

The Criminal Lawyers Association of Australia and New Zealand

9th International Criminal Law Congress

Opening Address

by

**The Hon. Justice Terence Higgins
Chief Justice, Supreme Court of the ACT
Conference Chairman**

**Hyatt Hotel, Canberra
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Ladies and Gentlemen:

Welcome to Ngunnawal Country. I acknowledge the traditional owners of this country, the Ngunnawal people. Canberra derives from an Aboriginal word meaning, “meeting place.” And so it is to this meeting place, that I warmly welcome you as we host the Criminal Lawyers Association of Australia and New Zealand, 9th International Criminal Law Congress.

A famous Chinese curse says: “May you live in interesting times”. Well, they are indeed interesting times in which we are living. These interesting, and in many ways not so pleasant times are poignantly reflected in the developments of criminal law. Criminal law is one area where the individual is potentially in his or her most vulnerable state. It is exceedingly important to reflect upon the way criminal law and procedures have borne upon the liberties of persons in Australia, and overseas since the beginning of this and the previous century. It would be unfair to say that all law reform has had a negative impact upon human rights. There are progressive laws and regressive laws, yet it is often the most regressive which generate the most publicity. And have the most serious impacts on those affected by them.

The topics of this conference elucidate human rights and the criminal law from many different perspectives. After the keynote address from Chief Justice Spigelman we will be hearing from Professors Hilary Charlesworth and Simon Bronitt of the Australian National University Law Faculty. Hilary Charlesworth Chaired the ACT Bill of Rights Consultative Committee, a Committee whose efforts bore the fruit which became Australia’s first legislated Bill of Rights – *The Human Rights Act 2004*. Simon Bronitt who also happens to be the Director of the National Europe Centre, has a ‘sobering’ view of the much talked about Act and will, no doubt, spell out its limitations. He will be followed by Max Spry, a Canberra barrister who will reflect upon the force of the *Human Rights Act*, in the face of a barrage of criminal law amendments. One such amendment is the *Bail Act’s* reversal of the presumption in favour of bail.

Human Rights and War on Terror

No conference on criminal law this century in Australia could omit a session on terrorism related issues. After lunch, on “Human Rights and the War on Terror” we have: Ian McPhedran, Steven Mark and Justice Madgwick of the Federal Court of Australia.

The issues the speakers will cover are acutely topical given the three new Commonwealth security bills that Attorney-General Phillip Ruddock aims to “fast track” through the Senate. According to a newspaper report from early this week the bills give increased powers to investigators and create new secrecy provisions for terrorist-related court hearings.¹ There have been nineteen Commonwealth security laws passed since 2001. States and Territories have followed suit and all jurisdictions have made a series of amendments to existing criminal laws.

One such amendment, to which I alluded earlier, introduces a presumption against bail specifically for terrorism related charges. Is this part of a disturbing trend to needlessly limit the rights of the accused? Many civil libertarians would say yes. And it is possible that the presumption against bail will have a discriminative impact upon those charged with terror related offences. One reason is that evidence of the charges may have national security implications. Such implications would require time to evaluate before being brought to court. Meanwhile the persons charged with offences could spend a longer time on remand before their trial can take place. There is a distinct possibility that they will spend longer on remand than those committed for trial on other serious offences.

Ian McPhedran will be speaking instead of Lex Lasry QC. Mr McPhedran has been a journalist for 30 years and is currently the News Ltd National Bureau Chief, defence writer and travelling conflict reporter. I believe he will share his experiences in Iraq and why the war there is a diversion from the “real” war against terrorism. On the same panel is Steven Mark, the Legal Services Commissioner of NSW, who will speak about the ASIO legislation. Justice Rodney Madgwick will ask what we should do about the terrorist threat. The suggested answer may surprise you.

Human Rights and International Justice

Our final session of the day is on “Human rights and International Justice.”

Human rights abuses are happening to our own citizens in other countries, as well as within our own country to non-Australian citizens. Where does international law step in for use as a tool to hold accountable those governments and persons who violate human rights norms? When can a foreign military presence justifiably enter a country in an effort to curb known human rights abuses, which are occurring on a large scale? Who is qualified to make such a decision?

Regrettably, Prof Jose Ramos Horta, who was to speak on this topic, has been called away by the United Nations. We are nevertheless fortunate to have as speakers National Living Treasure and outspoken advocate for refugees, Julian Burnside QC, followed by Peter Faris QC who is the founder of the Fitzroy Legal Service and former head of the National Crime Authority. They will be a fascinating pair of speakers to provide insight into differing perspectives of human rights and international justice.

