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HUMAN RIGHTS IN CRIMINAL JUSTICE AND POLITICS

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INTRODUCTION

Thank you for the invitation to speak to you this evening. I am truly honoured to be included among the distinguished speakers who have addressed you over the last ten years and I hope you will find something of interest in what may well prove to be a somewhat discursive presentation.

I note that the core theme of the Foundation is human rights. I am pleased about that, because I would have had very great difficulty speaking to you about theology. I'm happy to stick to the "major issues" part of the Foundation's title and the recognition and protection of human rights has been a core activity of mine for many years.

I added "politics" to the title of this talk, not to address human rights in politics (we don't have time for that), but to catch the political influence on criminal justice and its interaction with the protection of human rights in the criminal justice process.

CRIME

Ever since humans came together to live in groups we have needed rules for our conduct. In time, some of those rules became prohibitions on certain kinds of conduct. The simplest example in modern society is the criminal law – it proscribes certain conduct and provides consequences for offending against those proscriptions: "crime and punishment" sums it up.

It seems to be a permanent feature of human behaviour, unfortunately, that wherever rules are made for our conduct there will be rule breakers. They need to be dealt with for our own welfare and the community has given the responsibility for that to government. The government makes laws for our behaviour, provides for breaches to be investigated, prosecuted and adjudicated and provides for the consequences of conviction. The legislative arm of government, which makes all these provisions, is composed of politicians. Their principal goal in life is to be elected by us – so they try to please those of us who make the most noise by the laws that they make.

Those laws cannot stop crime and if any politician tries to tell you that they do, usually at election time but not (I notice) for this election, then they are deluding themselves and you.

The causes of crime are extremely complex. Different crimes at different times and in different places and circumstances involving different people have different causes. Those causes are not only many and varied, but complicated by the personal characteristics of the people involved and the circumstances in which the offending occurs. Crime is fuelled by inadequate social conditions and influences, by lack of education, by greed, by selfishness, by lust, by revenge, by incapacity caused by intoxication or mental illness, by exhibitionism and so on. One thing is sure, however: more and harsher penalties for that proportion of offenders who are caught and punished have little if any effect on offending generally or on reoffending by those persons. We need to look elsewhere to effectively prevent crime.

CRIMINAL LAW

The criminal law we use to deal with all this must be carefully planned and effectively administered. That must occur in a context of protection of the legitimate human rights of all concerned, at every stage of the process.

The Hon Dr Ken Crispin QC has an illustrious history as a barrister, Director of Public Prosecutions, judge and law reformer. He has said[1]:

> *"The role of law is not to impose a particular moral or political agenda, but to maintain order, facilitate government, and protect human rights. The criminal law, in particular, should generally be governed by the 'harm principle', expanded to permit the protection of the vulnerable and to prevent serious alarm or offence… The system of justice should be fair, and penal sanctions accepted as a form of communal self-defence, subject to the constraint that responses should not exceed those reasonably necessary to protect the community and its members."*

The protection of human rights by the criminal law, on the one hand, especially the rights of an accused person, can sometimes seem to be at odds with the protection of the community generally; the right balance must always be struck between these apparently competing imperatives. We must find ways of dealing with the breaches of the law that will inevitably occur that will provide future protection as they deal properly with the instant infractions. Those ways must always be broadly consistent with the values, aims and desires of the community in whose name the criminal justice system operates and, of course, consistent with the broad principles of human rights for all involved, including the offender. It is not a simple process or one that can be carried out without the exercise of judgment.

Regrettably, those ends are not always well served. Crispin again:

> *"Crime and punishment remains one of the very few areas of public policy that is largely uninfluenced by careful consideration of the causes of the problems or how those causes might be effectively addressed."*[2]

In relation to laws against drugs, for example, he says:

> *"In blindly adhering to our present policies, we are trampling on people's rights, endangering lives, and causing untold misery and hardship. This is*

[1] "The Quest for Justice", Ken Crispin (Scribe 2010), page 54
[2] Op cit, page 163

making the problem worse rather than better. It is also morally unsustainable."

