

Issue 192 March 2003

Print Post Approved PP/24359/00069

www.nswccl.org.au

CONTENTS Page

CCL Reports 3

Book Review 6

Observing Columbian Justice 7

Spectre of Terrorism Has Some Law Makers Jumping the Gun 8

Review of the Law of Manslaughter 9

NSWCCL OPPOSES AUSTRALIAN PARTICIPATION IN WAR AGAINST IRAQ WITHOUT DEMOCRATIC PROCESS

Motion of the NSWCCL Committee

A motion proposing resolutions was put to the meeting of the Committee of the New South Wales Council for Civil Liberties at the Committee meeting of 22 January 2003.

Resolutions:

The New South Wales Council for Civil Liberties resolves:

- (1) to oppose Australian participation in a war against Iraq without consultation, referendum or immediate recall and support of the Parliament of the Commonwealth of Australia; and
- (2) to use the legal resources of the CCL to defend and support Australians who have a conscientious objection to Australian Government participation in war against Iraq.

Statement in Support of Resolutions:

Clearly the Australian government is hell-bent on unquestioned support for the USA Government in its aim of staging a war against Iraq—an aggressive war for which no just cause has been established. There is no evidence that Iraq has either an intention or capability of using weapons of mass destruction, unlike the USA.

Certainly Iraq presents no direct threat to Australia, yet the scenario of attack upon Iraq means very heavy loss of Iraqi lives, particularly civilians under bombardment. If Australian forces are involved, there will probably be some deaths there too, not to mention damage to Australian economic interests and reputation. Democratic principles demand that the Australian people be consulted on this issue by a referendum or immediate recall of parliament. In the latter case, a conscience vote is imperative, given that no political party has a mandate to command an automatic vote in favour of participation in this kind of war.

Councils for Civil Liberties have a particular concern in this matter. Rights such as due process of law will be undermined by legislation to be put before the Federal Parliament in the next parliamentary term*. Correspondingly, the NSW government has legislated to increase the powers of State police in matters such as search without warrant.

These are dangerous abuses of basic freedom, which will not be automatically reversed when the situation changes.

Given the possibility of an attack upon Iraq in the present circumstances, the Council expresses the basic concern that

JOURNAL DEADLINE DATES

Material Deadline: 14th May 2003

Only email or disk documents and digital images will be accepted.

Articles no longer than 1500 words and letters 100 words.

attack on any nation without sanction of the United Nations is a fundamental attack on the Charter of the United Nations and the rule of international law.

* See article by David Bernie in this journal.

CIVIL LIBERTY

Journal of the New South Wales Council for Civil Liberties Inc

PO Box 201 GLEBE 2037

telephone: (02) 9660 7582

fax: (02) 9566 4162

email: nswccl@mail2me.com.au

website: www.nswccl.org.au

COMMITTEES 2002–2003

Executive

<i>Cameron Murphy</i>	President
<i>David Bernie</i>	Vice President
<i>Pauline Wright</i>	Vice President
<i>Jeremy Styles</i>	Secretary
<i>Susan Cleary</i>	Treasurer
<i>Stephen Blanks</i>	Assistant Secretary
<i>Peter Breen</i>	Committee Rep

Committee

Peter Breen
Daniel Brezniak
Ken Buckley
Kep Enderby
Adam Halstead
Judith Henstock-Muru
Joan Kersey
David Leung
Shaughn Morgan
Doug Nicholson
Natasha Posner
Michael Walton

Susan Smith Executive Secretary

J.C. Cheadle Honorary Auditor
W.L. Browne & Associates

Natasha Posner Editor
David Leung Designer

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

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.

Fundraising/ Finance

Convenor: Susan Cleary

Civil Rights/Censorship/Privacy

Convenor: Doug Nicholson

Criminal Justice/Prisons

Convenor: Peter Breen

ASIO/Increased Police Powers

Convenor: David Bernie

Complaints

Convenor: Jeremy Styles

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

Copyright © New South Wales Council for Civil Liberties Inc. Sydney. All rights reserved.

