent. CCL opposed the legislation on the basis that it breached Australia's international obligations under various conventions designed to protect human rights, that it increased the power of the State to act arbitrarily in relation to individuals (particularly those likely to require protection), and that it represented a style of legislation which threatens the operation of a civil society.

CCL was invited to appear in August before the Senate Committee inquiring into the legislation, and was represented by Cameron Murphy and Stephen Blanks. That Committee reported to Parliament in October, with the majority (comprising Labor and Australian Democrat representatives) recommending that the proposed legislation not proceed.

CCL's submission and evidence to the inquiry, along with other submissions and evidence, and the Committee's report are available on the Senate website.

CCL's evidence was specifically noted in two places in the majority report. Firstly, in relation to the likelihood that the legislation would simply encourage asylum seekers to reach mainland Australia, which would logically lead to parts of the mainland also being excised. Secondly, the majority report favourably noted CCL's submission that Australia's commitments under international conventions applied to the whole of Australian territory, and could not be confined to specific parts of the country.

The initial legislation excising Christmas Island and Ashmore Reef from the migration zone was a foundation plank of the Commonwealth government's so called "Pacific Solution". Although Labor then supported that policy, it now seems that it is opposed to any extension of it. It is to be hoped, from a civil libertarian view, that the completely inappropriate Pacific Solution will now be wound back.

**Stephen Blanks**

*Jeremy Styles, CCL Secretary*

*left to right: David Leung and Michael Walton of University of NSW CCL*

## Visiting Villawood



My first visit to Villawood Detention Centre was undertaken with some trepidation. What sort of conversation would be possible with people who were incarcerated behind a high wire fence for the crimes of escaping from persecution and for hoping for a life of freedom in this compassionate, just country of ours. I went with a friend who took some things to eat – a small change from the adequate but unexciting diet the inmates are given; newspapers, in English and other languages; snippets of news which could be of interest and a \$10 phone card for a man who had been inside that fence for three and a half years. It gave him seven minutes talking to his family in Kuwait. I took food. I'd find out what people wanted me to bring next time.

I know Villawood is more civilized than Woomera, and I believe it is more comfortable than Maribyrnong – but it is a grimly forbidding place.

### ***My imagination hadn't prepared me for the effect that that fence had on me.***

And I didn't have to spend my days and nights behind it, not knowing when, if ever, I could re-enter the outside world. Men and women sat around plastic tables on plastic chairs, set on the bare campus. The living quarters are almost out of sight and are out of bounds for us.

The time it takes to get in depends on the length of the queue of visitors. The process is also a lengthy one. We were lucky. It only took us half an hour to fill in forms, present identification, put everything but the gifts we'd brought in a locker; empty pockets; have the gifts examined; walk through the detector screen; be braceleted and numbered and marked on the hand by an ultra-violet stamp. Then we go, in twos and threes, through a series of heavy locked doors, accompanied by different guards until we emerge at the entrance of the gaol.

When we finally reached the 'picnic' area, there were welcoming shouts and waves from the group my friend and I were joining. There were smiles and warm handshakes and hugs – even for me, a stranger, but momentarily so.

There were three tall, handsome and very black men from Sierra Leone, outgoing and cheerful.

### ***After we had left I learnt from my friend that the life of the party, a young man***

### ***about to celebrate his thirtieth birthday behind razor wire had returned to his home in Sierra Leone to find his entire family – parents and siblings – murdered.***

He escaped in confusion and panic, can't remember everything, isn't thoroughly documented, and has little hope of a better fate than to be sent back to Sierra Leone. As I was leaving on one occasion I said that I wouldn't be visiting the next week because my husband and I were going away for a few days to the North Coast. His face lit up – "Send me a postcard," he said. I will. Shall I write: "Having a wonderful time. Wish you were here"?

There is a Russian woman whose baby, born in Australia, is an Australian citizen. The baby lives outside the centre and is brought most days by his father to visit from 9 to 5. She asks the time fearfully as 5pm approaches. She may be deported, but the baby will remain here.

English is the shared language in the centre. It seems to be learnt quickly despite its complexities and despite lack of lessons. There is every opportunity to be bored through utter lack of stimulation – no classes, no gym, no flowers, no grass – just a few trees. Where can the babies be taken for a walk? What is there to show them? The men can play soccer and volley ball and there is a pool table and table tennis. Children of school age attend school outside, but there is no going to the park, visiting mates, going on weekend trips for them.