CAUSES OF CRIME

We can sometimes get some assistance in understanding why things happen from the observations of those in other fields of human behaviour. Tim Flannery[3] writes of the challenge of sustainability of our planet and refers to one of the greatest obstacles:

> *"It's not one of the seven deadly sins, though like them it was instilled in us through evolution by natural selection. But it is so little recognised that we don't even have a word to describe it. Among sociologists it is known as discounting the future – taking short-term gain even though doing so might cost us immensely in the longer term. At its most extreme, it manifests with mnemes* [transmitted ideas or beliefs] *expressed in ideas like 'I've nothing to lose' or 'I've no future'. While these sentiments may lead to a sort of moral paralysis, our genes do not give up. Instead, in their search for immortality, they seek to squeeze as much as possible out of us before we crash and burn. And that can be very bad for us, our society and our planet.*
> *We are all familiar with the pictures in the news: youths in balaclavas captured on CCTV robbing service stations for a few dollars; young men stabbed or shot dead over some seemingly minor affront. Why is it that some of us do risky things that could cost us our futures?"*

Perhaps the selfish gene, the one that is successful, compels much of the behaviour we deal with as criminal offending by heavily discounting the future of the offenders. Should it be regarded as an immutable feature of our being? As an illness, perhaps? Should we, rather, be reinforcing those external and internal factors that give us better self-control?

I have strayed a little from the central theme; but it seems to me that if we are talking about human rights, we need to have some understanding of what it is to be human.

PROSECUTION

Prosecuting is a demanding profession. In an address during the XXth Annual Conference of the Canadian Federal Prosecution Service in June 2000 then Deputy Minister of Justice and Deputy Attorney General of Canada, Morris Rosenberg, said:

> *"Carrying out the duties of a prosecutor is difficult. It requires solid professional judgement and legal competence, a large dose of practical life experience and the capacity to work in an atmosphere of great stress. Not everyone can do this. Moreover, there is no recipe that guarantees the right answer in every case, and in many cases reasonable persons may differ. A prosecutor who expects certainty and absolute truth is in the wrong business. The exercise of prosecutorial discretion is not an exact science. The more numerous and complex the issues, the greater the margin for error."*

[3] "Here on Earth: an argument for hope", Tim Flannery (Text Publishing 2010), page 211 ff

He also referred to the prosecutor's heavy obligation to conduct himself or herself with dignity and fairness; and to take into account what the public interest demands. One of the other aspects of decision making, contributing to further complexity, is the taking into account of the human rights requirements of a variety of situations.

Much earlier, in the Canadian Supreme Court case of *Boucher v The Queen*[4], Rand J famously said (because it has been repeated often) of the role of the prosecution:

> *"It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."*

HUMAN RIGHTS

Human rights cannot be and are not ignored in the criminal justice system. For at least the last 60 years prosecutors especially have been increasingly required to incorporate into the execution of their difficult duties the observance and protection of the human rights of all involved in the criminal justice process and to do that in the application of the just rule of law. There are some documentary imperatives for that.

The UN Universal Declaration of Human Rights of 1948 (UDHR) requires it. The UN International Covenant on Civil and Political Rights (ICCPR) details it (especially Article 14).

The International Association of Prosecutors (IAP) Standards give it more immediate legitimacy and force. In addition, the IAP has published the Human Rights Manual for Prosecutors, the second edition (2009) of which is now available (see www.iap-association.org). Its Human Rights Training Package has recently been finalised. The IAP is also a body with special consultative status with the UN's ECOSOC.

The UN Vienna Declaration and Programme of Action of 1993 noted that:

> *"The administration of justice, including law enforcement and prosecutorial agencies and, specially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realisation of human rights and indispensable to the process of democracy and sustainable development."*

[4] (1954) 110 CCC 263 at p 270

In 1994, following on the Vienna conference, the UN General Assembly prepared a Plan of Action for the UN Decade for Human Rights Education (1995-2004) calling for special attention to be given to:

> *"the training of police, prison officials, lawyers, judges … and other groups which are in a particular position to effect the realisation of human rights."*

So the obligation on all criminal legal practitioners and criminal justice operatives is clear. The legal regime applicable in any jurisdiction must be applied consistently with the protection of human rights.