REPORTS

SECRETARY'S REPORT

The upcoming months look to be an unsettling time for civil libertarians. Two significant issues are of concern to the NSW Council for Civil Liberties and its members. The first is the international crisis which is continuing in the Arabian Gulf (see the NSWCCL Committee's recent resolution which is reproduced on the front cover). The second is the upcoming State election and the so-called 'law and order' debate which is to precede it. Both of them are issues of concern to the NSW Council for Civil Liberties and its members.

Protests

The NSW Council for Civil Liberties has been involved in two protests in recent weeks.

At the first, in a small protest at Kirribilli House, members of the NSWCCL executive joined members of the Medical Association for the Prevention of War and a group of actors, including Judy Davis, Toni Colette and Colin Freils in protest against the Prime Minister's actions in supporting a possible attack upon Iraq by the United States. The protest received some

media coverage.

In the second, Members of NSWCCL and the University of NSW Branch of the Council took part in the Sydney City march on 16 February. A core group carried a large NSWCCL banner for the duration. Many other NSWCCL members attended the rally which was a resounding success amongst similar successes worldwide. It is hoped, as we go to press, that the expressed anti-war sentiment has a significant impact on Australian foreign policy in respect of Iraq.

Proposals for changes to the double jeopardy rule, victim impact statements, and periodic and home detention

The upcoming NSW State election is shaping up to be a bidding war in the 'getting tough on crime' auction being undertaken by both the major parties. The upcoming legislative session of Parliament is looking extremely troubling as regards the rights and liberties of individuals in this state. A number of questionable propositions have been put forward in the recent round of bids.

The Carr Government has proposed the revision of the double jeopardy rule. They suggest that if new evidence appears, cases might be reopened and retried. The response made in the media by some commentators and jurists has been that it will have

NSW Council for Civil Liberties at the peace rally in Sydney on 16 February 2003.





A very popular and effective representation of Bush and Howard on Iraq.

little effect. It is suggested that the number of cases to which it will apply is negligible, and its application would likely be limited to crimes occurring before DNA testing was available where samples are still held.

I would say otherwise. There is a principled objection to make. It is in the interest of justice to all persons interested in a case, to have the final conclusion of a matter be final. The rule of double jeopardy has been reported as being more than 800 years old. It is a legitimate and important part of the adversarial system. The rule of double jeopardy is an important corollary of the principle that the Crown bears the burden of proving guilt beyond a reasonable doubt. If proof is required it must be required once and for all. Not repeated over and over. To allow repetition allows the Crown the opportunity of vexatious prosecution and the opportunity to take a second shot if the first missed due to a reason within or without the Crown's control.

Further the removal of the double jeopardy protection is in breach of Australia's international obligations. As a States party to the *International Covenant on Civil and Political Rights*, Australia has committed itself to uphold the rule against double jeopardy. Article 14(7):



Jeremy Styles with the new NSWCCL banner.

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Additionally, in a practical sense, finality of criminal litigation, with a verdict of guilty or not guilty, also offers a measure of closure to all parties. Re-ventilating matters will expose victims and families to the repeated strain of litigation. It also affords a procedural unfairness on a criminal accused. Having been legitimately acquitted by a competent court, the then accused will have the threat of repeat litigation hanging over their heads.

Another issue raised in the debate has been the proposal by the Carr Government that courts hear victim impact statements in court (rather than merely receiving statements on paper). This poses real problems for the courts in offering a temptation to sentence for the subjective gravity of an offence as considered by the victim, rather than the objective gravity of the offence. The illiterate victim, the badly presented victim or the emotionally withdrawn victim will all elicit a different response to that of the articulate yet upset victim. It does not amount to a fair situation for an accused person.

