

Civil Liberty

Journal of the New South Wales Council for Civil Liberties Inc

Issue 198 September 2004

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NOTICE OF ANNUAL GENERAL MEETING OF THE NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES INC.

to be held at

6.00 pm on Wednesday 27 October 2004

At the Lady Mayoress' Room,
Sydney Town Hall
George Street, Sydney

A nomination form is enclosed for all those CCL members wishing to nominate for a position on the CCL Committee for 2004/2005.

All motions on notice for consideration at the AGM must be received by the NSWCCCL office no later than 4 October 2004.

MOTION FOR AGM

Motion: That the members are in favour of the NSW Council for Civil Liberties borrowing an amount determined by the Executive Committee up to a maximum of \$100,000 secured by a mortgage over its property at Glebe in order to meet the expenses of the activities of the Council.

Background information:

The Council's expenses over the last few years have not been covered by its income, and as a result the cash reserves of the Council presently stand at around \$40,000, down from over \$100,000 a few years ago. The Council's annual expenses run at about \$50,000 per annum, and the committee's view is that these cannot be significantly cut without seriously impacting on the extent of the Council's activities. The Council has a major asset in its building, which is worth over \$700,000.

(continued p. 3)

JOURNAL DEADLINE DATES

Material Deadline: 10th November 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.

CIVIL LIBERTY

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David Leung Designer

COMMITTEE MEETINGS

Meetings are usually held at 6.30pm on the fourth Wednesday of the month, at the Council's office, 149 St Johns Rd, Glebe. Members are welcome to attend as observers.

SUBCOMMITTEE MEETINGS

Subcommittees usually meet monthly. For further information please contact the Executive Secretary who can tell you when your subcommittee meets or put you in contact with the relevant Convenor.

Fundraising/Finance

Convenor: Susan Cleary

Civil Rights

Convenor: Doug Nicholson

Criminal Justice

Convenor: Shaughn Morgan

Security & Intelligence

Convenor: David Bernie

Complaints

Convenor: Tony Hay

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MOTION FOR AGM (CONT')

The Council's finances have been impacted by the withdrawal some years ago of funding from the Commonwealth Government, which used to be around \$12,000 per annum, and the fact that no major fundraising events have been undertaken, or are in contemplation. The Committee has sought to raise funds through letters seeking donations from members and others, but these have not had a major impact to date.

The Committee considers it prudent to canvas the views of the membership as to the funding of the Council's activities. The Committee has considered options involving the sale of the Glebe property, but is not in favour of those options. The Committee considers the proposal of borrowing against the security of the property to be the most desirable option at this stage, and seeks the approval of the members of this position.

HUMAN RIGHTS TRIAL OBSERVER PANEL

The Law Council of Australia has established and will administer a Human Rights Trial Observer Panel. Nicholas Cowdery AM QC has agreed to be one of the Panel's co-chairs. Members of the Panel may be sponsored by the Law Council to observe trials where there are reasonable grounds for suspecting that the trial may be unfair or improper, having regard to universal human rights standards. For example, Lex Lasry QC was an observer during David Hicks' recent appearances before the Military Tribunal.

NSWCCL is seeking the names of interested members whom it can put forward to the Law Council as appropriate panel members. For the selection criteria and further information, please read the Law Council of Australia Guidelines for Trial Observer Missions. This document is available by

contacting NSWCCL or the Law Council of Australia.

If you have ideas about members who might be appropriate nominees, please contact NSWCCL. Could you also provide a brief supporting statement (just a sentence will suffice).

REPORTS

SECURITY AND INTELLIGENCE SUBCOMMITTEE

The NSW Council for Civil Liberties (CCL) has, in association with the Australian Muslim Civil Rights Advocacy Network (AMCRAN) taken part in the launch of a new booklet about the terrorism laws called 'ASIO, The Police and You'. The booklet sets out the structure of the anti-terrorism laws and what remaining rights people have in respect of those laws. The launch of this booklet received some considerable publicity with Mr Justice Dowd speaking along with Senator Kerry Nettle and myself.

As was pointed out at the launch, the booklet may soon become outdated because of continuing changes to anti-terrorism laws. The latest outrage at the Federal level is the new offence of consorting with terrorists. Although certain exceptions were made in the draft proposal, they were clearly too limited on any view of the matter. A parliamentary committee has criticised those limitations, but has not fully rejected the proposal.

The NSWCCL completely opposes any proposal for consorting laws. Older members will recall consorting laws at State levels were abused by State police officers. The whole concept of a criminal offence simply aimed at a person's associations, strikes at the very basis of freedom of association and freedom of movement in a democracy.

Unfortunately, however, it appears that some sort of proposal will actually pass Federal Parliament since the Opposition is trying to avoid security issues as an election issue.

This has been the common theme underlying anti-terrorism legislation that has been introduced over the last few years. Australia now has in place a set of anti-terrorism laws that are in many ways far more draconian than those in Britain or the United States, despite these countries having a higher terrorist threat level.

David Bernie
Vice President and Convenor, Security and Intelligence Subcommittee

FUND RAISING AND FINANCE SUBCOMMITTEE

On 21 May, Justice Jeff Shaw was our guest speaker at a lunch in the President's dining room in Parliament House. His talk on 'The Courts, Legislature and Human Rights' was most interesting and well received by all. An edited version is included in this edition of the journal.

We were pleased to have Andrew Wilkie as our guest speaker for our luncheon on 17 September. The title of his address was 'Tell them what they want to hear'. The event was thoroughly enjoyed by those in attendance.

As this is the last journal before the Annual General Meeting, I would like to take the opportunity to thank Joan Kersey for the great job she has done in organising guest speakers for our lunches at Parliament House over the past two years, and hope she will continue to do so. Joan suggests speakers, contacts them and persuades them to come, and then produces them. What more could you ask for? Thank you Joan from all the committee.

