

Civil Liberty

Journal of the New South Wales Council for Civil Liberties Inc

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PRESIDENT'S REPORT

The last few months have been very busy for the Council with the re-emergence of the legislation to increase ASIO powers, attacks on the Human Rights and Equal Opportunities Commission (HREOC), and of course unlawful attacks by our nation on Iraq, amongst many other issues.

The Council played an active role during the NSW election campaign by commenting on and criticising many of the 'Law and Order' proposals of each side of politics. There was a great danger that the election would turn into another law and order 'auction' but fortunately there were only a few of these types of proposals.

The ASIO legislation has been reintroduced by the Howard government into the Commonwealth Parliament. This is the second attempt at passing this bill which will allow ASIO to arrest and detain people without charge, without contact with others including family, and without legal representation. No-one has yet been able to demonstrate that these changes are either necessary or productive in terms of combating terrorism. These are exactly the sort of powers that led to the abuse of citizens in apartheid South Africa, Pinochet's Chile, or by the KGB in soviet Russia. There is no place for this sort of unaccountable and repressive power in Australia. The ASIO legislation was blocked by the ALP and minor parties late last year and now would provide the government with a double dissolution trigger if it is blocked again. The Australian Labour Party (ALP) must remain firm and ensure that this legislation does not pass the Senate and does not become law.

The Commonwealth government has also attacked HREOC by attempting to limit its most important asset—the ability to intervene in cases where there is a human rights issue. Commonwealth Attorney General (AG), Daryl Williams would have us believe that removing its independence and forcing it to obtain the consent of the AG before intervening is increasing HREOC's powers. If the government manage to get away with this stupendous line of reasoning and pass laws reducing its power, it will effectively turn HREOC into nothing more than a toothless tiger, adding to the appalling human rights record of this government. While other nations are increasing the powers of their human rights watchdogs, ours will be left ineffective. Even Fiji would have a more powerful human rights watchdog than Australia.

The NSW Council of Civil Liberties (NSWCCL) actively campaigned against Australia's participation in the illegal war on Iraq. It is our strong and fundamental belief that the United Nations is the appropriate international policing agency not the United States, and not our nation, regardless of the personal affinity between John Howard and George Bush.

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JOURNAL DEADLINE DATES

Material Deadline: 13th August 2003

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

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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.

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REPORTS

PRESIDENT'S REPORT (CONT')

As President, I have been campaigning and providing commentary on behalf of NSWCCL on many issues including:

- university students and prosecutions by music corporations to increase copyright profit;
- prisoners rights—voting rights and conditions;
- illegal war in Iraq—ignorance of the importance of the United Nations;
- tougher bail laws removing presumption of innocence;
- new unjustified ASIO powers;
- increasing and less regulated telecommunications interceptions;
- need for regulation of video surveillance; and
- listing of SARS in the highest quarantine category—allowing arrest and forcible medical treatment.

The media releases that I have issued on many of these issues are available for download from our newly designed website, or can be obtained by contacting the NSWCCL office.

I would encourage all members to become active and get involved in the work we are doing on these important issues. We are always looking for assistance in writing submissions, researching issues, website development, and of course, need money

and other resources (see below) to get our message out. If you are not able to become involved yourself, then please send us a donation so that your help will enable us to do a more effective job.

Cameron Murphy
President

FUNDRAISING LUNCHES

Another most enjoyable lunch was held in the President's Dining Room, Parliament House on 28 February 2003. Senator Natasha Stott-Despoja spoke on 'Too much democracy? The lie of the 21st century' (see article below).

Our second lunch for the year is scheduled for 4 July. Senator Ian Cohen will speak on 'The Greens in a world with a diminishing right to dissent'. The Council is hoping to hold lunches more regularly and has decided to notify members by e-mail where possible when the timing of a lunch does not allow notification in the Journal. Where this is not possible then a flyer will be sent as usual.

Council members were invited in the last Bulletin to suggest speakers for the lunches and/or propose other fund raising activities which might be attractive to them. Unfortunately no suggestions have been forthcoming. So put on your thinking caps as we would really like to hear from you.

Susan Cleary
Convenor, Fundraising/Finance Subcommittee



The Council would really appreciate any contributions members could make in the way of stationery, prepaid envelopes, stamps, printer and computer supplies. If members have suggestions of other items which might be of use to the Council, then please telephone, fax or email the Council office with your offers.



OBITUARIES

Joan Marie Locke

19.9.1934 – 24.2.2003

Joan Locke, the immediate past Secretary of NSWCCL passed away in February of this year after a long struggle against cancer. Many of us came into contact with, and knew Joan, in very diverse ways. She was, at different points in her life, a distinguished and successful barrister, an actor, a judicial registrar, a tribunal member, and of course, a civil libertarian.

