Criminal Oversight:

a human rights review of recent criminal justice law in New South Wales

by

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public space

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Synopsis

This paper analyses eight criminal justice laws applicable in New South Wales - six are matters of state legislation, one is the absence of state legislation and one is a High Court decision. The cases were chosen for their currency and the degree of concern expressed about them. In each case the law about which there was concern is identified, the suggested human rights breach is noted, some background to the development of each law is given, and then the international jurisprudence is applied, leading to a provisional conclusion. In almost every case probable breaches (in two cases possible breaches) are found of the relevant human rights standards.
Table of Contents

1. Police Powers  
   1.1 Knife searching powers  

2. Pre-trial rules  
   2.1 Offence based restrictions on bail  
   2.2 Mandatory defence disclosure  

3. Trial rules  
   3.1 Restricted crossexamination of sexual assault complainants  
   3.2 The ‘reasonable explanation’ rule in Weissensteiner  

4. Criminal Sanctions  
   4.1 Retrospective life penalties  
   4.2 Compensation for victims of miscarriages of justice  

5. Equality before the law  
   5.1 General police immunities  

6. Conclusion  

7. Bibliography  
   7.1 UN Treaties and Documents  
   7.2 Human Rights Committee decisions  
   7.3 Australian Legislation  
   7.4 Australian cases  
   7.5 Books, articles and reports
Criminal Oversight: a human rights review of recent criminal justice law in New South Wales

This paper examines eight criminal justice laws applicable in New South Wales - six are matters of state legislation, one the absence of state legislation and one a High Court decision - and audits them according to the international human rights jurisprudence, in particular the *International Covenant on Civil and Political Rights* (1966) (the ‘ICCPR’) and the *Convention on the Rights of the Child* (1989) (‘CROC’).

These instruments were chosen because of their preeminence in international law, their broad and still growing acceptance and legitimacy, the firm ratification and accountability processes created under these treaties, and the body of international jurisprudence that already exists (especially for the ICCPR) to assist in the interpretation of their principles. As one half of the ‘International Bill of Rights’ (the other half being the *International Covenant on Economic, Social and Cultural Rights*) the ICCPR has become a centrally important means of defining an evolving human character and identity. A proper understanding of its implications in the area of criminal law is therefore also central to the broader legitimacy of that law. For the purposes of this audit study, the ICCPR and CROC are taken as the primary measuring tools, while the other relevant international treaties, agreements and declarations (eg. *The Convention on the Elimination of Racial Discrimination*, and the *UN Standard Minimum Rules for the Administration of Juvenile Justice*) are simply used to help interpret them.

The laws are clustered in five groups: (i) Rights and Police Powers, (ii) Pre-trial Rights, (iii) Trial Rights, (iv) Rights and Criminal Sanctions, and (v) Equality Before the Law. These represent the major areas in which an individual's rights may be affected by the criminal law. Each legal issue to be examined under each of these five groups is then subject to each of these four steps:

- identifying the law about which there is concern, and the possible human rights breach,
- recounting a brief background to the law,
- applying the international jurisprudence, and identifying the suggested breach and possible justifications of the law (counter arguments, compensatory mechanisms, defences, exceptions provided for by human rights law),
- reaching a conclusion, which may be that the law under consideration (or a part of it) represents (i)
a clear breach, (ii) a possible breach, or (iii) no breach of human rights standards.

1. **Police Powers**

In examining the human rights compliance of criminal justice laws which relate to police powers, mostly to do with detention, search and arrest, the relevant questions relate to: (i) the right to life, liberty and security of the person (ii) avoiding arbitrary arrest and detention, particularly in the case of young people (iii) avoiding arbitrary interferences with privacy, and (iv) ensuring equality before the law. In particular, the human rights instruments suggest these questions:

1. To what extent does the law protect the right to life, liberty and security of the person, and prohibit arbitrary arrest or detention, and to what extent does the law provide an effective remedy in case of such treatment? [ICCPR 9 (1); CROC 37(b)]
2. To what extent does the law prohibit arbitrary invasion of privacy, in the course of criminal process, and to what extent does the law provide an effective remedy in case of such treatment? [ICCPR 17; CROC 16, 40(20)(b)(vii)]
3. To what extent does the law provide that arrest and detention ... for young people under eighteen is only to be used as a measure of last resort and for the shortest appropriate time? [CROC 37(a) (b)]
4. To what extent does the law ensure that persons are treated as equals before the law? [ICCPR 2 91) & 14 (1); CROC 2 (1)]

As an example in this area I consider the knife searching powers, introduced under the *Crimes Amendment (Police and Public Safety) Act* 1998.

1.1 **Knife searching powers**

**The law and the possible breach**

In 1998 the NSW Government introduced a law to allow widespread police searching for knives. The law was aimed primarily at young people and adds to a range of laws related to the possession, sale, carrying and use of knives. This particular search power is of concern for the way it attempts to redefine 'reasonable grounds', to allow police stop and search. This may breach the provisions of the ICCPR and CROC which prohibit "arbitrary arrest or detention" and "arbitrary invasion of privacy" (Anderson, Campbell & Turner 1999). The relevant section of the *Crimes Amendment (Police and Public Safety) Act* 1998 creates a new s.28A (3) of the *Summary Offences Act* 1988, which sets out the basis for police intervention and search
for knives.

For the purposes of this section, the fact that a person is present in a location with a high incidence of violent crime may be taken into account in determining whether there are reasonable grounds to suspect that the person has a dangerous implement in his or her custody.

Subsequent parts of the Act regulate the way in which the search must be carried out. It is a more restrictive search than that allowed under other laws -- for example the searches authorised by the Drug Misuse and Trafficking Act 1985 -- and it must not involve a strip search. However the concern here is not with the nature of the search but the basis for it. In considering this law I look at two questions about rights and police powers, that is to what extent does the law prohibit arbitrary arrest or detention [ICCPR 9 (1); CROC 37(b)] and to what extent does the law prohibit arbitrary invasion of privacy [ICCPR 17; CROC 16]? In doing this I bear in mind the fact that such searches apply mainly to children and young people (Youth Justice Coalition 1990 & 1994). I note also the comments of Wilke (1995) who argues that police 'stops' on young people are so routinely abusive that they should be limited wherever possible. She points out that both CROC and the 'Beijing Rules' (UN ) require the "least possible intervention" by legal authorities in young people's lives. The relevant question here is whether the 'reasonable grounds' of s.28A(3) are contemplated and allowed by the treaties, or whether this device for detention and invasion of privacy is 'arbitrary' and so prohibited.

Background

The Crimes Legislation Amendment (Police and Public Safety) Act 1998 arose out of the state Labor Party's 1995 'anti-gang' policy, aimed at groups of young people in public spaces who were said to be a threat to public safety. A Street Safety Bill incorporating 'move on' powers was drafted in 1996, but this idea lapsed. However by early 1998 the 'move on' law had been revived and combined with new police powers to search for knives, in the Police and Public Safety Act (Anderson, Campbell & Turner 1999).

In late 1997 two knife law changes had been made to the Summary Offences Act. First, the use or public display of a knife in a public place or a school was made an offence (s.10 already made it an offence to carry a knife); and second, the sale of all knives to children under 16 years of age was banned. These knife related offences were said to have been related to the bashing and fatal stabbing of police officer David Carty in April 1997 (Blake 1998: 7).
The February 1998 fatal stabbing of a second young police officer, Peter Forsyth, catalysed further community debate about knives, and led to a raft of new summary offences. Constable Forsyth, off-duty with two colleagues, was said to have been attempting to arrest some young people who had tried to sell drugs, when he was stabbed to death. One of his colleagues was also wounded. Following a Police Association request (Harris & Sutherland 1998: 5), Police Minister Whelan announced he was considering allowing off-duty police to carry guns; Victorian Police commented that they would not consider such a move (Herald Sun 1998). This proposal stalled, but the knife debate widened. Criminologist Paul Wilson called for public denunciation and 'shaming' of those who carried knives (Wilson 1998). Police Association Secretary Mark Burgess called for laws to prohibit the sale of 'attack weapons' (Blake 1998: 7) though existing law provided for this in the Prohibited Weapons Act 1989. The Police Association later agreed that the Summary Offences Act already provided "sufficient scope to deal with knives of any description" (Police Association 1998: 3). The supposed link with youth gangs was then pushed by the Sunday Telegraph and the Police Association, the former citing several unnamed knife sellers who spoke of "lots of gangs" who would spend "hundreds of dollars for any kind of knife" (Blake 1998: 7) while the latter claimed that knives were readily available to 'gang' members (Police Association 1998: 3).

Conscious of the pending state election, the Police Association claimed a range of new powers, demanding additional restrictions on knives, stop and search powers, identification powers, and dispersal powers (Police Association 1998). The call for a review of the knife laws had been backed by Police Commissioner Ryan (Harris & Snell 1998: 1), and in early May crime statistics showed that robbery 'with a weapon other than a gun' had risen significantly (though this was to fall again in 1999). Bureau of Crime Statistics Director Don Weatherburn made the link to heroin addicts, rather than youth gangs, but pointed to a parallel increased use of knives in assaults (Morris 1998: 9). While rival victim groups battled over what penalties should apply to the new knife offenders, Premier Carr accepted the Police Association claim, almost in its entirety (Milohanic 1998: 5).

By late May 1998 the Crimes Legislation Amendment (Police and Public Safety) Bill 1998 had passed the NSW Lower House and had entered a long debate in the Upper House. The Bill made five main changes to existing law: on knives in public places, police searches for knives, confiscation of knives, police powers to give 'reasonable directions' in public places
and a limited police power to demand names and addresses. Human rights concern has been expressed most strongly about the new search powers and the new move on powers, and the way in which these powers were aimed at juveniles (Anderson, Campbell & Turner 1999).

The Bill amended the *Summary Offences Act* to create a new offence of having custody of a knife in a public place or a school, without a reasonable excuse. (This paralleled an existing and wider summary offence of having custody of an "offensive implement" in a public place, without reasonable excuse.) Reasonable excuse was to be proved by the person, but the new provision gives some examples, including food preparation and lawful occupation, recreation or sport. The Bill also amended the *Summary Offences Act* to allow police to search for "knives and other dangerous implements" in public places and schools. (Police already had a similar power under the Crimes Act s.357E, but only for "any thing used or intended to be used" in an indictable, or serious, offence.) Police must "suspect on reasonable grounds" that the person has possession of a dangerous implement before exercising this new power, but the meaning of "reasonable grounds" was extended to include "the fact that a person is present in a location with a high incidence of violent crime". This particular search power regulates the search in several ways, and does not allow a strip search. However it was made an offence to refuse such a search. Police officers must identify themselves and warn the person that to refuse to comply with the search is an offence.

The *Summary Offences Act* was also amended to allow police in a public place or a school to confiscate "any thing" suspected of being an unlawfully held "dangerous implement". The Ombudsman was required to monitor the operation of this new *Crimes Legislation Amendment (Police and Public Safety) Act* and the Police Minister was required to review and report on it to Parliament.

