A geriatric barrister's yearning for the good old days

The following is an edited version of a paper delivered by Ian Barker QC at the Criminal Lawyers Association of the Northern Territory Conference, held in Bali in July

I seem to have practised law from a time beyond which the memory of man runneth not. In the criminal law, things in the 1960s were considerably different than now. Partly this is because of the enormous intrusion of federal criminal laws, really starting with the Crimes Act amendments in 1960 followed by the expansion of the Customs Act to deal with narcotic importations, the transformation of the Commonwealth Police by the *Australian Federal Police Act 1979*, the *National Crime Authority Act 1984*, the *Director of Public Prosecutions Act 1983* and the *Criminal Code Act 1995*, to say nothing of the Corporations Law or the Tax Acts. Whilst trying to stay afloat in this legislative morass, the practitioner on the defence side, in New South Wales at least, has seen what used to be hallowed concepts fade away or be forcibly removed by parliament passing bad laws. They might be attractive to voters, but they have severely eroded old principles such as the right to silence, freedom of speech, freedom of assembly, freedom from arbitrary arrest, the right of privacy, the right to see evidence led against one, the right to confront one's accuser, and the freedom of the judiciary from executive intrusion, to name some.

The events of 11 September 2001 led to the absurdly harsh counter-terrorism laws enshrined in Part 5.3 Division 100 of the Criminal Code Act (with similar legislation in the states) and a re-statement of sedition in s 80 of the Criminal Code Act (in case you were thinking of saying something disloyal).

The latest legislative nightmare (said by the New South Wales premier to be tough but fair and well balanced – you have heard it all before) – is the *Crimes (Criminal Organisations Control) Act 2009*, directed at motorcyclist organisations usually called bikie gangs.

It is impossible in an article of this nature to adequately deal with all these failings in the law. Much has already been said and written about the Commonwealth terrorist laws and I will not repeat it here at length, except to look at sedition. This is a rather superficial look at what seem to me to be some problems in criminal law and procedure, particularly in NSW.

NSW Police on duty during APEC. Photo: Newspix

Certainly there have been some improvements, notably the introduction of the electronically recorded interview, but this article is concerned with the erosion of rights. I do not see improvements and regressions in some sort of balance. Neither do I suggest a remedy. I merely draw attention to what seems to me to be an unhealthy move to authoritarianism coupled with a trend towards making easier the conviction of those tried for crime. Much of what I write is relevant to New South Wales. It might resonate elsewhere.

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Abuse and potential abuse of power

It is a melancholy fact of life that some of those concerned with the investigation of crime and the enforcement of law will eventually abuse their powers. It is a fact largely ignored by governments, at least by the Commonwealth and in NSW. The legislative rule seems to be: keep giving them what they ask for; don't be troubled by how they have behaved in the past.

A fine example of the abuse of executive power in Australia was the flagrant misuse of the powers conferred on the NSW Police Special Branch in the 1980s and 1990s. The branch was formed in 1948 to meet the communist threat and to liaise with 'D' Branch, which later became ASIO.

In 1996 and 1997 Wood J examined the activities of the Special Branch and found (amongst other things) they operated under a cloak of secrecy and they adopted a seemingly indiscriminate approach to gathering information on people such as barristers and public figures, whose

activities were no business of Special Branch.

After the branch was disbanded, the Police Integrity Commission supervised the audit of its records and found that:

- the branch's activities bore little resemblance to its charter;
- information gathering on people who posed no threat of politically motivated violence or similar matters was rife;
- the branch kept secret dossiers, including dirt files, which were used for political advantage and which were collected and updated on a diverse range of individuals; and
- there were some 26,800 index cards relating to information kept on individuals, *including 6930 cards on people described as terrorists.*

In December 1998 the Protective Security Group was formed in the NSW Police Service to gather and analyse intelligence in relation to people who presented a risk of politically motivated violence or terrorism activity. The group was subject to stringent statutory restrictions, to overcome the risk of abuse, but in 2003 it was disbanded and replaced by the new Counter Terrorism Co-ordinate Command.

A much larger organisation, it is not subject to the oversight under which its predecessor worked. Its members have the clear potential to act in the way Special Branch acted and to abuse their powers in the way Special Branch did.

But throughout, the public has been exhorted to trust the police because they had the confidence of government.

Look at the amendments to the Commonwealth Crimes Act in light of the *Haneef* case. Part 1C permits police to detain a lawfully arrested person for the purpose of investigation. It thereby made a grave departure from the common law. The period for which the person may be held is four hours, unless extended. But the period is subject to down time such as during travel, or breaks in questioning when the suspect is talking to his lawyer.

The investigation period for a terrorist offence may be extended any number of times, but the total cannot be more than 20 hours. Somehow the AFP in Queensland were able to use their powers of detention and investigation to keep Dr Haneef in custody for some 12 days, a clear and gross abuse of their powers (followed by no apology or even acknowledgement of any failing in the system).

ASIO

ASIO can apply for a warrant the effect of which would be to detain a person without charge or even suspicion for up to seven days on the ground that the warrant 'will substantially assist the collection of intelligence that is important in relation to a terrorism offence'. A person so detained may be interrogated in increments of eight hours at a time, up to 24 hours; there is no bar to a further warrant for the same purpose against the same person and it is all in secret. The Act inhibits recourse to lawyers for people so detained. ASIO may object to the choice of lawyer. The first meeting between a detained person and a lawyer must be monitored by ASIO, and the lawyer subsequently is given only the warrant and no other documents. There is little useful a lawyer can do to help.

The most odious feature of all is that a citizen, about whom there is not even suspicion of any inclination to terrorism, may be arrested and interrogated in secret imprisonment for seven days and would thereafter commit a criminal offence if before the end of the period specified in the warrant the citizen told anyone why he or she had disappeared for a week (unless specifically permitted to do so).

