

Civil Liberty

Journal of the New South Wales Council for Civil Liberties Inc

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FROM THE EDITOR

Welcome to the 196th issue of the NSW Council for Civil Liberties (NSWCCL) journal. This journal is published quarterly, reporting on the activities of NSWCCL, which includes the very active University of NSW (UNSW CCL) branch. The journal welcomes articles and reviews of books with a focus on civil liberties issues in Australia, as well as occasional suggestions for reprints of articles published elsewhere, and throwing light on the preservation of Australian civil liberty. Short letters commenting on civil liberties issues are also welcome. The suggested length of articles is between 1000-2000 words; reviews are normally 500 words, but may be longer, and letters 200–300 words.

The prime aim of the journal is to keep members informed of NSWCCL work and current threats to civil liberties. Even if you are unable to be directly involved yourself, passing on the journal to someone else could help increase awareness and understanding of the importance of this work. The journal also provides a forum for expression of views that are not necessarily those of the editor or NSWCCL, but invite thought and debate amongst civil libertarians. It is easy to assume that basic human rights, such as the right to enough food and a roof over one's head, are necessarily met in Australia. The article in this journal on the limited availability of adequate accommodation for our ageing population implies that this is not the case.

Our website <<http://www.nswccl.org.au/>> carries recent NSWCCL media releases—for instance, about the banning of the film Ken Park and its implications, feature articles of note, and a wealth of information about a range of civil liberties issues: Bill of Rights, double jeopardy, sniffer dogs, death penalty, asylum seekers, drug reform, privacy and genetics, BRCA1, and same sex issues. Click on 'Privacy and Genetics' for instance, and you will find a resource with many links to relevant legislation and articles, as well as newspaper and television features. We invite you to take a look.

JOURNAL DEADLINE DATES

Material Deadline: 12th May 2004

We may not be able to accept documents which are not sent on disk or by email attachment. Digital images will be accepted.

Articles: 1000-2000 words, reviews 500 words, and letters 200-300 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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EVENTS

'NO IMPRISONMENT— MANDATORY IMPRISONMENT'

NSWCCL President, Cameron Murphy, will be speaking on the above theme at a seminar organised by the Institute of Criminology. The seminar 'will discuss the seemingly contradictory controversies in sentencing at the moment: abolishing sentences of imprisonment of six months or less, and on the other hand demanding that for particular offences there be "mandatory" minimum terms of imprisonment'. Speakers will include:

- **Ian Harrison**, President, Bar Association
- **Pauline Wright**, Law Society Councillor and Chair of the Society's Criminal Law Committee, NSW Law Society.
- **Kenneth B Marslew AM**, Enough Is Enough.
- **Cameron Murphy**, President, NSW Council for Civil Liberties Inc.
- Seminar convenor: **Judge Stephen Norrish**.

Date: 18 March 2004, 5.30pm
 Venue: Sydney University Law School
 173–175 Philip Street, Sydney
 Registration: Institute of Criminology
 tel: 02 9351 0239
 email: criminology@law.usyd.edu.au

REPORTS

SECURITY AND INTELLIGENCE SUBCOMMITTEE REPORT

As expected in my last report in this Journal, yet further draconian amendments have been passed and proclaimed to the ASIO Act late last year. Disturbingly, these new proposals only passed with the disgraceful support of the Australian Labour Party (ALP) 'Opposition', despite real opposition by the Greens and Democrats against the amendments. It seems Mr Latham is afraid to take the Government on over security issues, no matter what loss of civil liberties is involved. The amendments also show that both the Government and ALP are completely willing to forget the rights of ethnic minorities and free speech to further their political power.

The latest amendments provide some minor, but two major changes. The first major change provides that, if an interpreter is used, then the questioning time blocks allowed are doubled from 24 to 48 hours, effectively discriminating against non-English speaking subjects who will often be the target of these warrants.

The second major change creates offences to give ASIO unprecedented secrecy to its operations. It is an offence to disclose 'operational information' not only during the period of the warrant, but for a period of 2 years after the expiry of the warrant! The sections are particularly targeted at lawyers and the subjects of warrants, but could also affect journalists and the media in general. These offences carry a maximum penalty of five years imprisonment. This amounts to a gag of public and private discussions of the actions of ASIO, and attempts to put its activities beyond any criticism.

During the use of the new questioning powers by ASIO, the Government continually briefed and leaked material to the media to create sensational stories for certain media, with spins favourable to the Government agenda. In future, any person who seeks to correct such stories by giving the full information may face prosecution under these provisions. In short, the Government will be free to spread lies and misinformation and those who seek to tell the truth to the Australian public could face five years in prison. Go to gaol for telling the truth about government lies! That is life and law in 'honest' John Howard's Australia (albeit consistent with the Government's attitude to the truth about refugees).

David Bernie
 Vice President and Convenor, Security and Intelligence Subcommittee

LEGAL PANEL'S REPORT

Case reports: Refugee matters

In November 2003, the Federal Court of Australia decided a case dealing with the consequences of translation problems in an application for a protection visa. Although the Court found that the translation problems may have resulted in the application for a protection visa being improperly rejected, the Court declined to give relief on discretionary grounds as the applicant had escaped from detention and therefore did not avail himself of the Refugee Review Tribunal procedure. The decision is now being appealed: *NAUV v. Minister for Immigration & Multicultural & Indigenous Affairs (MIMIA)* [2003] FCA 1319.