The Bill was subject to some amendment in the Upper House. Firstly, the Government amended its own Bill to double the penalty for knife possession where the person had been "dealt with previously" for a knife related offence. It also created an offence for parents who "knowingly authorised or permitted" their child to carry a knife. As the *Children (Protection and Parental Responsibility) Act* 1997 already provided for this, the amendment required that "the offender is not liable to be punished twice" for the same offence. Independent MLC Richard Jones then succeeded with an amendment which added "or drink" to "the preparation or consumption of food", as one of the reasons why one might legitimately be carrying some
form of knife (eg. a pocket knife with a corkscrew). Better Future for Our Children MLC Alan Corbett had two amendments passed which extended police powers. The first was an amendment which extended the power to search for dangerous implements to school lockers (the original Bill only provided for 'pat down' body searches and bag searches). A locker search must be done in the presence of the student and, if "reasonably possible" a nominated adult who is on school premises. Corbett's second amendment gave police the additional power to "request a person [who is a witness to a serious crime] to provide proof of the person's name and address".

This Act is thus a composite law, primarily containing some 'anti-gang' dispersal powers and additional police powers to conduct wholesale (though regulated) searches for knives. Our concern here is limited to whether the 'reasonable grounds' of s.28A(3) are contemplated and allowed by the treaties, or whether this device for detention and invasion of privacy is 'arbitrary' and so prohibited.

**Does the law breach human rights commitments?**
Critics have argued that the 'stop and search' power is drawn far too wide (eg. Anderson, Campbell & Turner 1999). This is of particular concern, given that most police searching is done under a notional but usually coerced view of 'consent'.

Even though "reasonable suspicion" has been a poorly defined term in New South Wales' law, this redefinition of "reasonable grounds" for suspicion, as encompassing "the fact that a person is present in a location with a high incidence of violent crime", might be seen as an artificial contrivance, to arbitrarily widen the law but retain the language of 'reasonableness'. Location in a certain general area -- in ordinary circumstances -- is unlikely to be a specific or particular enough reason to suspect a person of committing an offence. However the social circumstances of the development of this law must also be considered.

There is no doubt that a police 'stop' for the purpose of a search is a 'detention' or a deprivation of liberty and that the provisions of paragraph 1 of ICCPR Article 9 apply broadly, and to detentions other than those for the purpose of arrest and charge (Human Rights Committee 1994: GC 8; Nowak 1993: 169). And while deprivations of liberty are only violations of rights where they are arbitrary or unlawful, both the detention and the privacy
provisions of the ICCPR make it clear that an 'arbitrary' act may be one provided for by law (Human Rights Committee 1994: GC 16). This same formulation of arbitrariness occurs in the relevant Articles (16 and 37(b)) of the Convention on the Rights of the Child. It was in fact an Australian proposal in 1949, gaining unanimous Human Rights Commission support, which led to the ICCPR formulation which prohibits 'arbitrary' arrest or detention. The interpretation of the word 'arbitrary' was contentious, but was designed to avoid an attempt at exhaustively listing all the permissible types of deprivation of liberty (Nowak 1993: 164, 172).

What then does 'arbitrary' mean in these circumstances? The Human Rights Committee has said, regarding the right to privacy, that the law must not be arbitrary and "should be, in any event, reasonable in the particular circumstances" (Human Rights Committee 1994: GC 16). The majority in the Human Rights Commission gave a broad meaning to 'arbitrary', saying it contained "elements of injustice, unpredictability, unreasonableness, capriciousness and unproportionality", as well as lack of due process (Nowak 1993: 172). I feel the 'unproportionality' argument is most relevant to widely framed searching laws. For example, when could wholesale, near-random street searching for weapons ever be 'reasonable' and proportional? Possibly in time of war or serious civil disturbance, when there is widespread possession of weapons and when this is causing a serious threat to life. In this circumstance, effectively a 'state of emergency', a power to intervene and stop and search people in a zone or region might be considered proportional. However there are internationally recognised limits to search powers, even in times of war. Deprivation of liberty, where justified, must not be "manifestly unproportional, unjust or unpredictable", nor must it be discriminatory (Nowak 1993: 173). Is there that sense of proportionality in the use of a near-random search power on a civil population which is overwhelmingly not armed, and peaceful? I think not. Advocates of this law may suggest that increased crime levels pose such a high level of threat that a special response is called for and proportionate. There is no real evidence to support this view. Some others, in support of this law, have argued that if the new law produces ‘results’ (ie detects weapons, or leads to arrests) then the law is justified. However this is a purely instrumental argument which does not seek to address the rights issues. One might as well say that imprisoning all poor people may reduce levels of theft, therefore it is justified.

I note the Australian Government's acceptance, in its reservations to the ICCPR, of the limited circumstances that may apply to interference with a person's privacy, ie "national security, public safety .. [and] protection of the rights and freedoms of others" (DFAT 1999: ICCPR).
A widely drawn search power must therefore base itself on arguments of national security, public safety or protection of the rights of others. In doing so it must constitute a proportional response to the threat. However this law is not proportionate. I do not believe that the somewhat higher crime rates of the so-called ‘hot spots’ (poorer or inner city areas) justify the type of wholesale searching instituted by this law.

Subsequent reviews of the police use of this search power showed that there were certainly far more searches in the so-called ‘hot spots’. For example, the Fairfield, Campsie, and Wollongong police areas had 13 to 17 searches per thousand residents, compared to 0.5 or less per thousand in Camden, Rose Bay and The Hills. However the ‘productivity’ figures for these areas (ie. the proportion of searches that found some sort of knife) were in an inverse relationship. In the former (more highly searched) areas searches were ‘productive’ 6-9% of the time, while in the latter (less searched) areas searches were ‘productive’ 50-85% of the time (NSW Ombudsman 1999: 132-133). The hot spots therefore attracted a great deal of unjustified searching. A similar pattern applied to the targeting of young people. Those between 14 and 21 were searched far more intensively than any other age group (up to ten times more), yet the ‘productivity’ of searches for these age groups was far lower. In some cases even the absolute numbers of knife ‘finds’ were less, despite a much higher level of searching. For example, 14 year olds were searched more than twice as much as any of the late 20s age groups, yet the searches of 14 year olds yielded less knife finds than searches on any of these older age groups (NSW Ombudsman 1999: 128). This data supports the view that knife searching in the more heavily searched areas has been ‘arbitrary’. Several Local Area Commanders even complained to the Ombudsman that the statistically driven Operational Command Review (OCR) management system was forcing them to carry out searches they felt unjustified (NSW Ombudsman 1999: 123).

The British Government's report to the UN's Committee for the Elimination of Racial Discrimination held on to the language of 'reasonableness' by claiming that police officers were "subject to a strict discipline code" which might include dismissal for offences including conducting a search "without sufficient cause" (CERD 1996: par 30). That Government also said that its Police and Criminal Evidence Act 1984 ensured that "stop and search powers are used appropriately and responsibly" and that "searches can be made only on the grounds of reasonable suspicion, and not in a random or discriminatory fashion" (CERD 1996: par 31). However since then the British Government introduced its Knives Act 1997, which allows for
24 hour periods of near-random searching, in designated areas and after authorisation by a Police Inspector. The test for the invocation of this power is if the Inspector "reasonably believes" that serious violence may take place "in any locality", or if people are carrying dangerous weapons "in any locality ... without good reason" (Home Office 1999). If the British model is one of a temporary and formally authorised 'state of emergency', the New South Wales model is the permanent version. There does not appear to have been any cases before the Human Rights Committee, as yet, on the issue of street searching as arbitrary detention or arbitrary invasion of privacy. However First Optional Protocol complaints, under Article 9 and/or Article 17 are clearly possible.

The State Government proposed this knife searching law partly in response to fatal knife attacks on two police officers, over a period of ten months. There was also some evidence that the use of knives in robberies had increased over a short period. However robbery is still a relatively rare crime in this state, and murder even more so. Despite the tragic deaths of the two police officers, there had been no suggestion that the state's murder rate has risen. In these circumstances I conclude that there is no real proportionality in the provisions of Section 28A(3) of the Summary Offences Act. In this sense the law acts to allows an 'arbitrary' detention and an 'arbitrary' invasion of privacy of citizens (mostly young people) going about their own legitimate business, including that of occupying public space. The main purpose of the section is to redefine "reasonable grounds" in terms of general geography (so called 'hot spots'), which is an attempt to force the meaning of the 'reasonableness' test.

In my opinion, therefore, Section 28A(3) of the Summary Offences Act 1988 (inserted by the Crimes Amendment (Police and Public Safety) Act 1998) most likely breaches the Australian commitment to ICCPR Article 9(1) and CROC Article 37(b) (which prohibit arbitrary detention) and ICCPR Article 17 and CROC Article 16 (which prohibit arbitrary interference with privacy), in that the section allows for 'arbitrary' detentions and 'arbitrary' invasions of privacy.

2. Pre-trial Rules
In examining the human rights compliance of criminal justice laws which relate to pre-trial processes the relevant questions relate to: (i) the right to bail (ii) maintaining the presumption
of innocence (iii) the right to silence (iv) diverting young people from formal legal processes, and (v) ensuring equality before the law. In particular, the human rights instruments suggest these questions:

1. How clearly does the law ensure that it shall not be the general rule that persons waiting trial be detained in custody? [ICCPR 9 (3)]

2. How clearly is it maintained under the law that a person is to be presumed innocent until proven guilty? [ICCPR 14(2); CROC 40(2)(b)(i)]

3. How clearly does the law establish that a person must not be compelled to confess to a crime or to provide evidence against him or herself? [ICCPR 14(3)(g); CROC 40(2)(b)(iv)]

4. To what extent does the law provide that, so far as possible and while respecting human rights, measures other than judicial proceedings be used for young people under eighteen? [CROC 40(3)(b)]

5. To what extent does the law ensure that persons are treated as equals before the law [ICCPR 2 91) & 14 (1); CROC 2 (1)]

As examples in this area I consider offence based restrictions on bail, and pre-trial mandatory defence disclosure.

2.1 Offence based restrictions on bail

The law and the possible breach

A number of provisions in the Bail Act 1978 now either create a presumption against bail for certain offences, or exceptions to the presumption for bail. This latter category has expanded rapidly in recent years. Section 9 of the Bail Act 1978 now provides that the presumption in favour of bail has several exceptions. These exceptions, added between 1986 and 1998, initially included several armed robbery offences, failure to appear on bail, which is an offence under s.51 of the Bail Act, and then murder and related attempts and conspiracies. In November 1998 this list was extended to include eight additional charges: manslaughter, wounding with intent, kidnapping and several sexual assault offences. In addition to the 'no presumption for bail' offences, s.8A of the Bail Act was added in 1988 to provide that there is a positive 'presumption against bail' for certain drug offences as defined in the Drug Misuse and Trafficking Act 1985 and the Commonwealth Customs Act 1901.