The opposition has proposed reduction or removal of Periodic and Home Detention as modes of punishment for some crimes, notably property crimes. Periodic and Home Detention are known to produce lower recidivism rates in offenders and yet still effect a punishment. Thus the removal of these forms of punishment appears unjustifiable.



Cameron Murphy at the front of the march.

Actions

The NSWCCL is undertaking a number of ongoing projects; the two following are ones which have had some secretarial involvement.

The Council is currently drafting a pamphlet for prisoners with convictions for sex offences. The pamphlet seeks to redress a particular problem which has been reported to the Council on numerous occasions. Convicted sex offenders, who maintain

their innocence are being pressured and having disciplinary action taken against them for not completing sex offender courses. Prison officers have apparently been putting forward the erroneous view that without doing the courses, prisoners cannot get parole. The courses require admissions of guilt as a starting point for rehabilitative counselling. Prisoners who maintain their innocence cannot complete the courses. The Council publication offers advice on the Parole Boards' consideration of such courses in relation to the prisoner's capacity to gain parole.

The Council is also in the process of developing an education program for 'support persons' who attend police interviews with minors or other vulnerable persons. The program is intended to offer these volunteers an understanding of the rights held by the interviewees, and the manner in which they can assist them.

Jeremy Styles
Secretary

LUNCH AT PARLIAMENT HOUSE

On 15 November 2002 we held another very informative and enjoyable fundraising luncheon at Parliament House, thanks once again to the hospitality of The Hon Dr Meredith Burgmann MLC.

Our guest speaker was Mr Kevin Rudd MP, Shadow Minister for Foreign Affairs, who spoke about the Opposition's policy on foreign affairs. Mr Rudd was asked some pertinent questions from around the table with respect to Iraq and the opposition's views on asylum seekers. At that stage, Labor's policy on Iraq was less well-articulated than it has become more recently; but Mr Rudd was prepared to state his own views which coincided with what has now openly become Labor policy, that is, that Australia should not participate in war without UN sanction.



Guest Speaker: Kevin Rudd

The first fund raising lunch for 2003 has been arranged for 28 February. Senator Natasha Stott-Despoja has agreed to speak on 'A great lie of the

21st century: we have too much democracy'. A flyer was distributed in January to all members announcing the details of the lunch, to be held again in the President's dining room.

The committee would like to put together a panel of speakers for the rest of the year. Any suggestions on speakers of interest to members would be most welcome. Also welcome are any suggestions on other fund raising activities. We really would appreciate ideas for activities which would have the support of members. Please telephone, fax or e-mail the CCL office with your contributions.

Members are encouraged to participate in these events which give us a real opportunity to speak freely with policy-makers about important civil liberty issues. The President's dining room is a beautiful venue and the food is excellent, so don't miss out next time!

Pauline Wright, Vice-President
Susan Cleary, Convenor,
Fundraising/Finance Subcommittee



Pauline Wright at the luncheon

ASIO/INCREASED POLICE POWERS SUBCOMMITTEE

The ASIO bill providing for detention without charge, was rejected by the Senate last year after the Government and Opposition could not agree on amendments recommended by an all-party committee. While the Government agreed to some changes, including a sunset clause, they would not agree to changes that would prevent repeat detention. Most lawyers who made submissions on the bill were of the view that nothing in the bill prevents almost immediate re-detention, effectively meaning indefinite detention without trial. The fact that the government would not even accept amendments recommended by its own party members in the committee report to overcome this problem must mean that the government intends this bill to have the practical effect of indefinite detention without trial.

There are many public misconceptions about the ASIO bill. Many believe the bill only applies to suspect terrorists whereas in fact anyone only suspected of simply having information about terrorism including journalists, lawyers, politicians, etc. who receive information in the course of their work can be detained. Many also believe the period of detention is limited to 48 hours but the bill expressly provides for detention up to 7 days and the government draft has the practical effect of indefinite detention without trial. CCL members should point out these errors as the bill is likely to be introduced again into Federal Parliament this year.