Services generally come from charities and well-wishers. There are no resident medicos, social workers, counselors, chaplains. One man told me he had been in Australia forty-five months – in Perth, in Maribyrnong, in gaol and in Villawood. I asked him which was the best. "Definitely gaol," he replied. "In gaol you know how long your sentence is, you get education, activities and attention from social workers etc." So Villawood is worse than a gaol for people who, as far as we know, have committed no crimes, but, in many cases have had crimes committed against them.

I don't believe I am naïve in believing that the people I have met would make useful and peace-loving Australian citizens. But as time drags on for so many of them, they suffer more and more from depression which will poison their lives, possibly permanently. How would their lives be without daily visitors from outside the wire? I hate to think. All I know is that Australia is doing it wrong. We all bear the shame. Those who feel that this is a right and proper way to treat asylum seekers, overstayers of visas, "illegal immigrants" should go and see the human faces and hear the human voices of these people. I dare to guess that many would change their minds.

**Dorothy Campbell**

## BOOK REVIEWS

### **Prisoners As Citizens: Human Rights in Australian Prisons**

David Brown & Meredith Wilkie (eds)

The Federation Press, Sydney, 2002

rrp \$49.50 (incl.GST)

Reviewed by: Daniel Brezniak

The rights of prisoners has been a central concern for the Council for civil Liberties since its formation. For decades, prisoners have been writing to the council for civil Liberties with new problems. The Council, through its lawyers, has appeared in countless courtcases from parole hearings, through to Supreme court appeals and hearings defining principles of sentencing. There was a time when the prisons subcommittee of the council performed some of the most important work of all.

It has been said before that the importance of this work lies in the fact that the worth of a community can be measured, in large part, by the way the community approaches its less popular members.

During 1977 and 1978 the Council for civil Liberties, largely through the efforts of its prisons subcommittee led by Tom Kelly (with the help of Jack Graham) appeared throughout the Royal Commission into the New South Wales Prison of which His Honour Mr Justice Nagle was the Commissioner. The Council for Civil Liberties took a leading role in marshalling evidence and making submissions which led, at the time, to the most far reaching changes throughout the Department of Corrective Services, to the lives of prisoners in the goals and even to public attitudes to prisons and prisoners at the time.

The problems which prisoners have raised have often involved questions of fundamental rights. There are many examples of these. For a while, prisoners were punished by being kept in strict isolation for periods, at least for two prisoners, for 18 months by the simple expedient of executive order extending by six months the order for segregation. At other times prisoners were, and have been, punished without any right whatsoever to speak up and defend themselves. Laws have been passed to provide some protection but those laws (amendments to the then Prisons Act) were found wanting. These problems were taken up by the Council for Civil Liberties on behalf of affected prisoners in representations, Court cases and public statements.

The Council, at times, through its lawyer members made applications to the Supreme Court of New South Wales for writs of habeas corpus in cases where, when prisons were overcrowded, prisoners were retained in cells in police stations for up to four and even five days at a time.

During the two decades since the Nagle Royal Commission there has been very rapid changes to the prison system. These changes have seen, among other things, a dramatic increase in the numbers of prisoners within the prison system, a relentless building program with the number of prisons increasing beyond the imagination of just about any observer (there are now a total of 26 metropolitan and country establishments with more planned – 2 of these immediately) and the privatisation of many existing establishments and almost all of the newer ones.

What then is the state of corrections now? How have attitudes changed? What is happening to the rights of prisoners? A new book on this subject, edited by Professor David Brown from the University of New South Wales and Meredith Wilkie from the Australian Human Rights and Equal Opportunity Commission, provides a very valuable analysis into many, if not most, of the changes. The book is a collection of contributions from academics, lawyers and others concerned with the criminal justice system including one, Craig Minogue, who is described as having “survived in Victoria’s prison system for the past 15 years”

The book has three parts. The first of these, “Prisons and Prisoners,” embraces a study of overcrowding; rights of indigenous prisoners and other topics. The second Part “Regulating Prisons and Prisoners’ Rights” looks at privatisation of prisons; an historical view of prisoners and their rights (which contains an interesting glimpse at the destruction of Bathurst goal in 1974, prison justice and some state “discipline regimes”) The final part, Part Three, of this book on the subject of “Citizenship and Rights” includes separate contributions on the subjects of International human rights law; prison discipline; Prisoners’ Right to health and safety; the Right to vote and prisoners as citizens. The book also contains a bibliography, a table of cases, a table of statutes and an index.