Susan Cleary
Convenor, Fundraising/Finance Subcommittee

CIVIL RIGHTS SUBCOMMITTEE

At its May 2004 meeting, the Committee of the NSW Council for Civil Liberties (NSWCCL) reaffirmed the Council's commitment to an Australian Bill of Rights by adopting a policy drafted by the Civil Rights subcommittee (see website: <<http://www.nswccl.org.au/>>).

One of the rights protected by a Bill of Rights, is the guarantee of freedom from arbitrary interference with your privacy. Almost everyday on the streets, trains, pubs and other public places in Sydney, the NSW Police use drug detection dogs to violate that guarantee. The NSW Ombudsman has released a discussion paper that reveals that these dogs have a 'success rate' of just 30%. In other words, 70% of the people the dogs identify as being in possession of drugs, actually have no drugs on them. Those 70% are treated as criminal suspects, subjected to searches (even strip searches), and their names recorded on the police database—but they have done nothing wrong. The CCL has made a submission to the Ombudsman on this issue, pointing out that the dogs are so inaccurate a method of detection that they should not be used.

Another fundamental right provided in a Bill of Rights is equality before the law. In Canada, where there is a Charter of Rights and Freedoms in the Constitution, several courts have ruled that the common law definition of marriage as 'a union between one man and one woman' is discriminatory and unjustifiable in a free and democratic society. In Canada, marriage is now defined as 'a union between two people'—upholding the principle of equality before the law and making same-sex marriages legal.

Conservative groups around the world, have been worried ever since that their courts will follow the Canadian decisions. In the US, President Bush unsuccessfully attempted to amend the Constitution to entrench discrimination against same-sex couples by banning gay marriage. In Australia, the Prime Minister wants to ensure that the

Marriage Act enshrines the discriminatory definition of marriage, coined in 19th century Victorian England, in 21st century Australian law. Without a Bill of Rights, it is possible that he might succeed. The ALP has announced that it will support the legislation.

The CCL has made a submission to the Senate Committee looking into the changes to the Marriage Act, but it appears that the politics of this issue are such that the Senate will pass the legislation without waiting for the Committee to report.

Another fundamental human right is the right to adequate housing. The NSW Parliament recently passed legislation introducing 'acceptable behaviour agreements' for public housing tenants. Anyone deemed by the Department of Housing to be engaging in 'anti-social behaviour' will be forced to sign one of these agreements. 'Anti-social behaviour' is only vaguely defined in the Act as including 'emission of excessive noise, littering, dumping of cars, vandalism and defacing of property'. A tenant who fails to modify their behaviour faces eviction. It is up to the tenant to prove to the Consumer, Trader and Tenancy Tribunal that he or she has not breached the acceptable behaviour agreement. A tenant who refuses to sign an acceptable behaviour agreement also faces eviction.

The Housing Minister, Mr Scully, assures critics of the legislation that specialist response teams will provide support to people forced to sign these agreements. The CCL is extremely concerned about the impact this legislation will have on those with mental illnesses and intellectual disabilities. There is also scope for vexatious claims being made against unpopular tenants. An evicted tenant has only the Minister's assurance that the Department will continue to provide support—the legislation is silent on what happens to an evicted person.

You are welcome to join the Civil Rights subcommittee in our valuable work. Just contact the NSWCCCL office to register your interest. Most of our submissions and policy

documents are also available on the NSWCCCL website:
<<http://www.nswcccl.org.au/>>.

Civil Rights Subcommittee

AUSTRALIA INSTITUTE REPORT ON NGOS AND DEMOCRACY

The Australia Institute released a new discussion paper (no. 65) in June. It was titled 'Silencing Dissent: Non-government organisations and Australian democracy'. It sets out and discusses the results of a survey conducted by the Institute into the perceptions of NGOs with respect to having their message heard by governments in Australia. The results are disturbing. A summary and full copy of the discussion paper is on the Institute's website at <<http://www.tai.org.au/>>. It is hoped to include a summary of this paper in a future issue of the journal.

ARTICLES

A WELCOME FOR AUSTRALIA'S FIRST BILL OF RIGHTS

Michael Walton

To commemorate the first day of the operation of Australia's first Bill of Rights, a forum on the national implications of the ACT Human Rights Act ('the HRA') was held in Canberra on 1 July 2004. It was sponsored by the law centres from the Australian National University and the University of New South Wales.

The opening speech was delivered by the ACT Chief Minister, Jon Stanhope

A WELCOME FOR AUSTRALIA'S FIRST BILL OF RIGHTS (cont')

MLA, who was the driving force behind the HRA. In explaining why Bills of Rights are necessary, Mr Stanhope condemned the Federal Government for presiding over a "shameful period of Australian history" in which human rights have been progressively whittled away. He pointed to the retreat from reconciliation and indigenous self-determination, the failure to protest the continuing arbitrary detention of Mamdouh Habib and David Hicks in Guantanamo Bay, the treatment of terrorism offences as crimes that need not conform to the strict protective procedures of the criminal law, the failure of the Federal Government to sign up to optional international human rights treaties on torture and the elimination of discrimination against women, the treatment of refugees and asylum seekers, and the continuing discrimination against gays and lesbians in federal law.

The Chief Minister was critical of conservatives who claim that the rights of Australians are adequately protected by the common law. Australian common law, Mr Stanhope said, was "slow and patchy"—and had still not recognised a right to privacy. He went on to point out that conservatives contradict themselves when they claim that a Bill of Rights would give judges too much power, because it is exactly the same judges who make the common law—the common law that conservatives claim protects our rights. Either they trust judges or they don't—they can't have it both ways.