While the recommended amendments supported by the ALP would improve this bill, CCL oppose the bill in entirety, as no case has been made for the need for these powers. There are already wide powers of arrest for conspiracy, etc. in case of reasonable belief that a person(s) are planning a violent attack. Giving any detention powers to the unaccountable ASIO is a fundamentally flawed strategy, in effect creating a national secret police.

Unfortunately at the State level, the Carr ALP government has passed terrorism laws giving the police wide search powers without warrant. The enactment of these laws appeared to be motivated by a need to do 'something' after the Bali bombings and were supported by the opposition. This is yet another example of the Carr Government taking away individual rights in hastily conceived legislation designed to appeal to the short-term popular sentiment without thought of the consequences.

David Bernie, Convenor
ASIO/Increased Police Powers Subcommittee

REPORT FROM UNSW CCL

Well, it's been quite a summer for the members of the UNSW CCL. Picture this: sitting on a tropical beach, sipping cocktails as the sun sets over the sea....Unfortunately, our summer was not quite so relaxing! However, in true civil libertarian style, we have managed to keep ourselves active with a number of projects. After all, there's no rest for the wicked!

Primarily, this summer has consisted of preparing submissions. The first submission we completed was for the Attorney General's review of the *Administrative Decisions Tribunal Act*. The highlight of this submission was a recommendation that the protection and preservation of human rights be included as part of the objectives of the Tribunal.

Our second submission, in collaboration with our wiser counterparts at NSWCCL, related to the Attorney General's review of the law of manslaughter

and the possible introduction of a new offence of child destruction. (A summary of this submission is included in this newsletter.)

We have also been involved in research for a pro bono case CCL is working on. This has helped us gain practical insights into the workings of the criminal justice system. We have been collecting names of people interested in joining the police interview support project which we are very excited about, and hope will begin to take shape in the next few months. Finally, some of our members are helping to give the NSWCCL website a serious make-over, so please watch out for the new look. We are lucky that not everyone for UNSW CCL is as computer-illiterate as I am!

So as you can see, our dreams of relaxing on a tropical beach with the sun and salt melting our cares away has been far from reality. But seriously, I doubt any of us could lie on a beach for long...there's too much work to do! We've had a productive and interesting holiday and are all looking forward to the first semester of 2003. We can't wait to get involved in more projects and encourage more members to join our group!

Samantha Newman
UNSW CCL

BOOK REVIEWS

POLICE REFORM: BUILDING INTEGRITY

Tim Prenzler & Janet Ransley (eds.)
Hawkins Press, Sydney, 2002
RRP \$55.00 (incl. GST)
Reviewed by: Ken Buckley

This is a useful compendium of research in the past decade into problems of police corruption, mainly in Australia, although with some reference to comparable situations in the UK and the USA. Various aspects, such as miscarriages of justice and discriminatory race relations, are dealt with in separate chapters by more than a dozen authors, including the editors.

Most of the authors are academics in university criminology departments, particularly in Queensland. There are authors from several other States, but none from New South Wales (NSW). There are some references to the report of the NSW Wood Royal Commission on Corruption, but not to the transcript of evidence to that body.

The book is divided into two sections: one concerned with police practices and procedures relating to

corruption, including bribery, perjury and police brutality; the second considers ways of improving police behaviour, optimistically described as maximising ethical conduct. This two-fold division is rather arbitrary and leads to some overlap and repetition in the book.

The overall impression is that whilst police corruption is endemic, there has been some progress in checking it, especially in Queensland through the independent Criminal Justice Commission. As against this, a chapter on Public Order Policing refers mainly to Victoria in the 1980's and 1990's, yet makes no mention of Queensland bans on demonstrations in the years of Bjilke-Petersen government.