The book, which is a scholarly contribution to the history and contemporary views of punishment and corrections is full of surprises. David Brown, in his contribution, identifies “feudal remnants such as the notion of ‘civil death’ and a variety of practices it spawned are clearly evident in relation to prisoners” The history of the doctrines of “attainder” and “corruption of the blood” and the extraordinary tale Henry and Susannah Kable’s baby, as recounted by David Brown, await any interested reader. But the story of the reuniting of these two convicts with their baby all from the efforts of a good hearted jailer is followed by the Kables becoming the plaintiffs in the first civil case heard under English law in the Australian Colonies and then Kable becoming a constable and then chief constable in the new colony.

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## PROTECTION OF HUMAN GENETIC INFORMATION

A new and important discussion paper has recently been published.

The discussion paper was a result of a joint enquiry of the Australian Law Reform Commission and the Australian Health Ethics Committee of the National Health and Medical Research Council.

The published discussion paper is a valuable compendium of law theory and practice in an area of rapidly changing technology and the challenges that have arisen in all areas of our lives.

The reach of some of the changes can be discerned by looking at the 10 areas separately studied in the report. These are Genetic Testing (including definitions, access, reliability and coming to terms with Genetic Information); the Regulatory framework (including Anti-Discrimination; the Privacy Act and ethics) Human Genetic Research (regulating the Private Sector, need for reform); Human Genetic Databases including Research databases and regulation of Human tissue collections; Health services; Law Enforcement and Evidence and much more.

In an early part of the discussion paper some of the difficulties ahead are described:

In an earlier era, the centrepiece of any significant law reform effort often was the recommendation of a major new piece of legislation. However, in a more complex environment in which authority is much more diffused, modern law reform efforts are likely to involve a mix of strategies and approaches, including legislation and regulations; official standards and codes of practice (such as those promulgated by the National Health and Medical Research Council and the Privacy Commissioner); industry codes and best practice standards; education and training programs; better coordination of governmental and intergovernmental programs; and so on. Thus, the proposals contained in DP 66 are addressed to a range of parties and not merely to the Commonwealth Government.

*All of the literature, and our consultations and submissions, emphasise the rapid development of genetic science and technology. The pace of change certainly will not slow in the foreseeable future. Our improving knowledge of genetics, combined with technical innovations (including the harnessing of information technology), will make human genetic information easier, quicker and cheaper to obtain, and increase the range of potential applications for its use. In such circumstances, there also may be increasing pressures on governments, employers, insurers and others to uncover and utilise genetic information about individuals with whom they interact.*

The discussion paper in a part entitled "Planning for the future" describes a scenario which whilst beyond the vision or imagination of many of us is, apparently, entirely possible. This is how the report paints the picture:

*"The film "GATTACA" was released in 1977. It portrayed life in a "not-so-distant future" in which genetic engineering permits parents to screen embryos before implantation for the purpose of reproduction – avoiding those that are genetically imperfect and selecting those that offer a genetic guarantee of health, stamina and physical attractiveness. One reviewer described the film in the following terms:*

The main focus of *Gattaca* is the struggle of a genetically inferior man, Vincent Freeman, to survive and prosper in a world where his kind is routinely discriminated against.

Shortly after they were married, Vincent's parents decided to start a family the old-fashioned way, without any help from doctors and test tubes. The result was a boy who was diagnosed as 99% likely to have a serious heart defect. That rendered Vincent ineligible for all but the most menial of jobs. But his dream was to one day work at The Gattaca Aerospace Corporation and participate in the first-ever manned flight to the moons of Saturn. For most "invalids", this would have remained a fantasy, but Vincent possessed the determination and drive to make it real.