Elizabeth Kelly, the senior ACT administrator charged with overseeing the implementation of human rights principles in the ACT, also spoke at the forum. She observed that the HRA would ensure that human rights principles play a central part in legislating, administering and interpreting the law in the ACT. Ms Kelly also said that the HRA would increase community awareness of their civil and political rights.

Thomas Poole, from the University of Nottingham, gave an international insight into the impact of introducing a Bill of Rights. In the UK, he said, they were "complacent and self-satisfied" about the common law and Parliament protecting human rights. That complacency evaporated once the UK introduced its own HRA. Courts began to find that human rights violations do occur in Britain. All of a sudden, legislators and administrators had to pay attention to human rights.

The keynote speaker at the forum was Nicola Roxon, ALP shadow Attorney-General. Attorney-General Phillip Ruddock had been invited, but was overseas and so could not attend. Ms Roxon said that the ALP had no plans to introduce a federal Bill of Rights. Ms Roxon accused the Prime Minister of employing the politics of division and exclusion, and of systematically denigrating human rights in the community. The damage of the Howard years would require a lot of healing, Ms Roxon said. The legal priorities of a Latham government would include taking steps towards a republic and signing the optional international treaty on torture—leaving Australian mandatory immigration detention centres open to UN inspection. Other priorities would be indigenous, children's, refugee and women's rights. Ms Roxon also committed the ALP to removing all discrimination against same-sex de facto couples in federal law. However, she made it clear that this policy did not extend to amending the Marriage Act to allow same-sex couples to marry.

Simon Bronitt, from the ANU, discussed the impact of the UK Human Rights Act on the criminal law. Many court cases under the UK HRA deal with the inadequacies of the common law's implementation of the right to a fair trial. Other human rights have led to changes in criminal law. The right to privacy, for example, has led to the exclusion of evidence obtained by entrapment. Interestingly, the UK courts came to this conclusion by relying heavily on the

dissenting decision of the Australian High Court Justice Michael McHugh in *Ridgeway*—an Australian common law case in which the majority found that evidence obtained by entrapment can be admitted in Australian courts. The reversal of the presumption in favour of bail is also under judicial scrutiny in the UK.

UTS academic Megan Davis reported that there was overwhelming support for the HRA in the indigenous community. She argued that indigenous rights, though not explicitly recognised, are indirectly incorporated by provisions protecting the rights of racial minorities.

The final session of the forum was a little more lively with critics of the HRA surfacing—from both ends of the political spectrum. Bill Steffaniak, deputy leader of the ACT Opposition, quoted heavily from the country's leading anti Bill of Rights advocate—NSW Premier Bob Carr. He said that people in the ACT were not interested in a Bill of Rights, that the HRA was adding an unnecessary layer of bureaucracy and that many people feared an era of judicial legislation.

Cassandra Goldie, from the Centre for Housing Rights and Evictions, condemned the HRA for being unable to effectively protect human rights. When a court finds that ACT legislation is incompatible with the HRA, all that the Government is required to do is to table a report in Parliament—there is no obligation on Parliament to change the incompatible law. Ms Goldie contended that the HRA, if it had been in force in the Northern Territory, would not have stopped the mandatory sentencing laws. She argued that the HRA should provide the independent judiciary with the power to strike down laws that violate human rights and to award compensation to victims.

Overall, the forum was informative and demonstrated that the years to come in the ACT are going to be very interesting time indeed for human rights. Hopefully the momentum created by the ACT's bold move will continue. Already, the Victorian Attorney-General has announced an investigation into whether his state should have a Bill of Rights.

For more information about the ACT Human Rights Act, visit our website: <<http://www.nswccl.org.au/>> and click on 'Bill of Rights'.

THE COURTS, THE LEGISLATURE AND HUMAN RIGHTS¹

Jeff Shaw²

Writing in 1954, the constitutional lawyer Professor Geoffrey Sawer expressed concern about a recent legal development—the 1950 legislation providing for the dissolution of the Communist Party. That Act recited accusations against that Party which, if true, would have justified a prosecution under the ordinary, pre-existing law. He pointed to the potent amendments of the *Crimes Act* in relation to sedition, which cast the burden of disproof on the accused, contained vague definitions of the offence (such as to “promote feelings of ill-will and hostility between different classes of his Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth”), and by-passed jury trials in relation to associations alleged to be seditious. In that context Sawer expressed the view

¹ Edited version of the address to the NSW CCL on 21 May 2004, in the President's Private Dining Room, Parliament House, Sydney. Notes and references relating to this address may be obtained on the NSWCCCL website or from the NSWCCCL office.

² Jeff Shaw is a judge of the Supreme Court of New South Wales.

that: "it is certainly necessary that both the terms of these laws and their administration should be jealously watched, and a Council for Civil Liberties is a very necessary organisation in any society whose formal legal structure on these matters is so elastic". That observation applies with at least equal force and effect to the legal environment in which we find ourselves 50 years later.

It is true that the dangers of terrorism cannot be ignored by elected representatives. It must also be acknowledged that there are some forces at work which pose a real physical threat to ordinary people and a challenge to liberal democracy and secularism. Notwithstanding these dangers, there is a vital role for informed, reasonable critics to put a countervailing view in relation to legislative intrusion upon the rule of law and freedom of legitimate political dissent. Similarly, we need rational debate about proposed laws which entail indefinite detention without charge or trial and lengthy periods of incarceration for the purpose of questioning without adequate access to legal advice or other assistance.

The CCL and me

I joined the NSWCCCL in the early 1970s when I was also part of the H V Evatt Labour Club at the University of Sydney Law School. I retained my membership until being appointed a judge last year. I was not as active as might have been desirable, but as a student, helped to secure the election of Ian Dodd (now Judge Dodd of the District Court) as a CCL council member. As most of you know, Ian then became the Secretary of the CCL for many years and played an active role in its various functions. I valued the friendship of Jim Staples, whom I knew as a member of the Lane Cove branch of the Labor Party, and also came to know Ken and Berri Buckley who were members of the Hunters Hill branch. When I went to the bar in 1976, I read with Jeff Miles, a CCL activist who became the Chief Justice of the ACT Supreme Court.