As for the section embraced by the term 'Innovations in Creating Ethical Police Departments', a cynic might say that talking of ethics in relation to police is as misleading as in relation to company business. Nevertheless, the authors of this book make some valid points concerning complaints against police. Tim Prenzler, whilst detailing progress in systems of dealing with complaints, including the work of Ombudsmen, suggests that **direct** investigation by bodies independent of the police is desirable, if not essential.

There are some notable omissions from the authors' interests. There is little reference to relevant legislation or to the work of lawyers or magistrates in criminal courts. Secret police (ASIO) are not mentioned, despite their wide-ranging powers.

Above all, there is no mention of Councils for Civil Liberties (CCLs) apart from one footnote reference (p. 195) to a publication by the National Council for Civil Liberties in Britain and another to the Human Rights Watch in the USA—but none to the very active American Civil Liberties Union. It appears that none of the authors of the book under review have made contact with any CCL, let alone participated in their activities. Yet CCLs, which include experienced lawyers prominent in their membership, are vitally involved in such matters as investigation of complaints against police, lapses in the role of the Ombudsman and police ignorance of the right to silence by suspects under questioning.

Is the research of academics in university criminology departments limited to printed sources and police contacts?

Ken Buckley is a NSWCCL Committee Member.

ARTICLES

OBSERVING COLUMBIAN JUSTICE

Bogotá is the capital of Columbia at the northern tip of South America. It lies kilometres above the sea in a country that is larger than Spain and France combined and has a population almost twice the size of Australia. Were it not for a civil war and a culture of kidnapping and violence, it would probably be a wealthy country and a sought-after tourist destination. It has vast reserves of oil and a strong agricultural sector. It stretches from the Andes to two oceans. Its food is fascinating and its pre-Columbian art is extraordinary.

These benefits are largely of academic value alone. The tourist trade is tiny and many governments strongly advise their citizens not to travel here. For years, leftist rebels have been fighting against the government and paramilitary forces. The government is backed by the United States (US) and a massive military force. Some fear that the war, which is fuelled by the massive cocaine trade, may last forever.

The war that they are fighting permeates everything in Bogotá. The military are everywhere. You are constantly searched. Meanwhile the killings and the kidnappings continue. While the US mourns the death of the crew of the Space Shuttle Columbia, murders in the country of the same name are so commonplace that they hardly register. Kidnappings are estimated at the staggering figure of 3000 per year.

As a visitor, the impact is immediate. For my first few days here, my hands and feet poured with sweat despite the cold of the mountain climate. While I am no longer scared, I am still apprehensive. I long for my suburban life in Sydney and my family. And I am relatively safe. Hours from here sleep three Irishmen who are by no means safe. Charged with training the rebels, they have been in jail for over a year waiting for their case to come to a conclusion. The case is not big news here and to the extent that the Columbians know about it, most think the three guilty. Government officials have loudly proclaimed their guilt in advance of the verdict.

I am in Bogotá with a dozen or so Irish, American, Australian and English politicians, lawyers and journalists. We are here to observe the trial and, at least in terms of the observers, to try to ensure that the trial is fair. I am not Irish. I have never been to Ireland. But I am lawyer and lawyers should believe that people should not be convicted before their guilt is determined by a fair trial.

While it is always dangerous to view another system through the prism of your own world and while the

case is yet to conclude; it is difficult not to have concerns about the fairness of this trial. While Australian courts rely upon direct evidence of what people saw or heard, there seems to be no substantial restriction on what evidence is put before the court in Bogotá. Hearsay evidence, which would be rejected in Australia because of its unreliability and its failure to prove what it alleges, is regularly put before the court. Much of the evidence is simply the opinion of the witnesses and proves nothing. Much of it is simply irrelevant. We are hampered by the lack of a Spanish interpreter, lack of ready access to transcript and witness documents. Our constraints are nothing compared to those of the defence lawyers. Lawyers are regularly killed in Columbia and one of the defence lawyers has gone into hiding overseas after his life was threatened.

