Civil Liberty

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JOURNAL DEADLINE DATES

Material Deadline: 11 August 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.

AUSTRALIA'S FIRST BILL OF RIGHTS

A Forum on the National Implications
of the ACT Human Rights Act 2004

Thursday 1 July 2004
National Museum of Australia, Canberra

This forum will be held on the day the new ACT *Human Rights Act 2004* comes into force. Speakers will examine its significance for Australia, including whether it is a landmark development or a negative step in the protection of human rights. While the event will focus on changes to the law made by Australia's first Bill of Rights, it is aimed at both a legal and non-legal audience.

Speakers include Jon Stanhope (ACT Chief Minister), Professor Hilary Charlesworth (ANU), Nicola Roxon MP (Shadow Federal Attorney General), Megan Davis (Jumbunna Indigenous House of Learning, UTS and UNSW), Cassandra Goldie (Centre on Housing Rights and Evictions and UNSW), Bill Stefaniak (Deputy Leader of the Opposition and Shadow ACT Attorney General) and Helen Watchirs (ACT Human Rights and Discrimination Commissioner).

The cost is $95 for the full day, which includes lunch and tea. A concession rate of $45 is available. The brochure and registration form is available on the following websites: <http://law.anu.edu.au/cipl/> and <http://www.gtcentre.unsw.edu.au/>. A copy can also be posted to you if you contact the Forum Secretariat at 02 6125 0454 (ph), 02 6125 0150 (fax) or cipl.law@anu.edu.au (email).

This event is organised by the Centre for International and Public Law at ANU and the Gilbert + Tobin Centre of Public Law at UNSW.

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PO Box 201 GLEBE 2037
telephone: (02) 9660 7582
fax: (02) 9566 4162
email: nswccl@mail2me.com.au
website: www.nswccl.org.au

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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.

Fundraising/Finance
Convenor: Susan Cleary

Civil Rights
Convenor: Judith Henstock-Muru

Criminal Justice
Convenor: Michael Walton

Security & Intelligence
Convenor: David Bernie

Complaints
Convenor: Tony Hay

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

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REPORTS

SECURITY AND INTELLIGENCE SUBCOMMITTEE

The Government has proposed yet further amendments to its Anti-Terrorism legislation. Part of this allows for extended detention times for federal offences and also effectively reversing the onus of proof on some serious offences. Another part seems directed at Messrs Hicks and Habib and proposes to recognise the US President's executive order for their detention as if it was a criminal statute for the purposes of the Proceeds of Crime Act. This appears to be an attempt to prevent them from receiving any payment for any publication about their ordeal, even though they have not been convicted of any recognised criminal offence. A submission was made to Senate Legal & Constitutional References Committee on behalf of the NSW Council for Civil Liberties opposing this legislation.

A submission was also made on behalf of the Council in respect to the Surveillance Devices Bill 2004 and the changes proposed by that legislation. The Council is concerned about various provisions of this bill and the general thrust of the legislation. The Council is in general concerned about any extension of power to place innocent Australian citizens under surveillance. While the Bill proposes to regulate the use of data, optical and listening surveillance devices and tracking devices in much the same way that telephone tapping is regulated by the *Telecommunications (Interception) Act 1979*, the issue of warrants by members of the AAT has seen a great increase in telephone warrants. In both the submission and evidence given before the Senate Legal & Constitutional References Committee, we suggested that any warrants regime requires Judges, who are independent of the executive, to be the issuing authority, as well as the need for enforcement and the protection of whistleblowers.

A submission was also made to the Australian Law Reform Commission in response to Discussion Paper on *Protecting Classified and Security Sensitive Information*. The Council remains very concerned about the use of secret evidence in any proceedings.

The whole concept of secret evidence strikes at the basic principles of justice and a fair trial. (By secret evidence, we mean evidence that is not only not disclosed to the public, but is not disclosed to one of the parties and/or their legal representative). The Council is aware of secret evidence being used in Administrative Appeals Tribunal cases involving refusal of security clearances and refusal of passports. In both these cases the secret evidence that was heard by the Tribunal was not provided in any form to the party who had been adversely affected by the security assessment. It was not even provided to their lawyer. In effect, the evidence was presented to the Tribunal without being tested in any of the ways the evidence should be forensically tested before being accepted by any court or tribunal.

The President and I also followed up the written submission with a lengthy meeting to discuss these issues. We suggested that classification of security sensitive information should no longer be carried by the Government or Attorney General alone. Also, the onus should be on the Government to prove to an independent body or tribunal that information to be used in proceedings should be kept classified. The present situation, where the Attorney General issues a certificate regarding certain information is entirely unsatisfactory. It effectively places the onus upon the person adversely affected to seek redress in the Federal Court or elsewhere, without knowing the details, and therefore unsure of their prospects in this regard.

These points and suggestions to the Commission seemed well received and we look with interest to the final report. Whether the Government will accept

recommendations that limit its power of secrecy will of course be another matter.

David Bernie
Vice President and Convenor, Security and Intelligence Subcommittee

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LEGAL PANEL

Refugee matters

ABC Radio broadcast an interview on the AM program on 6 May with a detainee in Baxter Detention Centre about his being held naked in solitary confinement. The story was newsworthy only because of the publicity given to the treatment of Iraqi prisoners by US forces at around that time. The full details of the case are more disturbing than the broadcast indicated, as the person is in solitary confinement for damaging a toaster after being told he was being charged $30 for some other minor infraction of detention centre discipline.