The issue here is whether these various offence-based restrictions on bail constitute a breach of the human rights principles that "it shall not be the general rule that persons waiting trial be detained in custody" [ICCPR 9 (3)] and that "a person is to be presumed innocent until proven guilty" [ICCPR 14(2); CROC 40(2)(b)(i)]. For the purpose of this analysis the various
provisions are considered as two groups: (i) the "presumption against bail" provisions (of s.8A) and (ii) the "no presumption for bail" provisions (under s.9). The relevant question here is whether these groups of provisions are allowed by the treaties, or whether they breach the principles of pre-trial custody and the presumption of innocence.

**Background**

The *Bail Act 1978* began with the principle that persons are entitled, at the least, to conditional liberty pending the hearing of a charge against them. The Bail Review Committee which recommended the Act made the point that "it was difficult to overstate the importance of bail", as it affected whether a person could continue his or her normal life, pending the hearing of a criminal charge, and that bail decisions must respect both the legal right to be presumed innocent and the need of society that accused persons are brought to trial (Simpson 1997).

In its original form the *Bail Act 1978* would have been unobjectionable, for the purpose of this analysis. The Act provided for bail and set out two categories of offences: those lesser offences for which there was a "right to release" (s.8) and those more serious offences for which there was a "presumption in favour of bail" (s.9), provided that "an authorised officer or court" was satisfied certain criteria (set out in s.32) were met. In addition, a court could dispense with bail altogether (s.10). The only exceptions to some form of release entitlement under this regime were where a person had previously failed to appear (s.51), had failed to comply with previous bail conditions, was convicted of the offence, was "incapacitated" by drugs or alcohol, was in need of physical protection, or was already serving a sentence of imprisonment and was likely to remain in custody longer than the likely bail period (ss.8-9).

Arguments about entitlement to release, from the late 1980s onwards, began to change this approach. In particular, specific cases of breach of bail, or the commission of serious offences whilst on bail, led to popular generalisations about the risks involved in granting bail. Legislative changes followed highly publicised cases, where a person on bail or on parole had been charged with another serious offence. The notion of serial offending thus became a driving theme in law reform, to the detriment of the presumption of innocence.

In 1986 the Act was changed to remove the presumption in favour of bail to those charged
with serious drug offences, and in 1988 this was extended to create a new presumption against bail for serious drug offences (s.8A). In 1987 the presumption in favour of bail was removed for those charged with domestic violence offences, where there had been a failure to comply with prior bail conditions, and in 1993 this was extended to include cases where there had been a prior history of violent offending. The removal of presumptions in favour of bail (under s.9) were progressively added for those charged with robbery, then those charged with murder, and later a range of other serious offences.

Moves to generically restrict bail are not unique to Australia, despite being criticised by the United Nations Human Rights Committee. The British Government in its Criminal Justice and Public Order Act (1994) moved to deny bail to those charged with homicide or rape, having previous convictions for such offences, and to those alleged to have committed offences while on bail (sections 25-26). However while these are generic rules, rather than matters to be considered in an individual case by a judicial officer, they only apply to extreme and compound cases. The NSW laws go much further than this. In South Africa moves to deny bail to those charged with certain categories of offence -- at a time of high levels of violent crime -- have been variously criticised as an attack on judicial independence (Schönteich 1997) and as a false assertion that denying fair trial rights will somehow control violent crime (Mureinik 1995). Debate there has focussed around the limited right to bail, formulated by the South African constitution, that is:

Everyone who is arrested for allegedly committing an offence has the right ... to be released from detention if the interests of justice permit, subject to reasonable conditions (s.35 (1) (f))

a formulation somewhat less firm than that of the ICCPR, which states that pretrial custody "shall not be the general rule" [Article 9 (3)].

The logical extension of the categorical restriction of bail move -- where bail comes to be determined solely on the seriousness of the charge and without reference to individual circumstances -- would seem to be the Bolivian model. Here, under certain drug laws, release on bail is simply denied to all those charged with offences that carry a penalty of two years or more of imprisonment. The Human Rights Committee has criticised this legislation as having (amongst other things) "severely restricted" bail and "not respected" the presumption of innocence (Human Rights Committee, Concluding Observations on Bolivia, U.N. Doc. CCPR/C/79/Add.73 (1997)).
As with many 'law and order' initiatives, the offence-based restriction of bail in NSW was pursued by both major parties, in association with the popular media. However there was opposition. In 1997 the NSW Law Society called for the repeal of section 8A of the *Bail Act*, pointing out that "the presumption of innocence is affronted by a denial of bail where the decision regarding bail is based squarely upon the seriousness of the offence and little else" (Law Society of NSW 1997b: 1). In later letters to parliamentarians the Law Society noted its alarm at the rise in the remand population -- the unconvicted persons held in prison -- which had shot up from around 800 in 1996 to well over 1100 by late 1998 (Law Society of NSW 1998), causing a crisis of overcrowding in the newly built remand centre at Silverwater. This rise appears to come from changing attitudes in policing and the magistracy, rather than a result of restrictions in the *Bail Act*. However following the killing of two schoolgirls on the south coast, and the revelation that one of those charged with murder had been on bail for another offence, a review of the *Bail Act* 1978 was directed by the NSW Attorney General. A fair amount of the argument in this January 1998 review turned on the question of extending or repealing the offence-based restrictions on bail.

The NSW Police Service urged greater offence-based restrictions on bail. The late Bev Lawson, then Acting Commissioner of Police, argued for amendment of the Bail Act "to create a presumption against bail for all serious sexual offences" and also for all 'serial' offences (Anderson 1998b: 7). Juris Laucis of the DPP mounted a direct attack on the presumption of innocence, underlying as it does much of bail law. He claimed the Bail Act's exemptions to the presumption for bail:

*clearly indicate that the original philosophy, based on the presumption of innocence, whilst serving the altruistic approach of legal purists, failed to come to grips with the reality that the community needs to be protected (Laucis 1998)*

Laucis went on to propose a presumption against bail for accused persons "requiring drug rehabilitation", as all drug addicts were said to be repeat offenders, and a presumption against bail for all those "charged with offences of a non-trivial nature, whilst on bail". He argued that the rise in the remand population should not be addressed by facilitating access to bail, and called for an end to the notion of the presumption of innocence (Laucis 1998). This latter view was later disowned by DPP Nick Cowdery (1998), who added that his office did not suggest that the provisions of s.8A be "further extended". On the other side of the argument, Gurdev Singh, Principal Solicitor of the Intellectual Disability Rights Service, urged that the "relevant legislation" be amended to make a presumption against arrest -- and in favour of
proceedings by summons or court attendance notice -- for those with an intellectual disability. This would make bail irrelevant (Anderson 1998b: 7). The Council for Civil Liberties (CCL) went further, noting the large rise in remandees, and called for urgent measures to facilitate bail. Any additional considerations the Parliament felt warranted in bail applications should be added to the existing criteria to be considered in bail applications (s.32) rather than in new attempts at "discriminatory and ultimately unjust exclusion clauses" (Anderson 1998a). The CCL and the Law Society both urged the repeal of the restrictive provisions of ss.8A and 9 of the *Bail Act* (Anderson 1998b: 7).

This review of bail by the Attorney General's Criminal Law Review Division did not appear to recommend the expansion of offence-based restrictions on bail, as no new proposal for change emerged for more than six months. The Attorney General later reported that the review had found that "the Act was generally working well" (Shaw 1998: 8976). However in the course of the 1998-99 election campaign, the issue resurfaced, with the Government announcing, in its *Bail Amendment Bill 1998*, several new categories of offence to be subject to s.9's "no presumption for bail" provision. The contribution of the Opposition in the subsequent debate was focussed on the difference between the s.8A and the s.9 restrictions. They wanted bail restrictions on more categories of offence, and at the higher s.8A standard (Andrew Tink in Lynn 1998: 8981). In face of this consensus for restriction, crossbench objections were muted, leading the Attorney General to comment in the parliament that "the only substantial question that was raised is whether there ought to be more offences in respect of which the presumption in favour of bail should be abolished" (Shaw 1998: 8984). Concerns about those with intellectual disabilities were met with a provision in the Bill that bail conditions be set to be "appropriate" for those persons (Shaw 1998: 8977), a provision that clearly does not encompass the potentially inappropriate denial of bail. The *Bail Amendment Act 1998* went on to extend the "no presumption for bail" provisions of s.9 to charges of manslaughter, wounding, several sexual assaults and kidnapping.

That the presumption of innocence was marginalised in arguments over offence-based restrictions on bail is fairly clear from the language of the legislators. In South Africa, there was strong criticism of labelling those "who are merely accused of crime as 'criminals'" (Mureinik 1995). In NSW, Attorney General Jeff Shaw said his Bill was intended to "restrict the availability of bail to serious offenders" (Shaw 1998: 8976), rather than citizens charged with a serious offence. Such comments reflect the notion that bail is being seen more as a
benefit to an offender, which should be measured against the seriousness of the offence, rather than as a right accorded an individual who was to be presumed innocent until proven guilty, by a process of fair trial. In the 1998 parliamentary debate both Jeff Shaw and Opposition MLC Charlie Lynn argued bail changes as important to "protecting the community" (Shaw 1998: 8976; Lynn 1998: 8981), confirming the force of 'protection' arguments within most law and order initiatives.

**Does the law breach human rights commitments?**

The international jurisprudence on Article 9 (3) of the ICCPR has repeatedly stated that the refusal of bail should be an "exception" and that there must be specific reasons for such refusal:

> **pre-trial detention should be the exception and bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the state party (Michael and Brian Hill v. Spain, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993 (2 April 1997))**


While a number of other Human Rights Committee decisions dealing with Article 9 (3) have been concerned with the length of pre-trial detention, and none as yet appear to have dealt directly with offence based restrictions on bail. Human Rights Committee comments on state reports have expressed concern with legal systems which limit bail and deny the presumption of innocence. HRC comments on Argentina, for example:

> **express concern that bail has been established according to the economic consequences of the crime committed, and not by reference to the probability that the defendant will not appear in court or otherwise impede the due process of law. Nor is [the law] compatible with the presumption of innocence that the length of pretrial detention is not a product of the complexity of the case but is set by reference to the possible length of sentence (Human Rights Committee, Comments on Argentina, U.N. Doc. CCPR/C/79/Add.46 (1995)).**
In more recent comments on Bolivia the HRC, in its traditionally cautious language, has "expressed concern" over Bolivia's *Coca and Controlled Substances Law*, which provides that:

> release on bail is never possible for those persons charged with offences that carry a penalty of two years or more of imprisonment ... [therefore] the presumption of innocence is not respected under current Bolivian legislation (Human Rights Committee, Concluding Observations on Bolivia, U.N. Doc. CCPR/C/79/Add.73 (1997)).

Returning to the relevant words of ICCPR Article 9 (3), that is, "It shall not be the general rule that persons awaiting trial shall be detained in custody", it seems reasonably clear that offence-based restrictions on bail, at least those which do not go to the likelihood of persons charged to appear, are not allowed under international law. Provisions which (for example) did not raise a presumption for bail for persons who had previously failed to appear, or who had previously failed to meet bail conditions, might not breach Article 9 (3). However offence-based presumptions not relevant to the "probability that the defendant will not appear in court or otherwise impede the due process of law, and not relevant to the likelihood of reoffending", must be ultra vires. Such provisions seek to reverse the presumption for bail. They must be ultravires when they categorically deny the right to access bail. This is especially the case when the laws presume against bail, but also when they remove the presumption for bail.