Throughout her life, from her earliest involvement with NSWCCL, she remained committed to civil liberties causes and served the Council in various positions, including Treasurer, Secretary and Committee Member.

There was never a dull moment around Joan, and she was never short of intelligent and logical advice, or entertaining conversation. Above all, Joan was a tower of strength, full of resolve and enduring loyalty, and definitely someone that you were proud to have on your side, as a friend and as an advocate for your point of view. She was also a very complex person, and someone who devoted much of her life to important social issues. She consistently placed her loyalty to her friends above her own interests and was tireless in her commitment to assisting others.

Joan was well known at CCL for vigorously asserting her views and has a proud record of successfully representing people in the defence of their liberty. You could always rely on Joan to defend the underdog, and it was this characteristic that defined almost every aspect of her work.

We have lost a great friend and colleague.

Cameron Murphy
President

Bob St John

1925–2003

We also regret to report the very recent death of Bob St John, one of the original members and leaders of NSWCCL. He was a great civil liberty barrister whose achievements will be fully reviewed in the next issue of the journal.

ARTICLES

CHIPPING AWAY AT HREOC

The Federal Government has drafted a bill significantly diminishing the powers of the Human Rights and Equal Opportunity Commission (HREOC) and reforming the Commission to one without specialist commissioners. This is the second major bill reforming HREOC put by the present Government; the first was rejected by the Senate in 1998. The current bill is titled the *Australian Human Rights Commission Bill 2003*. The Bill was passed by the House of Representatives and subsequently referred to Senate Committee.

Written submissions were made to the Senate Legal and Constitutional Committee about the *Australian Human Rights Commission Bill 2003* by the NSWCCL along with the University of NSW CCL ('the Councils'). The basis of the written submissions of the Councils were that:

- (1) The Attorney General should not hold an effective veto over the intervention of HREOC in court proceedings; and
- (2) The current 'portfolio' specific commissioners should not be changed to general human rights commissioners; and
- (3) That the power to recommend that damages be paid, should not be removed from HREOC.

The Councils' submissions will be available on the NSWCCL website when submissions to the Committee are made public along with the publication of the report.

After making written submissions, the Councils were asked to give oral evidence to the Committee. On Tuesday 29 April 2003 Jeremy Styles, Secretary NSWCCL, and Michael Walton of the UNSW CCL executive gave oral evidence to the Committee. The evidence of the other witnesses was observed, and it was noted that the vast majority of submissions made were analogous to the Councils' submissions. The weight of support for the current HREOC structure and powers was substantial.

The Hansard (proof at 13 May 2003) record of the Committee proceedings can be found at: <http://www.aph.gov.au/hansard/senate/commtee/S6386.pdf>.

CHIPPING AWAY AT HREOC (CONT')

All witnesses who gave evidence, including the HREOC representatives themselves, opposed the proposed veto to be held by the Attorney General over HREOC's statutory power to intervene in court proceedings where issues of human rights occur. The vast bulk of the witnesses also opposed the creation of three general-purpose 'Human Rights Commissioners' in place of the specific 'portfolio' commissioners. Many of the witnesses opposed the removal of a recommendation of damages.

In oral submissions, in addition to the principal submissions, the Councils supported the reference of other witnesses to the issue of minority rights and the importance of independent organs of government in protecting them.

The Councils supported HREOC's submissions that the Commission should have an expanded series of statutory powers, including the power to initiate proceedings; that the Attorney General be required to respond to the reports of HREOC tabled in Parliament (necessary under the Act) about Australia's performance of its international human rights obligations; and the contention that causes of action should arise directly under the International Covenant on Civil and Political Rights ('ICCPR').

The Councils expressed the view that a Bill of Rights could be a worthy measure to give effect to Australia's international obligations, and that ultimately, an Australian Human Rights Court (under Chapter III of the Constitution) would be a valuable institution.

On the issue of the proposed veto (to be held by the Attorney General) over HREOC interventions, the Councils submitted that the veto undermined the independence of HREOC and was inconsistent with principles affirmed by the UN General Assembly. The Councils further submitted that the independence of HREOC might be assisted, particularly where there was an issue about the constitutional legitimacy of a judicial president of the Commission, by the use of fixed terms for the commissioner without any re-appointments.

On the question of the named 'portfolio' commissioners, the Councils affirmed their alternative submission that the 1998 model was preferred to the new model, in that it provided three commissioners considering the subject matter between them, rather than separate consideration by the five commissioners under the statute. The named commissioners provide a visible contact point for the community and a focus for education about human rights.