With the help of a shady middle-man, Vincent locates Jerome Morrow, a genetically superior individual who was paralysed as the result of an accident. He agrees to sell Vincent his identity (including blood and urine on demand, fingerprints, hair and other body debris, etc.). So, equipped with Jerome's genetic resume, which guarantees him work anywhere, Vincent applies for a position at Gattaca. He is accepted and quickly proves his worth to everyone. But, a week before he is to attain his lifelong ambition of making a space flight, he becomes a suspect in a murder investigation and his carefully-guarded secret is in danger of being exposed.

With the indulgence of a sympathetic medical officer who chooses not to expose Vincent's deception Vincent transcends his 'genetic' prophesy. Despite a life expectancy of only 33 years and 'already 10,000 heartbeats overdue' in the final scene Vincent is launched into the night sky on his mission into space"

The discussion paper says of this story that “it identifies many themes that are central to the present enquiry: the prospect that genetic science may in time enable a persons genetic destiny to be napped out at birth ....the prospect that those with better genetic profiles may be favoured over those with weaker profiles....”

There are many glimpses of concerns which arise with regulating the exploding science of human genetics. In relation to problems of a globalised world the Discussion paper says”

“For example, in Chapters 5 and 31 the Inquiry addresses the regulation of human genetic testing, including parentage testing. At present, parentage testing is available from Australian laboratories, which may or may not be accredited according to Australian standards, and from overseas laboratories, which may or may not be accredited in accordance with the standards prevailing in those foreign jurisdictions. If parentage testing is heavily regulated in Australia, one consequence may be to encourage people to use the less regulated facilities of overseas laboratories, whose services are often marketed over the Internet. Similarly, if the conditions for medical research in Australia are excessively stringent, research facilities may move offshore to sites that are more conducive to their particular brand of research.”

There must always be a right not to know. Of this the discussion paper observes:

*“It may be that some people would rather remain ignorant of their genetic status or the genetic status of their child. For late-onset degenerative diseases with no cure, like Huntington’s disease, people develop such a condition. If a condition is treatable, they may be more inclined to want to know whether they are or will be affected.”*

*This Discussion Paper is a mighty compendium of almost all we need to know in considering the questions we need to answer. For lawyers the summary of the law on admissibility of DNA evidence is excellent. For medical practitioners the looming ethical questions are fearlessly opened up to gaze. For social workers and psychologists there is a glimpse of the world to come and for the rest of us it is, if nothing more, a fascinating adventure.*

**Submissions for the final report closed on the 29<sup>th</sup> November 2002.**

**Daniel Brezniak**

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## **The Cole Royal Commission – the case for bias**

### **by David McElrea, CFMEU Industrial Officer (NSW Branch)**

For the past twelve months the Federal Government’s Royal Commission into the Building and Construction has conducted public hearings in every Australian capital city. The Commission wound up the hearings on 18 October with a final report due in December this year. Newspapers have had a field day with the hearings, splashing lurid and salacious headlines referring to union thugs, standover tactics and union rorts across the pages of all major broadsheets and tabloids. The Royal Commission has ensured there has been plenty to write about, a statistical analysis of the proceedings of the Royal Commission shows that a staggering 97% of the Commission’s time was spent hearing allegations damaging to unions. This article will attempt to demonstrate that the Royal Commission has been a deliberate, partisan and political exercise which has sought to destroy the most powerful and effective trade union in the country – the Construction, Forestry, Mining & Energy Union (CFMEU).

#### **Establishment of the Cole Commission**

The letters patent establishing the Royal Commission, signed by the Governor-General on 29 August 2001, provided for an enquiry into “unlawful or otherwise inappropriate practice or conduct...in the building and construction industry”. The Federal Liberal government, then facing almost certain defeat at the upcoming election, appointed former NSW Supreme Court Justice Terrence Cole QC to head the Commission.

At the press conference held to announce the establishment of the Royal Commission, Minister for Employment & Workplace Relations Tony Abbot, stated:

*“we [will] try to ensure that bad practices are, as far as is humanly possible, eliminated. That’s what we want to happen. Now, bad practices are bad practices, whether they’re perpetrated by site delegates for the union or whether they’re perpetrated by foremen for the companies. But we want a clean industry.”*

After listening to Mr Abbot’s public utterances, union officials could be forgiven for thinking the government were genuinely trying to address the wide-ranging problems that exist in the building industry. Perhaps they would address issues such as the appalling record of health and safety in one of the country’s most dangerous occupations; address the fear every building worker carries on their way to work in the morning knowing that on average one worker is killed on a construction site in Australia every single week. Unfortunately, despite the government’s rhetoric it soon became clear the Commission had been set up with one outcome in mind – the public hanging of the CFMEU.