We all (including especially prosecutors) need to be alert to threats to and the erosion of rights and be proactive in preventing them. This is particularly so when the community, rightly or not, feels itself under threat from particular forms of (usually transient) offending. It is exactly when the risk of abuse is at its highest, often as a result of media and political agitation, that particular efforts need to be made to ensure that the right balance between community protection and the protection of individual rights mentioned above has been struck. (Almost all aspects of criminal justice involve balance).

Human rights provisions have a practical effect on the way in which criminal trials are conducted. The principles expressed must be given effect by substantive and procedural laws – and by the willingness of prosecutors, above all, to see them enforced.

Human rights (as you all would know) are not soft and fuzzy things that we can pull around us on a cold night to keep us warm and safe. They are not something observed only by left-leaning fringe dwellers. Nor are they optional add-ons to a criminal justice system or the practice of law – something that we embrace only if we feel like it. Human rights are fundamental. We prosecutors have no reason to fear them any more or less than anyone else – they belong to us as well, to every person.

The pursuit of human rights is about as hard as any pragmatic political exercise can be. People die doing it – occasionally even prosecutors. But prosecutors are generally tough and can and do protect human rights just by adhering to the basic principles. They can also do it without compromising their cases. It should never be forgotten that prosecutors are "ministers of justice".

The following propositions, amongst others, emerge from the references and statements of principle that have been made.

1. Prosecutors when they enforce the criminal law must do so fairly. The ultimate aim of the criminal prosecution process is a fair trial – fair to the accused as well as to the community whom prosecutors represent (and which includes the victims of crime). Fairness is not something that can be precisely measured. It is a goal to be achieved in all legal systems – whether the purpose of a criminal trial may properly be regarded as a search for the truth (as the civil law system in its pure form, it is said, sets out to do) or as a contest between opposing cases (as the common law system in its pure form may be characterised).

2. Prosecutors, by reason of their place and role in the criminal justice system, are in a particularly powerful position to protect human rights. In common law systems some have little, if any, supervisory role over police; but they may affect the course of proceedings and the conduct of others by, for example, the attitude they take to the use of evidence that may have been illegally or improperly obtained and in the advice they give to police about further inquiries. Those who are more closely involved in investigations may have a more direct effect. In civil law systems prosecutors may supervise the investigation from the outset, ensuring by the exercise of quasi-judicial powers that the rights of the suspect (and any victim and anyone else involved) are fully protected.

Fairness to the accused may be broadly monitored, even if not measured: largely by the extent to which a jurisdiction complies with Article 14 of the ICCPR through its constitution and procedural (including evidentiary) laws and practices. Many criminal justice systems now guarantee at least the following rights for suspects and accused persons:

- the right not to be subject to arbitrary arrest, detention, search or seizure;
- the right to know the nature of the charge and the evidence;
- the right to counsel;
- the presumption of innocence;
- the standard of proof beyond reasonable doubt;
- the right to a public trial by an independent court;
- the right to test the prosecution evidence (eg by cross-examination);
- the right to give and to call evidence; and
- the right to appeal.

In some circumstances (for example, in relation to transnational or organised crime and terrorism) the rights of the accused are often eroded, even in the most advanced and stable democracies. If a community feels particularly threatened by some form of illegal conduct, rights may be more readily compromised, either in the name of expediency or in the name of revenge (but often out of fear). Needless to say, those trends are to be moderated by appeals to principle and reason and by the striking of the right balance.