Mental Health: The Medical/Psychological Perspective

Mental health and the criminal law system are notoriously enmeshed. Dr Amador a New York based psychologist and authority on the treatment of schizophrenia, describes the Los Angeles County Jail as “the largest in-patient facility in the country for the seriously mentally ill.”² I am very pleased that we have a panel made up of experts in psychiatry and psychology to assist those of us trained in law to come to some new understandings about how mental health fits in to the world of criminal law. On Friday morning, the panel on “Mental Health: The Medical Perspective” will consist of Dr Steven Allnut, Clinical Director of Psychiatric Services at Long Bay Hospital in NSW, followed by Professor of Psychology in the School of Health Sciences, Bob Montgomery, of the University of Canberra. The third speaker on this panel is Dr William Lucas a Fellow of the Royal Australian and New Zealand College of Psychiatrists who is currently a Psychiatrist Member of the NSW Mental Health

¹ Walker, Frank, “Tougher anti-terrorism laws on fast track”, The Sun-Herald, October 24 2004: <http://www.smh.com.au/articles/2004/10/23/1098474928471.html>

Review Tribunal and will be speaking, I gather, on the nature of criminal responsibility.

Mental Health: the Legal Perspective

The second session of the day looks at Mental Health from the perspective of those firmly within the legal system. Are victims and offenders adequately catered for by our present system of Mental Health Tribunals and Special Hearings? Justice McKechnie of the WA Supreme Court joins my brother, Justice Ken Crispin of the ACT Supreme Court and Robert Cock QC who is the Director of Public Prosecutions of Western Australia to illuminate such issues and proffer some suggestions for improvement.

Human Rights and Best Practice Prisons

Our first session for Saturday is entitled Human Rights and Best Practice Prisons. Considering best practice prisons is important in every Australian and New Zealand jurisdiction, and particularly so in the ACT where the proposal for a first-ever prison is a hot topic. Let's look for a moment at NSW prisons. While David Brown, who teaches Law at the University of NSW warns us against "glossing over local, regional and national difference," he describes, in an article reviewing the results of the Nagle Royal Commission after more than two decades³, the removal of Michael Yabsley as Minister for Corrective Services in the early 1990s as being:

followed by a decade of cautious penal politics in which the major political imperative has been to keep prisons off the front pages and keep quiet about any reforms, against the backdrop of a rapidly increasing prison population, a massive prison building program and a volatile and punitive populist debate over law and order and the criminal justice system.

Our two panellists for the session will provide their perspectives on prisons and prison reform. John Paget is the Director of the ACT Prison Project and Deputy Director of ACT Corrective Services. Ms Marion Watson will provide an excellent contrast. Ms Watson was CEO of a non-government organization dedicated to a range of activities related to the management of issues around drug and alcohol usage. This included

² The Law Report: 25 May 2004 – Mental Illness and the US Courts, ABC Radio National: <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s1114398.htm>

operating the National Demonstration Model of Needle and Syringe provision programs, and led to her being awarded an Order of Australia Medal for her contribution to the community in the area of HIV and AIDS. After nearly 20 years of being drug-free, she was charged with and convicted of trafficking in heroin and sentenced to four years imprisonment, with two years non-parole (and stripped of her Medal). This provides the background for her position on the role of prisons in the community. She describes herself as

in a hurry to get ‘things’ changed, preferably before concrete and clay have assured us that conducting a Canberra prison is not the best practice we can do but best of the worst, only comparatively good not good in its own right.

I look forward to hearing both perspectives on Saturday.

Indigenous Session

The Royal Commission into Aboriginal Deaths in Custody, back in 1991 made some 339 recommendations, many of which related to reducing indigenous incarceration levels. More appropriate sentencing practices are central to improving the relationship between the criminal justice system and aboriginal people. Two jurisdictions are compared in the Australian Institute of Criminology *Trends & Issues* paper on “Indigenous Courts and Justice Practices in Australia”⁴.

The NSW Circle Sentencing Court was established in Nowra and selects serious or repeat offenders – those likely to receive a custodial sentence. The court sits in a culturally appropriate location for the offender with the participants sitting in a circle consisting of community elders, the magistrate, the offender’s support people, the Aboriginal Project Officer, the victim and their supporters, the defence counsel and police prosecutor.

³ Brown, D., “The Nagle Royal Commission 25 Years On,” *29 Alternative Law Journal* 3, June 2004, p135.