If the disclosure is of 'operational information' it would be illegal if made within two years from the end of the period of the warrant. This may be thought to have the potential to create some difficulties between for example, husband and wife. Assume, again, for example, that a wife happens to notice her husband has not been home for a week. That is because he has been arrested for interrogation by ASIO. When he turns up, she may be inclined to seek some explanation. But if he gives a true explanation, he will make himself liable to prosecution. It is a very strange law for any government that holds itself out as concerned to preserve marriages and families.

It is truly amazing that this sort of nonsense found its way into serious

Then New South Wales Premier Bob Carr in the vault containing the files of the Police Special Branch. Photo: Pip Blackwood / Newspix

penal legislation. ASIO has shown its readiness to abuse its power of search and interrogation, in its treatment of Izhar Ul Haque, strongly condemned in the NSW Supreme Court by Adams J. There has been not the hint of an apology from ASIO.

National Security Information (Criminal and Civil Proceedings) Act

One of the more frightening aspects of federal criminal law is the *National Security Information (Criminal and Civil Proceedings) Act 2004*. It requires lawyers to obtain security clearances to have access to information concerning national security, amongst other insults. It puts an onus on lawyers to notify the attorney-general if they believe evidence which relates to national security will be disclosed. The attorney-general can effectively run the court system in any trial by issuing a certificate directing that information not be revealed. He may even prohibit a witness being called. His certificate is conclusive evidence that disclosure of the information is likely to prejudice national security. And so on. We have all had some experience of this Act. It effectively takes from the court and gives to the executive the power to determine whether a claim for public interest community has been made out. So far it has survived constitutional challenge.

Sedition

The recommendation of the Law Council, various bar associations and the Australian Law Reform Commission that sedition be abolished as a crime was ignored by the federal government in 2006, so we still have this anachronism along with its ancient sibling, treason.[1]

The essential problem with sedition, however defined, is that it is to be found in mere words, always susceptible of different construction and interpretation by different minds, and always dangerous to the individual who offends someone in high office, (or a member of ASIO). The offences, created by s 80.2 of the Criminal Code Act, are made no less problematical by the introduction of the notion of recklessness into the equation. A person is reckless with respect to a *circumstance* or a *result* if aware of a *substantial risk* that one or the other will exist, and if, having regard to the known circumstances, it is unjustifiable to take the risk. Robust political commentators may have a fragile hold on freedom if their writings or utterances are to be judged by whether they were 'justifiable' in 'taking a risk'. What is meant by 'it is unjustifiable'? Is the test objective, or subjective to the person on trial? The Australian cases and the early English cases all bespeak the great danger to a free society of having public discourse measured against a scale of things which might upset government sufficiently to prosecute, and of having such discourse constantly examined through the ever suspicious prism of ASIO or police.

The history of sedition prosecutions reveals a tendency of government to misuse the offence for political ends or to just over-react. Against this, it may be said, there has not been a prosecution in Australia since 1960 which of course lends support to the proposition that we do not need the law at all. Whether frequently used or not, it is dangerous to have such laws remaining in the statute books.

The Commonwealth, the states, and the pre-federation colonies of Australia, have an unlovely history of the misuse of the law of sedition, largely to stifle freedom of expression, for political ends. It is difficult to track down all the cases, some of which were disposed of at summary level and few of which were reported. They stand as a warning.

Seditious libel found its way to the colony of New South Wales early in the 19th century and was used as a blunt instrument to deter the early newspaper editors from publicly criticising the governor. Governor Darling's persecution of Dr Wardell, a joint owner with W C Wentworth of *The Australian*, and Edward Smith Hall, owner and editor of *The Sydney Monitor*, is a disgraceful bit of history. Each prosecution – and there were many, particularly against Hall – had much more to do with the governor's wounded dignity than the security of the colony.

It is well known that some of the Eureka Stockade rioters were tried, and acquitted, of treason. It is perhaps less well known that in 1855 Henry Seekamp, the editor of the *Ballarat Times* was convicted and sent to prison for six months for sedition, for calling on 'his fellow-countrymen, on nature and on Heaven itself for a 'vengeance deep and terrible' for 'the foul massacre' of human beings (by the military at the Stockade). His deeply felt emotions as expressed in the words were scarcely calculated to cause a serious insurrection in Victoria.

In 1896 John Norton was tried for seditious libel for publishing an article in *Truth* highly insulting of four monarchs – George III, George IV, William IV and Victoria – but which did not invite violence or insurrection or anything of the sort. The jury failed to agree.

There have been various state prosecutions. In 1930 F W Paterson was charged in Queensland for uttering

seditious words saying, amongst other things, 'if the workers shed a little blood in their own interests as they did for the capitalists in the war they will be emancipated'. The words seem no more than colourful communist rhetoric. He was acquitted.

In 1960 Rohan Rivett, the editor of the South Australian 'News', was prosecuted for seditious libel for injuring the feelings of the chief justice and three other judges by giving prominence to criticism of them during the Stuart Royal Commission. Rivett's offence was to publish headlines such as:

> Shand QC indicts Sir Mellis Napier
>
> These Commissioners cannot do the job
>
> Commission Breaks up Shand Blasts Napier
>
> Shand Quits 'you won't give Stuart Fair Go'

The jury acquitted Rivett of eight of the nine charges and could not agree on the ninth.

Early in the Cold War there were three federal prosecutions in Sydney, all of communists. The first was against Gilbert Burns in 1949 because, in response to a hypothetical question at a public meeting, he gave a hypothetical answer beginning 'If Australia was involved in such a war (between Soviet Russia and the West) it would be between Soviet Russia and America and British Imperialism… we would oppose the war'. He was convicted and sentenced to six months imprisonment. In the subsequent High Court hearing Dixon and McTiernan JJ held the words were merely expressive of a hypothesis; the majority held the case had been made out.