In 2000 the Hon Arthur Chaskalson, National Director of the Legal Resources Centres in South Africa and inaugural President of the Constitutional Court of that country, addressed a Public Interest Advocacy Centre (PIAC) dinner in Sydney. He said:

> *"… (C)ourts are the institutions to which people in democratic societies turn for the protection of their rights and no one has greater responsibility for promoting and protecting human rights than judges and lawyers. If that protection is lacking, if institutions fail, the consequences can be catastrophic. … Although South Africa was ruled by a minority regime the same course could (also) be followed … by majority governments, where the opposition is weak and the courts and the legal profession are either not powerful enough nor vigilant enough to resist incursions upon freedom.*

> *… (F)irst incursions into the protection of human rights are often the most dangerous, for they begin a process of erosion which is difficult to stop once it has begun.*
> *… (T)he erosion of the power and independence of courts, and the lack of vigilance by lawyers, judges, and organs of civil society, permit those who should be held accountable for their conduct, to go free."*

At the end of her term as President of the NSW Bar Association in 2001, Ruth McColl SC (now a Judge of Appeal in NSW) sounded a timely warning for us all. In her final column in the Bar's monthly newsletter Bar Brief she wrote:

> *"Lawyers tend to take these core values* [i.e. the rule of law and democratic principles] *for granted. We work with the Rule of Law every day. We should not lose sight of the fact that the Rule of Law is not as concrete and ever-present a phenomenon to some members of the community as it is to us. At times, the transient, but regrettably politically significant influence of opinion polls can push the Rule of Law to one side and allow pragmatism to prevail over principle."*

The corrupting force may not be just responses to opinion polls. These influences may be exerted openly or covertly by politicians, the media or rulers and policy makers of all kinds for many reasons. We cannot know what is in the minds of our rulers, what plans they may have for the future, so there may be no early warning to be had there. But we can know what they do, the way they act – and we can look to their actions and to events surrounding them to draw conclusions about the course that is likely to be taken in the future.

It matters not that the motives of the urgers or policy makers may be honourable. This is not a new challenge; and many years ago in 1928 Justice Brandeis 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."*

It is our obligation to assist them towards that understanding. Despite all those advances, however, no doubt there are still prosecutors around who do see human rights as obstacles in the way of doing their job; perhaps not obstacles in the way of pursuing any particular agenda (like white supremacy in the old South Africa or the support of national socialism), but obstacles in the way of securing the conviction of those who are claimed to be "obviously" guilty.

How convenient it would be – for a prosecutor intent on "winning" (being an infallible prosecutor, of course) – to be able directly or indirectly to ignore the rule of law and the human rights of those involved and to take any of the following unacceptable actions:

- to investigate or direct the investigation of crime without restriction: to be able to go anywhere and search anything, to watch and listen to all and

sundry by surveillance devices and telephone intercepts, to question and detain anybody, to seize property, to intercept mail;
- to detain suspects at will and be able to deny them bail (or conditional release of any kind), without judicial intervention;
- to interrogate suspects without restriction and to require them to answer;
- to prevent a suspect's access to legal advice;
- to undermine and destroy those who dissent against the social order, to target and remove "troublemakers";
- to have juveniles dealt with in adult courts and confined in adult prisons;
- to bow to political or media or other inappropriate pressures in deciding whether to proceed;
- to delay trials until conditions were right for the prosecution;
- to excite the media to spread prejudicial pre-trial publicity about the accused person;
- to conduct trials in private, away from the gaze of those connected with the accused and from public commentators;
- to have the judiciary constantly on one's side supporting improper practices;
- to refuse to cooperate with and to obstruct the defence at every turn and to disclose nothing about the case in advance;
- to require an accused person to provide and pay for his or her own interpreter, where translation is necessary;
- to be able to prove the prosecution case by easy shortcuts – indeed, to require the defence to disprove matters or even to prove innocence;
- to be able to rely on illegally and improperly obtained evidence;
- to be able to have inferences of guilt drawn from the silence of the accused;
- to have the accused shackled in court, at whim or excluded from his or her own trial;
- to have available and serving the wants of the prosecution the severest possible punishments, even by way of extrajudicial killings.