In response to questions from the Committee, the Councils submitted that the removal of the power to recommend damages, removed an 'effective remedy' where the Australian Government has an obligation under Article 2(3)(a) of the ICCPR to provide such remedies for breaches of human rights held under that covenant.

The responses and questions of the Senate Legal and Constitutional Committee members, and the weight of the submissions against the Bill, hinted at the prospect of a report by the Committee in favour of the current form of HREOC. The passage of the Bill through the Senate may, with any luck, become rocky upon the release of the Committee report.

Jeremy Styles
Secretary

THE RIGHT TO PROTEST

The NSW Council for Civil Liberties (NSWCCL) has recently assisted two students charged under the *Crimes Act* with maliciously destroying or damaging property. Two billboards advertising the Victoria

Park land development were altered from 'Sydney's new centre of attention' to read 'Villawood...Sydney's new centre of detention'.

The case first came to NSWCCL's attention because the billboard alteration was clearly a political protest.

The police case depended on evidence obtained from a digital camera which the police examined without permission. The camera contained several pictures of the billboards in the process of being altered, but there was no evidence that the persons depicted in the photos were the defendants in the case.

This evidence was rejected by the Magistrate hearing the case, Magistrate Ellis, who said:

The common law does not permit police to search a person simply to see if he has committed some crime. Goods cannot be seized where there is no search warrant.

The police case then collapsed and the charges were dismissed.

It is arguable that this style of protest is legally protected under the implied constitutional right of free speech on political matters. However, it was not necessary to deal with this argument, as the matter was won because the police had abused their powers.



Photograph: ©Tim Cole 2002

The right to protest has been under challenge again in connection with protests against the war in Iraq.

On 1 April 2003, the NSW Police issued a media release in relation to the 'Books not Bombs' demonstration in Sydney planned for the following day that included the following statement:

Last Friday, NSW Police informed representatives of the 'Books Not Bombs' group that Police would not grant permission to them for a march in the city this Wednesday, April 2, because of the violence and damage to property that characterised the event staged by the group last week ...

According to public statements from the group, they plan to proceed without permission. If this occurs, those involved will not enjoy the protection of the Summary Offences Act and any

offences committed by occupying city streets or blocking traffic will make those participating liable to be arrested.

The police statement is based on a fundamental misconception about the operation of the *Summary Offences Act* and could have the effect of inhibiting people from exercising their right of lawful assembly.

The *Summary Offences Act* provides that a public assembly (which satisfies certain administrative conditions) is a lawful assembly unless the Commissioner of Police obtains a Court order prohibiting the holding of the assembly. The provision of a notice by the Commissioner informing the event organiser that permission is not granted for an assembly is of no legal effect.

Acting on their apparent misconception of the legal position, police prevented people from making their way to the proposed assembly on 2 April by setting up roadblocks and other measures.

Clearly, many people wished to exercise their right to assemble in public during the Iraq war to protest against the war. It is unsatisfactory that they were prevented or deterred from doing so by police mis-stating the true legal position.

Stephen Blanks
Assistant Secretary

TOO MUCH DEMOCRACY? THE LIE OF THE 21ST CENTURY

Address given by **Senator Natasha Stott Despoja** to the NSWCCL Luncheon at 12.30 p.m. on Friday 28 February 2003 in the President's Dining Room, Parliament House, Macquarie Street, Sydney

I acknowledge the traditional owners of this land. Thank you for inviting me to speak today.

In recent years, the Australian community has been constantly warned that our way of life is under threat. And—just in case we should forget that this threat exists—the Government has provided us with fridge magnets to remind us every morning.

I do not want to trivialise or underestimate the threat of terrorism—many Australians have been directly and tragically affected by it. But I believe that some aspects of our *response* to terrorism could pose a more serious threat. Terrorists threaten our lives but our response to terrorism can also threaten our *way of life*. On the line are long-established rights and freedoms and the important role that they play in promoting accountability and decentralising power in our democratic system.

As the Prime Minister said on 17 September 2001, 'wouldn't it be a terrible, tragic, obscene irony if in responding ... to these terrible terrorist attacks we forsook the very things that we believed had been assaulted?' Unfortunately, in making this statement, the Prime Minister prophesied the ultimate flaw in his Government's response to terrorism. Over the past 18 months, we have indeed witnessed a 'terrible, tragic, obscene irony'.

The Government has consistently made the case that effectively responding to terrorism requires a departure from fundamental human rights and freedoms.