A transcript (and audio file) of the broadcast is available on the ABC website.

The right to protest

A protest was recently held outside the Prime Minister's Kirribilli residence concerning the Government's refugee policies. Media reports on the protest focussed on the fact that the police presence was entirely out of proportion to the number of demonstrators.

Prior to the demonstration, the Commissioner of Police had notified the organiser of the demonstration that he was considering applying to the Supreme Court for an order to prohibit the demonstration. However, after discussions between the police and the organisers, he apparently decided not to go ahead.

While common sense prevailed in this instance, clearly there is a sensitivity to demonstrations outside politician's residences—even official ones. The precedent created last year in relation to the demonstration outside Mr Ruddock's residence was a powerful disincentive to the police making an application in this case.

Munchausen's Syndrome by Proxy

Issues concerning the rights of mothers diagnosed with 'Munchausen's Syndrome by Proxy' were recently raised with CCL. The syndrome is, on occasion, relied on by State authorities to take children, including young babies, deemed to be at risk, away from their mothers.

There are plainly debates underway within the medical community as to the existence and nature of the syndrome, since it is one of those psychiatric conditions which is extremely difficult to identify objectively.

While the CCL legal panel was unable to provide assistance in relation to the particular matter in which it was sought, there are important civil liberty issues involved which will undoubtedly need to be resolved in some suitable way.

Stephen Blanks
Secretary and Legal Panel Convenor

CRIMINAL JUSTICE SUBCOMMITTEE

The criminal justice subcommittee has looked at several issues over the last few months. The subcommittee paid particular attention to the issues of the privacy of those who have served their time, and the 'reform' of double jeopardy.

The Internet has had a big impact on the administration of criminal justice. Recently the NSW Court of Criminal Appeal ruled that jurors must be told that under no circumstances are they to go looking for information on the Internet about any of the

people in a trial (*R v K* [2003] NSWCCA 406). This was after it was discovered that several jurors had searched for and found highly prejudicial information about the defendant on the Internet.

In 2000, a similar case occurred in Victoria in which a murder trial was aborted because jurors might have looked up information about the defendant on the CrimeNet website (*R v McLachlan* [2002] VSC 215). The CrimeNet website is still up-and-running and in the business of selling, to anyone who is willing to pay $11, someone else's (incomplete) criminal record. The NSW Council for Civil Liberties recently made a complaint to the Federal Privacy Commissioner about this website for breaching the *National Privacy Principles*. Those principles state that anyone selling sensitive personal information about individuals, such as information about their criminal convictions, must have made reasonable steps to obtain the individual's permission. It is unlikely that CrimeNet has done this. We are still waiting for an official response from the Commissioner.

For similar reasons, the subcommittee is also concerned about the MAKO website which currently publishes names and photographs of convicted paedophiles. The website claims to list over 831 Australian convicted child sex offenders. The concern is that this kind of sensationalist website encourages vigilantism. The subcommittee is also watching moves towards a national register of suspected and convicted paedophiles with concern.

In March, the Standing Committee of Attorneys General (SCAG) met on Norfolk Island. Among other things, they discussed national double jeopardy 'reform'. The proposals before SCAG included:

- retrial of acquitted people when 'fresh & compelling' evidence of guilt of a very serious offence comes to light after their trial;
- introduction of Crown appeals of acquittals, where a judge directs the jury to acquit, or where a judge sitting without a jury finds the defendant not guilty;
- retrial of people who procure their acquittal by intimidating or bribing witnesses or jurors.

The UK Government has passed legislation allowing these types of appeals, eroding the centuries' old protection of double jeopardy. Fortunately, there was no national consensus at SCAG. Only the Federal, WA and NSW Governments supported all the reforms. The Attorneys General did agree to examine the third type of retrial, called the 'tainted acquittal', in more detail, but nothing concrete has yet been proposed.

This lack of consensus was a kick in the teeth for the Carr Government, which has already drafted legislation to introduce these reforms in NSW. The SCAG decision is not binding on the NSW Government, and it is rumoured that Mr Carr will go ahead and introduce his legislation into Parliament anyway. The subcommittee will be keeping a close eye on this important civil liberties issue.

Michael Walton
Convenor, Criminal Justice Subcommittee

FUND RAISING AND FINANCE SUBCOMMITTEE

The NSW Council for Civil Liberties was very pleased to have Justice Michael Kirby AC CMG as its guest speaker at drinks co-hosted by the Law Society and the CCL on Friday 26 March. Justice Kirby spoke on *Civil Liberties Then and Now*. The evening was enjoyed by all. This issue of the journal includes an article based on the talk given by Justice Kirby at that function (see 'Terrorism—Keeping Calm' on page 8).

The next luncheon on 21 May, is imminent as the journal goes to press. Justice Jeff Shaw is our guest speaker on this occasion, addressing *The Courts, Legislature and Human Rights*. Members and their guests are encouraged to attend these lunches when they are able to, as they provide an opportunity for you to catch up with colleagues, meet other CCL members, and enjoy the thoughts and deliberations of the guest speakers who come from a wide cross section of backgrounds and interests.