The Separation of Powers

Thomas Paine in his 1790 work *Rights of Man* was scathing about the lack of a written constitution in England "to restrain and regulate the wild impulse of power". He argued that "many of the laws are irrational and tyrannical, and the administration of them vague and problematical". Instead, Paine contended for a formal constitution which defined three distinct classes of government—legislative, executive and judicial. He identified the application of laws as being at the heart of judicial power. "It is that power to which every individual has appeal, and which causes the laws to be executed" he said. Under this 'separation of powers' doctrine, it is the courts which have the responsibility of implementing, executing, interpreting, applying and considering the validity of those laws passed by the Parliament.

Judges and Civil Liberty

A fearlessly independent judiciary has been described as "the least dangerous branch, of government". As Hamilton said in *The Federalist* (1787) "...although individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter". It provides an effective check and balance to legislative and executive decisions. Such a dispersion of powers between the elements of government has the tendency to favour individual rights and to curb authoritarian excesses. This is not to idealise the courts, because it must be recognised as a matter of history and practicality that injustices have occurred within law. Many judgments of the courts will be controversial and citizens are entitled to argue that they are wrong. But appellate remedies

exist within the judicial structure to correct mistakes or excesses and, subject to questions of constitutional validity, the democratically elected legislature can override, at least for the future, the effect of a judicial ruling.

It was H V Evatt, as a young Justice of the High Court in the 1930's who developed a view as to the political role of the courts in the early New South Wales colony up to the Rum Rebellion of 1808, and provided an insight into the rule of law as a catalyst for democracy. This thesis was developed by Dr David Neal who argued that the law formed an important part of the "cultural baggage" inherited from England by the colonialists and that the rule of law, including its rules, institutions and reasoning processes, played a prime role in changing New South Wales from a penal colony to a free society.

The importance of individual cases

Many of the civil liberties battles of the 1960s were fought in our courts. These included questions of censorship (for example the Oz obscenity trial), opposing the segregation of Aborigines, challenging the dimensions of offensive behaviour, supporting conscientious objectors to conscription for war, and seeking to limit the potential oppression of vagrancy legislation.

For some ultra-libertarians, the fighting of individual cases in the courts, even when they succeeded outstandingly, such as the opposition to the banning of D H Lawrence's *Lady Chatterley's Lover* mounted by Penguin Books in England, amounted to a defeat of principled opposition to censorship—nothing else could have been expected, they argued, from a mere court case.

On the contrary, incremental decisions of that era cumulatively led to a freer society, where adults could see and do what they like, provided that innocent third parties were not injured. J S Mill's great principle of liberty was enhanced on a case-by-case basis before judicial officers and juries in the common law world. Mill wrote that "the liberty of the individual must be thus far limited; he must not make himself a nuisance to the people".

In a less well known passage Mill considered the struggle between liberty and authority, declaring that "the strongest of all the arguments against the interference of the public with purely personal conduct is that, when it does interfere, the odds are that it interferes wrongly, and in the wrong place". Amidst today's controversies about detention without charge, the old common law writ of *habeas corpus*, ordering an imprisoned person to be removed to answer the cause in a court, has been resurrected. As Brennan J said in the High Court: "many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence may be overlooked until a case arises which evokes their undiminished force". The issue was raised in the Tampa case, but not authoritatively determined because, by the time the special leave application came to the High Court from the majority view in the Federal Court, the rescuees were beyond that Court's territorial jurisdiction.

The New Zealand Court of Appeal has recognised that *habeas corpus* is not shackled by precedent but "can adapt" and "enlarge" when new circumstances require that.

Judicial activism

For some commentators such controversies in the court represent an over litigious society, inappropriate meddling by unelected judges or, in a pejorative sense “judicial activism”. Yet, such creativity has always been part of our common law tradition. The judges have formulated, moulded and amended the law to meet differing social and economic conditions albeit constrained by clear, valid enactments of the Parliament. In a constitutional court such as the High Court of Australia, or the Supreme Court of the United States, judges have exercised the power to declare laws, otherwise duly passed, to be an excess of constitutional power, *ultra vires*, and therefore invalid, or to have contradicted basic human rights, whether or not expressed in a Bill of Rights or necessarily implied in a constitutional compact. Many notable examples are to be found in our law books: the right of an indigent person to legal representation in a trial for a serious criminal offence; the existence of native title to land, over-turning the legal fiction of *terra nullius*; the subsistence of native title despite the existence of a pastoral lease; the finding of an implied right to free speech, impinging upon legislative regimes dealing with defamation, political advertising and contempt of court.

Checks and balances

It is in this sense that the courts constitute a vital part of the balancing processes between real and pressing concerns of the community and the need for the powers of government, security and law enforcement agencies to be carefully circumscribed, so as not to unduly intrude upon human rights. This is a useful, creative tension which is assisted by civility of discourse between the courts and the legislature, involving an understanding and respect for the different roles which those institutions play.

Political radicals and the defence of ancient institutions

There is nothing incongruous about those on the radical, reformist side of the political spectrum defending ancient institutions which are, in their practical application, supportive of individual liberty. In such debates, they may find common ground with those of a more conservative inclination. Take British historian, E P Thompson’s defence of the jury trial against its dilution in the face of Irish republican terrorism of the 1970s. “The jury system” he wrote “is not a product ‘bourgeois democracy’ (to which it owes nothing) but a stubbornly maintained democratic *practice*; its practice can never have risen higher than the common sense and integrity of the jurors, but it has provided repeatedly a salutary inhibition—especially in matters of conscience and political behaviour—upon executive power”.