I do not hold great ambitions relating to this case. My presence is unlikely to change anything, but this trip has changed me. It has made me think again about the importance of the rights that exist in Australia—the rights to a presumption of innocence, the right to a fair trial and to legal representation. Yet even these rights are under threat in Australia and few are willing to stand up for them. For the Australian Government, like other governments across the world, is saying that those accused of acts of terrorism, or even of knowledge of terrorism, should have many of these rights taken away. As I write, there are Australians in jail in Cuba who have not been presumed innocent, who have not been given a fair trial or legal representation. The Australian Government appears unfussed.

Lawyers and others have a duty to stand up and be counted. For if this war on terror is a war to protect our freedom, as our leaders say, it must include protecting those freedoms that I have written about; whether they be for the best or worst of us, for the most trivial or heinous of crimes, or for the richest or the poorest of people and of countries.

Ian Latham
Barrister

SPECTRE OF TERRORISM HAS SOME LAW MAKERS JUMPING THE GUN

Powerful anti-terrorism legislation is being rushed through and will create a dangerous legacy, writes **David Bernie**

The Terrorism (Police Powers) Bill was rushed through Parliament last week. This legislation was introduced in a climate of fear and horror following the outrage in Bali and a national security alert. The impression created by the rush to pass these new laws seems to arise from a general feeling that governments should 'do something' about terrorism. Police have had no difficulty getting search warrants under existing legislation in respect of suspected terrorism offences, and they already have substantial powers of arrest on reasonable suspicion in respect of any potential terrorist offences such as conspiracy to murder or attempts to plant explosive devices.

The new law provides for an 'Authorisation' to be made by a Commissioner or Deputy Commissioner of Police with the concurrence of the Police Minister, bringing in a political aspect to this area of policing. Once the authorisation is made, police can search people and property without warrant in the Orwellian named 'target area' or to search for a person who is 'the target of an authorisation'. 'Target area' is not limited in any way by size under the provisions of the legislation and to make matters worse, authorisation under the law need not always be in writing, leading both the police and the public to doubt exactly what their rights will be. The Bill deals with this problem by taking away the rights of citizens to sue police acting pursuant to a purported authorisation, even if it turns out later that this authorisation did not in fact exist. Yet, the onus is upon citizens to prove they have a reasonable excuse if they are charged with breaking any of the myriad provisions of the Act.

Although apparently intended to fight the present threat of terrorism, there is no sunset provision in the bill (only a ministerial review), so that these powers will remain on the statute books to be used by future governments in ways that may have never been intended. Mr Carr has said the use of these powers will only be in limited situations set out in the Act, but any decision to activate the powers under the new law cannot be called into question or reviewed in any court of law, ensuring that the decision to use these powers remains effectively a political one. This is an important danger in the bill despite provisions attempting to exclude peaceful protest and industrial action. We have seen recently it is very easy for governments to allege that certain demonstrations or strikes are illegal or violent.

Last century, the Queensland Labor Government passed extraordinary state emergency powers through the Queensland Parliament and several decades later a conservative premier, Joh Bjelke-Peterson, used those powers to declare a state of emergency in Queensland simply to prevent protests against the old authoritarian racist regime in South Africa. Use of extraordinary police powers against striking power workers in Queensland and miners in Britain seems to be completely lost on the Carr Labor Government.

Comparisons will be made with laws in the United States, Canada and Britain, but in all those countries there are now Bill of Rights provisions that will provide some review of their legislation in a more sober setting at a later date. Australia is now alone among comparable democracies by not having a Bill of Rights structure. Traditionally, the role of the parliamentary opposition is critically to scrutinize legislation so as to suggest amendments or even oppose bills. In these times, both at State and Federal level, the 'Opposition' could be better described as the 'Imitation'. The minor parties on the cross benches can attempt to oppose or amend legislation but they do not have the numbers without major party support. Mr Carr has argued that Australia does not need a Bill of Rights but he has provided the greatest argument in favour by showing the sort of legislation that can be passed in a time of crisis without adequate consultation or consideration.

