Striking the balance — fundamental freedoms and the threat posed by terrorism

In early February, Justice Virginia Bell addressed the local legal fraternity to mark the Opening of the Legal Year. The following is a report on the Judge's speech. The full speech is available from the Law Society's offices.

Opening the Northern Territory Law Year, NSW Supreme Court judge, Virginia Bell, said that Australia's High Court has "preserved the common law rights and immunities of the individual which we acquired from the English in a state arguably more pristine than has been the case in that country". She said that Australians should be more enthusiastic about "the role that the High Court has played in preserving our fundamental freedoms".

Guest speaker at the Darwin and Alice Springs Law Society lunches, Justice Bell warned that in the context of the 11 September terrorist attacks, we would do well to heed the call by the Law Council of Australia "for a constructive debate on the government's proposed counter terrorism legislation".

Her Honour cited the High Court's 1951 decision invalidating the *Communist Party Dissolution Act 1950* as the first in a series of judgments by the Court protective of civil rights.

"Whatever heightened sense of apprehension or threat we feel today in the face of international terrorism is, I suspect, nothing in comparison to the fears entertained by many Australians in 1951 arising out of the perceived threat of international communism. The High Court's decision holding that the *Communist Party Dissolution Act 1950* was invalid is, today, lauded as one of its most important judgments," she said.

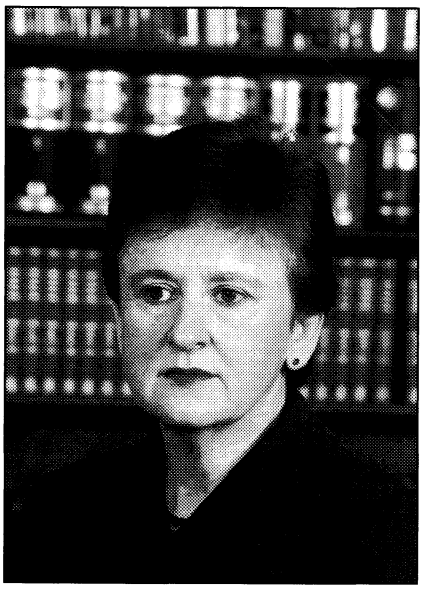
Justice Bell outlined how the United Kingdom, in particular, had responded poorly to "long exposure to terrorist violence" in terms of the protection of civil rights. She observed that the British response to the troubles in Northern Ireland had been the introduction of the *Prevention of Terrorism (Temporary Provisions) Act 1974*, which was described by the then Home Secretary as draconian. The anti-terrorist laws included the abolition of juries for those charged with terrorist acts, and trial in single judge "Diplock courts".

Her Honour said detention for interrogation for sustained periods of time "came to be accepted"; organisations and groups were proscribed, and persons were excluded "from being in or remaining in Great Britain".

"New offences were created which included that of withholding information known or believed to be of material assistance in preventing the commission of an act of terrorism or in securing the apprehension, prosecution or conviction of a person for such an offence," she said.

"This latter offence led in a practical sense to the curtailment of reporting in the media on the situation in Northern Ireland. On more than one occasion the Attorney-General raised with the BBC concerns that journalists may have been guilty of withholding information within the meaning of the provision.

"Under the provisions of the *Criminal Justice and Public Order Act 1994 (Eng)* an adverse inference may be drawn if the accused fails to mention to investigating police any fact relied on in his or her defence which he or she could reasonably have been expected to mention. An adverse inference may also be drawn from the failure of an accused to account to police for his or her presence at the scene of a crime or possession of an item or mark which police consider attributable to his or her participation in an offence. In the event that the accused does not give evidence at trial the jury may be invited to draw an adverse inference from that silence."



Justice Virgina Bell

Justice Bell said the provisions were enacted against a background which included two Royal Commissions rporting on aspects of criminal justice.

"The Royal Commission on Criminal Procedure, chaired by Sir Cyril Philips in 1981, recommended that 'the present law on the right to silence in the face of police questioning after caution should not be altered'," she said.