Since September 11, global leaders have often relied upon the mantra that the world has changed. And so it has. But what has changed more than anything else—is the way we talk about the world. The threat of terrorism, although very real, is also vague. Which has led to widespread debate over exactly how terrorism should be defined.

The Government's package of anti-terrorism legislation—which passed with the support of the Labor Party last year—defines terrorist acts very broadly. Under the legislation, a terrorist act is one intended to advance a political, religious or ideological cause, which involves an unlawful element such as serious harm to a person, serious damage to property, or serious interference with an electronic system, among other things.

This very broad definition implies that the threat of terrorism is insidious and pervasive—we can't be certain that any place is safe, nor can we be confident that the person standing next to us is not a terrorist. This is also the message projected by the Government's anti-terrorism campaign. We are told to 'be alert but not alarmed'. But we are all very confused about what exactly we should be looking out for.

If—as the so-called information handbook tells us—we should look out for people whose lifestyles don't add up, or who may have suspicious accommodation needs, *then perhaps I should be wary of some political colleagues or the audience in the room?*

Of course, it has to be acknowledged that terrorism can indeed emerge in many different contexts. As we know, previous terrorists include members of the IRA; Anglo-Americans such as Timothy McVeigh; and, of course, Islamic extremists such as Mohammed Atta. Terrorism has been used to advance various causes, and terrorist acts have ranged from car bombs to sending anthrax through the post to smashing planes into skyscrapers. Clearly, terrorism is not limited to any particular cause, type of perpetrator or form of violence—although, as we know, stereotypes have been rife in this context.

Because the threat of terrorism is so nebulous, it conveniently lends itself to exploitation by Governments in the pursuit of their political objectives. If the Government can draw terrorism into a particular debate, it can elicit fear within the community and then capitalise on such fear. This strategy is not new.

Since September 11, we have seen this occur in a domestic and international context. For example, the Howard Government's veiled implication that asylum-seekers might be terrorists seeking to enter Australia through the back door. In that case, the media were complicit in manufacturing a sense of fear by depicting an invasion that required military force to turn back, through headlines like 'Military shield to keep out illegals', and 'Fortress Australia'. Talk back hosts, as well as some Coalition politicians, described those of us who opposed Mr Howard's so-called solution, as traitors, treacherous, disloyal.

At an international level, we have witnessed the desperate attempts of President George Bush to establish a connection between Saddam Hussein and terrorism in order to justify an attack against Iraq, despite the fact that Bush has been overtly working towards that objective since long before September 11.

This culture of fear perpetuated by Governments and the media has wide-ranging implications for civil liberties.

In the past, the civil liberties movement has benefited from a level of cynicism regarding the State. For example, the push for greater privacy protection has been fuelled by conceptions of a Big Brother State, as characterised by Orwell in 1984. Most conspiracy theories have involved the State in some capacity. The threat of terrorism enables the Government to deflect this fear to other objects and to cast itself as the protector of the community. In this capacity, it can get away with a lot more than it could when the community was more wary of it. Perhaps this is a case of the community choosing to live with the devil it knows? That is, with the increasing intrusions of the Government, rather than the indiscriminate threat of terrorism.

I was disturbed to see this attitude reflected in a number of the letters and emails I received regarding the Government's anti-terrorism legislation. One man told me that he had nothing to hide and that the

Government should have the power to read his emails and sms text messages if this would protect the community from terrorists.

For the record, I should say that the overwhelming number of constituents who contacted me regarding that legislation were very strongly opposed to it.

The email campaigns mounted by various human rights and civil liberties organisations were persuasive and I am convinced that they played an important role in encouraging the Labor Party to adopt a stronger stance in relation to the ASIO Bill, which came up for debate some months after the original suite of Bills.

The ASIO Bill signalled a radical departure from well-established rights and freedoms, including the right to silence and the right to legal representation. But it was the scope of that Bill that was perhaps its most disturbing flaw. Unlike comparable legislation in other countries, which applied only to individuals suspected of involvement in terrorist activities, the broad-ranging powers which were to be invested in ASIO could be used against any individual in Australia. The Government failed to demonstrate why every Australian should be liable to be dragged away and detained incommunicado when this was not considered necessary in other countries.

Even after the radical improvements introduced by Labor and the Democrats, the Bill remained fundamentally flawed. It:

- removed the right to silence;
- provided only a limited use immunity to information obtained during detention;
- did not permit foreign nationals to contact their Embassy during detention; and
- vested police powers in an intelligence agency, raising serious accountability implications.