In December 2003, the Full Federal Court rejected appeals dealing with removal from Australia where there is a likelihood of torture: *NATB v. Minister for Immigration and Multicultural and Indigenous Affairs*

[2003] FCAFC 292. Two of the appellants have applied to the High Court for special leave to appeal, and injunctions preventing removal of the many detainees affected by this decision have been continued. It is expected that many of these detainees will apply for visas on humanitarian grounds.

In December 2003, the High Court rejected the special leave application brought for a stateless Palestinian seeking to raise legal issues as to the status of stateless Palestinians under the Refugee Convention. The High Court said the case was not a suitable vehicle for resolving the differences in judicial approach between the Federal Court of Australia and the UK Courts on this issue: *NACL of 2002 v. MIMIA* [2003] HCATrans 543.

Other matters referred to the Legal Panel

Several complaints have been received about random drug and alcohol testing in the State Rail Corporation. These are being investigated.

Comments have been provided to one of the persons convicted of malicious damage to property in relation to the painting of 'No War' on the Opera House in relation to his appeal from conviction.

Extradition to US for murder charge. This case may possibly provide a vehicle to test the formal requirements as to an undertaking from a country not to seek or impose the death penalty before extradition can take place. A similar case is presently before the Federal Court in relation to extradition to Singapore (*McCrae*).

Stephen Blanks
Assistant Secretary and Legal Panel Convenor

FUNDRAISING AND FINANCE SUBCOMMITTEE

Thank you to all those members who have responded to our letter for renewal of their membership for the coming twelve months.

The lunches at Parliament House in the President's dining room will recommence on 12 March. Robert McClelland MP, Shadow Minister for Homeland Security, will be our guest speaker on this occasion. You will have received a separate notification of this event advising you of the talk prior to this Journal being issued. It will be another tight year for the Council financially so we do encourage you to attend our fundraising events when you are able to do so. 2003.

Susan Cleary
Convenor, Fundraising/Finance Subcommittee

UNSW CCL REPORT

The University of New South Wales branch of CCL has been busy over the last few months writing submissions to various inquiries. This is a summary of some of those submissions. You can read the full submissions on the CCL website: <<http://www.nswccl.org.au/publications/submissions.php>>.

Double jeopardy

It appears that Mr Carr is determined to follow the Blair Government's lead in 'reforming' double jeopardy. Double jeopardy is the ancient legal rule that a person should not be tried twice for the same offence. It preserves the finality of an acquittal, which is 'the keystone of personal freedom' according to Justice Murphy in *Davern v. Messel*, and which protects the citizen from government oppression.

The proposals released by the NSW Government in a draft Bill in 2003 include:

- retrial after acquittal for offences attracting life imprisonment (murder, gang rape and large-scale drug trafficking), and manslaughter where there is either:
 - o fresh and compelling evidence; or
 - o the acquittal was 'tainted' (e.g. jurors were bribed or threatened);
- a Crown appeal *as of right* to directed and non-jury acquittals on a question of law.

Under this legislation, police could re-open an acquitted person's case and ask the DPP to apply to the Court of Criminal Appeal to quash the acquittal and order a re-trial. In effect, *an acquittal would become conditional*. The legislation has retrospective effect, which means that *all* past acquittals of very serious offences will instantly be rendered conditional. Only one retrial would be permitted.

These changes were passed in the UK in November 2003. The Australian Standing Committee of Attorneys-General has asked for submissions on introducing similar changes into Australian law generally.

Abolition of sentences of six months or less

To its credit, the NSW Government has proposed abolishing prison sentences of six months or less. The rationale behind this proposal is that such sentences cannot achieve rehabilitation of the offender in such a short time, and that they serve only

to introduce short-term prisoners to the 'university of crime'.

Western Australia (WA) abolished sentences of three months or less in 1995. From March 2004 it is expected to abolish sentences of six months or less. There is a lot of resistance to this move from criminal lawyers and remote Indigenous communities in WA. There is anecdotal evidence that the abolition has not led to fewer people going to gaol, but rather people being sent to gaol for longer. In other words, some magistrates who would normally have given a sentence of less than three months, are now handing down sentences of three months and one day, or four months.

UNSW CCL recommended the introduction of the abolition of six-month sentences, but under strict conditions to monitor the impact on sentencing to ensure that the reform has positive rather than negative consequences.

The merits of establishing a Gun Court in NSW

There have been a series of incidents in Sydney's south-western suburbs involving guns over the past few months. The Opposition has been calling for the introduction of a US-style Gun Court in NSW. In response, the Government held an inquiry into whether it was feasible or necessary.

Crime statistics actually show that the incidence of gun-related crime is on the *decrease*. The exception is in the south-western suburbs, where drug-related turf wars have been waging since 2001. The crimes involve only two or three family groups.

It is a massive over-reaction to entertain the establishment of a costly Gun Court to sort out such a highly specific and localised problem. This is a policing problem. Setting up another court will not stop criminals obtaining guns and using them. The State Government would be better advised to address the root-causes of poverty and lack of opportunity in the area.

Resolving deadlocks in the Senate

Paul Keating famously described the Senate as 'unrepresentative swill'. At the Federal level, most Prime Ministers who do not control the Senate call for its abolition or reform. Now Prime Minister Howard is having a go. He believes that joint sittings of Parliament should be held without calling a double dissolution election to resolve legislative deadlocks.