At some times and in some places some of these things (if not all) do happen. So what prevents a system with these features from operating with impunity? – human rights protected by the rule of law, reflected in provisions such as Articles 9, 10, 14, 17 and 19 of the ICCPR, enacted in local legislation and protected by local practice. These are mighty obstacles to abuse by the criminal legal system. Without these sorts of guarantees a country cannot claim to be truly operating under the rule of law.

It is plainly possible to have law and order without human rights; but it must be remembered also that it is really not possible to have human rights without law and order – under the just rule of law.

POLITICISATION OF LAWMAKING

It is not overstating the situation to say that on occasions the lawmakers have taken their drafting instructions from the most prominent rantings of the tabloid media. There have been many examples of inappropriate knee-jerk political reaction, often ultimately demonstrating the truth of the old adage that "bad cases make bad law.

Sometimes legislation is the product of the most informal of procedures. Lawmaking may occur with minimal consultation and in great haste. Sometimes my Office is not consulted at all about planned criminal legislation. At other times, however, we have been able to have substantial constructive input into criminal legislation and I suggest that we have a proper role to play in that process.

In his valedictory speech in the Legislative Assembly on 23 November 2006, the former Attorney General, Bob Debus, boasted of the 258 legal bills passed through the Parliament in the previous six years, being one third of all bills passed. The pace has not slackened under the present Attorney General. Much of this legislation, at least so far as the criminal law is concerned, has been to tinker at the margins of substance and procedure in an *ad hoc* fashion, often (as with changes to bail laws) in response to unusual and atypical situations and to appease the latest demand for ever more punitive measures to be applied in the criminal justice system.

PUNITIVENESS

The trend in lawmaking and in political commentary in NSW has been for some time towards greater punitiveness in the disposition of criminal cases – the prescription of more restrictive procedures to apply to accused persons, of more and harsher penalties for criminal conduct and of the extension of punishment beyond the sentences imposed by trial judges. There are significant human rights implications in approaches of this kind.

On 2 June 2010 Chief Judge Blanch of the District Court of NSW spoke at a conference of Legal Aid Commission lawyers. He drew comparisons between NSW and Victoria. In 2009 there were 150 people in custody (on average each day) per 100,000 in NSW and half that in Victoria. In NSW for the 2008-09 financial year just over a billion dollars were spent on Corrective Services. If we did whatever is being done in Victoria, he said, we could spend half that amount. (And it might also be remarked that if imprisonment reduces criminal offending, then NSW's crime rates should be significantly lower than those in Victoria – but they are not. Rates of personal assault, murder, robbery, break-ins, burglary and car theft are lower in Victoria.)

The NSW Bureau of Crime Statistics and Research (BOCSAR) has recently published a report on this issue and I commend its website to those who may be interested in following this up: www.bocsar.nsw.gov.au

Furthermore, in NSW 25% of the prison population is unsentenced – on remand. In Victoria the figure is 18% (where the delays in coming to trial, however, are significantly greater than in NSW).

The Bail Act 1978 (NSW) was passed substantially to address a burgeoning number of prisoners on remand. Presumptions in favour of bail were enacted in some cases and offences and situations stipulated where no presumption applied or there was a presumption against bail. We seem to have come full circle with the progressively legislated removal of presumptions in favour of bail and the enactment of presumptions against – often in response to individual and atypical cases that have received publicity. Many people refused bail are ultimately acquitted and many

receive non-custodial dispositions of their cases. There is no recourse to compensation in such circumstances (as there is in some other countries, especially in Scandinavia and other parts of Europe).