To quote Professor George Williams, the Bill remained 'rotten at its core' and, consequently, the Democrats voted against it. In any event, the Government refused to accept most of the key amendments relating to the questioning regime. Perhaps, most disturbingly, the Government continues to insist that ASIO should have the power to detain and question children over the age of 14. It is likely that the Government will reintroduce the legislation in the coming months. The Labor Party have indicated that they are prepared to negotiate some of the more minor amendments but that they will stand their ground on the key changes to the questioning regime and the power to detain children.

It is interesting to note that one of the reasons why legislation similar to the ASIO Bill could not have been passed in other countries, such as the United States and the United Kingdom, is because it would have contravened the Bills of Rights that operate in those countries.

The draconian provisions of the ASIO Bill sent a very clear message that—in the absence of an Australian Bill of Rights—the rights and liberties of Australians are *not* inalienable but may be overridden by clear legislative intent. Australia is now the *only* remaining common law country which lacks a Bill of Rights. There is no justification for this lack of protection against infringements of fundamental human rights and freedoms.

As you would be acutely aware here in New South Wales, the infringement of rights and liberties in the name of anti-terrorism is not confined to the Federal arena. The *Terrorism (Police Powers) Act* recently passed by the New South Wales Parliament is particularly disturbing. It gives police special powers to stop and search individuals, vehicles or premises without a warrant and provides that:

an authorisation [made by a police officer] may not be challenged, reviewed, quashed or called into question on any grounds whatsoever before any court, tribunal, body or person in any legal proceedings.

What we see here is a radical increase in the Government's powers, enabling it to further infringe the civil liberties of individuals. What makes the NSW Act particularly disturbing is that these powers are coupled with measures to limit the accountability of those who exercise them.

While the Government persists with such serious assaults on the rights and liberties of Australians, many Australians have become so enraged that they have relied on their right to protest for the very first time. I have been encouraged by the activism of so many Australians who have rallied against the war in recent weeks. In some senses, the No War rallies have demonstrated that democracy is alive and well in Australia, but the Government's response has suggested otherwise.

In this globalised world, where power is so concentrated, we must encourage increased political participation, not less. We must advocate for strong democratic processes from the grassroots level right through to the United Nations. But what we are increasingly hearing from dominant rulers is that too much democracy hinders progress, restricts leaders and often leads to the wrong result.

This notion—of too much democracy—could be the great lie of the 21st century.

Leadership has become a euphemism for autocracy—for over-ruling freedom and democracy. A courageous leader is characterised as one who is prepared to make the tough decisions in the face of opposition. But a truly courageous Leader is one who listens to the oppositional voices and does not crush them. Moreover, a courageous Leader is not afraid to trust the community with information so that they can make informed decisions, rather than hide the facts from them. Abraham Lincoln once said: 'I am a firm believer in the people. If given the truth, they can be depended upon to meet any national crises. The great point is to bring them the real facts.'

But that is **not** the vision of strong leadership commonly presented these days. Today we see Leaders who silence dissenting voices—not by using overt violence—but much more insidiously through legislation such as the Anti-Terrorism legislation, which has been described by some as the "Anti-Dissent Legislation", and through rhetoric in which dissenting voices are accused of being unpatriotic, treason or—in the case of the UN—irrelevance.

President Bush says you are 'with us or against us'. And in Australia, if you dare to question the justification for attacking Iraq, as I have done, you have some members of the backbench calling you a 'handmaiden of Hussein'.

At a time when such rhetoric dominates our global dialogue, it is chilling to recall the words of Nazi leader, Herman Goering, who said during the Nuremburg Trials:

Why of course the people don't want war ... But after all it is the leaders of the country who determine the policy, and it is always a simple matter to drag the people along, whether it is a democracy, or a fascist dictatorship, or a parliament, or a communist dictatorship ... Voice or no voice, the people can always be brought to the bidding of the leaders. That is easy. All you have to do is to tell them they are being attacked, and denounce the pacifists for lack of patriotism and exposing the country to danger.

It is a time for the proponents of democracy and participation, to prepare themselves for courageous stands. Global politics is indeed at a pivotal point and there is a very real sense of urgency attached to our cause.

In this current climate of terrorism and war, however, it is crucial that we do not allow other important civil liberties issues to fall off the political agenda. For example, issues concerning privacy protection. As you know, I have a long running interest in these issues beginning with my Private Member's Bill extending the *Privacy Act* to the private sector in 1997.

The Federal Privacy Commissioner recently reported a number of serious privacy breaches investigated by his office during the past year. In one case, a private health insurer accidentally forwarded highly sensitive information regarding a person's medical condition to a large number of Australian employers, who subsequently distributed the information amongst their employees. Cases such as this illustrate that particular caution must be exercised when handling sensitive medical information about individuals.