The second was against Lance Sharkey also in 1949, who was convicted and sentenced to three years imprisonment for articulating what seems no more than an unlikely hypothesis, that is (in part) 'If Soviet Forces in pursuit of aggression entered Australia, Australian workers would welcome them'. The High Court held the words were capable of being expressive of a seditious intent. *Burns* and *Sharkey* were not products of the High Court's finest hour.

In 1950 William Burns was tried before a magistrate in Sydney, charged with publishing seditious words published in *Tribune* when he urged resistance to Australian involvement in the Korean War. After a convoluted summary trial and an appeal before a famously eccentric judge (Berne J) and then Lloyd J he was sentenced to six months imprisonment. It is difficult to see in the words published any more than robust criticism of government policy. Burns was again prosecuted in 1953 because ASIO took affront to an article in the *Communist Review* critical of the monarchy. He was acquitted.

The last sedition case before the High Court was *Cooper* in 1961, which went on appeal from the Supreme Court of Papua New Guinea. Cooper had spoken to 'a number of natives' urging them, amongst other things, to expel all the white people. He seems to have been a little mad. The case was marked by the reception of hopelessly irrelevant evidence introduced from ASIO to the effect that Cooper was a communist, an atheist, and disliked missionaries. He received six months imprisonment, confirmed on appeal.

The law of sedition is anachronistic and should be discarded entirely. An indication of its real antiquity lies in its close relation to treason, both being in Chapter 5, Part 5.1, Division 80. It remains treason to kill or kidnap the governor-general or the prime minister; to do the same to anyone else is merely murder or abduction but the punishment for intentionally killing the prime minister is the same as for intentionally killing the leader of the Opposition. One can only assume that in this context the references to the governor-general and the prime minister remain because of the very special penalties treason once attracted, that is, hanging, drawing and quartering and, if a man, having one's bowels and genitals burned as one watched (not having any longer much interest in either). Women were spared this immodest indignity by being totally burned alive. Also, of course, a sentence of death for treason once also required attainder and its consequences, forfeiture and corruption of blood. It is unlikely such penalties will reappear on the statute books, at least in Australia. Why do we retain such anachronisms?

I have seen little interest by the present federal government in amending the worst of so-called counter-terrorist legislation. One can only hope.

DPP

No doubt it is because of my intellectual infirmity, but I cannot escape the conclusion that in enacting the Criminal Code Act the Parliament of the Commonwealth did its utmost to make federal criminal law an unattainable mystery. Regrettably however, the Commonwealth DPP seems to be intent on widening the reach of the Act by attempting, for example, to charge conspiracy *by recklessness*. Such an indictment resulted in a directed verdict and an unsuccessful Commonwealth appeal in a recent NSW case.[2]

The effect of the indictment and particulars was to bring a charge that some people recklessly entered a conspiracy to launder money, reckless as to whether it was illegally obtained. The offence alleged seemed to be that they agreed to deal with money upon the basis that at some future time they might come to the collective view that there was a substantial risk it was illegally obtained. It was a very curious indictment; the worry of it is an increasingly gung ho approach by the Commonwealth DPP to prosecutions. Let us go to New South Wales legislation.

Committal proceedings

The right to test evidence on committal has, in NSW, been severely eroded. The High Court's view of the procedure as a necessary part of the criminal process

has been largely ignored. In *Barton v The Queen* (1980) 147 CLR 75 Gibbs ACJ and Mason J expressed agreement with Lord Devlin in describing committal proceedings as 'an *essential* safeguard against wanton or misconceived prosecutions'. The deprivation of the advantages of testing evidence before trial was 'a serious departure from the ordinary course of criminal justice'. And in *Grassby v The Queen* (1980) 168 CLR 1 Dawson J examined the history of committal proceedings from Sir John Jervis's Act in 1848, concluding along the way that the importance of the committal in the criminal process should not be underrated. In 1986 an advisory committee on criminal proceedings in Victoria was unanimous in their view that properly constituted committal proceedings are a vital cog in the machinery of the criminal law and should be maintained.

We still have committal proceedings, but in an emasculated form. They do not require the attendance of witnesses unless:

1. the accused person and the prosecutor agree the witness should be called; or
2. the accused person applies to have a witness called and the magistrate is satisfied there are *substantial reasons* why, in the interests of justice, the witness should attend to give oral evidence (the accused person having given notice of the application).

The magistrate cannot direct the attendance of an alleged victim in a case in which an accused person is charged with an offence involving violence (agreement notwithstanding) unless the magistrate is satisfied there are *special reasons* why the alleged victim should in the interests of justice give oral evidence. No direction at all can be given in a sexual assault case where the complainant was under 16 at the time of the offence and is under 18 at the time of committal.

Committal proceedings still have some use but their importance in the criminal process is seriously diminished. What was once a right is now subject to a circumscribed judicial discretion and in the case of a young complainant has gone altogether. The rationale for the change was they took too long and lawyers cross-examined witnesses at unnecessary length. That may have been so, but if magistrates had exercised proper control over proceedings the problem could largely have been avoided.

The unsworn statement

Whatever happened to the dock statement? I remember once pondering its utility to an accused person when I represented a man in Darwin charged with shooting another man during a quarrel of some kind. He was tried for malicious wounding. I urged upon him the view that he should dress neatly for the trial. He took my advice and came to court wearing a dark suit, a white shirt, and tie. On his feet he wore rubber thongs. As it happened, the jury could not see his feet in the dock, which he did not leave during the trial. He was acquitted. In my opinion the case still stands as an argument for the retention of the unsworn statement, at least in Darwin. The jury can't see your client's feet.