In our opinion, therefore, provisions of s.8A and s.9 of the Bail Act 1978 - insofar as those sections act to impose a presumption against bail, or did not raise a presumption for bail - most likely breach the Australian commitment to Article 9(3) (which prohibits a general rule for pretrial imprisonment) and 14 (2) (which recognises a person's presumption of innocence until proven guilty) of the *International Covenant on Civil and Political Rights*. They do so, to a greater (s.8A) or lesser (s.9) degree, by wrongly imposing a legal presumption for pretrial imprisonment.

### 2.2 Mandatory defence disclosure

#### The law and the possible breach

At issue here are the legal requirements that compel defendants to give advance warning to
the prosecution of defence evidence they may call at trial. Section 405A of the *Crimes Act* 1900 provides that notice must be given of a defence intention to call alibi evidence:

*(1) On a trial on indictment the defendant shall not without the leave of the Court adduce evidence in support of an alibi unless, before the end of the prescribed period, he or she gives notice of particulars of the alibi.*

This section goes on to specify that details of names and addresses must be given, the committing justice must give notice of the requirement and disclosure must be made in writing to the Director of Public Prosecutions. The fact that "leave of the court" is required suggests that leave might not be given, and that a defence witnesses might not be allowed to be called, if the pre-trial disclosure rule is not followed.

Similarly, section 405AB of the *Crimes Act* 1900 provides that notice must be given of a defence intention to call evidence of 'substantial impairment' of mind, in defence of a murder charge:

*405AB. (1) On a trial for murder, the defendant must not, without the leave of the Court, adduce evidence tending to prove a contention by the defendant that the defendant is not liable to be convicted of murder by virtue of section 23A, unless the defendant gives notice, as prescribed by the regulations, of his or her intention to raise that contention.*

A successful defence of 'substantial impairment' of mind, under Section 23A of the *Crimes Act* 1900, reduces the crime of murder to manslaughter by reason of 'diminished responsibility'. This section requires that names and addresses of witnesses must be given, and that disclosure must be made in writing to the Director of Public Prosecutions. Once again, the fact that "leave of the court" is required suggests that leave might not be given, and that a defence witnesses might not be allowed to be called, if the pre-trial disclosure rule is not followed.

In a recent discussion paper prepared by the NSW Law Reform Commission (1998a), at the request of the Attorney General, it has been suggested the additional pre-trial disclosures might be required of defendants. Those canvassed by the paper include disclosure to the prosecution of defence expert evidence, disclosure of the intention to raise certain defences, and disclosure of issues to be litigated at trial.

However international law suggests that the prosecution must prove a criminal case, and that a person charged must not be compelled to assist the prosecution. The relevant question here, then, is whether the existing defence pre-trial disclosure rules breach the Australian
commitment to the presumption of innocence, equal treatment in the calling of witnesses and right to silence provisions of the *International Covenant on Civil and Political Rights*, Articles 14(2), 14(3)(a), 14(3)(b) and 14(3)(g):

(2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law ... [and]

(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ... 

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; ...

(g) Not to be compelled to testify against himself or to confess guilt.

**Background**

The NSW Law Reform Commission Report (1998a: 58-61) notes that, despite court rules and the subpoena process, there has been no common law duty of 'disclosure' (using the civil law term) on either party in a criminal trial, but that the position has been modified by statute. However rules have been introduced to require advance notice of prosecution witnesses, and provision to the defence of a copy of their statements. Section 405A, requiring disclosure of alibi defence to the prosecution, was introduced in 1974, then amended in 1986 and 1994. The common law has then allowed the prosecution to cross-examine a defendant where this alibi requirement is not complied with until the last available opportunity (Latouf v The Queen, 1980). Section 405AB, requiring defence disclosure of the 'diminished responsibility' defence to murder, was introduced in 1997. The *Evidence Act* 1995 (ss.67, 97 & 98) has now also required either party in a criminal trial to give advance notice of an intention to lead evidence of tendency or coincidence, or first-hand hearsay evidence. There has been a trend in legislation, therefore, to treat pre-trial criminal procedure as civil trials, where pre-trial disclosure may add to the efficiency of the eventual litigation, and where the defence and the prosecution are treated more and more as equal parties.

The common law and the Supreme Court rules, however, have generally tended to maintain the special status of the criminal procedure. This approach seeks to maintain a defined set of defendant's rights, and to maintain distinct roles for the prosecution and the defence, for the very good historical reasons that the criminal procedure most often pits a relatively powerless
individual (after his or her arrest) against the resources of the state. The Supreme Court
Standard Directions (1994) require, amongst other things, a draft prosecution case statement
and an invitation to resolve some issues informally, or by consent. These Standard Directions
also provide for disclosure of all psychiatric reports, but there is no penalty for non-

The 1981 British Royal Commission on Criminal Procedure proposed only compulsory pre-
trial prosecution disclosure, but subsequent inquiries (including a subsequent British Royal
Commission on Criminal Procedure in 1993, and a 1986 NSW Law Reform Commission
report) have recommended "mutual pre-trial disclosure" (NSW Law Reform Commission
1998a: 75). However with the tradition of the special status of criminal trials, detailed rules
for the terms and timetables of prosecution disclosure have been developed, while defence
disclosure requirements have been patchy. This in turn has led to a desire to 'equalise' the
terms of disclosure, based on a supposed 'mutuality' of obligation. For example, the NSW
Director of Public Prosecutions has pushed for defence pre-trial disclosure, arguing that the
notion of a 'right to silence' be dropped in favour of "approaching the whole issue on the basis
of mutual disclosure and procedural reform" (Cowdery c1998).

The arguments for defence disclosure are mostly based on a suggested improved efficiency
for the courts. The prosecution would not have to waste time and resources guessing what
defence might be advanced. Non-contentious issues might be resolved before trial,
adjournments might be avoided and trials might be shortened (NSW Law Reform
Commission 1998a: 79). In the spirit of 'mutual obligation' and, adopting economic liberal
jargon, a Deputy Commissioner of NSW Police suggested that defence disclosure generally
would bring the two parties to a "more level playing field" (Jarrett 1997). Arguments against
defence disclosure have stressed the fundamental and distinctive principles of the criminal
justice system, which maintain the burden of proof on the prosecution, maintain the privilege
against self-incrimination and maintain the presumption of innocence. The creation and
maintenance of these principles, in turn, have been influenced by the typically unbalanced
resources available to the defence and prosecution, the great difficulty unrepresented
defendants would have in complying with pre-trial requirements, possible unfair penalties for
departures from a disclosed defence 'case', and the creation of opportunities for police to
fabricate evidence or intimidate defence witnesses, after defence disclosure (NSW Law
Reform Commission 1998a: 81). Finally, if someone is really to be considered innocent, he or
she does not have a 'defence case' to prove. Barrister Stuart Littlemore (1998) has supported this view, saying that without recognition of basic rights, the unique features of criminal system would collapse, leaving it "just litigation".

Despite these powerful arguments, the NSW Law Reform Commission (1998a: 84 & 93) proposed an extension of some pre-trial disclosures in the District and Supreme Courts. The Commission did recognise that this would create particular problems for unrepresented defendants. During the 1999 state election campaign, Labor announced that it would proceed with further mandatory defence disclosures, but the subsequent Labor Government has not yet acted on these proposals.

The weak basis in human rights analysis in the Australian legal system has allowed a fairly cynical attitude to rights in international law. The NSW Director of Public Prosecutions, Nick Cowdery (c1998: 1), in arguing for greater defence disclosure, has asserted that "there is no right to silence". He also argued, contrary to the principles of the UN’s Vienna Declaration (1993), that rights might be "considered in isolation" when amending the law (Cowdery c1998: 2). Yet these proposals compound the problems for those facing a charge, as they come at a time when (i) the defence right to cross examine prosecution witnesses, pre-trial, has been severely restricted, and (ii) cuts to legal aid have driven up the number of unrepresented defendants.

**Does the law breach human rights commitments?**

However resistance to mandatory defence disclosure stems from adherence to the right to silence, which is rooted in the internationally accepted and coherent form of the criminal process. Persons charged are presumed innocent until proven guilty, they are prosecuted by the state which carries the burden of proof of the charge, and they are not to be compelled to assist the state in this process. The International Covenant on Civil and Political Rights, by requiring detailed prosecution information, and the time and facilities for defence preparation (Article 14 (3) a & b), does demand a detailed disclosure of the prosecution case. However there is no corresponding requirement for defence disclosure, as suggested by the proponents of 'mutual obligation'. The need to protect traditional defence rights is underscored by the overwhelming resources of the state, when pitted against those of the individual. It is also reinforced by the abuses and deceits of police interrogation, actions likely to be encouraged.
by a state's express disregard for defendant’s rights.

The validity or otherwise of defence disclosures in international law must therefore require consideration of a number of provisions within Article 14 of the *International Covenant on Civil and Political Rights*. The argument that there is a human rights breach in mandatory defence disclosure of some evidence which might be used to defend a charge (as opposed to disclosure of a plea, or of some procedural notification), must make the links between Articles 14(2), 14(3)(a), 14(3)(b) and 14(3)(g), concerning the presumption of innocence, the right to be informed of details of the charge, the right to prepare one's defence, and the right not to be compelled to testify, respectively. The Human Rights Committee's General Comments (1994: Comment 13) clarifies that these provisions (i) maintain the burden of proof on the prosecution and a right to be tried in accordance with this principle, (ii) require that the prosecution case indicate both the alleged offence and alleged facts on which the charge is based, (iii) insist that the right to defence preparation "must include access to documents and other evidence which the accused requires to prepare his defence", and (iv) that "any form of compulsion [to require an accused to testify against himself] is wholly unacceptable".

There appears to be no decided Human Rights Committee cases on mandatory defence disclosure. However, the argument that there is a breach would rely on the combination of prosecution burden of proof, required prosecution disclosure, provision for defence preparation and prohibition of forced testimony. This combination does not contemplate, and implicitly excludes, an additional pre-trial procedure whereby the defence is forced and the prosecution has an opportunity to respond and so improve its case, prior to the trial. On the one hand, there is nothing in the Covenant to prevent codes which allow pre-trial resolution of non-contentious issues by consent. On the other hand, there is no suggestion in the Covenant of a 'mutual obligation' to disclose, such as exists in the civil law. Those arguing that mandatory defence disclosure constitutes a human rights breach would say that the combination of rights within Article 14 militates against a 'mutual obligation' to disclose.