Information about a person's genetic make-up is even more sensitive. This is why I introduced in 1998 the Genetic Privacy and Non Discrimination Bill. Genetic information is predictive rather than prescriptive—it does not simply divulge a person's current state of health, but predicts illnesses they are likely to suffer from in the future.

The management of genetic information also raises unique concerns relating to collective privacy, since one person's genetic information contains sensitive information about the relatives of that person. Such information is obviously highly valuable to insurance companies and employers, and—as you may be aware—there have already been a number of documented cases where companies have misused genetic information to discriminate against individuals.

Australia continues to lag behind other countries, including the United States, that have introduced legislation to prevent genetic discrimination. The Australian Law Reform Commission and the Australian Health Ethics Committee are yet to present the final report of their Joint Inquiry into the Protection of Human Genetic Information. However, I have been impressed by the comprehensive Discussion Papers released during the course of the Inquiry.

I support the establishment of a Human Genetics Commission of Australia (HGCA), as recommended in the Discussion Paper released last August. For an issue as complex as the protection of human genetic information, detailed consideration must be provided by an independent, stand-alone, statutory authority such as the proposed HGCA. It is intended that this body will provide high-level technical advice about human genetics, and advice on the ethical, legal and social implications arising from advances in biotechnology.

I also agree that the proposed HGCA should liaise closely with other Government departments, authorities and entities to promote a national and coordinated approach to the protection of genetic information. However, the requirement for wide-ranging consultation should not be so onerous that the entire process is allowed to delay the introduction of federal laws to protect genetic information. I look forward to the final report of the Joint Inquiry. Although the instigation of this Inquiry was long overdue, it is a welcome recognition of the pressing nature of genetic research as one of the most far-reaching and potentially revolutionary developments in recorded history.

In conclusion, I want to take this opportunity to encourage you not to grow weary in your efforts to protect the civil liberties of Australians. In the climate we find ourselves in at the beginning of the 21st century, strong advocates for civil liberties are perhaps more vital than ever before but there is no doubt that the task of civil libertarians is becoming increasingly challenging. When Governments perpetuate a culture of fear and anti-dissent, civil libertarians need to get smarter when articulating our cause. We need to employ strategies that effectively combat the over-powering rhetoric of the Government.

I assure you that your efforts are not in vain. They helped prevent the enactment of the ASIO Bill last year and they will be desperately needed when it re-emerges later this year. They will also be fundamental to the establishment of a comprehensive regime for the protection of human genetic information. But perhaps most importantly, they will be crucial if we are to revitalise democracy here in Australia and further abroad.

NSW PARLIAMENTARY PROCEEDINGS

The New South Wales (NSW) Parliament resumed for the Budget sittings on 29 April 2003, after the March State Election in which the Carr Labor Government was returned for a further four year term. The state of the parties in the Legislative Assembly has the Australian Labor Party (ALP) with 54 seats, the Liberal/National Party Coalition with 32 seats and the remaining 6 seats in the hands of independents, making a total of 92 seats. Due to the untimely death of Jim Anderson, the sitting ALP member for Londonderry, the 'by-election' for that seat will be held shortly. However, as presently

advised, the Coalition does not intend to run a candidate in his seat, and it is assumed that the ALP will retain this seat.

In the State's Upper House (the Legislative Council) the ALP has 18 seats, the Coalition 13 and the Cross Bench Members 11 between them. Of the Cross Bench Members, the Greens have the largest bloc with three seats, followed by the Christian Democratic Party with two seats. The remaining Cross Bench Members have one seat each.

Of significance for the CCL, the Attorney General's portfolio has been retained by the Hon. Bob Debus MP, with the Opposition spokesperson being Andrew Tink MP (a former practicing Barrister in NSW). The Justice Ministry (formerly known as Corrective Services) has been allocated to the Hon. John Hatzistergos MLC, with the Shadow responsibilities being given to Andrew Humpherson MP. NSWCCL will be meeting with these MPs shortly in order to discuss issues of concern to NSWCCL members. If any member has an issue that they wish to have raised, please forward the information to the NSWCCL secretariat.

While this Parliamentary season will be primarily focused on the State budget, a number of Parliamentary Bills introduced into the House have great significance to civil liberty issues. These include a Private Member's Bill which would amend NSW bail laws, and an 'equal age of consent' Bill (which has been sponsored by the Government). Both these Bills are to be debated in the forthcoming session.