Susan Cleary
Convenor, Fundraising/Finance Subcommittee

UNSWCCL

UNSW Council for Civil Liberties (UNSWCCL) has recently come into possession of a significant number of complaints from the inmates at the 'SuperMax' High Risk Management Unit (HRMU) at Goulburn gaol. The HRMU is a gaol within a gaol. The complaints include lack of access to fresh air, to sunlight, to adequate medical care and to legal assistance. There have been reports of self-harm and hunger strikes in response to the conditions. Another disturbing complaint involves the deliberate racial segregation of inmates. Overall, the conditions appear to amount to cruel and unusual punishment. They also appear to breach the UN *Standard Minimum Rules for the Treatment of Prisoners*.

Current residents at the HRMU include high-profile inmates like Ivan Milat, Bilal Skaf and Phuong Ngo. Some remand prisoners, that is prisoners who have been refused bail but who have not yet gone to trial, are being held in the HRMU. The three terrorist suspects arrested by the Australian Federal Police are also being kept on remand in the HRMU. Peter Breen MLC was recently denied access to the HRMU.

UNSWCCL has forwarded these complaints on to the NSW Ombudsman and asked that an independent review of conditions at the HRMU be undertaken as a matter of urgency. We believe that this will be the first big test of the Ombudsman since taking over the duties of the office of the Inspector-General of Corrective Services, which was abolished in 2003. We will keep you informed of progress.

UNSWCCL has also been helping the Australian Muslim Civil Rights Advocacy Network (AMCRAN) with their project to put together a know-your-rights booklet for Muslim Australians. The focus of the booklet is on the powers of federal authorities like ASIO and the Australian Federal Police (AFP). This is a significant community-based initiative and we were able to help by providing research on the search, arrest, investigation and detention powers of the AFP.

We are also planning to co-host with AMCRAN a seminar for Muslim medical students at UNSW. One of the arrested terrorist suspects is a UNSW medical student. Many of his fellow medical students are very concerned that ASIO will come knocking on their doors. Given the secret-police powers that federal Parliament has given ASIO (to pick up and interrogate anyone who might know something about someone who might be a terrorist), the students' concerns are real. That law-abiding Australians are living in such fear is a sad reflection on contemporary Australia.

UNSWCCL has begun a campaign to encourage Sydneysiders to send in their complaints about police drug-detection sniffer dogs. We will be helping NSWCCL prepare a submission to the NSW Ombudsman about how the sniffer dogs have been used over the past two years. Complaints have included police using the dogs on public streets and in shopping malls without a warrant—which is not legal. If the police do not have a warrant, the dogs can only be used in pubs, at entertainment events and on public transport. So if you

have any complaints about these dogs, or know anyone who does, please forward a written complaint to the NSWCCL office and we will include it in our report to the Ombudsman.

UNSWCCL also helped with research for a recent NSWCCL action in the courts involving the refusal of federal police to return a foreign passport that had been seized on a search warrant. If such items are necessary for the investigation, then they should be photocopied and returned as soon as possible. There is a disturbing trend at the federal level to deny both citizens and non-citizens their freedom of movement by confiscating passports or refusing to reissue them to citizens. In countries with a Bill of Rights, courts have consistently held that everyone has a right to a passport. Of course, Australia is the only common law country in the world without a Bill of Rights.

Another issue we have been examining includes the High Court and its recent refusal to allow unrepresented NSW prisoners to appear before the Court to argue their special leave applications. Prisoners in every other State and Territory are routinely brought before the court in person or via video-link. However, NSW Corrective Services refuses to do this without an order of a court—and the High Court of Australia claims it does not have the power to order NSW Corrective Services to bring a prisoner to court for a special leave application! It appears that the High Court thinks it does not need to hear what unrepresented NSW prisoners have to say, and that the Court can decide special leave applications from written submissions alone. This is obviously discriminatory: only prisoners in NSW are denied their right to be heard; people who are not incarcerated, routinely get 20 minutes to argue their application before the Court; and, NSW prisoners who are granted Legal Aid or who can afford a barrister, are represented by lawyers at their application hearing.

In a recent special leave application, Justice Michael Kirby delivered a strong dissent on this point. Justice Kirby said:

> Prisoners are human beings. In most case, they are also citizens of this country. They should, so far as the law can allow, ordinarily have the same rights as all the persons before this Court. They have lost their liberty whilst they are in prison. However, so far as I am concerned, they have not lost their human dignity or their right to equality before the law (*Muir v The Queen* [2004] HCATrans 113).

We concur. And we are looking into ways to rectify this discrimination. The highest court in the land should be administering justice, not denying it to minorities.

UNSWCCL

ARTICLES

TERRORISM — KEEPING CALM

Speech given by The Hon Justice Michael Kirby, AC CMG on 26 March 2004 at a function, *Civil Liberties Then and Now*, co-hosted by the Law Society of NSW and NSWCCL

It is a great pleasure to return to the scene of the crime.

My progress in life can be traced directly to my activities in the Council for Civil Liberties (CCL). It was there that I met wonderful people, many, but not all of them, lawyers, who saw that the law is something more than making money. In the mid-1960s, I was elected to the Committee of the New South Wales CCL. I worked closely with Ken Buckley, Bob Hope, Jim Staples, Bob St John, Berry Buckley, Gordon Johnson, Dick Klugman, Colin Marks and other valiant toilers in the garden of civil liberties.

These were the times of the Vietnam War. They were times of protests, arrests, claims to conscientious objection from compulsory military service in Vietnam, civil disobedience and plenty of action.