⁴ Marchetti, E. and Daly, K., “Indigenous Courts and Justice Practices in Australia”, *Trends & Issues in Crime and Criminal Justice*, No. 277, Australian Institute of Criminology, May 2004.

However, the Nunga Court in South Australia sits in a special courtroom where all people, accused and magistrate alike, are seated at eye level, but across several tables with greater informality and fewer legal actors than usual. The special court sits several times a month with eight to 12 people listed for sentencing on the one day.

Magistrate Shane Madden from the ACT Magistrates Court will lead our panel of speakers on where exactly the Australian Capital is on Indigenous Issues and the Law. Shane Drumgold of the Director of Public Prosecutions ACT, talking about a shift in paradigm for restorative justice, will follow him. Mr Drumgold's views are no doubt shaped by his experiences studying restorative justice programs in indigenous communities in the USA, Canada and New Zealand. He has also been involved in the Steering Committee of the inaugural Ngambra Circle Sentencing Court.

Jury Research

Jury trials are expensive to run and consume the time of at least 12 panel members, not to mention prosecutors, defence lawyers and court staff. Five months ago in the NSW Court of Criminal Appeal the convictions of Bilal and Mohammed Skaf were overturned and retrials ordered much to the distress of the 16 year old victim of the gang rape. This was despite the instructions of the trial judge to the jury not to "go and do your own research". These days, we judges have to be very careful in selecting language to instruct jurors. And we always wonder how our instructions will be interpreted.

*Secrets of the Jury Room*⁵ is described as a "unique documentary experience" on how juries come to their eventual decisions. Assisting its creation were the Hon. George Hampel QC and Ms Elizabeth Fullerton SC⁶ who will be speaking after the presentation of the film on Saturday.

⁵ A one-hour film produced by 220 Productions Pty Ltd for SBS TV, Completion March 2004, Producer - Julian Russell, Director - Aviva Ziegler, Associate Producer - John Bryson .

⁶ Who starred as the judge and prosecutor respectively.

Sexual Assault

The final session will focus on the issue of Sexual Assault. In his keynote presentation four months ago at another Criminal Law Conference, Justice John Dunford of the NSW Supreme Court noted⁷ that:

Perhaps the greatest change to the substantive law has been the replacement of the offences of rape and carnal knowledge by the various categories of offences relating to sexual assault, which has not only reformulated the different offences, but has also significantly changed the definition of what constitutes sexual intercourse.

He also notes an unfortunate trend which I have also observed:

Whereas twenty years ago the most common offence of this nature was the rape of an adult woman ... and the most common form of carnal knowledge case was the charging of 16-20 year old males for having intercourse with their 15 year old girlfriends, the most common charge nowadays relates to child sexual assault, particularly, but by no means exclusively, by fathers and stepfathers on young girls in their early teens, and these charges are most commonly brought 10-20 , or even more, years after the offences are alleged to have been committed.

The needs of child witnesses are hence becoming an important issue for legal and judicial officers to consider. Professor Marcia Neave from the Victorian Law Reform Commission will be speaking on this topic on Saturday afternoon, followed by Ms Tania Evers, Barrister and NSW Attorney-General Bob Debus.

Conclusion

Indeed, the Conference covers serious issues, as this era is one of serious developments in the Criminal Law. On a brighter note, there are extensive opportunities over the course of these three days to meet with specialists in the fields of law, psychiatry, psychology and legal policy. I encourage you to attend the Cocktail Reception after the final speaker tonight in the opulence of the Centenary Ballroom here at the Hyatt. The long lunch tomorrow at the Ottoman is a Congress tradition (they say that those who *can* remember it must not have actually been there),

⁷ Hon. Mr Justice John Dunford, Supreme Court of NSW, "Looking Forward – the Direction of Criminal Law: Keynote Presentation", Criminal Law Conference 2004, Tuesday 27 July 2004, Sydney Marriott Hotel.

and please be sure to attend the Congress Dinner on Saturday night to be entertained by raconteur, Philip Dunn QC.

It is not every day such an excellent array of speakers on Criminal Law gathers in the nation's capital. I hope it is a worthwhile and memorable occasion for all of you.

Before I close, I would like to extend a vote of thanks to Jennifer Saunders and the conference organisers, especially Cassandra Smith, for their many months of preparation of this, the Criminal Lawyers Association of Australia and New Zealand, 9th International Criminal Law Congress.

Thank you.

- Now for our keynote speakers: Mr Jon Stanhope MLA, Chief Minister of the ACT, followed by Chief Justice Jim Spigelman of the Supreme Court of NSW -