The Constitution says that before a joint sitting of both Houses can be held to resolve legislative deadlocks, *both* Houses must be dissolved and an election held. This is known as a 'double dissolution'. It is an Australian constitutional innovation. In 1901, no other house of review in the world could be dissolved by the Government. The beauty of this solution is that it

allows the People to have their say about the deadlocked legislation. The risk to governments, and this is why they don't like it, is that historically they have a 50-50 chance of not being returned to office.

The Prime Minister's proposals would grant governments the power to rule unchecked by the People or the Senate, upsetting the delicate system of constitutional checks and balances which define Australian democracy and safeguard our liberty.

UNSW CCL unequivocally rejected the need for constitutional reform.

Young v. Australia—rights of same sex partners

In 1999, Mr Edward Young applied for a war veteran's dependant pension under the *Veterans' Entitlements Act 1986* (Cth). The Federal Department of Veteran Affairs refused to consider his application because his partner of 38 years was also male. The relevant law stated that to be a 'member of a couple' the persons must be 'of the opposite sex'.

Mr Young complained to the UN Human Rights Committee that he was being discriminated against on the grounds of his sexual orientation. In August 2003, the Committee found that Australia had denied Mr Young his right to equality before the law and equal treatment of the law, in violation of article 26 of the ICCPR. The Committee recommended that the law be changed to allow the Department to consider Mr Young's application on its merits.

Concerned that many pieces of federal legislation discriminate against same sex couples in exactly the same way, UNSW CCL wrote to the Minister for Veterans' Affairs, the federal Attorney-General and leaders of the ALP, Greens and Democrats to ask what they were doing to remedy this discrimination. The opposition parties were supportive in reply. For example, the Australian Labour Party (ALP) replied that 'Labor will work to remove this, and all other discrimination, from Australian laws'.

The Attorney-General could not comment because 'the Government is currently considering the view of the Committee'. The Minister for Veterans' Affairs, Dana Vale, assured us that 'the Government does take its international human rights obligations seriously'. An official government response is expected in February 2004. We are not hopeful, given that Mr Ruddock said in Parliament that 'the Government does not acknowledge that Australia has failed to comply with international law' (3/11/03).

UNSW CCL Branch

ARTICLES

THE RIGHT TO ADEQUATE HOUSING: THE CRISIS IN ACCOMMODATING AUSTRALIA'S AGEING POPULATION¹

by Alan Morris,
Senior Lecturer, School of Social Science and Policy, UNSW

The age profile of Australia and other advanced industrialised countries is rapidly changing. In June 2002, just over 2.5 million people or 12.7 per cent of Australia's population was 65 or over, up from 10 per cent in 1982 (ABS, 2003). By 2051, it is estimated that about 1 in 4 Australians will be 65 or older, equivalent to at least 6 million people (ABS, 1998). In 1999, only about six per cent of this age cohort were in the labour force and in 1998 for 74 per cent of Australians aged 65 and over, 'government pensions and allowances were the principal source of income' (ABS, 1999:4).

The significance of these statistics is enormous. One patent implication is that over time the proportion of the population that is dependent mainly on the Australian Government for income will continue to increase. Despite the Government's plaintive pleas that older employees be retained, it is evident that this is not occurring. For many people their superannuation on retirement will be minimal due to periods of unemployment, and the relentless increase in part-time and casual employment.

At present the dependence on the Australian Government for income by most older Australians has not led to a major crisis or protests despite the old-age pension being set at only \$440 per fortnight (maximum) for a single person and at \$735 per couple. The main reason for the crisis not being major is the high level of home-ownership, with about 80% of the 65 and over age group owning their own home. Besides not having the expense of rent or a mortgage, older home-owners are able to borrow against their home in times of financial need.

Of the 20% of older Australians who do not own their homes, about half are in public housing. This article briefly focuses on the remaining 10% (approximately 250 000 older Australians) who live in private rented accommodation. Our research found that if you are 65 and older, dependent on Australian Government benefits and living in private rented accommodation, everyday life is often characterized by intense anxiety due to the constant battle to pay the rent, avoid eviction and eat adequately. This is despite the rental assistance which is set at a maximum of \$94.40 a fortnight. A 75-year-old male dependent on a pension and resident in Sydney's eastern suburbs described his perilous situation in the following way:

Yeah, \$170 a week [rent]. I have some money before [savings] and was not hurt but when the money's finished the trouble started. What can you do on \$200 a week? You pay rent and you don't eat.

At the time of the interview he had recently managed to move out of private rented accommodation and was living in public housing. His life had clearly been transformed by the move: 'Yeah, I have enough to survive...before I didn't have enough to eat'. A 66-year-old woman on a government pension commented:

You just can't live on a pension and rent. That's the whole thing. I only live on the pension. I don't have any other income, and it's totally impossible to rent when you're on a pension. You just cannot live on the pension and rent.

For older tenants the death of a spouse often results in the rent burden becoming unbearable. An informant, whose wife had passed away, described his dilemma: 'Oh well, I was on \$480 a fortnight

¹ This article is based on a research project entitled 'Housing Options and Independent Living: Sustainable Outcomes for Older People who are Homeless' funded by the Australian Housing and Urban Research Institute (AHURI). My fellow researchers were Bruce Judd, Kay Kavanagh and Yuvisthi Naidoo.

and \$520 [a fortnight] was the rent. How could I, how could you live on one (pension).’ When his wife was alive they had managed.