### **Natural Justice and the Royal Commission**

Hearsay, leading of witnesses, departing radically from written submissions and prevention of an accused person cross-examining their accuser are all contrary to established rules of evidence and henceforth are normally disallowed in courts of law. However, they were a daily occurrence in the Royal Commission.

Royal Commissions are granted extraordinary powers by the parliament; they are regarded as inquisitorial arms of executive government and operate in much the same manner as a police force. However, by tradition they are quasi-judicial in procedure; court etiquette and evidential rules are expected to be observed, at least in part. The Cole Royal Commission departed radically from this formula and the result was a denial of natural justice to the CFMEU and its legal representatives.

The ability to cross-examine an accuser was drastically curtailed with trade union legal representatives severely handicapped by procedural disadvantage. For instance, following the giving of evidence adverse to the CFMEU, on occasions the Commissioner would instruct union Counsel to forecast in detail the content of their proposed cross examination of the witness – whilst the witness remained in the box. .

Of particular practical effect was an early ruling by Commissioner Cole restricting the granting of cross-examination rights and confining its proposed content and timing to matters pre-approved by the Commission. Cross-examination was also restricted to matters where there was a specified and direct conflict between the evidence – with the Commissioner having the exclusive arbitral power to determine the existence of a conflict - meaning much evidence which was prima facie in conflict with union beliefs was allowed to go unchallenged. When queried on these rulings, Commissioner Cole could only find one precedent for such a restriction on the right of the accused – the widely discredited and highly partisan Royal Commission on Communism occurring at the height of Cold War paranoia and at the time Prime Minister Menzies was attempting his unsuccessful proscription of Communist Party. I will leave it to the reader to draw any comparisons.

The effect of this ruling at the commencement of hearings was that objections made by Counsel to statements made in the witness box were uniformly overruled. Accordingly, all manner of hearsay and baseless allegations were aired in the witness box – and reprinted in damaging headlines in the media the next day with no chance of rebuttal from the union. By the time the union’s solicitors received their opportunity to respond and lead contradictory evidence, which was usually weeks later, the allegations had been accepted as truth – in any case a hostile media didn’t bother to report the other side of the story. The Commission ensured the damning evidence got out - the media department of the Royal Commission was allocated a budget of \$750,000. In contrast the HIH Royal Commission, set up to investigate the largest corporate collapse in Australian history, managed to get by with a media budget of \$140,000.

There were countless incidences but a classic example is that of a union organiser in New South Wales whose reputation was shattered by a subcontractor giving evidence that he had threatened and intimidated her. The story became front-page news in Sydney and around Australia – ‘Union Thug Threatens Family Of Subcontractor’.

About six weeks after that story was supplied as evidence and filed as truth, the Counsel Assisting the Royal Commission quietly tabled a report from the Commission’s own investigators showing that the evidence on which that story was based was clearly false. The statement from the subcontractor that she had received phone calls and had reported the incident to the police was found to be untrue – the phone call had not happened and no incident had been reported to the police.

But of course this didn't make front page - it didn't make it into the news at all.

Another example was an allegation made by Counsel Assisting at the commencement of hearings in Sydney when the statement was made that Bovis Lend Lease had made a suspicious payment of \$750,000 to the NSW Branch of the CFMEU in December 1999 – with the innuendo being that the CFMEU had dishonestly pocketed the money. Whilst this “fact” was widely reported, later evidence led by the union proving that this was a tax debt owed by a dodgy sub-contractor, subsequently recovered by the union and remitted to the tax office, did not receive any attention.

None of this was accidental – indeed an express purpose of the Royal Commission was to gain headlines tarnishing the reputation of the CFMEU and the union movement. In the box, treatment of witnesses by Counsel Assisting and the Commissioner varied dramatically depending on whether the witness was giving evidence adverse to the union or not. Most employers were merely required to swear to the truth of a pre-prepared statement, whilst union witnesses were subject to lengthy, probing and hostile cross examination – sometimes for up to a day.