The evolution of the right to make an unsworn statement to a jury was a process far more complex than its arbitrary and mindless abolition, in NSW, in 1994. Ancient English practice allowed the accused to plead his or her case orally, in person, but the accused person was not allowed counsel in treason trials until 1695 or felony trials until 1836. The effect of this was that the person on trial was able to say whatever he or she wanted about the evidence and the law, but not on oath. The accused was not permitted to give evidence. Neither was a party to a civil cause.

The rule, Starkie had said, 'was founded on the known infirmities of human nature'. In 1843 Lord Denman's Act enabled all persons previously disqualified by crime or interest to give evidence, except parties on the record or their spouses. The right was extended to the parties to a civil action in 1846 (county courts) and in 1851 (superior courts) and by 1869 the parties to a civil action, and their spouses, were competent witnesses in the action. Such changes found their way into New South Wales law by the Evidence Law Act of 1852 and the Evidence Law Act of 1858.

But an accused person and his or her spouse continued incompetent as witnesses in the accused's own defence (with some exceptions) until 1898 in England. In New South Wales the right was first conferred in 1882 by the *Evidence in Summary Convictions Act* which permitted a defendant in a summary case to be sworn as a witness. Then in 1883 s 351 of the Criminal Law Amendment Act enabled an accused person on indictment to give evidence in his or her defence on an issue where the burden of proof was on the accused. The defect was cured altogether in 1891 by s 6 of the Criminal Law and Evidence Amendment Act which made an accused person and the spouse of an accused person competent witnesses. This was repeated in the *Crimes Act 1900* (NSW), s 407.

The right of the accused to make an unsworn statement was as old as the prohibition against the accused giving sworn evidence. Old procedure dictated that, if the person was represented by counsel, the statement could be made at the conclusion of counsel's speech, subject to a right of reply by the Crown.

The right to make an unsworn statement appeared in New South Wales legislative form in 1883 in the Criminal Law Amendment Act. It was re-enacted in 1900 in s 405 of the Crimes Act. The practice in New South Wales was for the accused person to make the statement before counsel's address. The law remained unchanged until 1994, when the right was taken away in respect of all people charged after 10 June 1994.

In 1985 the New South Wales Law Reform Commission recommended that the unsworn statement be retained, subject to qualifications. The commission's view was

the right should be extended to summary proceedings. But by 1994 the government was under increasing pressure by victims' lobby groups, and the dock statement was an easy political target. The Hon John Hannaford MLC, then attorney general, homed in on it saying:

> The testing of evidence in cross-examination is the basis of all criminal trials in our adversarial system of law. However, the truth of assertions made by an accused to the jury in a dock statement cannot be tested by cross-examination. In abolishing the right to make dock statements, it is aimed to remove the existing unchecked process whereby an accused can make unchallenged allegations and attacks on the character of witnesses and victims. The accused will be prevented from ambushing the prosecution's case by introducing material which is not subject to cross-examination.

The law relating to the onus of proof seems not to have intruded into the government's deliberations.

In concluding the debate the attorney general became more impassioned, saying that the Legislative Council's:

> debate on dock statements raised issues that go to the very heart of the system of justice in New South Wales. This Government has moved to abolish the right of accused criminals to give from the dock unsworn, untested and unaccountable evidence. I thank those members of the Government who rose to speak in the interests of victims of crime in this State.

It is not easy to see what the issue had to do with victims of crime, except politically. Compelling contrary arguments were presented in parliament, such as by the Hon BH Vaughan in the Legislative Council when he said:

> Dock statements are just one of the range of protections for what people describe as the less able or the disadvantaged in society. There is considerable anecdotal evidence to suggest that people with less than average education or literacy levels, that is, people lacking a complete command of the English language or those with mild intellectual disability, completely confused by their surroundings, may feel some pressure to inappropriately agree with skilful prosecutors, thereby incriminating themselves. Therefore, if accused do not give sworn evidence, their sole means of expressing themselves to a jury is lost. As Mr Justice Isaacs explained in *Rex v McMillan*:
>
> The accused may be a nervous or weak type person who may be easily overborne by a strong cross-examiner into saying things which may put an adverse complexion on his evidence.
>
> An innocent person, therefore, may give the impression of lying as a result of nervousness or ignorance. This also applies to Aboriginal Australians.

Of course, the conferral of the right of an accused to give sworn evidence was one of forensic history's great two-edged swords. There was a certain safety in being able to say to a jury, 'if only he were allowed to tell you on oath, you would understand his case', and the unsworn statement carried with it its own dangers. Usually, counsel were not permitted to question the accused in any detail so the statement was the product of a flow of consciousness. Sometimes it flowed into dangerous territory, such as when a man on trial for armed robbery (not for the first time) said that *he would never do anything like that*, thereby inviting rebuttal.

But the unsworn statement was sometimes a necessary way of ensuring fairness, particularly in trials of Aboriginal people, for the reasons advanced by Mr Vaughan. They were abolished as part of a continuing attempt by government to buy votes by being seen to be tough on crime.

The right of peremptory challenge

In NSW the right has all but gone. Since 1987 the Jury Act has permitted but three challenges per accused, unless by agreement with the Crown. I have never heard of such agreement being reached. The jurors remain anonymous with no disclosure of either age or vocation. You might challenge a grey haired man wearing an RSL badge because you think he might not like your client. Another barrister might think the same juror might be sympathetic to the accused. I am not a clever enough student of human nature to be able to form an instant view about which three jurors, if any, ought to be challenged. The present process is really a nonsensical ritual, and got that way far quicker than the evolution of the right to challenge a much larger number of jurors.