Principle 5 of the UN’s *Vienna Declaration* (1993), that human rights are "universal, indivisible and interdependent and interrelated" would ensure that the Cowdery argument (c1998: 2), of explicitly treating rights in isolation, would not go far. However, the counter argument would have to rely on a narrow interpretation of Article 14, and the fact that there is no explicit prohibition on mandatory defence witness disclosure, pre-trial. The burden of
proof on the prosecution could be maintained with existing mandatory defence disclosures, 
the prosecution case would still be disclosed and the prohibition on forced accused testimony 
could be distinguished from disclosure of defence witness evidence.

However in my opinion, this argument would be decided on two issues (i) the need to 
maintain the integrity of the form of combined rights in the criminal process, as outlined in 
Article 14, an integrity which is undermined by laws which seek to prosecute a 'mutual 
obligation' to disclose, and (ii) an overriding concern that procedures must also be assessed 
for their likely impact on unrepresented accused persons, who are certain to be disadvantaged 
by these procedures. In my opinion, therefore, the existing defence pre-trial disclosure rules 
most likely breach the Australian commitment to the presumption of innocence, equal 
treatment in the calling of witnesses and right to silence provisions of the *International 
Covenant on Civil and Political Rights*, Articles 14(2), 14(3)(a), 14(3)(b) and 14(3)(g). They 
do so by compromising the principles that the prosecution caries the burden of proof, and that 
an accused person presumed to be innocent should not be required to present a 'defence case', 
except by an act of free choice.

### 3. Trial Rules

In examining the human rights compliance of criminal justice laws which relate to the trial 
process the relevant questions relate to: (i) the guaranteed 'due process' provisions of 
international human rights law (ii) the right to an interpreter and to legal aid (iii) the right to 
appeal (iv) the elimination of double jeopardy and retrospective crimes and penalties

In particular, the human rights instruments suggest these questions:

1. To what extent does the law provide for (i) a fair and public hearing before an independent tribunal, in 
which those charged with a crime (ii) may have adequate time and facilities to prepare their defence, (iii) 
are able to question witnesses against them and call their own witnesses, and (iv) are afforded free 
assistance of an interpreter, where necessary? [ICCPR 14; CROC 40(2)(b)(iii)]

2. How effective are procedures to ensure that those charged with a criminal offence may (i) defend 
themselves in person or through a lawyer of their choice, (ii) have free legal assistance if they cannot 
afford to pay? [ICCPR 14(3)(d); CROC 40(2)(b)(ii) (vii)]

3. To what extent are all persons ensured the right to have a criminal conviction and sentence reviewed by 
a higher tribunal? [ICCPR 14(5); CROC 40(2)(b)(v)]
4. How effective are procedures to ensure that a person is not finally tried or punished twice for the same offence, and that there are no retrospective crimes or penalties? [ICCPR 14(7), 15(1); CROC 40(2)(a)]

As examples in this area I consider the restricted cross-examination of sexual assault victims, and the ‘reasonable explanation’ rule in the Weissensteiner decision.

3.1 Restricted cross-examination of sexual assault complainants

The law and the possible breach

Section 409B of the Crimes Act provides that, in proceedings involving serious sexual assault, (i) evidence of the sexual reputation of the complainant is inadmissible and (ii) evidence of the prior sexual experience of the complainant is inadmissible, except for a list of stated and detailed exceptions. There is no judicial discretion outside these listed exceptions, which include:

- sexual activity at the time of the alleged offence,
- the relationship between the alleged offender and the complainant,
- any relevant evidence of a sexual disease
- any relevant evidence that the complainant's allegation of sexual assault was made after discovery of pregnancy or sexual disease,
- where the prosecution asserts some issue of the complainant's sexual experience, the accused might then suffer some prejudice if not able to cross-examine, and where the probative value of the questioning outweighs "any distress humiliation or embarrassment" the complainant may suffer

Witnesses shall not be asked to give evidence which is inadmissible under these rules.

However a number of judges and lawyers have expressed concerns about the restrictions this section places on cross-examination, in some cases, and the section was recently reviewed by the NSW Law Reform Commission.

The law was designed to put an end to unfair inferences against complainants, on the basis of their sexual reputation or experience, and to limit the extent of distressing and irrelevant cross-examination. However the criticism has been that a formulaic and rigid response to relevance in s.409B has led in some cases to real injustice, and to the denial of a fair trial.

The relevant question here, then, is whether the prohibitions on cross-examination in s.409B are allowed by the treaties, or whether they breach the accepted human rights principle which
provides an entitlement to question witnesses (ICCPR 14 (3)(e)).

**Background**

I will briefly consider here the origins of s.409B, the reviews of the section that have been conducted, the problems created by it, and the NSW Law Reform Commission's review and proposed amendments.

Sexual assault laws in NSW were reformed in the early 1980s, after concerns were raised in the 1970s about the conduct of rape trials, where many women were humiliated in cross-examination, unfairly questioned on their ‘reputation’ and alleged sexual experience, and at times accused of ‘deserving’ or 'asking' to be raped (see NSWLRC 1998b: 33-37). Amongst a package of proposed reforms in many jurisdictions were proposals to limit the admissibility of evidence concerning the sexual experience and reputation of the complainant/victim. This was to sustain a focus on the real issues of the criminal trial (ie whether an assault occurred) and to exclude offensive and irrelevant questioning, which could also retraumatise rape victims.

Section 409B was introduced as an amendment to the NSW *Crimes Act* in 1981, and this completely banned evidence of sexual reputation, and restricted evidence of sexual experience to the list of exceptions described above. The NSW Law Reform Commission (1998b: 37-39) notes from the parliamentary debate that the new law had four objectives. Firstly, it was designed to end the practice of using sexual experience to infer that the complainant was either untruthful or was likely to have consented to sex. There was concern that male judges with sexist attitudes, given a discretion, would continue to allow irrelevant evidence of sexual experience or reputation. Secondly, the law was designed to limit the extent to which complainants/victims would be subject to distressing cross-examination about their sexual history. Thirdly, it was hoped that these controls would encourage sexual assault victims to report the offence. Fourthly, it was said that the new law (through the exceptions to the general rule) would continue to allow the accused person room to question complainants about relevant facts. The section was amended in 1987 and 1989, but only to extend its application to a wider range of newly created sexual offences, including child sexual assault.

Over 1981-85 a review of the new section was carried out by the Bureau of Crime Statistics and Research. This review (Bonney 1987) examined transcripts from 1979 to 1983 and found
that, in local court cases, evidence related to sexual experience of the complainant had halved since the introduction of the section. In the higher courts, evidence of sexual experience had fallen from 68% of cases (before s.409B) to 41% (after s.409B).

However by the 1990s defence lawyers were signalling problems with the section, pointing out that relevant evidence had been excluded in some cases. They argued that the section was too rigid to deal with cases which required relevant exploration of a complainant's sexual experience outside the list of exceptions in s.409B(3). For example, s.409B creates a bar to the questioning of complainants about prior false accusations of sexual assault. This problem had been raised in a number of cases of child sexual assault. Further, under 409B, a complainant may not be questioned about sexual assault by someone other than the accused. Yet in some cases such evidence might be relevant, to help determine the charge.

Several such 'problems cases' have been identified and described (NSWLRC 1998b: 45-55), and these cases led some judges to comment that s.409B operated too restrictively, could exclude relevant evidence and that there was therefore a "danger that s.409B may operate to deny an accused person a fair trial" (NSWLRC 1998b: 44). As a result of this view, in the cases of Grills and PJE, trial judges granted stays of proceedings, on the basis that the accused was prohibited from exploring relevant evidence and therefore could not be assured a fair trial. Stays are ultimately an unsatisfactory remedy, as the matter charged cannot be determined. However courts grant stays if there is no prospect of a fair trial. The NSW Court of Criminal Appeal later overturned these stays, saying that the courts could not rule that legislation created by parliament was inherently unfair. This CCA decision was upheld by the majority of the High Court, but the High Court also unanimously suggested that 409B needed legislative review (Grills and PJE 1996). Accordingly, the NSW Attorney General directed the NSW Law Reform Commission to review the section.

In the meantime, the Department for Women (1996) had carried out its own review of the experiences of women in sexual assault trials. This *Heroines of Fortitude* report revisited s.409B, broadly confirming Bonney's earlier conclusion on the reduction of evidence of sexual experience in the higher courts, but commenting that "in a high proportion of trials" evidence of a complainant's sexual experience was still admitted "without this material being first subjected to the tests and limitations set out in Section 409B". Some evidence of sexual reputation had also been allowed, despite the complete ban. This report proposed a clearer...
definition of the term 'sexual reputation', Judicial Commission education for judicial officers on the difference between 'sexual experience' and 'sexual reputation', and Judicial Commission guidance on proper interpretation of the various exceptions under s.409B(3) (Department for Women 1996: 248). The Law Reform Commission, however, criticised the methodology behind the Department for Women's finding of procedure failure. It argued that the authors of the Heroine's report "did not know ... whether the issue of admissibility had been dealt with before the trial, or informally during the trial" (NSWLRC 1998b: 67). The assessments of the Heroines of Fortitude report certainly focussed more on how the courts affected women's experience, than on how they delivered justice to all participants in the criminal trial.

In reviewing the section, the Law Reform Commission posed several questions, and took submissions from a range of interested parties. The main questions posed were: (i) should the section be retained, or simply be subsumed by the Evidence Act (ii) has it been successful? (iii) should any additional specific categories (where sexual experience might be relevant) be added to the section?

A large number of submissions from sexual assault services and women's groups generally supported the existing form of s.409B or called for further restrictions on the admissibility of sexual experience, under s.409B(3). Some of the exceptions were argued to be too broad, or to allow too broad an interpretation by the courts (NSWLRC 1998b: 67-78). On the other hand, a large number of lawyers argued for reform of the section, to accommodate relevant material which had been excluded. These arguments were generally not unsympathetic to the original intent of the section (ie generally excluding evidence of sexual experience) but rather of the means by which the exceptions to the rule were determined. The Public Defenders, for example, argued that s.409B generally worked well in adult complaints, where the issue at trial was consent. In some case, however, the exceptions of 409B(3) were inadequate to admit relevant evidence, and so ensure a fair trial (NSWLRC 1998b: 51). The NSW Council for Civil Liberties also wrote to the Commission, saying that s.409B was:

> a difficult issue, involving consideration of the legitimate but at times apparently opposed rights of victims of sexual assault, to be protected from distressing and unnecessary questioning, and accused persons, to a fair trial ... [however] the regular exclusion of evidence of possible histories of false complaints [M 1993 67 A Crim R 549, Bernthaler NSW CCA unreported 17.12.93, PJE NSW CCA unreported 9.10.1995, and Morgan 67 A Crim R 526 at 537] and the acceptance that this is unjust, by both public defence and prosecution barristers, demonstrates to us the danger of attempting a tight legislative prescription of all
Prosecution lawyers also accepted that there were problems with the section. The Crown Prosecutors said there were cases where s.409B had excluded evidence to the detriment of the complainant and the case for the prosecution (NSWLRC 1998b: 55).