"Subsequently, on 14 March 1991, (the day the convictions of the Birmingham Six were quashed by the Court of Appeal) a Royal Commission under the Chairmanship of Lord Runciman was announced to report on the effectiveness of the criminal justice system in England and Wales in securing the conviction of those who were guilty of offences and the acquittal of those who were innocent. Sir John May, who had been appointed in 1989 to inquire into the circumstances surrounding the convictions of both the Guildford Four and the Maguires, was asked to complete his inquiries as a member of the Royal Commission. One of the Commission's terms of reference was to report on:

> The opportunities available for an accused person to state his position on the matters charged and the extent to which the courts might draw proper inferences from primary facts, the conduct of the accused, and any failure on his part to state his position.

"The Royal Commission conducted research (and commissioned a review of the existing research) on the exercise of the right to silence by suspects and its impact on trial outcomes. They found no evidence to support the belief that silence at the police station leads to improved chances of an acquittal. The majority recommended against allowing an adverse inference to be drawn from the exercise of the right of silence at the police station.

"They recommended retaining the present caution and trial direction unamended. The report went on to observe:

> It is the less experienced and more vulnerable suspects against whom the threat of adverse comment would be likely to be more damaging. There are too many cases of improper pressures being brought to bear on suspects in police custody ... for the majority to regard this with equanimity.

"As to the directions to be given in the event of silence at trial, the Runciman Report favoured the existing direction:

> The defendant does not have to give evidence. He is entitled to sit in the dock and require the prosecution to prove its case. You must not assume that he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing, one way or the other. It does nothing to establish his guilt. On the other hand, it means that there is no evidence from the defendant to undermine, contradict or explain the evidence put before you by the prosecution.[However, you still have to decide whether, on the prosecution's evidence, you are sure of the defendant's guilt].

Justice Bell said that, in contrast, Australia's High Court "in a line of cases" had done much to uphold civil rights over this period in that it has "acknowledged the vulnerability of people in custody when it comes to disputed confessional evidence."

She cited the Fitzgerald Inquiry and the Royal Commission into the NSW Police Force as revealing widespread practices of fabrication of evidence, verballing of suspects and planting of evidence.

"The judgment of Gibbs J in *Driscoll v the Queen (1977)* was notable for the acknowledgment that it would be unreal to imagine that every police officer in every case would be too scrupulous to succumb to the temptation to secure a conviction," she said

"In the light of the findings of both inquiries, the decisions of the High Court in cases such as *Driscoll, McKinney* and *Foster* might be thought to have been timely and appropriate.

"In all Australian jurisdictions we place a premium on respect for individual liberties and, in the context of the criminal law, we accord primacy to the right of the accused not to be subject to an unfair trial. The experience in England and Northern Ireland suggests that these values can be subject to strain when a society is confronted with sustained terrorist violence.

"The arguments which tell against allowing the trier of fact to draw an adverse inference from the exercise of the right of silence are as set out in the judgments in *Petty & Maiden v the Queen*. Mason CJ, Deane, Toohey and McHugh JJ observed:

> A person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of the participants and the roles which they played. That is a fundamental rule of the common law which, subject to some specific statutory modifications, is applied in the administration of the criminal law in this country. An incident of that right of silence is that no adverse inference can be drawn against an accused person by reason of his or her failure to answer such questions or to provide such information. To draw such an adverse inference would be to erode the right of silence or to render it valueless.

"We have to-date in Australia been fortunate to have preserved the common law rights and immunities of the individual which we acquired from the English in a state arguably more pristine than has been the case in that country. This reflects, among other things, our good fortune in not having faced a campaign of sustained terrorist violence."

Justice Bell said that the 11 September bombings threatened the Australian polity with the kinds of legislative response that had threatened individual liberties in England.

"Within three weeks of the 11 September attacks the Commonwealth Government foreshadowed a number of measures designed to deal with international terrorism," she said

"The Attorney-General announced that the Cabinet had approved legislation including provision for the Director-General of Security to apply to a federal magistrate or a legal member of the Administrative Appeals Tribunal requiring a person to appear before a prescribed authority to provide information or produce documents or things. ASIO would be empowered to question persons (including persons who may not themselves be suspected of terrorist activity). A new general offence of terrorism together with an offence of preparing for, or planning terrorist acts is also proposed. Amendments are to be introduced to the *Proceeds of Crime Act 1987* to allow for the freezing and seizure of terrorist property.