I think we can set aside challenges for cause or exotica such as challenges to the array, because they are so seldom used. The last challenge to the array I have heard of succeeded before Nader J in Darwin in 1983, when the sheriff had summoned 47 women and 23 men, women apparently being easier to serve with jury summonses (*R v Diack*).

A brief history of peremptory challenges and their significance is this.

In 1895 in his *New Commentaries* Stephen observed that in 'criminal cases, or at least in cases of felony, there is allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all – which is called a *peremptory* challenge, – a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous'. Stephen says there were two reasons for peremptory challenges. Firstly, it was necessary that a prisoner when put to his defence should have a good opinion of his jury, the want of which 'might totally disconcert him' and, secondly, if he failed in a challenge to a juror for cause, the bare questioning of the juror may 'provoke resentment'.

He said the common law settled on 35 challenges in criminal cases because it was fully sufficient to allow the most timorous man to challenge through mere caprice. If there were no limit, an accused person could avoid trial altogether. But in

England, by 5 Geo 4, c.50, (1825) s 29, no person arraigned for murder or felony could be admitted to any peremptory challenge above 20.

Peremptory challenges to military officers as jurors were not permitted. The New South Wales Act of 1823 (s 4) permitted a limited challenge to a military or naval officer 'upon the special ground of a direct interest or affection'. Section 6 enabled a challenge for cause to the magistrate assessors who sat with the chief justice in civil cases. On 25 January 1808 John Macarthur was indicted for sedition. He objected to Judge Advocate Atkins sitting with the military officers. His objection was, in part, that Atkins owed him money. The objection had no legal substance but was sufficiently disruptive of the proceedings to delay the trial, and the rebellion against Governor Bligh was effected on the following day.

The Jury Trials Act of 1833 specifically declared the right of challenge to be the same as in cases in the Courts of Westminster (s 6). That is, it was restricted to cases of felony. By the Jurors and Juries Consolidation Act of 1847 the number of challenges was restricted to 20 (s 24) following the English legislation. The Crown had no right of peremptory challenge, but the Act recognised 'the power of any court to order any juror to stand by until the panel shall be gone through at the prayer of those prosecuting for the Crown as has been heretofore accustomed': (s 24, following the old English practice). According to Archbold, an old practice entitled the Crown to ask that a juror should stand by, that is, to postpone consideration of the cause of challenge until the panel had been gone through and it appeared there would be jurors enough to try the defendant, citing an 1837 case of *R v Parry*.

The Crown's right to have jurors stood aside obtained until it was abolished by s 43(2) of the *Jury Act 1977* (NSW).

In 1901 in NSW the right of peremptory challenge became permitted in cases of misdemeanour as in felony, but the number of challenges was restricted to eight unless the offence charged was capital, when the right to 20 challenges remained. The Crown was given the same right: s 57, *Jury Act 1901* (NSW). These provisions were re-enacted (as to capital offences) in the consolidated *Jury Act 1912* (NSW) (s 55) and the *Jury Act 1977* (NSW) (s 42).

In 1986 the New South Wales Law Reform Commission by majority recommended that peremptory challenges in all cases be reduced to three. The commission said this would 'allow both parties to take steps to remove bias, without going so far as to enable them to select the jury of their choice'. The commission noted the change in the law relating to murder since 1955 when the death penalty for murder was abolished. Mandatory life sentences were replaced by a discretion to impose a lesser sentence. The commission said this change in the law made it necessary to re-examine the rule relating to peremptory challenges. They did not consider the rules of criminal procedure should differ depending whether the charge was murder or some other serious offence. They were satisfied that the exercise of a large number of peremptory challenges could adversely affect the representative character of the jury.

The recommendation was accepted with some enthusiasm by the government, leading to the *Jury (Amendment) Act 1987* (NSW). The amended s 42 reduced the number of peremptory challenges to three in all criminal proceedings. Attorney General Sheahan felt able to say:

> However, when that selection process reaches the court, it may be influenced significantly by the parties through the use of peremptory challenges. At present, in murder trials each party is allowed to challenge twenty jurors without showing cause, and eight jurors in other criminal trials. The origin of this challenge was to enable the accused to remove bias and secure an impartial jury. In fact, the challenge is now put to the opposite use: jurors are systematically challenged with the intention of introducing bias to achieve the desired verdict. In short, challenges are used in an attempt to skew the representatives of the jury. Thus, by way of example, peremptory challenges have been used by the defence to secure all male juries in rape trials, by the prosecution in a case in Bourke in 1981 to secure an all white jury when the accused was an Aborigine, and an all male jury in the trial of Gloria Hill who was accused of murdering her husband.

I have to say the right of peremptory challenge was criticised well before 1987. In 1864 the *Sydney Morning Herald* disapproved of the acquittal by a jury of the bushranger Frank Gardiner. On 12 July 1864 the editor had much to say of the proceedings, with particular reference to the right to challenge. The editorial included this:

> We shall not impute to the persons who were entrusted with the preliminary steps in the prosecution of GARDINER, an intention to screen him from the consequences of his crime, because we do not believe it existed. We cannot, however, but perceive that he has been most fortunate.
>
> We propose to point out in this article how everything has been set in hostile array against public justice - whether in design or through inadvertence - whether by the perversion or the abuse of the law – or by the stumbling-blocks cast in their way in its discharge.
>
> Those friends of order and justice who were in Court saw how the right of challenge could be perverted. If any man appeared looking more respectable than another, or whose character was thought to be too reputable to be trusted, he was immediately challenged. That there was not scope for a jury entirely in harmony with the defence may, we trust, be taken as a sign that society is not wholly gone.