The Law Reform Commission ultimately decided to propose reform of s.409B, to abolish the list of exceptions and introduce a form of controlled discretion. It had considered several options for reform (NSWLRC 1998b: 116-146) which included extending the list of exceptions under 409B(3), creating a separate provision for child sexual abuse, or adding an overriding judicial discretion. However it settled on a total reformulation of 409B, to retain the ban on evidence of sexual reputation and sexual experience, but with a "restricted discretion" for determining the admissibility of the exceptions. While it supported the special treatment of evidence in sexual assault proceedings, for the reasons argued in the early 1980s, it said the arguments for a discretionary model to deal with the exceptions were "compelling" and "the only means of ensuring a fair trial" (NSWLRC 1998b: 152). The discretion to introduce exceptions would be restricted by (i) a prohibition on the old common law position of generally allowing evidence of sexual experience from which to draw inferences about consent or credibility (ii) a requirement that a court weigh up the relevance of such evidence, with competing considerations, and (iii) detailed procedural requirements to be followed if evidence of sexual experience is to be admitted (NSWLRC 1998b: 156).

This is a similar approach to that of the Standing Committee of Attorney General's Model Criminal Code. In its final report on Sexual Offences Against the Person, the Standing Committee noted that "the rigid structure" of s.409B "remains an area of contention in New South Wales". Noting that Canada had moved from a mandatory regime to a discretionary one, and noting "the undoubted difficulties encountered with the New South Wales model in recent times, and the fact that the rest of Australia and indeed the rest of the common law world has rejected the mandatory model", the Committee supported "a strictly circumscribed discretionary model", where questioning of a complainant on prior sexual experience would be prohibited "unless leave of the judge is obtained" (MCCOC of SCOG 1999: 243, 245).

At the time of writing, section 409B of the NSW Crimes Act 1900 remains unamended.
**Does the law breach human rights commitments?**

While the High Court expressed concern about this section, and suggested a review, on jurisdictional grounds it could offer no remedy. The High Court did not attempt to reformulate the law and the matter was sent back to the parliament. A human rights assessment of this law, however, has no such limitations. This law can and should be assessed against the human rights obligations of the *International Covenant on Civil and Political Rights*.

The relevant part of Article 14 (3)(e) of the ICCPR provides that:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ... (e) to examine, or have examined, the witnesses against him

The Human Rights Committee's General Comments (1994) associated with this subparagraph state that the provision:

> is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.

Nowak (1993: 262) notes that

> the right to examine or have examined witnesses for the prosecution is ... formulated without restriction.

Nevertheless, the Strasbourg organs have accorded the courts a certain amount of discretion to reject some questions that do not serve in ascertaining the truth.

So the Covenant would be unlikely to provide any support for irrelevant questions concerning a complainant's sexual experience. However, as the review bodies have determined that s.409B of the *Crimes Act* 1900 acts to exclude material that may be relevant to determination of the charge, the position is different.

An argument in support of this section might most usefully draw on the right to privacy, honour and reputation of the complainant (*ICCPR* 17). However privacy is protected only from "arbitrary or unlawful" attacks, while honour and reputation are only protected from "unlawful" attacks. An invasion of privacy for a purpose associated with the administration of justice would be allowed if it did not contain "elements of injustice, unpredictability, unreasonableness, capriciousness and unproportionality", or lack of due process (Nowak 1993: 172). Therefore an exploration of a complainant's sexual experience, so long as it were relevant, reasonable and proportionate to the matter before the court, would not constitute an "arbitrary" invasion of privacy, and so violate the Covenant. On the other hand, the recognised right of an accused person in a criminal trial to examine witnesses, on relevant matters, does not have any qualifications. This view is reinforced by the Human Rights...
Committee’s ruling that an accused person must have the “same legal powers” of cross-examination as the prosecution.

In our opinion therefore, s.409B as it presently stands clearly breaches the Australian commitment to Article 14(3)(e) of the *International Covenant on Civil and Political Rights*. So long as the section excludes material relevant to the conduct of a fair trial, this will remain the case. The matter could be remedied in a number of ways, including that proposed by the NSW Law Reform Commission and the Australian Model Criminal Code.

### 3.2 The ‘reasonable explanation’ rule in Weissensteiner

**The law and the possible breach**

The common law principle of the 'right to silence' is finally determined and defined in Australia by the High Court. However the High Court must also respect constitutionally valid laws passed by the states, which may reflect on and affect this right. The cases of Weissensteiner (1993) and Petty and Maiden (1991) spell out the relevant common law regarding the 'right to silence' in Australia.

However the decision in Weissensteiner appears to undermine this right, as it suggests an obligation on accused persons to testify in their own trial, if it is thought they have special knowledge of the crime. By this case, accused persons are expected to explain themselves, in some circumstances. A "failure to explain" may then lead to comments by the judge and prosecutor (in states where statute allows this) that this silence supports the prosecution case, or is "inconsistent with innocence". In NSW, since 1995, judges (but not prosecutors) have been allowed by statute to make some comment on the failure of accused persons to testify.

The relevant question here is whether the High Court decision in Weissensteiner (as it applies to NSW) breaches the Australian commitment to the right to silence as defined by the *International Covenant on Civil and Political Rights*, Article 14:

(3) *In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality...*

(g) *Not to be compelled to testify against himself or to confess guilt.*
Background

Weissensteiner was a case where the appellant had been convicted of murdering the owners of a yacht (Hartwig Bayerl and Susan Zack) who had disappeared. Their bodies were never discovered. Manfred Weissensteiner was found in possession of the yacht and some of the missing persons' possessions, and it was suggested that he had special knowledge of their disappearance and presumed deaths. In September 1990 he was arrested in the Marshall Islands and charged in Cairns with murder and with theft of the yacht. The evidence against him was entirely circumstantial. At his trial he chose not to give evidence, and his silence was used against him. The inferences allowed to be drawn from his silence were then matters that were argued before the High Court. At issue was the trial judge's directions to the jury:

The accused bears no onus. He does not have to prove anything. For that reason he was under no obligation to give evidence. You cannot infer guilt from his failure to do so ... [however, an inference of guilt] may be more safely drawn from the proven facts when an accused person elects not to give evidence of relevant facts which it can easily be perceived must be within his knowledge.

The High Court unanimously expressed the principle that an explanation from the accused was called for ('might reasonably be expected') in certain limited circumstances, and that failure to provide such an explanation may tend to support the prosecution case. The judge may comment to this effect in a state (such as Queensland) where there is no statutory bar to such comment. Five judges (Mason, Deane and Dawson in one judgement, and Brennan and Toohey in another) held this principle, and approved of the trial judge's directions. Two others (Gaudron and McHugh) upheld this same principle, but found that there was nothing in the evidence to establish that Weissensteiner had special knowledge of the whereabouts of Bayerl and Zack, much less to implicate him in murder.

In NSW, until 1995, there was a bar to judicial or prosecutorial comment on the "failure" of an accused to give evidence. The Crimes Act 1900 (s.407(2)) read:

The failure of an accused person, or the wife or husband, as the case may be, of an accused person to give evidence, shall not be made the subject of any comment by the judge or by counsel for the Crown.

This section was repealed and replaced by a provision in the Evidence Act 1995 (s.20), which allowed some judicial comment, but not so as to suggest guilt:

(2) "The judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence. However unless the comment is made by another defendant in the proceeding, the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned."
The same provision applies to comment on failure of a spouse or de facto spouse, parent or child, and in a joint trial the judge may comment on a comment of a co-accused about another co-accused's failure to give evidence (s.20).

In the earlier case of Petty and Maiden (1991, 173 CLR 95 F.C. 91/029) the High Court had expressed strong support for the right to silence, holding six to one that a trial judge could not suggest that an initial exercise of silence might undermine a later explanation by the accused of his or her actions. Justices Mason, Deane, Toohey and McHugh had expressed strong support for the right 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 ... 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 to silence or to render it valueless ... [further] it should not be suggested, either by evidence led by the Crown or by questions asked or comments made by the trial judge or the Crown prosecutor, that an accused's exercise of the right to silence may provide a basis for inferring a consciousness of guilt.

This was a NSW case where, at that time, there was a statutory bar on judicial comment about the 'failure' of an accused to give evidence. The four judge majority added that "the right to remain silent applies to the conduct of a committal hearing". Six of the judges in Petty and Maiden (Dawson J dissenting) rejected the distinction made in some earlier cases between "reliance on silence as evidence against the accused and reliance on it by way of answer to or comment upon a defence raised for the first time." Some of the judges noted that such a distinction had been described as "gibberish" by Professor Rupert Cross, author of a leading text on evidence.

However in Weissensteiner, Justices Mason, Deane and Dawson distinguished Petty and Maiden from Weissensteiner, saying that while the former case maintained it was not permissible to suggest that an accused's exercise of the right to silence before trial can provide a basis for inferring a consciousness of guilt or inferring that a defence raised at trial is a new invention or is otherwise suspect the latter asked whether it is permissible for the trial judge to instruct the jury that inferences available to be drawn from facts proved by the Crown case can be drawn more safely when the accused elects not to give evidence on relevant facts which the jury perceives to be within his or her knowledge. All seven judges in Weissensteiner answered this latter question in the affirmative.
explanation might be "reasonably expected" in some circumstances, and inferences could be
drawn from a failure to explain. Mason, Deane and Dawson cited with approval Justice
Windeyer (Bridge v The Queen 14 1964, 118 CLR at 615), who maintained that "the failure
of an accused person to contradict on oath evidence that to his knowledge must be true or
untrue can logically be regarded as increasing the probability that it is true." This clearly
suggests an obligation, in some circumstances, to give evidence and so breach one's right to
silence.

The case poses some peculiar questions. Firstly, if this was an exceptional circumstance
where the right to silence as stated in Petty and Maiden was to be effectively compromised,
how might such an exception be characterised? Secondly, was it being said that remaining
silent could amounted to evidence, or to corroboration? Thirdly, when the accused remains
silent, how can the trial judge determine which "relevant facts ... the jury perceives to be
within his or her knowledge"? The judges answered these questions in different ways.

On characterising the exceptional case, Mason, Deane and Dawson left the question open,
simply saying:

\[
\text{a jury should not be invited to take into account the failure of the accused to give evidence unless that}
\text{failure is clearly capable of assisting them in the evaluation of the evidence before them.}
\]

Noting that previous cases did not determine this question, Gaudron and McHugh said there
was no general answer, but that it would occur when the silence was "inconsistent with
innocence". However such a circumstance could not be generally characterised.

\[
\text{the circumstances which so obviously suggest a particular conclusion that they call for an explanation ...}
\text{are not susceptible of definition .. the circumstances must be such that failure to explain is inconsistent with}
\text{innocence}
\]

Both these approaches leave great room for an imaginative prosecutor or judge to suggest
suspicious inferences to be drawn from the 'failure' of an accused to testify. The result of
following this decision is likely to expand the range of cases in which a right to silence will
not be respected.