They were times when the CCL was brimming over with new ideas and new programs. Until the 1960s, insufficient was done to redress the widespread discrimination against Australia's Indigenous peoples. The CCL briefed Gordon Samuels (later the Governor), Malcolm Hardwick and myself to take part in one of the 'Freedom Rides' to advance Aboriginal equality in outback New South Wales. However, much of our regular work was concerned with cases alleging police misconduct, the notorious police 'verbals' of those days, and oppression by governments and their agencies.

In my work for the CCL, in highly practical ways, I came to understand the importance of the rule of law, of public law as a remedy for public wrongs, and of the need for law reform.

Although some initiatives were taken by the CCL at that time to defend the rights of overseas students, insufficient was done to advance the civil liberties of women, of Asian Australians and of gays. In fact, I cannot remember a single voice ever being raised concerning the civil liberties of homosexual Australians. This, in the 1960s, was still a topic that 'dared not speak its name'. There was a special kind of discrimination. It may not always have been direct, but it was palpable. 'Don't ask. Don't tell' was the watchword of the 1960s on gay issues. I can say this with assurance. Because of my own sexual orientation, I was alert to these issues. But they were simply not seen as part of the agenda for those times. They were not on the radar.

Such experiences teach all of us the need to keep our minds and hearts open to the future issues of human rights and civil liberties. There are perspectives of civil rights that we do not now see, that will appear clear in forty years time.

One issue which is certainly on today's agenda (and seems unlikely to go away in a hurry), is our response to terrorism. Let there be no doubt that real terrorists are the enemies of civil liberties. They do not wish to partake in dialogue and discussion. They do not address themselves only to their oppressors. Many terrorists speak only the language of violence. Truly, they think that power comes from the barrel of a gun. They act cruelly and oppressively to those who do not agree with them. They visit violence on innocent people. They operate in the politics of fear. They seek to capture headlines by brutal acts addressed to those whose lives they treat as dispensable.

Nevertheless, whilst recognizing the necessity for societies to respond to terrorists who have access to means that can wreak havoc on the innocent, we must also recognize two important lessons from the past. The first is the need to draw a distinction between 'terrorists' and those who are simply objecting to injustice as they see it, perhaps of longstanding. In his day, Mahatma Gandhi was certainly called a terrorist. So was Nelson Mandela. So indeed, were most of the leaders who rose against colonial domination. There are some activists of this kind in our world today who are labeled terrorists. It is important for all societies, including Australian society, to observe the distinction. Civil libertarians will defend and protect the rights of those who peacefully protest against injustice and oppression and argue for their view of basic rights.

The second lesson is that, in responding to violent antagonists, democratic communities must do so in a way, as far as possible, consistent with the defence of civil liberties. Not only is this the course required by universal principles of human rights, experience repeatedly demonstrates the error of responding to violence with violence. When this happens, the terrorists win. Their attack on civil liberties succeeds when the fundamental principles of a tolerant society, ruled by law, are replaced by excessive state powers and suspension of basic legal rights.

These lessons were taught throughout the twentieth century in the wars of colonial liberation. They were taught early in the century in the responses to anarchists. In mid-century they were taught by the responses to the communists—who were the 'terrorists' of their day. One of the greatest legal moments in the history of Australia was the decision of the High Court in 1951, declaring unconstitutional the *Communist Party Dissolution Act*. One of the greatest moments in democracy in Australia was the decision of the people refusing the attempt to amend the Constitution to empower Parliament to re-enact that law.

In today's age, we will face similar challenges. Doubtless there will be many more. It is essential that legislation, adopted to combat terrorism, preserves (even for alleged terrorists), fundamental rights of due process, judicial review and civil liberty.

In England, a recent decision of the Court of Appeal in *The Secretary of State for the Home Department v M* [2004] EWCA 324, has shown that, difficult as it may be, a proper balance can be struck. The United Kingdom Parliament has enacted strong laws against terrorists. But it has included provisions permitting the intervention before tribunals and courts of guardians (called 'special advocates') who are paid by the State to defend and uphold the interests of terrorist suspects. In the case in which Lord Chief Justice Woolf presided, one accused terrorist was released. The Court of Appeal confirmed the decision of the tribunal appealed from over the objection of the Home Secretary. The Lord Chief Justice emphasized the importance of preserving the rule of law and real judicial supervision in the age of counter-terrorism. The decision of the British tribunal and the Court of Appeal are heartening

indications that, in our form of society, we can maintain a proper balance. We in Australia must learn from this case.

It will be important for the CCL to be vigilant to these issues in the future, as it has been in the past. Many of those who served on the Committee of the CCL in the 1960s and 1970s went on to significant service to the State and the nation. Those who love civil liberties in Australia defend the core institutions of our country. The Council for Civil Liberties can look back on its past with pride. Complacency has no part in the future of the CCL. Vigilance for liberty was, is, and always will be, the watchword for the CCL.

BIG DAY OUT FOR POLICE DOGS

Michael Walton

The Big Day Out just keeps getting bigger! It is now so big that in Sydney this Australia Day long weekend there were two Big Days Out on consecutive days. Over 75,000 fans made the trek to Olympic Park, to see over 40 bands and other acts on eight stages. Many of those fans travelled to the concert by train. City Rail put on extra trains to meet the demand.