Unfortunately this law is not the end of this type of legislation in Australia. There is a bill before the Senate effectively to give detention without trial to ASIO, the least accountable government organisation in Australia. Again, the Federal Government has also rejected even recommendations by its own members to insert a sunset clause into this legislation. Another generation may have to live with the consequences of laws passed now.

David Bernie is a Sydney barrister and Vice-President of the NSWCCL. This article was originally published in The Sydney Morning Herald on 25 November 2002.

REVIEW OF THE LAW OF MANSLAUGHTER

Summary of joint submission by NSWCCL and UNSW CCL

The NSW Attorney General recently called for submissions to a review of the law of manslaughter that is being conducted by former Supreme Court Justice the Hon. Mervyn Finlay Q.C. The review is looking at firstly, whether manslaughter should be codified into different grades (with a view to applying model sentences to each grade), and secondly whether the law should recognize an offence of manslaughter of an 'unborn child'.

The NSW Council for Civil Liberties (NSWCCL) and the University of NSW Council for Civil Liberties (UNSW CCL) sent a joint submission to the inquiry on each of these points. The following is a brief summary of the points that we raised in our submission—a full copy can be obtained from the NSWCCL office.

Manslaughter & Homicide Generally

The law of manslaughter is inextricably linked to murder. The mental element of murder—and by implication manslaughter—is complicated and controversial. Any attempt to codify manslaughter should proceed, therefore, from a thorough examination of both forms of unlawful homicide.

Before a scheme of categories of manslaughter is introduced in NSW, the Councils for Civil Liberties recommend that a more detailed inquiry be held to examine unlawful homicide. Such an inquiry could, among other things, review the adverse effect of the 1997 changes to the partial defence of substantial impairment, and examine ways to correct the unfair treatment by the law of manslaughter of those with lower than average intelligence. Manslaughter covers a broad range of conduct and moral culpability. It ranges from the mere accident right up to murder. For this reason, the Councils believe that manslaughter is not suited to the scheduling of minimum sentences. Even if a scheme of categories of manslaughter is devised, the range of conduct and criminal liability within each category will vary widely and be unsuited to a single standard non-parole period.

Manslaughter and the foetus

It is important in any discussion on this topic to employ neutral language. A foetus is not an 'unborn child' and should not be referred to as such by the law.

Recognising the foetus as a legal person

The Councils do not support the suggestion to alter the law of manslaughter to include the destruction of a foetus. Such a suggestion demonstrates a fundamental misunderstanding of the law of homicide. For centuries it has been the position of the common law that before anyone can be killed they must first be born.

If the legal definition of personhood was extended to include the foetus, then the law would recognise mother and foetus as two distinct legal persons. This leads inevitably to a conflict of rights between mother and foetus and the policing of pregnancy to ensure that the mother does nothing to harm the foetus in any way.

In the United States pregnant mothers considered a danger to the foetus have been detained until the birth of their child. Pregnant mothers have been charged with child abuse of the foetus, assault of the foetus, delivering prohibited drugs to the foetus via the umbilical cord, and even child neglect of the foetus for failing to follow medical advice and for continuing to have sexual intercourse.

If the foetus is a legal person, then will a pregnant woman be charged for the motor manslaughter of her own foetus? Will pregnant women be prohibited from playing sport etc. in order to ensure that the foetus is not endangered? How will this impact on young inexperienced mothers who do not necessarily know what will endanger the foetus? If a foetus is to be granted personhood, then how will this affect Australia's treaty obligations under the *Convention on the Rights of the Child*? Will a foetus accrue all the rights of a child under that Convention?