Reformist initiatives by Parliaments

The legislature has often conferred powers on courts or tribunals which have had significant social impact. Anti-discrimination laws have resulted in tangible measures to reduce harassment and enhance equal opportunity in the workplace. The evolution of administrative law in the last few decades has exposed bureaucratic decision makers to much greater scrutiny. Both as a result of common law and statutory changes, our courts are empowered to require reasons for the ruling, enquire whether the decision took into account all relevant considerations or was otherwise distracted by error or unreasonableness. The expansion of judicial review of public sector decision making has been justified on a number of bases: control of government power, protection of individual rights, improvement of the quality of administration and the fostering of participation. Chief Justice Spigelman has advanced a new description of such review, providing a broader context and protecting the proper role of judges—the “integrity branch of government”.

Whereas Lord Denning in the (English) Court of Appeal took the view that an implied or constructive trust could be used to divide the beneficial ownership of property, either within or without the bounds of matrimony, the Australian courts found such heterodoxy “unattractive”. In the area of domestic relationships, courts of equity were cautious about implying a trust to facilitate the fair division of property in relation to de facto and same sex relations. However, in 1999 the New South Wales Parliament acted, bringing in an innovative, non-discriminatory property relationships law.

In Australia, the conferral by legislatures of powers to deal with industrial issues has, with free labour market advocates dissenting, generally been seen as an enlightened exercise favouring a more egalitarian society and minimising the existence of the “working poor”.

In the United States, the (*New Deal*) *Wagner Act* of 1935 created a National Labour Relations Board to regulate bargaining in good faith and prohibit unfair labour practices, a law which the United States Supreme Court upheld as supportive of the fundamental rights of workers.

It would be simplistic to attribute all positive initiatives to one or the other sphere of government. The creative tension between the reformist impulses within elected legislature and the appointed, tenured judges should be recognised, not deprecated.

I wish the CCL well for the future and thank you for the invitation to address you today.

ANTI-TERRORIST MEASURES IN THE UK— WILL THE “NATIONAL EMERGENCY” EVER END?¹

Kate Beattie²

Despite sustained criticism from parliamentarians, privy counsellors, judges, lawyers, civil liberties and human rights organisations, and the wider public, the UK Parliament has recently renewed for another year its controversial anti-terrorism measures which allow indefinite detention of foreign nationals suspected of being international terrorists.

Part 4 of the Anti-Terrorism, Crime and Security Act 2001 (UK) (ATCSA) provides for the indefinite detention, without charge or trial, of people certified by the Secretary of State as being a risk to national security and suspected of being international terrorists, if they are not UK nationals, and cannot be removed from the country for practical or legal reasons. While the legislation is expressed in terms of international terrorism, the UK’s derogation from the European Convention on Human Rights (ECHR) was made with reference to September 11, and accordingly the derogation does not extend to other forms of international terrorism.

Detainees are neither charged nor prosecuted, but can be detained indefinitely in high security conditions. They may appeal against certification to the Special Immigration Appeals Commission (SIAC), which is presided over by a high court judge. The appeal process considers whether or not there are reasonable grounds for the Home Secretary’s belief or

¹ Notes and references relating to this article may be obtained on the NSWCCCL website or from the NSWCCCL office.

² Kate Beattie is Human Rights Coordinator at Doughty Street Chambers, London.

suspicion. Detainees may leave the UK of their own volition if they can find a state willing to take them, and SIAC may grant bail, subject to conditions.

Sixteen foreign nationals have so far been detained under these provisions, some for over two years. Of these, two have voluntarily left the UK (for France and Morocco) and one was released on the grounds that the Home Secretary had not established that he was a terrorist whose presence in the UK was a threat to national security. One detainee was recently released on bail on mental health grounds and will remain at home under stringent conditions. One individual has been certified, but is currently detained under other powers.

Incompatibility with human rights obligations

The provisions of Part 4 are incompatible with the UK's human rights obligations. Under the ECHR, detention is only permitted for certain reasons (after conviction, on mental health grounds, etc), one of which is "the lawful arrest or detention of a person...against whom action is being taken with a view to deportation or extradition" (Article 5(1)(f)). However, the ECHR prohibits removal of a person where it might result in treatment contrary to Article 3 (the prohibition on torture and inhuman or degrading treatment or punishment). Accordingly, if an ATCSA detainee establishes that removal would violate Article 3, and there is no alternative destination for him or her, their continued detention may not be permissible because it cannot be said that action is not being taken "with a view to deportation" as required by Article 5. For this reason Part 4 violates the ECHR, the Human Rights Act 1998 (UK) and Article 9 of the International Covenant on Political and Civil Rights (ICCPR), which is the equivalent provision to Article 5 ECHR.

This acknowledged incompatibility with its human rights obligations led the UK to derogate from both the ECHR and ICCPR. It is alone among states party to those treaties to do so in the wake of September 11. The UK's derogations state that "a public emergency exists within the UK" within the meaning of Article 15 ECHR and Article 4(1) ICCPR respectively, and that "the threat from international terrorism is a continuing one". The Home Secretary, David Blunkett, recently stated that "it is not possible to predict for how long the current state of emergency will continue to subsist"; and the Home Office has defended the legislation in its latest discussion paper on anti-terrorism measures, *Counter Terrorism Powers: Reconciling Security and Liberty in an Open Society*. However, as the UK Parliamentary Joint Committee on Human Rights (JCHR) has recently reported, insufficient evidence has been given to the UK Parliament to justify an indefinite derogation from these treaties, and there is no end in sight to the "national emergency".