And on 12 August 1864 the *Sydney Morning Herald* printed a long letter from *Civis* which attacked the process, saying

Three victims of the Greenacre gang rape face the media outside the Downing Centre Court in Sydney, August 2002. Photo: Craig Greenhill / Newspix.

it should be limited to six peremptory challenges. The writer directed a broadside at what he (or she) perceived to be abuse of the process, saying, in part:

> Practically, it is almost equivalent to allowing him to select the twelve worst jurymen on the list, ... A juror in good broad-cloth and clean linen is 'most intolerable and not to be endured;' a flash-looking *gent*, or one with an air of coarse ruffianism, or (best of all) a fellow with a grog-bepainted nose, is hailed as a god-send.

I have seen jurors with grog-bepainted noses. I have to say the phenomenon does not necessarily bespeak a disposition to acquit.

The reasoning of the Law Reform Commission in 1986 in favour of the reduction to three challenges is really no longer valid, because a person convicted of murder in NSW can now be imprisoned for the term of the prisoner's natural life. However, do not expect any change to the old system.

For a giddy moment I once had the power to make things very difficult for the Supreme Court of the NT in a sittings in Alice Springs. In 1933 the governor-general made an ordinance requiring trial on indictment for offences against any law of the NT (except those punishable by death) to be by a judge without a jury. Trial by jury in all cases was restored in 1962 when Garfield Barwick procured an amendment of the Commonwealth Northern Territory Supreme Court Act. A judicial visit was arranged and jurors summoned. But true to form the Commonwealth Attorney General's Department had overlooked revising the old jury lists, compiled God knows when, to hear murder cases. So we had about 12 trials (some with more than one accused) and a jury panel of 20. Had I exercised my right of challenge to the full it might have effectively stopped the sittings. But as I knew most of the panel (it was difficult not to know jurors in a town of 3,000 people) and guessed they were none of them disposed to convict, I thought it wise to act with restraint. Which proved right. We had almost the same jury in every trial. I won six straight, after which I should have retired. Then unexpectedly the seventh trial resulted in a conviction. *The Centralian Advocate* then published a front page denunciation of the system, saying, in large print, that being tried by a jury in Alice Springs was like buying a lottery ticket: six times they acquitted and then suddenly convicted! The jurors responded by informing Justice Bridge they would not sit any more unless the paper's editor apologised. He did. The judge referred the papers to Canberra and recommended the institution of contempt proceedings.

That was in about 1962 or 1963. It seems the Attorney General's Department is still considering the matter.

New South Wales sexual offences

> 'Let the jury consider their verdict' the King said, for about the twentieth time that day.
>
> 'No, no' said the Queen. 'Sentence first – verdict afterwards.'

Lewis Carroll wrote with some prescience about the trial of the Knave of Hearts, which, while for larceny, looked a bit like a twenty-first century NSW trial for a sexual offence. Trials for sexual offences, particularly rape, have always caused difficulties. Perhaps the most notorious Australian rape trial occurred in Sydney in 1886 when 11 young men were tried for raping a young woman at Moore Park. Contemporary records suggest the trial judge, Windeyer J, was entirely biased against the men, and in a gross display of judicial menace managed to bully the jury into convicting 9 of the 11. In the result 4 were hanged and the rest served 10 years.

The *Truth* on 29 November 1886 reminded readers of the trial judge's 'morose and murderous will'. The editorial went on to say:

> The facts of the trial, together with WINDEYER'S conduct in keeping the jury sitting all night, after a protracted trial of four days, and compelling counsel to commence their addresses to the jury after midnight, and to continue them until early 4 o'clock in the morning; his monstrous summing up and almost diabolical determination to prevent as far as possible, the exercise of the Royal prerogative of mercy are too indelibly engraven on the public mind to call for recapitulation. So, too, his brutal sentence of penal servitude and floggings on SWEETMAN, the cabman, who drove the

> strumpet to Moore Park, and WINDEYER'S subsequent sudden and judicious 'scoot' on a holiday trip to Europe need no recalling.

Windeyer's summing up is recorded in detail in the *Sydney Morning Herald* of 29 November 1886. It is certainly one sided. He positively slavered when sentencing the youths, saying, in part:

> Prisoners, you have been convicted of a most atrocious crime, a crime so horrible that every lover of his country must feel it is a disgrace to our civilisation. I am glad to find that this case has been tried by a jury that has had the intelligence to see through the perjury on perjury that has been committed on your behalf…. It is terrible to think that we should have amongst us in this city a class worse than savages, lower in their instincts that the brutes below us…. I warn you to prepare for death. No hope of mercy can I extend to you. Be sure no weakness of the Executive, no maudlin feeling of pity, will save you from the death you so richly deserve… be sure no pity will be extended to you;… I advise you to prepare to meet your Maker… remember that your time is short. The recommendation to mercy which the jury have made in your favour it will be my duty to convey to the Executive.

The report noted the prisoners appeared unnerved by the sentences.

Generally, judges are not now as bad as Windeyer in 1886, but for some years there has been a trend towards the notion that a woman who accuses a man of a sexual offence will probably be telling the truth. She should therefore be believed and any attack on her credit should be regarded as insulting and offensive. Complainants are now always victims, whether or not they are proved to be so by the conviction of the assailant.

Of course, there will be cases where there will be no doubt that rape was inflicted on a woman, who was obviously therefore a victim. There are cases where the only issue is identity, not the fact of rape. I accept that the majority of complaints of sexual offences may be true, although there is no way of establishing this as an empirical truth. However, that provides not the slightest justification for eroding an accused person's right to a fair trial. The presumption of innocence is not a quaint anachronism, to be ignored in sexual cases.