Older private renters often live in fear of the landlord. Besides having the power to increase rents to unaffordable levels, research suggests that older, poor tenants are more likely to be abused by their landlords. An older tenant in South Australia who was paying \$150 a week for a run-down apartment, described how he was harassed by the landlord who would just ‘barge’ into his unit at any time. The informant alleged that the landlord would charge \$25 to change a light bulb.

Their limited income means that these tenants are often confined to unsavory, poorly maintained blocks. A male informant who had been living in a boarding house in Sydney’s inner west, described it in the following way:

The kitchen was filthy, and the toilets were awful, the bathrooms were terrible...and you know there was drunk residents and the police were there all the time.

It is evident that an ever-increasing number of older Australians are finding it difficult to access and hold on to affordable, adequate and secure housing. Over the last decade this has become more and more difficult due to the virtual freeze on the building of new public housing, ever increasing rents and the spiralling cost of buying a home. The dire shortage of affordable housing is mainly due to cuts in Federal funding for public housing, the shift towards the rent assistance model and the relentless closing down of boarding houses. In June 2003, a spokeswoman for the Department of Housing in NSW argued that ‘more than \$76 million in real terms [had been] taken out of public housing in NSW under the last Commonwealth State Housing Agreement’ (Masters, 2003). In mid-2003 about 92 000 people in New South Wales were on the waiting list for public housing (Masters, 2003). There are varying estimates as to the average waiting period. Gary Moore, the NSW Council of Social Services director, estimates that the waiting period is between three and ten years (Masters, 2003). The waiting period is dependent on location and priority. A manager of an agency in the eastern suburbs of Sydney commented that in her area ‘there’s a twelve year waiting list for Department of Housing [housing] ...a huge lack of public housing, and...to get onto the priority waiting list one needs to be aged over 80 and have medical support and evidence’.

The dramatic shortage of public housing comes at a time when structural unemployment, low earnings and a sustained housing boom means that it is very likely that an ever increasing proportion of Australians face old age as renters rather than earners. The 2001 Census found that 66.2 per cent of all occupied private dwellings ‘were either fully owned or being purchased’, and 26.3 per cent were being rented (ABS, 2002). In the larger cities a greater and greater proportion of families are finding it difficult to purchase a home. In the year to June 2002, house prices in Sydney increased by 20 per cent and the median price of a home in Sydney in mid-2002 was \$372 000. This scenario suggests that by the middle of this century, when 24-26 per cent of the population or at least 6 million Australians are over 65 years, there could be 2–3 million older people without the security of home-ownership. A proportion will have accumulated enough superannuation to comfortably afford the private market; however, most older private renters are unlikely to be in this position.

The argument that rental assistance means that the private rental market is affordable is clearly not correct, especially in the larger metropolitan areas. Much of the cheaper private rental accommodation is not there any more. In 2002, a survey by the South Sydney Council found that of the 640 properties in the area listed as boarding houses, half no longer existed (South Sydney Council, 2002). They had been knocked down to make way for upmarket apartments or converted into back-packer hostels.

Our research suggests that if Australia wants to avoid the spectre of tens of thousands of older people being destined to primary or secondary homelessness, it is crucial that the Australian Government’s policy be revamped. The virtual freezing of the building of public housing has to be rethought. In many ways it is the easiest way to ensure that poorer, older Australians are adequately housed. Some thought also needs to be given to the building of age-specific housing. If private renting is to be used to supplement public housing then the level of rental assistance has to increase.

Clearly, when it comes to ensuring the provision of adequate and affordable accommodation, the market can only do so much. More and older Australians will require substantial government intervention and support if they are to spend their retirement years in adequate and affordable accommodation.

References

Australian Bureau of Statistics 1998, *Where our Population is Headed by 2051*, 14 July.

Australian Bureau of Statistics 1999, *Older People, Australia: a Social Report*, 15 December.

Australian Bureau of Statistics 2002, *2001 Census Basic Community Profile and Snapshot*, 19 November.

Australian Bureau of Statistics 2003, *Population by Age and Sex, Australian States and Territories*, 27 March.

Masters, C. 2003, 'Mother and son shelter in an old Holden', *The Sunday Telegraph*, 29 June.

South Sydney Council 2002, *Victims and Victors of Social Change*, South Sydney City Council, 19 March.

THE SEX ALLEGATION INDUSTRY

By Gene Simring
NSW CCL member

Within the confines of courthouses, police stations, barrister's chambers, forensic mental health worker's rooms, the printing factories and broadcast studios of the media—there looms an industry immensely powerful in its capacity to destroy the innocent accused and to reward the unjust accuser. How can this be? How can the accused be destroyed just because of an accusation? How can the Government, the legal and medical professions and the media be party to such injustice? The answer is the cultivation of a new growth industry, the *Sex Allegation Industry*, crouching behind the banner of political correctness and righteousness. For advocates of this industry have it in their interest to sacrifice the expendable few—'If one is accused then one must be guilty, anyway, who am I to say?'—for the palpable good of so many (the industry and ostensibly the public).

What exactly is the Sex Allegation Industry? When a complainant makes allegations of sexual misconduct, a process commences which rapidly gains momentum. After a short interval, it is virtually unstoppable. This process can take three forms:

- actual or threatened criminal action; and/or
- actual or threatened civil action; and/or
- actual or threatened media action.

In any of these forms, the process is similar. A criminal complaint is made to the police via a statement; or a civil 'complaint' is made to a solicitor via a statement of claim and affidavit; or a media 'complaint' is made to a reporter of some description. The media notification is normally a catalyst for a criminal or civil action. Often the complainants hope that they will be 'bought off', thus saving the accused person humiliation, loss of work, of friends, of family, etc. If no settlement is reached, the criminal or civil complainant is normally heard in a court of law.