Absence of fair trial guarantees

The SIAC procedure fails to adhere to basic fair trial guarantees. While detainees may appeal to SIAC against certification by the Home Secretary, suspects are not fully represented or present during these proceedings, and are not informed of all the evidence against them. SIAC holds "closed sessions" to hear sensitive intelligence material, at which they are represented by a "special advocate" appointed to represent their interests, but are not themselves entitled to appear. Special advocates are present to "enhance the interests of the detainee", but are unable to communicate with the detainee or his lawyer after seeing the sensitive material.

In other words, the detainees are not entitled to know the full case against them. Furthermore, the standard of proof involved in SIAC proceedings is low ("reasonable belief and suspicion"). As Liberty UK has pointed out, the "lack of due process means that the

suspect does not have the chance to hear and test the case against him and furthermore the process itself is free from any statutory or international rights that ensure a fair hearing". These failings recently led a SIAC member to resign in protest.

There have been long delays in substantive SIAC appeals, in part due to the small number of special advocates and to delays in obtaining legal aid, as well as the initial challenge to derogation from Article 5 (still to be determined by the House of Lords). The Newton Report points out that the process has been lengthy, taking almost 1½ years between initial detention and the hearing of the appeal before SIAC, and almost 2 years before determination of the appeal, which it notes is "equivalent to a significant custodial sentence".

Discriminatory effect

Indefinite detention is only possible for foreign nationals who cannot be deported, which means that the provisions have a discriminatory impact in violation of the prohibition on discrimination in Article 14 ECHR. In July 2002, SIAC found that Part 4 was incompatible with Article 14, but this decision was overturned by the Court of Appeal in October 2002. The question will be decided by the House of Lords Judicial Committee later this year.

Concerns about its efficacy as an anti-terrorism measure on this basis have been raised repeatedly, as the potential risk posed by UK nationals is not addressed by the legislation. This is despite accumulating evidence that the threat from al Qaeda-related terrorism is not predominantly from foreigners but from UK nationals as well.

Alternatives to indefinite detention

As argued in the Newton Report, ATCSA demonstrates the tendency for unnecessary or ineffective powers to be taken by governments in response to a terrorist threat merely in order to be seen to be doing something. The legislation was passed at great speed and without adequate legislative scrutiny. The Newton Report has called for the replacement of these provisions "as a matter of urgency", with new powers which would apply to both British and foreign nationals, and which would not require a derogation from the ECHR. This call was reiterated by the JCHR in February 2004, which argued that "a more satisfactory legal framework is urgently required which would be both effective and compatible with the UK's human rights obligations including full compliance with ECHR Article 5".

In light of the Home Office's recent discussion paper, there is little room for optimism that Part 4 of ATCSA will be replaced in the near future. It is to be hoped that the House of Lords (and, if necessary, the European Court of Human Rights in Strasbourg) will put a check on detentions under Part 4, which are for a potentially indefinite period.

ABOLISHING SHORT TERM PRISON SENTENCES— BENEFITS AND RISKS¹

Pauline Wright²

Introduction

The NSW Sentencing Council has published a discussion paper on the merits of abolishing short sentences. The NSW Council of Civil Liberties President Cameron Murphy and Vice President Pauline Wright addressed an Institute of Criminology Seminar 'No Imprisonment—Mandatory Imprisonment', held on 24 May 2004, at which this issue was discussed.

Clearly if short sentences of imprisonment were abolished and offenders were instead diverted to alternative options, this would be of great benefit to the community. The NSW prison population has been growing at an alarming rate, and the NSWCCCL would welcome any proposal that would have the effect of reducing the prison population and stopping people from re-offending. There are, however, significant problems which would mean that the anticipated benefits may not, in fact, eventuate.

Sentencing options and alternatives to full-time imprisonment are neither sufficiently resourced, nor available to all eligible offenders throughout the State. The Probation and Parole Service is inadequately funded, and struggles even now to fulfil its reporting, work program and supervision load. Other support services are similarly struggling.

Further, there are unfortunately some circumstances where a short term in goal may be the appropriate penalty and there is serious concern that to abolish sentences of less than six months would impose a de facto minimum mandatory term of six months. The courts should have available to them more options, rather than less.

PROPOSALS TO ABOLISH TERMS OF IMPRISONMENT OF 12 MONTHS OR LESS AND ASPECTS OF THE PROGRESSION TO MANDATORY SENTENCING³

Cameron Murphy⁴

The primary objective of any sensible criminal justice system should be to keep people out of it, and out of incarceration. The best approach in tackling crime is clearly to expend more resources on analysis of, and prevention of crime, rather than prosecuting, and sentencing after the event.

¹ Pauline Wright's presentation at the seminar 'Impact of Abolishing Short Prison Sentences', and an addendum to the presentation, 'Summary of Issues Identified by the 2004 NSW Sentencing Council Discussion Paper' can be found on the NSWCCCL website: <<http://www.nswccl.org.au/>>.

² Pauline Wright is the Vice President of NSWCCCL, Councillor of the Law Society of NSW and Chair of the Criminal Law Committee of the Law Society of NSW.

³ Edited version of a presentation given to the Institute of Criminology Seminar on 24 May 2004.

⁴ Cameron Murphy is the President of NSWCCCL.

Short term sentences do not provide any real deterrent to crime but they do have a devastating impact on families, and society. The person incarcerated for a short term will usually lose their employment and become disconnected from society for the term of their incarceration. They lose the ability to provide for others, and take a long time to reintegrate into the community.

The sentence is often too short for the prisoner to engage in meaningful rehabilitation programs. (Many such programs at Long Bay are offered in the final 14 weeks of imprisonment). In these circumstances it is usually the main breadwinner that is removed from the family, causing social chaos behind them as they serve their sentence for a few months. It is rare that a short term sentence provides more benefit than detriment to the community as a whole.