The editorials in the Sydney Morning Herald and The Age of 20 April 2010 had referred to the "Disappearing right of bail" and to the matters raised above. They said:

> *"As the NSW government steadily piles on new categories of serious crime in response to the latest crime scare…, ramps up mandatory sentences, restricts bail eligibility, and most recently, throws away the key for convicts perceived as unrepentant, we are entitled to ask what returns in safety we are getting from our billion-dollar-a-year jail industry. On a more humane calculation, we should be asking what damage is being done to individuals and society by this pursuit of vengeance… Of course, there will always be a few who go out and commit new crimes while on bail or parole, and set the tabloid dogs barking again at the Attorney General. If jail worked at reform, the lock-'em-up philosophy might have more appeal. Unfortunately, the statistics show NSW also has a much higher recidivism rate than Victoria."*

The Bail Reform Alliance in NSW has been set up to address these issues, headed by a former magistrate.

A NSW Parliamentary Briefing Paper[5] examines the bail issue in great detail. It concludes:

> *"Changes to bail laws since 2002 have followed the dominant trend of making it more difficult for accused persons to obtain bail: both in relation to a range of offences, and where the accused person is regarded as a 'repeat offender'. These changes have been justified on the basis that they provide greater protection for the community against the risk that such persons will commit offences while awaiting trial. However, critics have argued that the changes have largely been ad hoc responses to particular crime incidents, and that a good case has not been made out for reforms that have undermined an accused person's right to the presumption of innocence."*

The Chief Judge in his paper put forward as another reason for the growth in the gaol population the operation of the Standard Non-Parole Period regime. The stated objective of the scheme was limited to "promoting consistency and transparency in sentencing"[6], but the unstated intention of its proponents must also have been to increase the number and length of sentences for the offences listed and that has been the effect.

The Chief Judge said:

> *"40 years ago murderers received a life sentence but most were released after serving 10 – 15 years and that was generally regarded as the most serious of offences. It was unusual for a prisoner to spend more than 20 years in gaol. It was then generally accepted that prisoners became institutionalised after serving 5 years in gaol and that after 10 years, they would have extreme*

[5] "Bail law: developments, debate and statistics", Briefing Paper 5/2010, Lenny Roth, NSW Parliamentary Library Research Service, June 2010

[6] Explanatory Note to the Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002

difficulty coping with living by themselves in the community. I suspect little has changed in that regard. We also should ask if our community is now any safer and less prone to crime because of the increase in sentences."

The upwards shift in sentencing was substantially accelerated by the Sentencing Act 1989 and the introduction of "truth in sentencing" from 1990. It also brought in "true life" sentences, of which there are presently about 50 being served (and some lifers have died in custody).

The Chief Judge asked if we should review a number of practices, including amending or abolishing the Standard Non-Parole Period regime:

"As I have said, gaol sentences must be imposed in many cases and in some the sentence should be substantial but the real question is how much is enough. You would have a good understanding of just how difficult serving time in gaol is. As you know, in the gaol population there is an over representation of people with mental disabilities, people with very low IQs, people with personality disorders and people from severely disadvantaged backgrounds. That is a difficult environment in which to live.

Sir Winston Churchill said in 1912: 'The mood and temper of the public in relation to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of a country. A calm, dispassionate recognition of the rights of the accused and even of the convicted criminal … (is a) sign and proof of the living virtue in it.'

The question how much is enough assumes real significance in the context of a prison budget of more than a billion dollars a year."

As I have already mentioned, recidivism is a significant issue in NSW (at around 40% of prisoners being back inside within two years of release). Ross Gittins in his column of 28 April 2010 said:

"…how would you go about reducing recidivism? You'd do it by putting a lot more effort into rehabilitation, while people were in jail or after they'd been released.

Would it work? According to a big US study, yes it would. It finds (in descending order of cost-effectiveness) vocational education in prison, intensive supervision using treatment-oriented programs, primary- or secondary-level education in prison, cognitive behavioural therapy, and drug treatment in the community are particularly effective.

These programs would have a cost, but they'd end up saving a lot more than they cost. And, of course, as well as saving the taxpayer money they'd achieve a reduction in crime – the thing we supposedly care most about.

The one thing they wouldn't be is politically sexy – which may explain the public's, the media's and the politicians' lack of interest."

AFTERMATH OF THE TERRORIST THREAT

Difficulties with the modern development of familiar laws have been compounded by the creation of new laws for new applications.