It was not just union officials that held this view on proceedings, for example the manager of JR Rigging John Chandler, signed a statutory declaration swearing that Commission investigators brushed evidence of insurance fraud, stand-over tactics, bogus inspection records and major health and safety breaches because the union was not implicated. After supplying documentation in response to a request by the investigators to back up his criminal allegations, he heard nothing. When he phoned the commission to enquire on progress four months later, he was told it would not be investigating his allegations

### **Bias and the Royal Commission**

On August 5 2002 Commissioner Cole handed a secret report to Minister Tony Abbott. The interim report, not released until 20 August, recommended the immediate establishment of a Building Industry taskforce, on the basis of the evidence presented to the Commission up until that time. This was despite the fact that, due to the Commissioner's procedural ruling discussed above, the union was yet to present its evidence and submissions in response to the allegations made by employers and the government. Coincidentally (or not), the taskforce is headquartered in Melbourne and has commenced its operations just prior to the announcement of the Victorian State election and a three-yearly campaign by building workers to increase their wages under the system of enterprise bargaining (the only time the Federal *Workplace Relations Act* accords them the legal right to strike in contravention of international law – see International Labour Organisation Convention No. 87 on Freedom of Association and Protection of the Right to Organize, 1948; Convention No. 98 on the Right to Organize and Collective Bargaining, 1949).

The NSW Branch of the CFMEU decided to take action and made application to the Commissioner that the Commissioner disqualify himself from further hearings on the basis of bias. The initial application was made in open hearings at the Commission. In response the Commissioner released a lengthy written decision denying the application, which in essence hinged on the argument that he there was no grounds for a finding of bias as, in his interim report, he had made “no findings”.

The response from the union was simple. How could the Commissioner make “no findings” at the same time as recommending the establishment of a \$7 million dollar taskforce? How can you make a recommendation when you don't have a finding? We were not alone in this interpretation, it was apparent that Tony Abbot shared this view - when announcing the formation of the taskforce he stated that it was clear from the report that unlawful practices “particularly intimidation and coercion designed to secure a closed shop” occurred right across Australia.

The NSW Branch appealed Cole's refusal to disqualify himself to the Federal Court. The case was heard between the 14<sup>th</sup> and the 16<sup>th</sup> of October before Justice Branson who has reserved her decision. If we are unsuccessful we intend to appeal the matter as far as possible – to the High Court if necessary.

### **Abuse of Civil Liberties**

The Royal Commission has engaged in many abuses of the civil liberties of union officials and union employees. For instance, many CFMEU clerical staff, some as young as 16, were compelled to hand over their personal diaries under the terms of a “Notice to Produce” served on the NSW Branch by the Commission. Further, in Senate Estimate Hearings, investigators admitted that, although the Royal Commissions Act did not grant them the power to tap the phones of private citizens, they had seconded the Federal Police and NCA to tap the phones of a number of union officials.

But perhaps the most galling action is the court action currently being taken against CFMEU Victorian Branch Secretary Martin Kingham. Kingham is facing two charges of failing to supply documents to the Cole Commission. Each charge carries a penalty of \$1,000 or six months jail.

The documents Kingham have refused to supply relate to the identity of union delegates who have attended union training courses into matters such as Occupational Health & Safety and Industrial Law. The union was repeatedly asked to also identify the workers' employers, and give details of the course trainers. Kingham suspects that if the names are handed over the delegates, who attended training on the assumption that they would be kept secret, will be blacklisted by employers and refused work on future building projects because of their union activism. He is not prepared to take that risk.

Even Alan Jones, who himself admits he is no fan of the union movement, is incensed by the proceedings. I quote from his editorial on 25 September on his Today Show:

“There has been a fairly major exercise in union-bashing going on for some months, calling itself a Royal Commission into the building industry.... Now surely in all of these things fairness has to be real as well as apparent. But a bloke refuses to give up the names of his shop stewards and he faces criminal charges. It sounds fairly un-Australian.”

If Kingham is jailed it will be the first jailing of a union official for defying a government order since 1969. In that year Victorian Secretary of the Australian Tramways and Motor Omnibus Federation, Clarrie O'Shea, was jailed for contempt after failing to produce the financial records of the union to the court. In 1969 this led to a national strike; unfortunately in 2002 the potential jailing of a union official in similar circumstances has barely rated a mention in the media.