But the right has been eroded. In 1981 the Crimes Act s 409B (now re-enacted as Criminal Procedure Act s 293) prohibited evidence of a complainant's sexual reputation or sexual experience or lack of it, with some exceptions, such as sexual experience by the complainant at about the time of the alleged offence, but then only if the probative value of the evidence outweighed any distress, humiliation or embarrassment the complainant might suffer. It is difficult to see how such a balancing act could be possible, but such evidence is scarcely ever allowed. The prohibition has the obvious potential to cause injustice. Without it, a judge having proper control of proceedings could prohibit such cross-examination unless the evidence was relevant to an issue, but judges do not always exercise proper control when it is needed. There is no doubt that cross examination of a woman in a rape trial about other sexual experiences could be humiliating and should be pursued sparingly, but sometimes it is necessary for a just outcome.

Take the case of *Bernthaler* for example, where evidence of a complainant's propensity to make false accusations of a serial nature was held inadmissible. Was that not manifestly unjust to the accused?

The section was the consequence of too many embarrassing but irrelevant questions, and too little judicial intervention. The position could have been cured without the law taking a 180 degree turn.

Another example of the erosion of the rights of an accused person is found in Criminal Procedure Act ss 295-306 which erects a privilege from disclosure of 'protected confidences' which are counselling communications made by alleged victims of sexual assault. A subpoena can be resisted unless the court is satisfied that the contents will have 'substantial' probative value and the public interest in preserving confidentiality is outweighed by the public interest in allowing inspection. Similar provisions apply to the tender of the documents in evidence.

Perhaps on most occasions the counsellor's records will not advance a case one way or another. But sometimes they will. Sometimes they could lead to an acquittal. I have seen it happen, where the story told a counsellor was starkly different from the story told on oath. But what does 'substantial probative value' mean of evidence in a criminal trial? And how is a judge to know, unless he or she knows precisely the defence to be pursued? It is another example of the readiness of government to act inconsistently with the rules of ordinary justice.

An extraordinary example of a direct attack on a person on trial for a sexual offence is Criminal Procedure Act s 294A which effectively excludes the accused from personally defending himself. His only means of cross-examination is by someone appointed by the court to ask only the questions the accused requests be put. It is farcical legislation.

From a lawyer's perspective, the best thing that can be said about this 'reform' is that it should act as a powerful incentive for the accused to obtain legal representation. When enacted it was mistakenly assumed that the court might easily appoint a lawyer to conduct the cross-examination. The Bar Council has, rightly, disapproved of the idea that a barrister can act as a mere mouthpiece asking only those questions the accused wants asked whether they be irrelevant or tantamount to forensic suicide. Where persons other than lawyers relay questions to a complainant, the questioning process is slowed up sufficiently to be ineffective

Permier Nathan Rees at a NSW Police briefing on violence related to outlaw motorcycle gangs, 23 March 2009. Photo: Tracey Nearmy / AAP Image

and it becomes worse if the questioner's proficiency at putting questions is not up to that of the accused.

Why should an accused not be permitted to question his accuser? The answer proffered is that, if he is guilty, it would be painful for the complainant to face questions, probably containing humiliating but untrue suggestions, from the accused. That is not a reason to prevent the accused from asking otherwise admissible questions. Not permitting him to ask questions personally makes it appear as if he is guilty and that his guilt has been prejudged. In any event, the risk that an accused man, capable of running his own defence, might be wrongfully convicted is increased. What happened to the principle that an accused person was entitled to confront his accuser?

There are other examples. For example, a complainant may be screened from the view of the accused and may not even need to attend the trial (except via video link) (s 294B). If a conviction is quashed on appeal, and if there is a second trial, the complainant does not have to give evidence at all. The Crown can simply rely on the transcript of her evidence at the first trial. This provision is grotesque. What if new facts emerge between trials? What if the conviction was quashed because of the incompetence of defence counsel who failed to adequately cross-examine the complainant?

My worry about all of this is that the continuing influence of pressure groups on government, well meaning or otherwise, may one day lead to a position where guilt is presumed unless an accused person proves otherwise. I think we are paying too high a price in smoothing the path of complainants in sexual cases.

Bikies – The Crimes (Criminal Organisations Control) Act 2009

I sometimes wonder whether the reason why bikies are often unkind to each other, and sometimes less than orderly, is that they feel obliged to live up to the curious names of their various associations. Adult clubs bear the sort of names that the most psychopathic schoolboys usually grow out of by their early teens, but nonetheless names like Hells Angels, Bandidos and Coffin Cheaters suggest a warrior class constantly living on the edge of violence, indeed complete oblivion.

So, instead of denying their right to exist, it might be better if the law simply obliged them to change their club names and so start a trend to a more placid existence. For example, things might quieten down if the name Hells Angels was abandoned and replaced by The Motor Cycling Academy for The Sons of Gentle Folk or something like that.

I have to concede this is unlikely to happen, so we are confronted with the new tough law and order 'let's go get them' statute called the *Crimes (Criminal Organisations Control) Act 2009* (NSW). The Act is a truly odious exercise of legislative power, worse than the terrorist legislation. For a long time after the constitutional failure of the *Communist Party Dissolution Act 1950*, legislation enabling the executive to proscribe an organisation was unheard of. But it has returned with renewed vigour. In this case, all because one bikie beat another bikie to death at Sydney airport. The airport was not, I understand, under siege.

Like the numerous speeches inflicted upon us in support of terrorism legislation, the second reading speech was quite silent about why the existing criminal law was inadequate to deal with violent crime. It is apparent from the premier's speech that the police were able to make wholesale arrests after the airport incident pursuant to their existing powers, and there is already anti-criminal group legislation in the NSW Crimes Act.