Here lies the root of the problem. The public rightfully expects justice to be impartial—blind—fair. This premise forms the foundation of the laws of our civilised society. Unfortunately, weak *Santa Clause* Judges make decisions based on compromised or politically correct interpretations of legislation, if not simply wishful thinking and/or naivety. Many members of our society accept these poor decisions without question. These weak judicial officers explain away their decisions, and some members of the public are keen to accept that. They are, after all, the experts, are they not?

However, the more complete truth, as the more legally minded decision makers know, is that these less sensible decisions are made to feed the flames of the Sex Allegation Industry. Why would good people want to do this? What good does it do? Many individual judges, the writer assumes, are basically fair people. In spite of this, they make judiciously poor decisions, encouraging more and more complainants to emerge from the woodwork—prompted to pursue fanciful complaints—hoping to achieve unearned glory, notoriety, sympathy and ultimately wealth. In fact, they may feel (with some justification) that they have nothing to lose.

It must be emphasised that *real* victims of sexual assault, those assaulted by violence or the threat of violence, those who are forced to endure unwanted sexual contact, deserve the encouragement and empathy they receive by society and the courts. The comments in this paper are directed solely to the *manufactured victims*, jumping on the bandwagon, the 'victims' of convenience who fabricate allegations in the hope of achieving gain, especially material gain. The result of this lugubrious state of affairs can be an innocent person lamenting in jail and a *nouveau riche* complainant overdosing on illicit drugs.

Is the writer being paranoid in his assertions? Read on and draw your own conclusions. Aside from successful complainants, who else are the 'winners'?

Sex Allegation Industry—Winner #1

The more budding complaints that instigate criminal law complaints, the more police and Attorney-General's staff are required to investigate those complaints. Many people in the police/Attorney-General's department are involved in the investigation of sexual complaints. The more ancient the complaint, the more complicated it can be, and the more research it may take. If the investigation demonstrates a prima facie case, mind you, just a prima facie case—that on first impression it could have happened—the police are obliged to prosecute. Any sanctions that they may need from the Director of Public Prosecutions, will be forthcoming. Why are the police so anxious to prosecute sexual allegations? Because sexual misconduct is so abhorrent in our society's eyes, especially if accompanied by violence and/or against the young, it would be political suicide not *to be seen* to be vigorously prosecuting those complaints. Moreover, there are buildings full of such workers investigating such claims.

Sex Allegation Industry—Winner #2

The would-be complainant who chooses a civil law path, has a need to involve a solicitor and presumably a barrister at some stage. Due to the high success rate of these prosecutions, coupled with society's encouragement in prosecuting them, speculative or no-win-no-pay lawyers are readily found. These are often solicitors and barristers who would have, as a rule, difficulty in attracting normal fee-paying customers. Usually on Friday in the list judge's court rooms in the Supreme Court of New South Wales, Queen's Square, Sydney, there are hordes of lawyers jostling to the bar table to be heard regarding the listing of hearing dates. It is true that these are not all for the setting down of Sex Allegation Industry cases, but many undoubtedly are. A wander around the corridors of the building will demonstrate a plethora of activity: cases being argued, hearings, status call overs, mentions—lawyers galore—fees galore. The paid up-front lawyer rubs his hands in glee at every interlocutory and final procedure requiring his attention. The no-win-no-pay lawyer (also known as 'ambulance chasers'), also rubs his hands in glee, because he may not win this case, and resultantly not be paid for this effort, but he knows that because sex allegation cases will receive a disproportionately sympathetic judicial ear, he will win out more often than not.

Sex Allegation Industry—Winner #3

Every lawyer, litigant, complainant, defendant, prosecutor, police, or other advocate that sets foot to be heard in a courtroom, requires judicial persons (a judge, magistrate, master, judicial registrar, etc.) to attend to them. There is not only the chief judicial person, but also the five or ten other salaried people working in that courtroom: associates, transcribers, marshals, sheriffs, clerks, tipstaff, etc. Each one of them is earning a living from the proceedings. Additionally, there are the cleaning contractors, security personnel, catering contractors, counter staff and a multitude of 'back room people'. Naturally, not every action involves a Sex Allegation Industry case, but many do, indeed many do. One could justifiably think that individual, sincere, judicial staff may not want to be involved in the deceitful complaints of *manufactured victims*. Then again, the work pays well, and, 'Who knows, the complaints may just be genuine'. When cornered about the veracity of some of the allegations, it is often glossed over as 'Let the jury decide. Who am I to make that decision'?

It would be reasonable to think that the paid staff (police, Attorney-General's department employees, solicitors, barristers, senior counsel, Queen's Counsel, judges, magistrates, masters, judicial registrars, court staff) who are involved in Sex Allegation Industry cases would not all be so naive. Many must realise that there are some cases, perhaps an abundance of cases, that are based on allegations that can neither be proved or disproved. So why do they encourage these cases along to a hearing—to ignore the improbability, or the incapability, of proving the claims? Litigation is an expensive exercise, but not expensive to the employees. It is, after all, merely a waste (or an investment) of OPM (other people's money)—easy for someone else to spend/invest.