### **Cost of the Royal Commission**

In the Federal government's 2002-3 the Royal Commission into the Building and Construction industry was allocated \$65 million dollars, a massive squandering of taxpayer's money. To put this waste in perspective, in the same budget this figure represented just under half the additional funding allocated to rural and regional cancer patients over the next 4 years, half the additional funding to given to aged care in 2002-03 and over 8 times the additional funding going to recognising and improving the capacity of people with disabilities.

Again, a contrast with the HIH Royal Commission is instructive, it received a budget off just 29 million dollars in total.

Throughout the proceedings an incredible 19 million dollars was spent on legal fees, with Commission lawyers earning between \$2,400 and \$3,800 per day (not including travel and other allowances).

Cole was also paid handsomely for his services: he received an annual salary of \$660,000 plus accommodation, meals and expenses. This makes him the highest paid public servant in Australia; as he sits in judgement on construction workers he earns approximately 25 times that of a builders labourer on award wages. On top of this he continued to receive an indexed NSW government pension of \$140,000 per year.

### **The Political Agenda**

The Commission heard 12 months of a relentless assault upon the credibility of the union and its officials. All sorts of unsubstantiated and scurrilous hearsay and muck was raked up and splashed across the front pages of our daily newspapers. The union's analysis shows that there were 663 appearances by employers or their representatives and 36 appearances from workers – in other words workers were allocated a total of 3.35% of appearances.

It is widely acknowledged, even by the man himself, that this was Tony Abbott's version of the war on the wharves, his attempt to gain credibility within his own government and stamp his mark on the Australian industrial relations system. However, it has been much more sophisticated than the government's attack on the MUA in 1998, instead of balaclavas and dogs on the wharves it has been a dry and brutal dissection of a trade union. The aim is the same was one of the most zealous governments and ministers of all time – destroy a powerful opponent and gain political capital to use against the ALP at a State and Federal level.

The CFMEU has never denied there is corruption in our industry or even corruption within our ranks. When the activities of two corrupt characters from the NSW Branch came to light over two years ago, we threw them out of the union and reported them and their connections to the NSW police. In any event, as the HIH and One-Tel enquiries have demonstrated, corruption is not confined merely to blue collar industries. But what the Royal Commission is actually doing is redefining union strength and organisation as corruption. We are a strong and militant union and our

members expect and demand that kind of representation. Building workers are employed in a dangerous and uncertain occupation, by its very nature the work is project-based and comes and goes. And our members have never expected a job for life, but they do want safe working conditions and a fair share of the profits from this most profitable of industries. And that is the job they expect their union to carry out.

We would have liked to have seen a Royal Commission that investigated the issues that matter to workers in the building industry. Issues such as:

- health and safety – one Australian building worker dies on a worksite every single week of the year;
- phoenix companies that go bust owing millions to the taxation department and to employees and then re-emerge a week later with the same directors but under a different name;
- widespread use by employers of illegal immigrants, particularly in the Sydney area;
- evasion of workers compensation payment by employers;
- systematic underpayment of wages and entitlements throughout the industry;

### **The Final Report**

When Commissioner Cole hands down his report in December I can confidently make the following predictions:

- Commissioner Cole will hand down a report scathing of the CFMEU;
- Tony Abbott will seize on it as proof of crisis in the construction industry;
- the Howard Government will seek to introduce legislative changes, including a national taskforce, laws to ban pattern bargaining, laws to restrict union rights on safety in the workplace, a special building industry tribunal; and
- possible legislation to deregister some or all of the CFMEU.

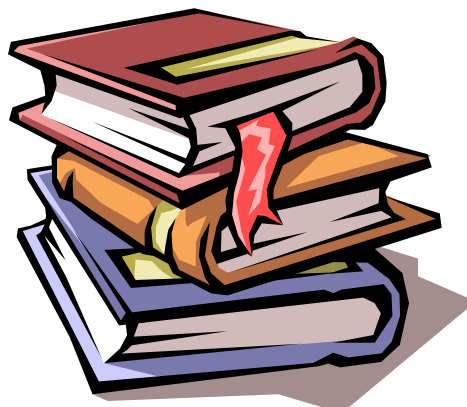
There is no doubt that this will trigger a long and hard fight between the union movement and the government. They have not spent \$65 million dollars on an enquiry where 97% of the time has been spent on allegations damaging to unions for nothing. When this time comes you can expect a strong and untied response from the CFMEU and indeed the entire union movement. Our union traces its history back to the 1830's and in that time we have faced a lot of challenges and difficulties from a lot of powerful opponents – and you can be sure we will see this one off.