"The Attorney described the new general offences as providing a useful adjunct to the fight against terrorism. In this context he acknowledged that existing Commonwealth State and Territory criminal laws cover terrorist acts. It is not apparent if any conduct, not presently the subject of criminal sanction, is to be made so.

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CASE NOTES

O'Connor v Ryan

Supreme Court No.JA65/2001

Judgment of Mildren J delivered 11 December 2001

CRIMINAL LAW – SENTENCING

The appellant pleaded not guilty in the Alice Springs Court of Summary Jurisdiction to a charge of aggravated assault. He was convicted and sentenced to imprisonment for one month.

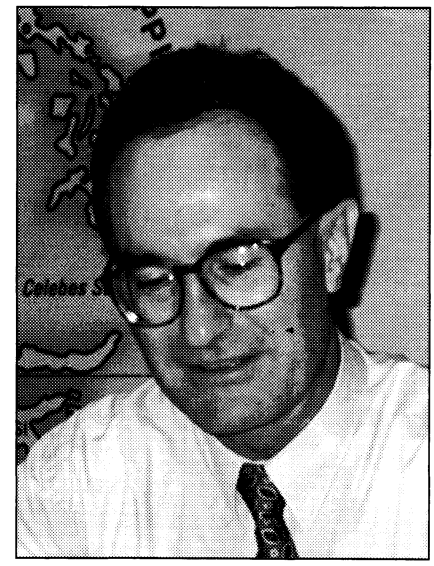
The Magistrate ordered that this sentence be suspended upon the rising of the court, conditionally upon the appellant being of good behaviour fot two years and paying a fine of $500 within six months.

The appellant personally conducted his appeal against conviction and sentence.

HELD

- Appeal against conviction dismissed.
- Appeal against sentence allowed (in part); order to pay fine quashed.
- The *Sentencing Act* (s.7) does not permit the imposition of a fine *as a condition of an order for suspending a sentence of imprisonment.*

Mildren J noted that the Magistrate had intended to dispose of the matter by way of fine only, until his attention was directed by the prosecutor to the appellant's conviction and fine in 1979 for aggravated assault.



Mark Hunter

Section 78B of the *Sentencing Act* therefore required the imposition of a term of actual imprisonment for a subsequent "violent offence".

His Honour observed that the Magistrate's order of actual imprisonment (to the rising of the court) ranked as a more severe penalty than the $500 fine originally intended by him.

In these circumstances, the imposition of the former made the latter unjustifiable. Mildren J identified this as a further sentencing error.

APPEARANCES

Appellant - in person

Respondent - McMaster/DPP

JUSTICE BELL from page 9

"In a further statement issued on 18 December 2001 the Attorney-General outlined further details of the proposed increase in the powers to be given to ASIO. The power to detain a person will allow for a period of up to forty-eight hours. The detained person may be held incommunicado without legal representation. This power is to be the subject of safeguards which were identified as including; that ASIO be required to give a copy of the warrant issued by a federal magistrate or a senior legal member of the Administrative Appeals Tribunal to the Inspector-General of Intelligence and Security together with a statement containing details of the detention."

Justice Bell said the proposed increase in the powers available to ASIO involves a significant alteration to common law rights and immunities and that the Law Council of Australia has urged that the legislation should be the subject of the close scrutiny of a Parliamentary Committee.

"The Council urges the need for the Government to demonstrate that the proposed new measures are reasonably necessary to assist in the defence of Australia against terrorism," she stated.

"It is apparent that at both the Federal and State levels of government it is necessary for security agencies and police to collate and exchange information on those who might reasonably be thought to pose a risk of politically motivated violence. Equally, history demonstrates that agencies charged with this function have in the past exceeded their charter.

"It is to be hoped that the President of the Law Council's call for a constructive debate on the government's proposed counter-terrorism legislation will be heeded."