The High Court judges in Weissensteiner did not present a clear view on whether silence
could amount to some form of evidence. Brennan and Toohey suggested a distinction between
silence as evidence and silence to support adverse inferences.

\[
\text{An accused's failure to testify 'has no evidential value' ... If there is insufficient evidence of the facts from}
\text{which an inference of guilt could be drawn, a failure to testify cannot supply the deficiency. But the jury}
\]

Criminal Oversight: a human rights review of criminal justice law in New South Wales
may draw inferences adverse to the accused more readily by considering that the accused, being in a position to deny, explain or answer the evidence against him, has failed to do so.

Mason, Deane and Dawson were also unclear, saying on the one hand that an accused's silence could not be evidence, or an admission of guilt, yet on the other that silence might or might not amount to "an admission by conduct".

The failure of the accused to give evidence is not of itself evidence. It is not an admission of guilt by conduct. It cannot be ... [but] In some other circumstances, silence in the face of an accusation when an answer might reasonably be expected can amount to an admission by conduct.

The suggestion here is that there is a distinction between the drawing of inferences from conduct not in evidence (ie. maintaining one’s right to not answer questions), and the drawing of inferences from conduct as evidence. But it is a laboured distinction, and one which invites the jury to look beyond the evidence and to suspect what an accused's silence may mean.

Two further distinctions were made, in the course of sustaining the in-principle decision in Weissensteiner. Justices Brennan and Toohey suggested that the right to silence at trial warranted less protection, given that testimony was "directly under judicial control!":

Petty and Maiden and Woon [19 1964 109 CLR 529] were cases relating to the responses of a suspect to enquiries by police; the present case related to the non-exercise by an accused of his statutory right to testify in his own defence at trial ... to the course of proceedings directly under judicial control.

However it is not clear how an expectation that one should to testify at one's own trial might be less onerous than a demand to answer police questions. It is well recognised that there were reasons why persons might not testify at their own trial. Justice Isaacs in Bataillard v The King (30 1907 4 CLR 1282 at 1290-1) noted that there are a range of reasons not to testify:

other than a sense of guilt, such as timidity, weakness, a dread of confusion or of cross-examination, or even the knowledge of a previous conviction [which might be exposed]

One might add to this list: a sense of shame about or fear of exposing other related non-criminal, or other criminal, matters. Building on this 'friendly' expectation that one should testify at one's own trial, Justices Gaudron and McHugh proposed a distinction between testifying 'against' oneself and testifying 'for' oneself, the suggestion being that there could be no dread of the latter.

in circumstances involving an assumption that an innocent person would offer an explanation, the accused is not asked to testify against himself, but in favour of himself.

However this tends to ignore the practical reasons (fear of contradiction, ridicule, enhanced suspicion and cross examination generally) why people choose not to testify. An accused person really just testifies, or not. Surely whether the testimony is 'for' or 'against' him or
herself is a matter of how the tribunal views that testimony.

A range of arguments were thus presented by the judges to explain why, in some circumstances, an accused might be expected to testify at trial, and how this does not breach the common law rule respecting the right to silence. However the consequences of these variously and sometimes loosely defined lines of reasoning become clear when we see what very different inferences from Weissensteiner's silence were drawn by the High Court judges themselves. On the one hand, Mason, Deane and Dawson concluded that only Weissensteiner knew how he came to own the boat "in the absence of Bayerl and Zack". The assumed detail of this peculiar knowledge was suggested as being able to strengthen the murder charge against him.

The appellant, if anyone, could have explained not only his possession of the boat, but his possession of the boat in the absence of Bayerl and Zack. His failure to give evidence was, therefore, capable of strengthening the prosecution case by enabling the jury, in the absence of any explanation by him, to accept the inferences for which the prosecution contended as the only rational inferences from the evidence.

On the other hand, Gaudron and McHugh said that, while there were unanswered questions about which Weissensteiner may have had unique knowledge, this did not go so far as to indicate he knew where the two were, let alone implicate him in their assumed murders:

there is nothing in the evidence to provide the basis for an assumption that the appellant had some special knowledge as to the whereabouts of Ms Zack and Mr Bayerl, as might be suggested if, for example, it had been established that they sailed with him from Cairns. Much less can it be said that the facts so obviously implicate him in murdering them that they call for an explanation in the sense discussed.

The difference between the conclusions of these two judgments illustrates a basic danger in the Weissensteiner principle. If it is assumed that an accused has some unique knowledge, yet that person chooses to remain silent -- who can safely define the nature and extent of that assumed knowledge? In this case the High Court judges could neither define the circumstances in which a person would be required to explain, nor could they agree on what inferences could be safely drawn from Weissensteiner's failure to explain. If the judges cannot agree on it, what is to be gained from inviting a jury to do so? Inviting jury speculation on assumed knowledge may well be inviting them to depart from the evidence, and to form conclusions based on suspicion and prejudice.
The Weissensteiner case is further clouded by reports that the two presumed victims may still be alive. On 19 April 1998 newspaper reports indicated that Interpol was tracking an Austrian man across Europe who was believed to be Bayerl. Interpol experts believed that there existed a "good similarity" between recent photos of the suspect and of Bayerl. Manfred Weissensteiner is currently serving a life sentence at Borallon prison, in Queensland.

In NSW the decision in Weissensteiner has been applied on many occasions since 1993. In each case the NSW Court of Criminal Appeal has noted the combined effect of the High Court judgement in Weissensteiner and s.20 of the *Evidence Act* 1995. For example in Lewis (1998) the CCA noted that

*Pursuant to s 20 of the Evidence Act the trial judge was entitled to comment on his failure to [give evidence], but could not suggest that the reason he failed to give evidence was because the appellant was, or believed that he was, guilty of the offence concerned. Section 20 does not prohibit any other comment which may be made on a failure to give evidence: see Weissensteiner v R (1993)*

In that case, multiple and confusing directions by the trial judge led the CCA to direct a retrial. However, in Davis (1999) the following direction by trial judge Nader was supported by the CCA:

*The accused has a right to remain silent, and it extends to this trial as well as other periods of time between the accusation and the trial itself... Now the only effect that his failure to give evidence may have on you is this. His failure to give evidence here may affect the value or weight that you give to the evidence of some or all of the witnesses who have testified in the trial if you think the accused was in a position to himself give evidence about the matter. His failure cannot be treated as an admission. His failure to give evidence. But it may enable you to give, to help you to evaluate the weight of other evidence in the case, that he has not given evidence.*

Justice James Wood, writing the leading judgement for the CCA, added that the fact that the accused has participated in an electronic interview with police

*did not* necessarily militate against giving a Weissensteiner direction. The account given by an accused to police in an [electronic interview] is far from being the equivalent of sworn evidence in a trial.

In Fernando (1999) the CCA approved of the following direction by trial judge Abadee:

*However, a failure to contradict or explain incriminating evidence, in circumstances where it would be reasonable to expect it to be in the power of an accused to do so, may make it easier for you to accept or draw inferences from evidence relied upon by the Crown. Inferences available to be drawn from facts proved by the Crown's case can be drawn more safely or more readily where the accused elects not to give evidence on relevant facts which you, the jury, perceive to be within his knowledge. Where the evidence of the Crown witnesses is left undenied or uncontradicted by, for example, an accused's evidence, in circumstances where the accused must have personal knowledge of the relevant facts, doubts about the reliability of the Crown witnesses may be more readily discounted and the evidence of those witnesses*
more readily accepted.

Justices Newman, Studdert and James found that this adverse direction was allowed against one of the accused, even though he had

waived his right to remain silent when he was interviewed by the police, he had given his version to the police, he had participated fully in the process of being interrogated by the police.

The effect of Weissensteiner on cases such as Davis and Fernando has thus not simply been to demand an explanation from an accused, but to demand an explanation on oath, and where the accused may be cross-examined. This may compound the problem, from the accused's point of view, in that an unwillingness to testify out of fear of cross-examination (which may include the fear of prejudicial exposure of previous misconduct or criminality) will invite adverse comments, inviting suspicion about the failure to testify.

**Does the law breach human rights commitments?**

The High Court of Australia determines its decisions independently. However the court works in the absence of an Australian Bill of Rights and must also respect constitutionally valid laws passed by the states. In this case, s.20 of the NSW *Evidence Act* 1995 does allow some comment on the 'failure' of an accused person to testify. The High Court therefore has structural constraints on its capacity to fully express human rights principles.

However, there is no such structural problem in applying international jurisprudence to the rule in Weissensteiner. What is to be assessed is the effect of the High Court rule combined with the state legislation, and the benchmark is the relevant provision of the *International Covenant on Civil and Political Rights*. In this case the *ICCPR* (Article 14) says that:

(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ...  
(g) Not to be compelled to testify against himself or to confess guilt.

Nowak says this provision came from a Filipino proposal, and that the term "to be compelled" includes:

various forms of direct or indirect physical or psychological pressure, ranging from torture and inhuman treatment prohibited by Articles 7 and 10, to various methods of extortion or duress and imposition of judicial sanctions in order to compel the accused to testify (Nowak 1993:264).

The General Comments of the Human Rights Committee explains the provision in this way:

14. Subparagraph 3 (g) provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard the provisions of Article 7 and Article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently
methods which violate these provisions are used. The law should require that evidence provided by means
of such methods or any other form of compulsion is wholly unacceptable
Case law from the Human Rights Committee has mostly come from complaints in which
torture and physical coercion has been used by police to obtain confessions (eg. Miguel Angel
Estrella v Uruguay 1983; Delia Saldivas de Lopez v Uruguay 1984; Raul Cariboni v Uruguay
1988). However, "to testify against himself or to confess guilt" has clearly been read widely to
mean both "testify" in court and "confess" to police so that the evidence might then be used as
evidence in court. For this reason, a compulsion to "testify against" oneself in court, as
suggested by Weissensteiner, would appear to violate the Covenant. There is no exception to
the treaty provision, in the way that the High Court has constructed an exception to the right
to silence in Weissensteiner
If the Australian Government chose to defend the rule in Weissensteiner, it might argue in
two ways. Firstly, it might argue that there is no compulsion involved in the rule, as there is in
a confession extracted by torture. The accused is not "compelled" to testify, it is simply that
certain inferences may be drawn by the jury, and some comment may be made by the judge, if
the accused does not testify in a limited number of cases. Secondly, it might adopt the
argument of Justices Gaudron and McHugh in Weissensteiner, that there is a distinction
between testifying "against" oneself and testifying "for" oneself, that is "the accused is not
asked to testify against himself, but in favour of himself".
Neither of these potential arguments seem to me to be particularly impressive. There is indeed
compulsion in the prospect of knowing that, if one does not testify at one's trial, the judge
may make adverse comments, attracting suspicion rather than accepting silence as the
exercise of a universal right. And the distinction between testifying "for" or "against" is a
facile one. Prosecutors typically want accused persons to testify, so that they may be cross-
examined and attention may be drawn to the weaknesses of their defences, the inconsistencies
in their explanations or to their criminal or suspicious backgrounds. Defence lawyers may
then draw attention to the strengths of their client's testimony. However in my view it is
pointless to argue (particularly in an adversarial structure) whether an accused person has
been invited to or has in fact testified "in favour" of, instead of "against", him or herself. As I
said earlier, an accused person simply testifies, and others then comment and draw inferences.
The right to silence is rooted in the internationally accepted and coherent form of the criminal
process. Persons charged are presumed innocent until proven guilty, they are prosecuted by the state which carries the burden of proof of the charge. Accused persons are not to be compelled to assist the state in this process. The need to protect this right is underscored by the overwhelming resources of the state, when pitted against those of the individual. The danger of the rule is well illustrated by the fact that, while all the High Court judges agreed that (sometimes) juries should be allowed to draw inferences from an accused's 'failure' to testify, in certain cases, the judges themselves disagreed widely on what inference to draw in this particular case. The ruling does not encourage decision making based on evidence, and may instead encourage decisions based on innuendo and speculation. In my opinion, therefore, the High Court decision in Weissensteiner (as it applies to NSW) most likely breaches the Australian commitment to the right to silence as defined by the *International Covenant on Civil and Political Rights* (Article 14 3 (g)). It does so by raising the threat of judicial censure at trial, prejudicing the accused person's prospects of an acquittal, in order to compel that accused person to testify.