Australia (and NSW) acquired anti-terrorism laws after the "9/11" events and the Bali bombings. I do not pause here to consider the necessity for or the appropriateness of

the legislation, although anyone supportive of the just rule of law should have concerns about some aspects of it. The Clarke Report into the Haneef case[7] identifies many of them. However, legislation at federal and state levels seems to have been received as a signal for the legislators to expand such measures from exceptional and clearly dangerous circumstances requiring exceptional responses into areas of what might be described as "ordinary crime" – to push the envelope of measures available to law enforcement with the anti-terrorism laws as a guide. I query the desirability, effectiveness or legitimacy of such a course. There are human rights implications here, as well.

The International Bar Association has addressed the principles to be applied in the legal responses to the threat of terrorism in its report International Terrorism: Legal Challenges and Responses[8]. It is well possible to react in a principled and effective way while observing the principles of the just rule of law.

However, we have seen inappropriate measures taken against asylum seekers, against Vivienne Solon and Cornelia Rau and against children in immigration detention.

We have seen the bold (but thankfully ill-fated) move of the *Kable* legislation in NSW (prior to 2001)[9] follow through to serious sex offenders[10], fortified by anti-terrorism measures and the High Court's decision in *Fardon*[11]. The UN Human Rights Committee, in cases from NSW and Queensland[12], reported in March 2010 that continuing detention or extended supervision are double punishment and contrary to Article 9 of the ICCPR – the Australian Government was given 180 days in which to respond. The NSW government has talked about extending such measures to serious violent offenders who do not satisfactorily participate in rehabilitation programs in gaol. The Premier was reported to have ordered Corrective Services to begin an audit of the 750 "worst of the worst" prisoners in NSW. (I understand that it may have been possible to identify about 20 prisoners to whom this scheme could apply.) The Council for Civil Liberties (CCL) said in response: *"The rule of law requires politicians to set the framework of justice and for judges to deliver sentences away from political influence. The prison system is there to encourage prisoners to reform but, if they know they can effectively be resentenced by the government, there is no incentive to reform."*[13]

One serious difficulty with legislation of this kind is the prediction of future offending or future dangerousness. Another (illustrated starkly by the case of Denis Ferguson) is the community's and the media's responses to having such persons under extended supervision orders in the community.

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[7] www.haneefcaseinquiry.gov.au

[8] A report by the IBA's Task Force on International Terrorism, 2003.
Recommendation 9 states: *"States should not use the fight against terrorism as a pretext to adopt measures which unlawfully restrict the rights to freedom of expression, religion, opinion and belief, nor the rights of minorities."*
Recommendation 11 states: *All restrictions of substantive human rights must be expressly provided by law, must be necessary and proportionate, and must not exclude the possibility of judicial review."*

[9] Kable v The Director of Public Prosecutions for New South Wales [1996] HCA 24

[10] Crimes (Serious Sex Offenders) Act 2006

[11] Fardon v The Attorney General for the State of Queensland [2004] HCA 46

[12] Under the Dangerous Prisoners (Sexual Offenders) Act 2003

[13] AAP, 11 April 2010

In South Australia[14], NSW and Queensland[15] we have seen legislation described as laws against "bikie gangs" and as "gang laws". The Northern Territory has also gone down that route and Western Australia is thinking about it. Victoria, which has a human rights charter, has ruled it out. However, the laws are not confined in their terms to "outlaw motorcycle gangs" and their potential reach is much broader. They could apply, for instance, to political parties, labour unions, religious groups or charities (among many other possibilities).

CONCLUSION

I have often been told that "moderation in all things" is a good principle for living. In the criminal law I do not advocate more than that, but I add "balance". Human rights are in that balance and must be protected as both the criminal justice system and the politicians go about their work seeking to protect us from crime. But a community that has its rights eroded in the process may not be so worthy of protection.

[14] Serious and Organised Crime (Control) Act 2008
[15] Criminal Organisation Act 2009