These are the reasons that are used by the sentencing council in favour of the abolition of short term sentences, and are reasons that have convinced the NSW Government to act. They apply equally, and are just as powerful as arguments for a presumption in favour of bail, but the Government has taken exactly the opposite stance on that issue.

While there are very good reasons for eliminating short term sentences in most cases, there are examples where short term sentences are both necessary and beneficial. For example in the Western Australian experience, which I understand my colleague Pauline Wright will explore in greater depth, Aboriginal communities have welcomed the abolition of short term sentences but remain wary that it may lead to longer sentences being delivered. They recognise that in rare cases a short jail term is sometimes the only way to interrupt a cycle of alcoholism and depression. It provides breathing room for the community, and in a sense it acts as a circuit breaker for the individual.

The proposal of the sentencing council to remove sentences of six months or less has its merits, but can also be detrimental to the interests of justice, and may lead to a form of mandatory sentencing as an unintended consequence. If short term sentences are to be removed then they must be replaced with meaningful alternatives to incarceration. Social programs that ensure that criminals repay the community for their offence, and provide them with education and other services that reduce the risk of re-offence. Otherwise the result will be nothing more than a delay in incarceration and for a longer period.

We can already see the devastating consequences of poorly devised diversionary programs when indigenous people interact with the criminal justice system. This failure is just as likely to be spread to the general prison populace. For example, if six month sentences are abolished and alternatives programs are introduced—such as home detention, community service and others—what will happen if they are breached. The only result will be incarceration but for the minimum period.

The natural consequence of removing short-term sentences is that the presiding judge must decide whether to imprison or not, and if the decision is affirmative, then they are forced to impose a sentence at the standard minimum. Despite the best of intentions, this reform has the potential to see people serving longer prison sentences than they would at the moment. Anecdotal evidence from Western Australia, the only Australian jurisdiction to have abolished short-term sentences, is that prison sentences have increased. It should be carefully monitored in NSW to ensure that it does not have a similar, negative impact here.

There must be discretion and flexibility provided to the presiding judge in all criminal sentencing. It is not possible for parliaments, the sentencing council, or anyone else to

determine, in advance, the appropriate sentence for all cases in a class of offence. No matter how well informed politicians, or the community are, there will be cases where the mandatory sentencing regime will not fit.

I shall use as an example the recent review of the law of manslaughter undertaken by Findlay for the NSW Government. The review attempted to define categories of manslaughter and then to recommend standard minimum sentences for each category of offence.

The law of manslaughter is a good example of the problems associated with developing standard minimum sentences. There is often very little difference between murder and manslaughter, and even less between different degrees of manslaughter. The offence of manslaughter covers an incredibly wide range of moral culpability. As Lord Chief Justice Lane noted in the case of *Walker*: "... [Manslaughter] ranges in its gravity from the borders of murder right down to those of accidental death". *Walker* (1992) 13 Cr App R (S) 474 at 476.

In our submission to the review, the NSW Council for Civil Liberties identified at least eight distinct categories of manslaughter recognised in different Australian and other common law jurisdictions:

1. Voluntary manslaughter;
2. Manslaughter by reckless infliction of grievous bodily harm;
3. Manslaughter by dangerous and unlawful act;
4. Manslaughter by gross negligence;
5. Motor manslaughter;
6. Corporate or industrial manslaughter;
7. Infanticide; and
8. Child destruction.

To illustrate the large range of culpability that may exist between different incidents of manslaughter: at one extreme, we have the car driver who is blinded by the glare of the sun just long enough to lose control of his or her vehicle and kill a pedestrian. At the other extreme, we have a drunk, speeding motorist who loses control of his or her vehicle and kills a pedestrian. The result is the same, but the moral culpability is very different.

This broad range of criminal liability means that it makes no sense to nominate a single standard non-parole period for all of manslaughter. Furthermore, it makes no sense to schedule a minimum sentence for each of the eight categories of manslaughter for two main reasons: first, because within each category of manslaughter a similar broad range of moral culpability exists, from mere accident to something resembling murder; and second, because any attempt to rank the different categories by moral culpability would be purely arbitrary. For example, is motor manslaughter more serious than infanticide? Or vice versa?

It is abundantly clear that a grid system of sentencing is not suited to an offence with such a large range of moral culpability. The general public and popular media frequently fail to understand the complexities involved in the determination of manslaughter sentencing policy.

Sentencing judges, who at the time of sentencing are in possession of all the facts of an individual case, currently have a wide discretion when sentencing offenders found guilty of a manslaughter offence, commensurate with the wide range of culpability of different offenders. While judicial adherence to standard non-parole periods is not strictly mandatory, the

existence of such provisions runs against the principle, fundamental to the rule of law, that each case should be judged on its own facts, and that sentencing reflect those facts.

A codified manslaughter regime, or any other codified regime, when combined with minimum sentencing legislation, poses a threat to this judicial discretion. Furthermore, it hands further control over sentencing to the political arm of government. I am concerned that such a transfer of power, over offence categories and associated minimum penalties, could be cynically manipulated for electoral advantage and, subjected to pressure from commentators. Sentences are then likely to be determined not in the interests of justice or the interests of the community but by the interest of the ratings of shock jocks and other self made community commentators. As such, sentencing policy could be dictated by considerations other than those of community protection, retribution and rehabilitation.

There must be discretion and flexibility provided to the presiding judge in all criminal sentencing. It is not possible for parliaments, the sentencing council, or anyone else to determine, in advance, the appropriate sentence for all cases in a class of offence—no matter how competent, rational, and well informed they are. No matter how in line they are with community values, parliamentarians, shock jocks or even the sentencing council, cannot anticipate all of the circumstances in advance that may be required in formulating the appropriate sentence in any given case.