The Private Member's Bill is yet another attempt to remove the rights of accused persons, and erodes the basic presumption in favour of bail. At present, the Government has indicated that it will oppose the Bill, and this is to be applauded. However, it is yet to be seen whether the Government will introduce its own legislation in this area. The NSWCCL will remain diligent and ensure that members are alerted should the Government take this step.

The Government's sponsorship of the equal age of consent Bill is a positive step, as the Bill would remove a discriminatory provision from the New South Wales legislation. The Bill would make 16 years of age, the age of consent for all persons regardless of gender and sexual orientation. However, it is to be regretted that the Government has seen fit to also remove the defence of reasonable mistake of age. The Bill is to be debated in the House during May and a further report will be provided in the next edition of the journal.

Two further Bills should also be mentioned: the Victims Legislation Amendment Bill (introduced by the Government) and the Crimes Amendment (Protection of the Accused) Bill (a Private Member's Bill introduced by the Hon David Oldfield MLC). The Victims Legislation Amendment Bill 2003 seeks to give victims of crime, or their representatives, the right to read out all or part of their written victim impact statements in Court. Under the terms of the Bill, written victim impact statements would still be tendered to, and received by, the Court, but victims would be entitled to read out such statements, after a guilty verdict but prior to the sentence determination. While the importance of victim impact statements must not be ignored, there is some concern that the provision could disadvantage the accused and disrupt the sentencing process through vilifying the defendant (who may be planning an appeal), bringing excessive emotion into the criminal justice system and sensationalising trials.

There will be a regular journal column to keep members of the CCL informed about proceedings in the NSW Parliament. If any member has an interest in a bill or an item relating to the NSW Parliament, or an issue raised in this column, they are invited to contact the President, Cameron Murphy or myself by email at nswccl@mail2me.com.au.

Shaughn Morgan
Committee member

RESURFACING OF THE RULE AGAINST DOUBLE JEOPARDY

The resurfacing of the issue of double jeopardy is yet another symptom of the political capitalisation on the retribution hungry media and the community they feed. Bob Carr reopened the issue in his Law and Order Campaign in the recent NSW election and The Standing Committee on Attorneys General have recently considered the issue in their April meeting. They do not want to strengthen the rule on double jeopardy. This rule is a mainstay of the common law of Australia and does not need revision to bring it up to the sensational standards of the Australian media.

The injustices wrought by unsuccessful prosecutions should be laid at the feet of the police service and the prosecuting authorities—and not upon the person unsuccessfully accused. Police and prosecutors could run criminal matters later rather than sooner after comprehensive investigation. Additional time taken in investigation allows the investigating authorities a measure of distance, surety and completeness, and allows them to undertake their investigations objectively and with propriety. The pressure of the media and victims lobbies for speedy resolution of criminal matters is of no assistance to the upholding of justice in the community.

If prosecutions are being run where no merit exists, then the courts **should not** allow convictions to be recorded. Criminal accused, who have been found not guilty should be treated as innocent and allowed to continue normal productive life in the community. They deserve closure—as do victims.

The finality of a verdict allows a measure of closure not only for criminal accused, but also for victims and their families. It at least provides a book-end to their suffering, regardless of outcome. To leave victims with an expectation that the process may yet continue is a worrisome situation.

It is hoped that change of the rule against double jeopardy does not become the next vehicle for vote buying in the media-engaged and enraged electorate. The rule on double jeopardy should remain and stand in protection of the rights held by all Australians to a fair trial.

Jeremy Styles
Secretary

BOOK REVIEWS

A HISTORY OF CRIMINAL LAW IN NEW SOUTH WALES, THE COLONIAL PERIOD 1788-1900

G. D. Woods
Federation Press, Sydney, 2002
RRP \$69.50
Reviewed by: **Ken Buckley**

This is a very impressive piece of original research. It is scholarly, yet informed by Dr Woods' legal practice as a barrister and judge. All Australian lawyers who are interested in the development of their profession should read this book. Other categories of serious reader, such as teachers and doctors (and criminals), can also benefit, though they may be rather daunted by the author's attention to detail.

Dr Woods examines criminal law as it was established and modified in the colony of NSW, beginning with the automatic adoption of English legislation in the early 19th century, followed by colonial

statutes such as the NSW Vagrancy Act in 1835. Along with the development of legal principles and practice, notably the rule of law and habeas corpus, the author considers the law as well as punishment concerning serious crimes: murder, rape, assault and theft. Variations in law and court procedures pertaining to evidence concerning the acceptable age of consent (to sexual intercourse), insanity, rights of appeal and of legal representation, are traced clearly and accurately.