One compelling reason that these cases are vigorously pursued is the public perception of sexual offenders. The public is encouraged to believe the myth that alleged sexual offenders are predators—'grooming' their 'victim' or hiding in the bushes preparing to attack. Thus, no stone should be left

unturned in prosecuting and no such offender should escape the force of the law. This myth gives the Sexual Allegation Industry the validity it needs to prosper—to remove the obvious doubt that a reasonable person should have. Those that know better (judicial and legal staff) find it in their political/economic interest to be silent about the truth: that is, that most people convicted of sexual offending, if the alleged conduct was factual, did so consensually, in a relationship that soured.

The next group is the final winner...

Sex Allegation Industry—Winner #4

The forensic mental health worker, wearing the guise of a professional psychologist or psychiatrist, represents such a group who knows better, but still gives legitimacy to claims of assault for damages (criminal or civil). Traditionally, a forensic medical worker would examine an injury, or aftermath of an injury, and give an expert opinion as to the effect that the injury will have upon the life of the plaintiff. The fact that the injury was suffered is not in dispute. It is either well documented or is there for all to see. A pretentious issue is exactly what effect that injury will have upon the injured. If the forensic medical worker is an advocate for the prosecution, she or he will bolster the claim that maximum damage was done. If the forensic worker is an advocate for the defence s/he will endeavour to show that the injuries have had little effect on the life of the one injured. The suggestion that the forensic medical worker is a neutral aid to the court, offering an unbiased medical opinion, as an 'expert witness' is simply naïve or dishonest.

This difficulty experienced in relying on the opinion of a traditional forensic health worker is greatly amplified with the use of a forensic *mental* health worker. This is so because the existence of an injury can be, in itself, a vexed issue. In a Sexual Allegation Industry case, the alleged incident may well be ancient—one year old, five years, ten years, twenty, thirty, forty or more. Thus, no hard evidence—semen sample, DNA, scratches, etc. is available to facilitate proof. What then is available? It is the report of a paid forensic mental health worker, who, through one or two interviews hears a complainant's story and rewrites it as a quasi-medical anecdote, giving it a professional appearance, felicitous textbook corroboration and appropriate medical terminology. Such a report is designed to give credibility to perceived damage, asserting it as factual. What is also distressing is that the forensic mental health worker will sign their name to the report, prostituting their name and credentials, for a fee. They not only get the fee for making the report, but for all of the subsequent court appearances and conferences as well. Additionally, if they score a win—recommendations galore should follow.

If one were to tender a report from a forensic mental health worker verifying psychological damage resulting from an alleged broken leg from years before, where no scar, broken leg, fractured bone, hospital or surgical admission or witness is evident, one would rightly be treated with contempt. However, claim the same psychological damage resulting from an alleged ancient sexual incident (where there was no physical evidence or witness), and one will instantly be embraced, believed and perceived as a victim—'Who could be so callous as to question such a painful thing?'

So, what does all this mean?

Are all forensic mental health workers so heinous? Probably not, as they are merely filling a vacuum created by the court's desire to legitimise Sex Allegation Industry complaints. The forensic mental health workers are selling reports. It is their way to make a living. However, it is the court's judicial employees that know the dangers of relying on such reports. They know how they are adversarial and not scientific, but nevertheless choose to regard them as genuine scientific medical reports, perhaps because it takes the heat off them—'It wasn't my decision, I was merely relying on the 'expert's' report'. Some forensic mental health workers and judicial officers may actually delude themselves into thinking that relying on these reports is seriously serving justice. Why should the forensic mental health worker not bathe in the glory, being put on a pedestal; and it is, after all, denigrating to say, 'I don't deserve this'.

Are the police so mischievous? Probably not, as they are taking the politically correct way out and, at the same time, are *being seen* by many as champions of society's values. There are also, naturally, great increases in their numbers and perceived importance.

Are the lawyers so malicious? Probably not, as they are merely seizing a fantastic business opportunity. It is, after all, a good flavour-of-the-month money-spinner. Someone has to pay the rent.

So where does the real blame for the propagation of the Sex Allegation Industry lie? It must primarily lie with the judiciary. For it is the judges that know better, but still choose to look the other way to encourage dishonesty. For criminal allegations, it was once said that it is far better for a guilty person to go free than for an innocent person to be wrongfully convicted. It is now said, it is far better for an innocent person to be convicted than for a guilty person to go free. As disappointing as it is for a guilty person to go unpunished, how horrific is it for an innocent person to suffer the trauma of a wrongful conviction—to be thrown into a toilet to live for years or decades—stripped of liberty, family, integrity, humanity, wealth? How cheaply can the judiciary treat the life of an innocent person?

In the writer's argument, the judiciary can get a sufficient quantity of convictions through honest means. If the alleged acts happen, there should be ample evidence to prove them. If real evidence is not forthcoming, there must certainly be reasonable doubt as to the veracity of the claim. There is no need to manufacture evidence and to give it probity.

If the judiciary has the strength to stand up for truth, for justice, perhaps even at the risk of offending hypocrites, just for the sake of honesty, then maybe, just maybe, they would be returned to the position that they historically held in the eyes of the public—that of being enlightened, perceptive, sagacious, sapient, simply, wise.

Civil liberties Issues

The civil liberty issue that is most conspicuous is the court's ability to deprive a person of his liberty based on less than prudent grounds—without establishing (by placing a fact beyond dispute), that an offence has occurred—without proof, as the word has traditionally been understood to mean. Obviously, wrongdoers should be appropriately punished for their misdeeds. How else can our streets be safe for our families? The question remains, how much are we willing to allow the courts to compromise our standards in the administration of their duties?