The very nature of crime is that it is unpredictable and the circumstances that cause it are so varied that judicial discretion is vital. Only the presiding judge is in the position to hear all of the evidence and facts in the case at hand, and only the presiding judge is able to determine the appropriate sentence.

For these reasons, we must take great care in both reducing unnecessary short term sentences, but also in providing credible alternatives that serve the interests of justice and avoid mandatory sentencing. Despite its flaws, judicial discretion is the best system we have yet devised that is free of undue influence and delivers the most just outcome in each individual case.

OBITUARY

JOHN SHAW

We regret to inform you that John Shaw died in Canberra on 12 August 2004. John was a long term NSWCCCL committee member, who also edited the journal, with the help of his wife Liz, for many years. John and Liz moved to Canberra several years ago.

In recent years, John was a Canberra-based freelance journalist, contributing to publications in the US, Asia and UK. He had worked as a journalist in Australia (including the Federal Parliamentary Press Gallery), Asia, Russia (including being TIME correspondent in Moscow), the Middle East, Europe and USA. He was also the author of three books. John was a former honorary secretary of the National Press Club in Canberra, and, since 2002, a current board member.

In 1987–90, he took time off from journalism to work for the United Nations environment group in Africa. He was co-author of the concept of the 'hole in the sky' which has done much to change world thinking on the use of the earth's resources.

NSWCCL Committee

BOOK REVIEWS

THE CASE FOR AN AUSTRALIAN BILL OF RIGHTS: FREEDOM IN THE WAR ON TERROR

George Williams

UNSW Press, July 2004, \$16.95

Reviewed by **Cameron Murphy**

In this follow up to his earlier work *A Bill of Rights for Australia*,¹ Professor George Williams clearly articulates the need for an Australian bill of rights in the era of global security, terrorism, and fear.

This new work is clear, concise and to the point—that we urgently need a bill of rights in Australia to preserve the society and values that we take for granted. It is an essential reference guide for everyone with an interest in protecting civil liberties and human rights in Australia.

The book articulates the many concerns expressed in the wider community over governments legislating away fundamental civil liberties for perceived security in the short term. It critically analyses the effects of mandatory sentencing, racial discrimination, and other emerging problems in the Australian human rights landscape. Williams demonstrates that with a bill of rights we would be forced to carefully consider the sort of response required to the challenges posed by a post-September 11 war-on-terrorism world. Having a bill of rights would hopefully force considered public debate, or a least, serve to highlight the removal of liberties, as governments rush through questionable and draconian legislation.

In posing a series of questions, Williams answers them with powerful rational arguments that demonstrate the urgent need for formal recognition of and protection of civil liberties. He exposes the weaknesses and flaws in historical arguments against a bill of rights, and those that have been recycled in a modern context. The work also provides an analytical account of recent developments including the New South Wales parliamentary inquiry in a bill of rights, and the process leading up to and introduction of Australia's first bill of rights, which recently came into force in the ACT.

Readers, including those with a keen interest in a bill of rights, or those who are simply starting to learn about the subject, will find this work the most current, comprehensive and concise reference guide on all of the issues.

¹ Williams, George, *A Bill of Rights for Australia*, UNSW PRESS, Sydney 2000.

INEQUALITY IN AUSTRALIA

Alastair Greig, Frank Lewins, and Kevin White
Cambridge University Press, 2003, 306 pp., \$44-95
Reviewed by **Sol Encel**

This book is not primarily concerned with issues of civil liberty or human rights. It is set out in the form of a conventional textbook for undergraduate students of sociology, and its central focus is on the history and vicissitudes of Australian egalitarianism. Its major concern, according to the authors, is to “show that things we take for granted in daily life, and often assume to be natural or inevitable aspects of our lives, are in fact shaped by powerful social forces, especially class, gender and ethnicity”.

The book reflects recent trends in sociological theory, strongly influenced by French writers such as Bourdieu and Foucault, which treat individual behaviour and even individual physiology as social constructs. The self, according to this body of theory, is “interrelated with society in a global milieu”. In more commonplace terms, individual health and well-being depend on class, gender and occupation, as well as physique.

These propositions are not exactly new, although they are couched in a newer kind of rhetoric. The authors also argue that new forms of inequality are emerging, especially those based on education. “The rising importance of marketable educational qualifications has marginalised large numbers of workers who have not only been disadvantaged by their inability to gain those qualifications, but also by losing a voice in the wider political process”. The exercise of political rights, in other words, is circumscribed or even prevented because of social inequality.

This topic is pursued in chapter 9, which explores the gradual evolution of the policy of multiculturalism out of the earlier stress on assimilation. Multiculturalism entailed, among other things, the rejection of discrimination on the basis of race and ethnic origin (paralleled by the prohibition of labour market discrimination on the grounds of gender, marital status, age, disability etc.). These developments were formalised by anti-discrimination laws, and by official declarations of policy such as the Galbally Report of 1978, which recognised the need for special programs and services for non-English-speaking migrants. Chapter 10 then moves on to examine the conservative backlash against multiculturalism and feminism in the 1990s, which contends that groups struggling for equal treatment have “gone too far”, so that resources allocated to targeted groups are out of proportion to their needs. (Oddly, however, Pauline Hanson and the One Nation party receive only brief mentions on pages 104 and 209).

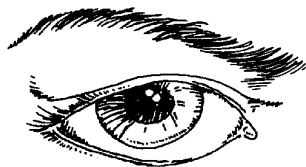
Chapter 10 is probably the most interesting part of the book, perhaps because it goes beyond the discussion of equality and inequality to review the debates about national identity and the “culture wars” of the last 20 years. Indirectly, this discussion has considerable relevance to the subject of human rights and responsibilities—the subject which provides the *raison d’être* for the Council of Civil Liberties.

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