Certain themes are emphasised. One is the savagery of punishment in early NSW (the convict period). The frequency of executions and floggings was bad enough, but torture was also often practised. This was in the form of *repeated* floggings, designed—by local landowners in the guise of magistrates—to extract information as to the disposal of stolen property. Woods notes the flogging parson, Samuel Marsden, in this connection adding (p. 170) that he ‘generally took the view that emancipation of convicts could wait until they passed into the after-life’. Some readers might also reflect on what goes on in Guantanamo Bay (Cuba). Dr Woods does not draw this analogy, though his humane views are made clear in observations on the barbaric treatment of Aborigines and the racist legal attitude in regarding them as inferior persons.

The author was precise in the choice of title for his book. Nevertheless, it is a pity that he defined the scope so narrowly. He has a great knowledge of relevant laws and of reported case decisions in NSW. He is also very familiar with relevant parliamentary debates and the divergent opinions of contemporary lawyers, judges and politicians. Yet to a professional historian such as the present reviewer of this book, the author’s awareness of the economic and social context of criminal law appears limited. Considerations of justice and punishment cannot really be so divorced from total reality.

Similarly, the exclusive concentration upon NSW (apart from incidental references to other Australian colonies) is unfortunate. For example, Woods includes a study of ‘slaving cases’, mainly the kidnapping (‘blackbirding’) of South Sea Islanders. The NSW cases are interesting, but Woods makes no reference to the only Australian court case resulting in successful prosecution (including death sentences) for blackbirding. This case occurred in Queensland in 1884, and involved the crew of a Burns Philp company ship.

It would be fair to criticise a historian in such terms. Woods’ brief is not so all-embracing and no general historian would be competent to cover the legal ground adequately. He is to be congratulated for a great work—one of lasting value. The follow-up work on the succeeding century will, one hopes, appear in print before very long.

A USEFUL REVIEW OF THE UN COMPLAINTS SYSTEM

How to Complain to the UN Human Rights Treaty System

Anne Bayefsky

Transnational Publishers (www.transnationalpubs.com)

with the Consultative Council of Jewish Organizations

RRP \$US25

Reviewed by: **Michael Walton**

Not all United Nations (UN) treaties offer a process for individuals to make complaints against their governments. Of those that do (ICCPR, CAT, CERD and CEDAW—see table below), the procedures to make a complaint are complex and daunting. A new book from Canadian academic and lawyer, Anne Bayefsky, attempts to explain those procedures in plain English in a logical step-by-step manner—and she succeeds.

How to Complain to the UN Human Rights Treaty System examines each of the major UN treaties in turn. One chapter is devoted to each treaty and includes a clear explanation of the Committee that accepts complaints and the entire process, from the communication of a complaint through to the

final determination. Bayefsky also includes a flow diagram for each treaty that shows the various stages a complaint goes through before final determination.

The last half of the book is taken up with statistics and useful information for the complainant. It includes:

- reproductions of the complaints forms for various Committees;
- contact details of the UN Committees;
- lists of countries that allow their citizens to make complaints to the various Committees (Australia has still not signed the Optional Protocol to CEDAW);
- extracts of the relevant procedural rules for making complaints; and
- an impressive cross-referenced listing of complaints brought to each Committee including information about the country against which the complaint was made and the Articles that were violated.

One gap in the content of the book comes from Bayefsky's failure to mention the '1503' procedure whereby the UN High Commission for Human Rights accepts complaints about human rights violations. Strictly-speaking, the procedure is not treaty-based, but it does provide another mechanism for communicating complaints to the UN—without the need for waiting for a nation to sign up to a treaty first. (For more information about 1503 complaints see www.unhchr.ch/html/menu6/2/fs7.htm). Bayefsky also fails to mention the International Labour Organisation (ILO) complaints procedure.

Overall, however, this book is a good introduction to the UN complaints procedures, written in plain English for non-lawyers. It does not have the kind of detail required for the legal practitioner preparing a communication to a UN Committee, but nevertheless, it is a worthwhile reference as an overview of the entire individual complaints system.

Bayefsky has set up a website providing much of the information in the book, and much more. The site is worth a visit: www.bayefsky.com.

Major UN treaties & complaint procedures

Acronym	Treaty	Complaint procedure	Australia's accession
ICCPR	International Covenant on Civil and Political Rights	1 st Optional Protocol	25 December 1991
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Article 22	29 January 1993
CERD	Convention on the Elimination of All Forms of Racial Discrimination	Article 14	28 January 1993
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women	Optional Protocol	Australia has not yet acceded to the Optional Protocol
ICESCR	International Covenant on Economic, Social and Cultural Rights	None	—
CROC	Convention on the Rights of the Child	None	—

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