By some amazing coincidence, NSW Police chose the same two days for *Operation Guardian*—targeting drug offences on the Sydney rail network. Nine drug-detection dogs, 300 police and 259 State Transit Officers were involved in the operation.[1] Across the Sydney rail network:

- more than 400 people were searched;
- 550 infringement notices were issued;
- 230 people were arrested;
- 150 cannabis cautions were issued;
- 130 Court Attendance Notices were issued.[2]

At Olympic Park police targeted Big Day Out ticket-holders exiting the railway station. Drug sniffer dogs identified people who might be carrying drugs. According to Big Day Out promoter Ken West it was ‘like shooting fish in a barrel’.[3]

The aftermath at Burwood Local Court

Three weeks later, I visited Burwood Local Court, where the list magistrate was still dealing with the aftermath. I watched several people plead guilty to charges of possessing prohibited drugs such as cannabis and speed. Most of them were in their twenties and thirties, unrepresented, and this was the first time they had ever been to court, let alone charged with a criminal offence. For some, the prospect of a criminal charge meant that they faced the cancellation of their residency visas and deportation from Australia.

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[1] NSW Police, ‘More than 200 people arrested: Operation Guardian’ (media release, 25 January 2004).
[2] NSW Police, ‘More than 200 people arrested: Operation Guardian’ (media release, 25 January 2004).
[3] Peter Holmes, ‘Drug arrests at rock festival’, *Sunday Telegraph* (Sydney), 25 January 2004, p. 17.

The Magistrate, after a half-hearted lecture about the law and drugs, dismissed the charges against the first-time offenders and recorded no criminal conviction.

He expressed concern from the bench that some of the police charge sheets recorded no weight measurements. This is important because for drug offences the severity of the offence and the associated punishment are based on the weight of the drugs alleged to be in the defendant's possession. The Magistrate was also concerned that even when the charge sheets included weight measurements, the weight appeared to be a visual estimate only. He also expressed the opinion that the police should not have charged anyone for possession of cannabis cookies.

Sniffer dogs and the courts

All the defendants had been initially identified by sniffer dogs. The use of drug-detection sniffer dogs is still controversial.

In November 2001 the Deputy Chief Magistrate of NSW ruled that 'Rocky' the sniffer dog had conducted a search when he was used to detect drugs on people entering an Oxford Street nightclub. Because the search was performed before the police had formed a reasonable suspicion, the Magistrate ruled that the search was illegal and inadmissible in court. Without the search evidence, the police case collapsed.

Interestingly, the Deputy Chief Magistrate also considered the search a violation of Article 17 of the International Covenant on Civil and Political Rights, which states that 'no one shall be subject to arbitrary or unlawful interference with his [or her] privacy'.

The Deputy Public Prosecutor (DPP) appealed the decision to the NSW Supreme Court, where Justice O'Keefe overruled the Deputy Chief Magistrate.[4] He stated that:

> The formation of a reasonable suspicion may not depend upon personal observation or sensation. It may depend, for example, on information conveyed to a police officer from…another police officer…a private citizen…[or] a dog. The reactions of the dog in such a case would be no more than a basis for the formation of a reasonable suspicion by the police officer.[5]

Parliament Acts

Parliament also moved swiftly to pass the *Police Powers (Drug Detection Dogs) Act 2001* (NSW), which authorises a police officer, without a warrant, 'to use a dog to carry out general drug detection' (s. 6) on persons at, or entering or exiting:

a. premises where alcohol is sold and consumed (but not any part of the premises where food is served);

b. 'a sporting event, concert or other artistic performance, dance party, parade or other entertainment'; or

c. any train, light rail or bus on a specified route, or any railway station or stop along those routes (s. 7).

[4] *DPP v Darby* [2002] NSWSC 1157.
[5] *DPP v Darby* [2002] NSWSC 1157, [49].

If police wish to use the dogs anywhere else, for example in a shopping centre, they must have a warrant (s. 8). The police are to take all reasonable steps to ensure the dogs do not touch anyone (s. 9(1)).

No right to privacy

So the use of sniffer dogs at the Big Day Out was legal under the Act, since the dogs were used on people exiting the Olympic Park railway station and on their way to a concert.

But the Act is so broad that it authorises the use of sniffer dogs on opera-goers at the Opera House. Of course, it is doubtful that the police would ever dream of harassing such ‘law-abiding’ audiences. This points to the broad discretion exercisable by police under this Act. The police chooses which venues to search and they appear to be focussing on venues patronised by younger citizens.

While using dogs to sniff luggage or other objects is less objectionable, the sniffing of people is undeniably an arbitrary interference with privacy. Unfortunately, there is no right to personal privacy in Australian law,[6] so it looks like drug-detection sniffer dogs are here to stay. At least until the next legal challenge.

…and the canines of the NSW Police Force can look forward to more Big Days Out.

This article was first published in Unsolicited*, newsletter of Kingsford Legal Centre and is currently included on the NSWCCL website: <http://www.nswccl.org.au/>.*

REGARDING ‘THE SEX ALLEGATION INDUSTRY’

Jeremy Styles

This is a response to some of the issues raised by NSWCCL member and commentator Gene Simring in the last issue of the journal under the title of ‘The Sex Allegation Industry’. It is not a direct critique, nor an affirmation of support of the position taken in that article; rather, it is a commentary on some of the civil liberties issues raised in that article.

Further comment on the article may be found published in letters from readers.