The second civil liberty issue to consider is the welfare of the family and friends of the doleful individual caught up in the web of the Industry. Casualties may include a wife or a husband deprived of a spouse, a child deprived of a parent. Additionally a self-sufficient, nurturing family nest may be violently ripped apart—discarded on the welfare heap—in the name of justice.

A third civil liberty issue to consider is society's loss of a productive member. An erstwhile contributor to the community's wealth is now demoted to being dependent on the fruits of others.

These civil liberties issues affect us all. Economically, we are burdened by greater taxation in the support of the Industry's casualties; socially we are disadvantaged by living in a less equitable or fair environment; legally we are more vulnerable because our right to a fair trial (and potentially our liberty), has also been compromised.

From a purely selfish point of view, we too could become a casualty, as it is not necessarily only the other person who falls victim to the Sex Allegation Industry. If it is argued that these are the sacrifices that we, as a society, must make to ensure that professed justice be served, history may judge us harshly. This is a dangerous stance, as who knows what alleged group will be targeted next?

BOOK REVIEWS

INDIGENOUS HUMAN RIGHTS

Sam Garkawe, Loretta Kelly and Warwick Fisher (eds.)
Sydney Institute of Criminology Monograph Series No. 14
Sydney, 2001.

Reviewed by: **Garth Nettheim, Emeritus Professor, UNSW School of Law**

In February 2000, the School of Law at Southern Cross University held the Australian Indigenous Human Rights Conference at Byron Bay. This volume presents 13 papers from that conference by a notable range of authors from Australia and overseas, Indigenous and non-Indigenous. It is preceded by a characteristically insightful Introduction by Professor Larissa Behrendt.

In the first paper, 'The Legitimacy of Special Measures', Dr Bill Jonas and Margaret Donaldson from HREOC emphasise the importance of winning public understanding that, for Indigenous people, formal equality of treatment is inadequate, and that true equality requires substantive equality in terms of outcomes.

Indigenous lawyer Irene Watson presents 'One Indigenous Perspective on Human Rights'. She considers that for Indigenous people to accept discussion in terms of 'rights' is to take on a colonial construct that diminishes the reality of 'Nunga views on relationships to land, law and peoples... based on spirituality and ancient traditional ways of life, and are in conflict with the intentions of the colonising state' (p. 23). She is critical of the native title legislation of 1993, as well as the 1998 amendments, as subordinating native title to non-Indigenous rights, particularly through the 'validation' provisions which were justified as 'special measures'. And she sees the asserted goal of equality as assimilationist:

But I have never wanted to be the same. It is difference, and the right to be different, that is central to the idea of an Indigenous struggle, the sameness is killing. The assimilation policy is genocidal (p. 35).

Chris Cunneen and Terry Libesman discuss 'Cultural Rights, Human Rights and the Contemporary Removal of Aboriginal and Torres Strait Islander Children from their Families'. They had previously worked for the National Inquiry, and their paper is based on an analysis of NSW Department of Community Services files of Indigenous children removed from their families in 1996–97. They argue that:

The intergenerational impact of past separations, together with poor socioeconomic conditions in communities, systemic racism and cultural difference between Indigenous people and the dominant society continue to produce the conditions which underlie contemporary removals (p. 43).

Thus, in NSW, 'Indigenous children comprised 2.1% of children in the State, they made up between 8% and 9% of welfare notifications, and they accounted for 21% of children placed in substitute care' (p. 43). The situation is analysed by reference to human rights standards.

Pam Ditton's paper presents a different study: "Dry 'Em Out" or "Lock 'Em Up": Contrasting Approaches to Law and Order in Tennant Creek'. She tells how, in the face of increasing drunkenness and street violence, Julalikari Council and other Aboriginal organisations proposed that the Northern Territory (NT) Liquor Commission reduce the availability of alcohol in Tennant Creek. The move was opposed by liquor licensees and other business groups, but the Commission eventually imposed limited restrictions on the hotel and takeaway licensees, particularly on 'Thirsty Thursdays'. The human rights arguments would have supported alcohol restrictions sought by the community as a 'special measure' applicable to their own members. But Julalikari wanted restrictions to apply to Aborigines and non-Aborigines alike.

Ditton relates this story to the NT Government's introduction of mandatory sentencing in 2000. The evidence indicated that this regime failed to prevent a rise in Indigenous imprisonment rates, but such rates declined in Tennant Creek, with improvement in the quality of life there; and 'the available data points to it being the 'Thirsty Thursday' restrictions rather than the mandatory sentencing regime that have resulted in this improvement' (p. 67). The alcohol restrictions have since been taken as a model in other towns.

Terri Janke's contribution is entitled 'Asserting Indigenous Cultural and Intellectual Property Rights'. Recognition of such rights, she argues, 'relate to cultural survival, cultural expression and the ability of Indigenous peoples ... to retain control over the maintenance and development of their cultures' (p. 86), and they may also lead to economic benefits. She discusses some of the findings and recommendations of the important report that she wrote in 1999, *Our Culture: Our Future*. She refers to the significance to the Australian economy of Indigenous cultural material, and the importance of Indigenous consent to commercialisation, the right to royalties or the like. She notes how Australian law falls short of providing adequate protection, and outlines proposals for specific legislation and policy.