*Book Reviews contin*

The contribution by Russell Hogg from the School of Sociology and Justice Studies at the University of Western Sydney, chapter one of the book, contains an overall view of prison conditions in 2002 including overcrowding, a profile of the Australian prison population, conditions in prison and statistics on offences and recidivism.

Meanwhile the New South Wales of Council for Civil Liberties, on behalf of a young woman, has had a recent victory against the Department of Corrective Services over her exclusion from visiting her father, a prisoner, even when, after a strip search found no drugs on her person, a departmental officer felt she had done the wrong thing by a sniffer dog! Exclusion of visit rights because of nothing more than suspicion is an area in which this Council is hearing a lot of concern from prisoners.

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**Regulating Racism – Racial Vilification Laws in Australia**

Luke McNamara  
The Federation Press, Sydney, 2002  
rrp \$44.00 (incl. GST)

**Reviewed by: Natasha Posner**

This is a clearly and carefully written book mapping out the development and operation of racial vilification legislation in Australian jurisdictions. The copious notes and bibliography will add to its value for readers wanting to inform themselves in this area, with almost a third of the book being a detailed examination of legislative regulation of racial vilification in New South Wales.

There is a brief discussion of the distinctions between racial vilification, racist violence and racial discrimination, and the motivations for legislative regulation. Application of government policies on multiculturalism, recognition of international human rights obligations, and recognition of the harmfulness

of racial vilification, have been major motivations. There remains a question of the extent to which the *Racial Hatred Act 1995* (Cth) satisfies Australia's obligations under international human rights law and article 4 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

The bulk of the book is devoted to analysis of the variety of legislative definitions and the main regulatory approaches to racial vilification adopted in Australian states and territories, beginning with the approach of the Commonwealth government based on the *Racial Discrimination Act* of 1975. The three main enforcement models in operation in Australia are criminal prosecution, statutory tort civil suit and civil human rights complaint. The limitations of each of these forms of regulation are examined. In general, there has been an avoidance of the use of criminal law as a mechanism for regulating racial vilification because criminalisation was seen as unjustifiable infringement of free speech. A civil human rights complaint-handling form has emerged as the most favoured legal mechanism for enforcement. There are questions relating to whether a statutory entitlement to complain places too heavy a burden on the victim(s) of racial vilification and inadequately addresses educational and public standard setting objectives.

Concerns about the implications for 'free speech' have been a major influence on the form and practical operation of racial vilification laws, limiting the scope of legislative proscription. The book explores the tension between 'free speech sensitivity' and effective regulation of racial vilification, and argues that the lack of consensus around the parameters of speech that should remain 'free' has resulted in a variety of judgements between and within jurisdictions, with implications for fairness and consistency. The author suggests that an enhanced role for the courts in the interpretation and application of racial vilification statutes may contribute to greater clarity and consistency. However, the overall result of these developments is that manifestations of racism which were previously thought of as beyond the reach of legal regulation, are now officially unlawful in all parts of Australia by virtue of the *Racial Discrimination Act 1975* (Cth) alone, or a combination of the national and separate state and territorial laws.

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*Ken Buckley, CCL co-founder and Committee member at the 2002 AGM*

## **Help protect our rights**

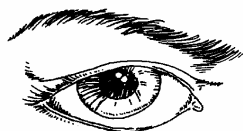
Your membership makes a difference

### **The NSW Council for Civil Liberties**

was formed in 1963 to ensure:-

- ◆ Freedom of speech and thought
- ◆ Freedom of movement and association
- ◆ Fair trials and freedom from arbitrary arrest
- ◆ Freedom of political preference
- ◆ Freedom of adult sexual preference

~~*Who watches them*~~ \_\_\_\_\_



*while they're watching you?*

***Is your membership due for renewal? Refer cover page for information.***