The question of sexual assault complaints (broadly described) presents one of the most contentious and heated areas of debate in the justice system at all levels and in every manner, relating to the rights and liberties of the persons involved. As with any question of rights, the rights held or asserted by different people or groups must ultimately be balanced.

The difficult balancing act undertaken in the case of sexual assault allegations is undertaken by a string of governmental bodies, and the legal system as a whole.

[6] See *DPP v Darby* [2002] NSWSC 1157, [43]. Though it does not affect New South Wales citizens, the *Human Rights Act 2004* (ACT) guarantees the right to privacy in the ACT. So, the use of sniffer dogs in the ACT might be incompatible with ACT law.

Where acted upon, legal actions (being criminal or civil) relating to sexual allegations, arise from complaints made to the police, community services officials, medical professionals, and the like. It can be further presumed that the bulk of complaints find recourse through courts of law, and particularly through the criminal justice system. There are not obvious alternate means of redress for a complainant. Some legal avenues exist at civil law but in the author's experience, these are not broadly used. This article focuses on the criminal justice system.

The veracity of complaints made to public authorities is a key issue underlying Simring's article. A series of checks upon the veracity of complaints exist within the system as it currently exists.

In the normal course of a complaint, many of the people a complainant will come in contact with will test or examine the veracity of the complaint made. There are a series of procedural safeguards, which exist to protect the right of an individual about whom a complaint has been made. These safeguards in the criminal justice system are geared to minimize the chances of wrongful convictions occurring. These safeguards are considered below.

Complainants

Simring's article in the last edition of the journal included the concoction of sexual complaints as an underlying theme. It is not asserted here that concoction does not occur. Concoction, should it occur, is subject in the current system to testing by people in the reporting process from initial complaints to psychological assessments. Ultimately, complaints if pursued, complaints can be tested by cross-examination in a court. It is also not asserted here that the process is perfect. The greatest criticism that can be made is that some people within the investigating organizations do not appear to operate from an assumption of innocence.

This said, there is an important discretion held by the prosecuting authorities, either the police in matters heard in the local courts, or the Director of Public Prosecutions for indictable matters: that a prosecution may be discontinued for want of compelling evidence. If the prosecuting authorities have serious doubts, about the veracity of a complainant's evidence or the strength of that evidence in all the circumstances, they will not, and should not prosecute. This process has been recently been the subject of extensive media coverage in relation to the decision not to prosecute a number of Rugby League players in relation to a sexual complaint.

Should the prosecution continue, despite doubts as to the veracity of the available evidence, the final decision remains a judgement of fact—for a judge, or in more serious matters, a jury.

Complainant's rights

A significant issue for civil libertarians is the position and treatment of complainants in sexual assault matters. There is a level of care and attention that must be provided to a person who comes forward as a complainant. Obviously, at the first point of complaint they must be taken to be giving a truthful account. To do otherwise would be a grave injustice for truthful complainants.

Trial by media

One of the great concerns raised by Simring, and shared by this author is the issue of 'trial by media'. Such extrajudicial justice is an ongoing problem in the current media climate. The issue of the media today and the reporting of crime, and particularly sexual assault matters, is one of the biggest issues facing civil libertarians today. The media regularly portrays accused persons as 'criminals' without attention to basic rights in the system; and with only scant lip service to the notion that 'allegations' have been made. The media frequently misreports evidence presented in court, and even more frequently misinterprets, or spins the meaning of that evidence. An even greater problem is the criticism of the process often occurring when the system finds the proof of a crime to be insufficient. The media may imply the guilt of an accused in advance of any verdict—and frequently appears to consider their interpretation more important than the determination of the judge of the facts in the particular matter.

The issue of reporting of court proceedings is a classic issue of balance. Trial by media is often a reprehensible outcome for someone against whom a complaint is made—be it well founded or baseless. The greatest problem is that none of the classical safeguards of a criminal trial (or even a summary hearing) exist in a media frenzy.

The solution to the media problem is not easy to determine. This is because an issue of balance arises in the weighing of the free press' right to comment on issues of public importance or debate, compared to the individual's right to be judged according to law.

Freedom of speech, particularly where held by the free press, is also a crucial civil right to be supported on principle. The limitation of this right to comment has the potential to stifle democracy. Free criticism of the government is an essential tenet of democratic government in a constitutional based system. The right to public hearings and the access of the public to proceedings before the courts are further democratic protections. The reporting of the operation of the law is a crucial means for citizens to assess the government of the day.

It is a very difficult balancing act.

One possible analysis—put forward as a point for future debate—is the suggestion that for individuals their right to privacy **until** proven guilty or innocent is greater than the public's right to receive information through the media during the course of a hearing. Such a model might allow persons to be tried at law, in the absence of media scrutiny during the process of trial. The individual accused would remain protected by the appellate system of review. The media would be free to report issues at trial after the hearing was concluded.

Such a model **might** allow justice at law to prevail for an individual accused, whilst ultimately allowing free access to the administration of justice. No doubt the issue is one for debate.

Legal profession

Simring criticizes a legal profession bent on profit in relation to sex allegations. It should probably be said that the legal profession as criticised by Simring is not the meat and three vegetables of the profession involved in sex allegations. If there is a no-win no-fee contingent working on sexual assault related matters, I have not encountered it as a lawyer in general and criminal practice.

