



Basic rights are being stripped away

By Greg Barns

The overarching and disturbing theme of this criminal law edition of *Precedent* is that the rights of accused individuals and those who have been convicted of offences are diminishing at a rapid rate.

Monash University's Professor Bernadette McSherry's essay on preventive detention bears out this argument. As she rightly notes '[d]espite being held to breach international human rights law, such legislation still seems to be regarded as a legitimate way to combat the fear of future harm.' Governments, pandering to the incessant noise of police, some prosecutors, the victims lobby and the tabloid media, see nothing wrong with detaining individuals for decades despite the fact that they have served the sentence which the court, reflecting the community, has pronounced.

We see this trend of rights being undermined in the treatment of those who come under the radar of the justice system in the anti-terrorism laws which are now a decade old. Professor George Williams, arguably Australia's foremost authority on these laws, argues that these laws are now part of the furniture in the sense that they are being copied by governments to control bikie gangs and other organisations. As Williams notes, these 'laws create new precedents, understandings, expectations and political conventions when it comes to the proper limits of government power and the role of the state in protecting human rights. Hence, despite the often exceptional nature of such laws, anti-terror measures are increasingly seen as normal rather than exceptional.' Williams' point is neatly illustrated by Professor Rick Sarre from the University of South Australia's exposition on that state's serious organisations laws.

And Henry Pill's analysis of the ever-increasing reach of police stop-and-search powers shows that it's not just terrorism and bike gangs who are being targeted by governments but also ordinary citizens.

One of the difficulties in Australia for defendants is that they are treated better or worse depending on where they are being sentenced. Despite the fact that we are one nation, the reality is that there is no equal treatment before the law when it comes to sentencing. Associate Professor David Field, from Bond University, has contributed an excellent survey of sentencing law which examines matters such as discounts for pleas of guilty in each jurisdiction.

This edition also includes a superb how-to guide by one of Queensland's most prominent criminal lawyers, Bill Potts, on guilty pleas, and developments in expert evidence by Gary Edmond, David Hamer and Andrew Ligertwood. And Western Australian researcher Judith Fordham updates us on the work she is doing on juries and whether they are an ancient ritual and little more, or have relevance in the 21st century.

We all like to think that the criminal justice system is underpinned by social justice principles. But Leanne Ho's thought-provoking look at what social justice really means in a developed-world society like Australia raises questions that practising lawyers ought to ask themselves regularly.

The ALA advocates for a fairer criminal justice system. We do not subscribe to the erroneous assumption that 'crims get away with it' and that the system is weighted against victims. As this edition emphatically shows, the opposite is occurring. It is getting harder for criminal defence lawyers to ensure that their clients get true justice. The criminal justice system is moving towards a position where the state, through its police, security agencies and prosecutorial manifestations, is stripping away fundamental rights. As this edition goes to press, the NSW government is proposing to abolish the right to silence and, in Western Australia, there is a proposal that makes it difficult to get a discount for a plea of guilty unless a client does so at the earliest stage of the process. The ALA is opposing both measures.

Enjoy this criminal law edition of *Precedent* – it's diverse, informative and challenging. ■

Greg Barns is a barrister in Michael Kirby Chambers, Hobart and Stawell Chambers Melbourne, and is the immediate past-president of the Australian Lawyers Alliance. **PHONE** (03) 6224 7063

EMAIL www.michaelkirbychambers.com