What would be the impact on civil law? Will a father be able to sue a mother if she chose to terminate her pregnancy? Will the father be able to sue the doctor who performs the operation? Will a court be able to issue a writ of habeas corpus for the foetus, forcing a non-consenting mother to submit to an immediate caesarean birth?

Knowledge of pregnancy

Any offence relating to the harm of a foetus must involve full knowledge on the part of the accused that the foetus exists. To hold a person criminally liable for conduct that they might very well have altered, had they been in full possession of the facts, is harsh in the extreme.

There is a big difference in terms of moral culpability between a person who holds a knife to a pregnant woman's stomach and says 'I'm going to kill your baby', and the person who substantially contributes to the loss of a foetus by inadvertently knocking over a pregnant woman whom they never realised was pregnant in the first place.

The Councils believe that the prosecution must prove that the accused knew that the mother was pregnant in any such offence.

Child Destruction

The usual way at law to deal with the destruction of a viable foetus is to prosecute for child destruction. New South Wales does not currently have such an offence. Such an offence should not be introduced unless it explicitly exempts lawful abortion, the pregnant mother acting lawfully, acts done to preserve the life of the mother or foetus, and any kind of legitimate medical procedure carried out in a competent manner.

The offence should require full intent to destroy the life of a foetus capable of being born alive. Recklessness is not sufficient *mens rea* for this offence. If it were sufficient *mens rea* then issues of policing pregnancy would again arise to ensure that the conduct of the mother did not harm the foetus.

In order to maintain the neutral language of the law, the Councils suggest that the Attorney General refer to this offence as 'foeticide'.

Michael Walton, Darren Magennis, Samantha Newman, Paula Novotna, Cameron Murphy

A full copy of this UNSW CCL and NSWCCL joint submission can be obtained from the NSWCCL office.

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 adult sexual preference

Who watches them



While they're watching you?

Is your membership due for renewal?

Refer to the back cover page for information.

NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES

PO Box 201 GLEBE NSW 2037 or DX 1111 SYDNEY
Phone: (02) 9660 7582 Fax: (02) 9566 4162 email: nswccl@mail2me.com.au

MEMBERSHIP FORM

NAME		I / We wish to join / renew membership for the year ending 31 October 20 _ _	
ADDRESS		Please indicate type of membership:	
		\$40 Ordinary	\$70 Household
POSTCODE		\$105 Ordinary 3 yrs	\$180 Household 3 years
PH (W)	PH (H)	\$150 Corporate	\$15 Pensioner/Student
FAX	MOBILE	\$50 Journal Subscription for Libraries	
EMAIL			
DX			
PAYMENT DETAILS:			
I enclose a cheque/ money order made payable to New South Wales Council for Civil Liberties			
Please debit my Bankcard / Mastercard / Visa (please circle correct card) for \$			
Credit Card Number:			
Name on card:		Expiry date: / /	
Signature:			
For Office use only	Member	Listed	File
			Receipt #

NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES

PO Box 201 GLEBE NSW 2037 or DX 1111 SYDNEY
Phone: (02) 9660 7582 Fax: (02) 9566 4162 email: nswccl@mail2me.com.au

MEMBERSHIP FORM

NAME		I / We wish to join / renew membership for the year ending 31 October 20 _ _	
ADDRESS		Please indicate type of membership:	
		\$40 Ordinary	\$70 Household
POSTCODE		\$105 Ordinary 3 yrs	\$180 Household 3 years
PH (W)	PH (H)	\$150 Corporate	\$15 Pensioner/Student
FAX	MOBILE	\$50 Journal Subscription for Libraries	
EMAIL			
DX			
PAYMENT DETAILS:			
I enclose a cheque/ money order made payable to New South Wales Council for Civil Liberties			
Please debit my Bankcard / Mastercard / Visa (please circle correct card) for \$			
Credit Card Number:			
Name on card:		Expiry date: / /	
Signature:			
For Office use only	Member	Listed	File
			Receipt #