Prosecutors are normally public servants; this is certainly so in the vast bulk of cases. If prosecuting in the local court they are normally police officers, normally holding the rank and entitlements of sergeant. If working in serious matters, they are tenured, independent barristers who are on the public payroll, and work for the public good. Prosecutors have an extensive set of obligations to the court; and should not be doggedly pursuing convictions—but rather putting rational evidence of guilt to the court for determination.

Should a group of lawyers exist who run claims with no merit (either by way of prosecution of criminal or civil matters); they would be in breach of their ethical obligations as lawyers and may be subject to professional sanction.

Defence lawyers acting in relation to sex allegations will often be either public servants in a legal aid organisation or be undertaking criminal defence work from the private sector for legal aid rates. The defence side of the legal work in a sex allegation case is not likely to be as lucrative as it might appear.

The ‘sex allegation industry’ is not a cash cow for the legal profession.

Judges

The judiciary involved in the hearing of sexual assault cases, are similarly to prosecutors, tenured independent people in all matters.

In less serious matters (in a structural sense—not diminishing the seriousness of such matters to those involved in them), Magistrates are employed by the State to judge issues of both fact and law. The Magistracy is checked in the fairness of its decisions by a number of possible avenues of appellate review.

In serious indictable matters, a Judge employed by the State determines issues of law and members of the voting public (a jury) are charged, as judges of fact, with the task of determining the guilt or innocence of an accused person.

A very important civil libertarian issue arises from the notion of judicial decision-making and is properly raised by Simring.

The State holds the power to deprive people of their liberty. It should be our concern as civil libertarians that this is only done in the most compelling category of cases. It should be well known to all, that this should occur only (in principle—if not in practice) in cases where the charge has been proven beyond a reasonable doubt. This is **not the same as a** determination on the balance of probabilities. A judge or jury would be falling into error should they think that it is ‘probable’ that an accused did the act charged and from that make a finding of guilt.

The criminal justice system, and particularly the central notion of ‘reasonable doubt’, is geared to minimize the number of wrongful convictions. It is unfortunate, and we continue to be concerned, that such convictions do continue to occur.

Mental health professionals

An aside to the normal prosecution process is the involvement of mental health professionals. One of the sometimes controversial issues in sex allegations is ‘revised memory’. In the administration of justice, this is an occurrence very rarely seen and likely given very little weight by a jury or judge. The issue will not be addressed further here.

Psychologists, psychiatrists and mental health nurses play two important roles in the criminal justice system: first, caring for the mental wellbeing of victims, or complainants; and second, in treatment and care for a proportion of criminal defendants.

The proper maintenance of the mental health of complainants is an issue which rebounds in the rights and liberties of individuals.

In today’s criminal justice system significant numbers of people alleged to have committed offences have mental health problems. This is likewise the case in regard to sex allegations. The assessment of people in this position is a structural role which is importantly undertaken (and underfunded) within the system.

Unfortunately, in regard to convicted sexual offenders, a view is often taken (and is now built into the rehabilitation structures), that treatment and rehabilitation cannot proceed without admission of guilt. There are now very problematic prisoners’ rights issues deriving from the CUBIT program for rehabilitation of sex offenders. This is an ongoing topic of discussion for civil libertarians.

Legislature and executive

Many of the questions of a balance of rights are in the hands of the legislature. They are not in the main held by lawyers, judges, prosecutors or mental health workers. The operating parameters for all these groups are fixed by the legislature. Procedural law properly limits the actions of all these groups. The balance is a question properly determined by Parliament after public consultation and debate.

Media influence

The greatest difficulty in the sex allegation area of the law, in the view of the author, is the media’s influence over the current Government—at both Federal and State levels. This has led to fast and ill-considered changes to legislation. Often legislation and common law protecting individual rights that has taken hundreds of years to develop, is cut away by the current Governments in exchange for column inches and sound bites. Recent examples of change in the ‘sex allegation industry’, are CUBIT (an administrative imposition on prisoners), and the changes to the questioning rules for unrepresented accused in sexual assault matters. In the latter, the greatest concern is the reason for the changes and the manner in which the changes were rushed through. Current Governments have little regard for researched and considered change and **too** great a regard for fast media responsive changes.

One of the biggest problems with the 'sex allegation industry' is the profitability of the headlines and sound bites. The media and its close relationship to executive and legislative government can be seen as the root cause of many of the real problems with the 'sex allegation industry'.

BOOK REVIEWS

JESSIE STREET: A REVISED AUTOBIOGRAPHY

Lenore Coltheart (ed.)
Federation Press, Sydney, 2004
Reviewed by **Ken Buckley**

This is the story of a great Australian. She was a strong-willed woman, accustomed to getting her way, as remarked by Faith Bandler, her friend in the Aboriginal rights movement.

Jessie was born into a wealthy pastoral family in northern NSW. A tomboy on the big cattle-station, she went 'home' to a select girls' school in England for her education. The headmistress was a graduate of Cambridge University—an unusual position in 1903. Besides the school atmosphere (where, as an Australian, she was nicknamed 'Bushranger'), Jessie was strongly influenced by the suffragette movement in England, and she returned to Australia with feminist attitudes which were to the fore in her life from then on.

Before graduating from Sydney University, Jessie met and later married a fellow-student, Kenneth Street. His father was a Supreme Court judge, and Jessie's choice of the son as marriage partner was much approved by Jessie's conservative father, who had originally opposed her wish to go to university, as he feared that there she would meet some 'bounder' and marry him!