S. James Anaya is a distinguished Native American lawyer and professor. He spoke on 'the Influence of Indigenous Peoples on the Development of International Law', focussing on four areas in which they have contributed in fundamental ways that go beyond the specific context of Indigenous rights:

- the move towards collective rights,
- the softening of State sovereignty,
- evolution of the norm of self-determination, and
- the role of non-State actors.

He concludes that, through such international advocacy, Indigenous peoples 'are helping to bring about change in the international legal order; a change of the kind that just may help bring about—not just for Indigenous peoples, but all of humanity—a more just and humane world (p. 114).

Maori lawyer Nin Tomas' topic is 'Locating Human Rights in the South Pacific: A Korero about Human Rights'. She, like Irene Watson, is concerned that human rights pay too little respect for the differing approaches of Indigenous peoples, and particularly Indigenous concern for collective rights. And, within national systems, the landmark court decisions that seem finally to recognise Indigenous rights, often deliver much less.

A more specific topic—but one which presents some of the issues discussed by Nin Tomas—is selected by US tribal court judge, Mary Jo B. Hunter: 'The Indian Child Welfare Act, Love Has Little to Do With It'. She questions whether, as sometimes claimed, the 1978 Act can properly be described as supporting Indian culture. It was enacted in response to the alarming rate of removals of Indian children from their homes. Priority is given to tribal court jurisdiction as against State courts in such cases, and certain placement preferences are listed for State courts for a child who is to be removed from home. (Similar placement preferences have been adopted in some Australian jurisdictions). 'Yet, despite such protections, statistically, the numbers of Indian children who are removed from their homes has not decreased dramatically since the inception of the ICWA' (p. 152). She argues that there is too limited understanding of the Act by judges and lawyers, leading to substantial non-compliance.

Joern Berglund Nielsen, from Greenland, discusses 'Indigenous Rights to Self-Government and Self-Determination: An Inuit Arctic Perspective'. He argues that 'Indigenous self-determination has natural, territorial and, most importantly, cultural, as well as political and economic preconditions' (p. 158). Inuit live in four nations—Far East Russia, Greenland as part of Denmark, Alaska and Canada. In the last three of these there are examples of 'Indigenous self-government by way of public government' (i.e. government not confined to Inuit) and he considers the extent, and the limitations, to the self-government of each. He also discusses the important linking role in international relations played by the Inuit Circumpolar Conference, and goes on to explore the prospects, particularly for Greenland, of moving from self-government to full self-determination.

Elizabeth Evatt's paper marks a shift from principles to processes. It is entitled 'Realising Human Rights: Utilising UN Mechanisms' and reflects her long experience as member of two of the key UN treaty committees. She relates her discussion of the six treaty committees' concern with Indigenous peoples particularly to the Australian situation. They have had critical comments to offer on Australia's periodic reports, and four of the six had done so during 2000. She explains how the committees operate, including the scope for input by non-government organisations (NGOs), and she discusses the opportunities under some of the treaties for individual complaints. She also refers to the committees' interpretations of treaty obligations in regard to Indigenous peoples through 'General Comments'.

Following logically from Elizabeth Evatt's paper is Bill Barker's 'Getting Government to Listen'. He describes his background 'as a diplomat and public servant working on international human rights' (p. 215). Barker emphasises that answers to problems need to be found at a national level, but argues that skilful use of international human rights procedures can provide useful leverage on national governments. Realistically, he notes the changed politics since the first complaint from Australia under the 1st Optional Protocol to the ICCPR (the Toonen case), ultimately produced legislative responses at the national level. He also observes (p. 220) that Australia:

Started to address the serious backlogs that had developed in the submission of its reports to the various committees. This is to Australia's credit. However, this has been at the cost of a serious deterioration in the quality of reporting. In my view, some of the recent reports to the treaty bodies verge on the offensive in their misrepresentation of the situation of Indigenous people in this country.

Barker stresses the importance of NGOs providing alternative reports to the treaty committees, and of effective Indigenous representation at relevant UN meetings, such as those of the Working Group on Indigenous Populations.

Paul Omojo Omaji's paper is entitled 'The *Realcrime* of the State and Indigenous Peoples' Human Rights'. He discusses the history of conquest, dispossession, killings, and other fundamental violations of Indigenous human rights—particularly the removal of children from Aboriginal families—and argues passionately that such actions on behalf of the State should be regarded as criminal.

The final paper, by Peter Yu, is called 'Unfinished Business—National Responsibilities and Local Actions'. His concern in 2000, was to try to ensure some outcome from the reconciliation process after the Council for Aboriginal Reconciliation went out of existence at the end of the year. He referred particularly to Patrick Dodson's proposals, endorsed by a Summit of Indigenous leaders, for a national framework agreement providing a legislative basis for the identification and resolution of outstanding issues.

He adds a call to address the socio-economic disadvantage experienced in Aboriginal communities through partnerships with non-Indigenous people at a regional level. He endorses Noel Pearson's call for such economic empowerment in Cape York, and outlines similar proposals for the Kimberley. In particular, he calls for changes to the system of governance in the region which he describes as 'totally inadequate to deal with these forces of change' (p. 253). He spells out in detail how a revised and effective system of regional governance might operate.

Overall, the papers in this volume, coming as they do from a range of perspectives, represent a valuable account of human rights issues of concern to Indigenous peoples both here in Australia and abroad.

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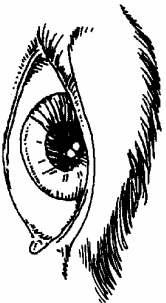
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