The object of the Act is to make criminal the association of a member with another member of a proscribed organisation. A member includes someone not yet a member. The proscription will be by an *eligible judge*. We are now in the wild terrain of executive intrusion into the judicial function. The police commissioner may apply to an eligible judge for a declaration that an organisation is a declared organisation. On the face of the legislation the eligible judge may be a favourite of the commissioner. He or she will have consented to being the subject of a *declaration by the attorney general* and will be *declared by the attorney general* to be an eligible judge. The attorney general may revoke such declarations. The judge will have surrendered himself or herself

to executive discretion. I understand that a number of judges have in fact been declared eligible judges, accepting the office on the understanding that any judge applying will be appointed, so there will be no selection of particular judges. That may be so, but I question why judges would want to have anything to do with such legislation, in particular by subjecting themselves to a declaration by the attorney general, which carries with it the right of the attorney general to revoke the declaration. Who is in charge here?

The provisions providing for Supreme Court judges to be eligible judges is much the same as that prescribed by the Listening Devices Act in respect of District Court judges and Local Court magistrates. That does not make the law any more acceptable.

The commissioner can apply to an eligible judge for a declaration that an organisation is a declared organisation, a declaration that may have serious consequences for a lot of people. Neither the application nor the grounds said to support it are given to those affected. Service is unnecessary. Publication of the application in the *Government Gazette* and one newspaper is sufficient. Probably, the *Gazette* is not at the forefront of the average bikie's reading, so they will have to carefully scan, every day, the four newspapers circulating throughout NSW to determine whether they are under attack.

The judge may have regard to any information 'suggesting' a link, and 'any other matter' the judge considers relevant. Rules of evidence are ignored. The judge is not required to disclose any grounds or reasons for the decision. He or she will be obliged to keep confidential, even from those directly affected, information considered to be 'criminal intelligence'. A member of the target organisation may be present and make submissions (subject to objection by the commissioner). Just how one makes submissions in respect of an application the grounds for which are not disclosed remains unexplained.

There is no appeal. Having found that members of an organisation associate for the purpose of criminal activity, and the organisation is a risk to public safety and order, the judge may direct that an organisation is a declared organisation. The order does not have to be served on anyone affected, just published in the *Government Gazette* and a newspaper. The consequences of a declaration are that the Supreme Court may make control orders against anyone who is a member of a declared organisation. This has the consequence that a controlled member of a declared organisation must not associate with another controlled member, nor recruit someone to be a member, or risk imprisonment for two years and for subsequent offences, five years. It is not necessary on a charge brought against an offending controlled member for the prosecution to prove the association was for any particular purpose or would have led to the commission of any offence.

Another effect of a control order is that the person affected is deprived of the right to earn a living in any number of legitimate ways (for example, carrying on business as a motor vehicle repairer or as a private inquiry agent and *any other activity prescribed by the regulations*). The Act gives a right of appeal against a control order. Otherwise, it does quite the reverse. Nothing can attract the jurisdiction of a court, whether to review a decision made contrary to natural justice or otherwise. No court of law has jurisdiction to consider 'any question involving compliance or non-compliance' with the provisions of the Act or the rules of procedural fairness. What are they frightened of?

The premier of NSW proudly introduced the Bill as providing 'tough new laws'; legislation that 'gets the balance right'. We will put in place, he said 'strong safeguards to ensure that gangs alone are the subject of the bill'. I do not know what they are. He said 'these are tough and well-constructed laws'. I do not know what a well-constructed law is. 'Tough' and 'getting the balance right' have become a familiar part of the tedious clichés and platitudes of politicians trying to justify the unjustifiable. We saw it time and time again in the passage of terrorist legislation; the words have lost their meaning.

So far as I am aware, no declarations have been made to date, and none need be. The NSW police already have ample powers to deal with violent crime, and conspiracies and solicitings to commit it.[3]

This legislation is a manifestation of the increasing tendency of modern governments to ignore, indeed actively destroy, those rights we once all enjoyed. Mr Cowdery QC, the NSW DPP, in a recent paper highly critical of the Act said:

> It matters not that the motives of the urgers or policy makers may be honourable. Justice Brandeis in 1928 warned in *Olmstead v United States* (277 US 438,479):
>
> > Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent…. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.'

The old days are unattainable. But sometimes politicians might like to reflect upon them. To quote from the Great Gatsby, we beat on, boats against the current. Regrettably we are not borne back ceaselessly into the past, or at all.

My thanks to Steve Robson, Leonie Nagle, Peter Kintominas and Kathy Thom in helping to put this together.

Endnotes

1. The law of sedition is presently under review by the Senate.
2. On 19 June 2009 the High Court granted special leave to the DPP to appeal against the decision.
3. See: *Totani v SA* (2009) SASC 301. The South Australian Supreme Court struck down similar legislation as invalid.

Verbatim

How good are we at predicting a judicial outcome?

See *Agbajec v Agbajev* [2009] 3 WLR 835, a decision of the English Court of Appeal on appeal from the poetically named Coleridge J. After referring to Lord Hoffman's speech in *Piglowska v Piglowski* [1999] 1 WLR 1360 at 1372 where his Lordship said, amongst other things that:

> The exigencies of daily courtroom life are such that reasons for judgment will always be capable of having been better expressed.

Ward LJ went on to say:

> So I begin with the easy acknowledgement of the high regard in which Coleridge J is universally held and of his vast experience in this field. Paraphrasing Lord Hoffman, one does not have to teach this old and ugly grandmother how to suck eggs. [2009] 3 WLR at 856)

Appeal allowed or dismissed? Score at full time?

'Old and ugly grandmother' 1, Court of Appeal 3.

In what was described by Longmore LJ as '… extremely luxurious litigation …' the Court of Appeal through Ward LJ feared that 'Homer has nodded' (Homer of course was Coleridge J).

Moral of the story? Old and ugly Greek grandmothers should not nod when sucking eggs.

BW Collins QC