The marriage of Jessie and Kenneth Street was very successful. He became a Supreme Court judge in 1931, by which time four children had been born to the couple. Yet, Jessie Street was never a stay-at-home housewife. She used her social position to travel around the world, making contacts with women engaged in feminist activities. As she acknowledges in this book: 'Only by paying for domestic work were wives emancipated from the role of unwaged worker' (p. 82).

Jessie was a very lively, spirited young woman, determined to make her mark in life. She was also a first-rate organiser and in the 1920s she became president of the Feminist Club in Sydney and an executive member of the League of Nations Union.

In the great Depression of the 1930s, Jessie worked in many organizations aimed at relieving distressed families. This was not simply charitable work. There was, for example, the Married Women's Teachers' campaign against the sacking of female teachers (though not male) who were married.

Jessie's thoughts went beyond the effects of the Depression. She considered the causes and became a socialist when she 'realised how effectively national policy can be determined by those who controlled the finances. If there is private and not public control, then private and not public profit is the goal pursued' (p. 183).

In 1938, Jessie Street visited the Soviet Union. She was excited to find women being employed as train-drivers and in other jobs usually restricted to men in other countries. She was equally impressed to discover that equal pay for women was not an issue in the USSR, as there was no such gender discrimination there.

Given this experience, when there was a massive German attack on Russia in 1941, Jessie Street was elected president of the new Australian Soviet Friendship Society, and she became famous (infamous to some people) as organiser of a very successful campaign to collect and export sheepskins for Russia. She had become strongly anti-fascist on the international scene in the 1930s.

Jessie came into her own in the Second World War. She worked hard to establish a Women's Charter aimed at equality with men in a variety of matters, and there were some important achievements during the war, in the context of a shortage of men available for work in industry. Jessie herself, under an assumed name, worked for a time in a munitions factory in Melbourne, in order to see what conditions were like for women. It was quite an educational experience for a woman of Jessie's background.

By this time, Jessie had joined the Labor Party, although she was soon bored by the parochial emphasis at branch meetings. At another level, she met Curtin, Chifley and Evatt. Such contacts bore fruit when she was chosen as a member—the only female member—of the Australian delegation to the founding conference of the United Nations in San Francisco in 1945. As usual, she made a strong contribution to debates there, after which she went on tour to women's groups in the US, UK, USSR and India.

At that point, Jessie Street's original autobiography ended. It was published in 1966, four years before she died. The current publication has been revised to eliminate inaccuracies and repetitions, with an additional concluding chapter by the editor. This chapter refers very briefly to 'Red Jessie's' continuing connection with the United Nations and her membership of the World Peace Council in the 1950s; also that she investigated Australian Aboriginal living conditions and drafted a petition calling for an amendment to the Australian constitution so as to give Aborigines the right to vote.

The epilogue to the current publication also contains some photos, together with family letters from Jessie in the 1950s. Apparently unknown to the editor is a slim file of letters from her to Doc Evatt, which conveys more of a flavour of her beliefs. For example, there is a letter from London, dated 10 April 1951, congratulating Evatt on his courage in opposing Menzies' attempt to ban the Communist party:

> Bert, can't you aim to be the leader of the workers and Trade Unionists…Never mind about the other classes of people. I believe they have had their day…Position, privilege and power, based on profits, is I believe completely finished. The thing now is to build a real Commonwealth in which all have a share of the good things of Life' (Evatt collection, Flinders University library, File—Jessie Street).

Over optimistic she may have been, but where today is the equal of Jessie Street, depicted so refreshingly in this book?

LETTERS TO THE EDITOR

(To: Mr Cameron Murphy, Executive Committee and Editor, Journal of NSW Council for Civil Liberties Inc.)

I read the article 'The Sex Allegation Industry' by Gene Simring, expecting as I continued to read that the writer would back up the allegations of fraudulent sex allegations with facts, cases and figures and state who were the group or groups being targeted in the article—women, homosexuals or child sexual abuse complainants. Unfortunately just more allegations.

I respect the CCL's record of advocacy for prisoners, political activists, Aboriginals, refugees and their record of opposing legislation designed to limit civil liberties but I cannot recall the CCL ever raising its voice on issues concerning women's rights and liberties. Nor was the CCL active in the debates concerning rape or sexual harassment or discrimination in divorce or in support of the passing of the *Sex Discrimination ACT 1984*.

However when women have managed such matters legitimised and/or legislated, the CCL opens its Journal to an unsubstantiated attack on one aspect of women's hard won rights.

…

Perhaps the CCL could regain some credibility with women or at least with this long time member by publishing my letter; by asking the writer of the article to substantiate his article with some facts and figures and by protesting to the Federal Government about its proposed amendment to the *Sex Discrimination Act* to accommodate the Catholic Education Commission's spurious educational arguments on the matter of male teachers in primary schools.

Joan Bielski AM

The article on 'The Sex Allegation Industry' in the recent issue of Civil Liberties is appalling. It consists of four pages of generalisations impugning the integrity of lawyers, judges, magistrates, even tipstaffs, involved in court cases which relate to sex.

Not one such case or person is specified or named in the article. No facts are given to substantiate the vague claims. The author appears to suffer from persecutory delusions, leading to snide comments dressed up by weasel words.

Ken Buckley

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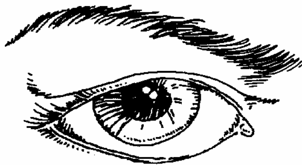

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