**Footnote:**
In the more recent case of *RPS v The Queen* (HCA 2000), the High Court appears to have tightened the rule in *Weissensteiner*. This was a New South Wales case, where s.20(2) of the NSW *Evidence Act* (1995) allowed the High Court to read more narrowly the comments that a trial judge may make on an accused's choice to not give evidence. In *RPS v The Queen* the High Court opposed a widening of the circumstances where courts believed an accused "might reasonably be expected" to give evidence. They rejected a distinction between comments which suggested the accused did not give evidence because he or she was guilty (prohibited by s.20(2)) and comments that the accused did not give evidence because the evidence "would not have assisted him". The Weissensteiner principle of reasonably expecting an accused's evidence should not be extended to include an expectation that the accused would contradict direct evidence against him or her, the High Court said. The rule in Weissensteiner would be limited, they said, to rare cases such as a circumstantial case where the accused might be expected to give account of some special knowledge that he or she may have had. If the NSW case of *R v OGD* (NSW CCA 1997) had been establishing a wider proposition, the High Court said this trend should be overruled.

I will not attempt a detailed analysis of RPS here, except to say that we are left with two
unresolved issues (i) the internal problems of the Weissensteiner reasoning, which undoubtedly contributed to the widening process mentioned in R v OGD, and (ii) the structural problems of High Court rule making, in the face of constitutionally valid statutes on judicial comment, and the absence of a federal Bill of Rights.

4. Criminal Sanctions

In examining the human rights compliance of criminal justice laws which relate to criminal and custodial sanctions the relevant questions relate to: (i) cruel, inhuman or degrading treatment, (ii) the right to compensation for unlawful arrest and detention, and for wrongful punishment (iii) ensuring that the aim of prison is reformation and rehabilitation, (iv) ensuring that young people are only sentenced to prison as a last resort, and (v) protecting life and security of the person.

In particular, the human rights instruments suggest these questions:

1. How effectively does the law prohibit the use of cruel, inhuman or degrading treatment or punishment, and to what extent does the law provide an effective remedy in case of such treatment? [ICCPR 7; CROC 37(a)]

2. How effectively does the law provide for an enforceable right to compensation for unlawful arrest or detention, and for wrongful punishment? [ICCPR 9 (5) & 14 (6)]

3. To what extent does the law provide that the essential aim of the prison system shall be reformation and social rehabilitation? [ICCPR 10 (3)]

4. To what extent does the law provide that ... imprisonment for young people under eighteen is only to be used as a measure of last resort and for the shortest appropriate time, and that no child is subject to imprisonment without possibility of release? [CROC 37(a) (b)]

5. How effectively does the law protect the right to life and defend the security of the person? [ICCPR 6 & 9 (1)]

6. To what extent does the law ensure that persons are treated as equals before the law [ICCPR 2 91) & 14 (1); CROC 2 (1)]

As examples in this area I consider retrospective ‘life’ sentences, and compensation for victims of miscarriages of justice.
4.1 Retrospective life sentences

The law and the possible breach

A 1993 amendment to the NSW Sentencing Act 1989 allowed those sentenced to indeterminate 'life' sentences (subject to eventual release on license) of imprisonment to be resentenced to 'natural life' (never to be released) -- a far more severe penalty, and one which did not exist at the time of their offence or trial. The resentencing procedure for those serving previously indeterminate 'life' sentences, [Sentencing Act s.13A(8)] was amended to provide that:

(8) If the Supreme Court declines to determine a minimum term and an additional term, the court may direct that the person who made the application:
(a) never reapply to the court under this section ...
(8A) ... [this] person is to serve the existing life sentence for the term of the person's natural life.

Another Sentencing Act amendment in 1997 substantially lengthened the time (from 8 years to 20 years) before a person, subject to a "non-release" recommendation by the trial judge, could apply for a redetermination of an indeterminate 'life' sentence. Section 13A (3) of the Sentencing Act was amended to read:

(3) A person is not eligible to make such an application unless the person has served:
(a) at least 8 years of the sentence concerned, except where paragraph (b) applies, or
(b) at least 20 years of the sentence concerned, if the person was the subject of a non-release recommendation.

However the International Covenant on Civil and Political Rights opposes retrospective offences or penalties, in unambiguous language.

No one shall be held guilty of any criminal offence ... which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. [Article 15 (1)]

At issue in this case is whether the retrospective nature of 'resentencing' penalties, under the Sentencing Act 1989, breach human rights commitments. The relevant questions are therefore (i) whether s.13A (8) of the Sentencing Act, by allowing for retrospective 'natural life' penalties breaches Article 15(1) of the ICCPR, and (ii) whether s.13A (3)(b) of the Sentencing Act, by introducing a 20 year bar to application for redetermination of sentence, breaches Article 15(1) of the ICCPR.
Background

In 1989 the NSW Sentencing Act was introduced and the NSW Crimes Act (1900) was amended, repealing s.19 and adding s.19A, to allow a 'natural life' sentence (never to be released) to be imposed on a person convicted of murder. Previously, those sentenced to 'life' (under s.19) served an indeterminate sentence, from which they might hope for release 'on license' after serving at least 10 years. The average life sentence at the end of the 1980s was 11 to 12 years. However the NSW Sentencing Act 1989 required all sentences to be determinate under so-called 'truth in sentencing'. Under this procedure both the system of remissions and administrative release on license were abolished, and a release date was set by a sentencing judge. Those sentenced to indeterminate 'life' were then required to have their prison sentences converted to a determinate sentence, with a specific date of eligibility for parole. The Sentencing Act 1989 (despite its title) only dealt with sentencing to prison, release on parole and some other prison related matters. It did not deal with those 95% of sentences which do not involve imprisonment. By abolishing all remissions from sentence it effectively lengthened all maximum sentences, and the range of applicable sentences, and required a specified date of eligibility for parole, for all sentences. It did in fact lead to an increase in terms of imprisonment (Potas 1992: 318). It did not initially apply to 'life' sentences [s.13(c)]. However later in the same year it was introduced, the Sentencing Act was amended to add a provision [s.13A] whereby a person serving a life sentence, imposed before the Act was introduced, could apply to the Supreme Court to have his or her sentence redetermined. A minimum term and an additional term could then be specified, as with other sentences. Those applying to have their sentences converted were prohibited from making application until they had served "at least 8 years" of their sentence [s.13A(3)]. This was broadly in line with previous practice, where a 'lifer' might seek a lowered security rating within the prison system, at about this time, with the expectation of possible release after serving at least 10 years.

Amidst public debate about the possible release of some notorious persons, convicted of murder, a 1993 amendment to the Sentencing Act [s.13A (8)] (see above) allowed for those sentenced to 'indeterminate life' to be resentenced to 'natural life'. This resentencing to 'natural life' may only be for the crime of murder, for "a most serious case" and when it is "in the public interest that the determination be made" [s.13A (8C)]. However while several people have now been sentenced to the new penalty of 'natural life', under s.19A of the Crimes Act, no-one as yet has been resentenced to 'natural life' under s.13A (8) of the Sentencing Act.
Further, most of those sentenced to indeterminate 'life' have now been resentenced to fixed terms. Only a few pre-1989 life sentence prisoners remain 'un-resentenced'. The 1997 amendment to the *Sentencing Act* [s.13A (3)] (see above) appeared to impose yet another legislative barrier to the release of this dwindling group of unpopular persons (including William MacDonald, Leonard Lawson, Kevin Crump and John Cribb). It lengthened the time (from 8 years to 20 years) before a person, subject to a "non-release" recommendation by the trial judge, could apply for a redetermination of sentence.

Both the 1993 and the 1997 amendments to the *Sentencing Act* were formulated in the context of public debate about the possible future release of a handful of notorious NSW prisoners convicted of murder and sometimes multiple murder. However a disturbing feature of the legislative process was the appearance of Parliament formulating law to ensure that specific individuals remained in jail. In a 1997 speech the then NSW Chief Justice Murray Gleeson attacked politicians and media commentators for competing with each other over ever 'tougher' sentencing proposals. Such campaigning and higher sentences had little impact on crime, he said (in Lagan 1997). The 1997 amendment had been pushed through Parliament after the resentencing of Kevin Crump to a possible release date in the year 2003, an effective 19 year minimum term. The Labor Government had responded to public criticism of the prospects of Crump's release, by shifting the 8 year bar on application for resentencing to (in certain cases) a 20 year bar on application. However Law Society President Patrick Fair criticised the move, saying the Parliament should not get involved with sentencing matters. Sentencing should be left to the courts, as "hard cases make bad law" (Law Society 1997a). The possibility of retrospective penalties formed part of a populist "law and order auction" (Hogg and Brown 1998) between the major parties.

How does Australian law view retrospectivity? Where there is no retrospective statute, the common law is against retrospectivity, but retrospective statutes are allowable. Indeed the High Court, without a Bill of Rights, cannot overrule such law unless it breaches some basic constitutional principle, such as the separation of powers. In the High Court case of *Nicholas*, Toohey J observed that:

> absent a clear statement of legislative intention, a statute ought not be given a retrospective operation where to do so would affect an existing right or obligation (Nicholas v The Queen [1998] HCA 9 2 February 1998, M60/1996, at 59)

In that same case Kirby J applied the accepted common law, that:
Parliaments may enact laws of evidence of general application to govern the trial of matters in the courts, including with retroactive operation, without being regarded as impermissibly invading the courts' domain or the judicial power (at 197).

The case of Polyukhovich v The Commonwealth of Australia (1991, 172 CLR 501 F.C. 91/026), where the War Crimes Act 1945 (Cth) had been amended with retrospective effect, affirmed this principle. However if a law was seen to be aimed at particular individuals, it usurped the judicial power and breached the separation of powers under the constitution. So according to Kirby J in Nicholas:

If [the statute] is highly selective and clearly directed at a particular individual or individuals, it is much more likely that it will amount to an impermissible intrusion upon, or usurpation of, the judicial power. The position is clearer where the legislation in question names the individual or individuals affected. However, such express identification is not required ... regard will always be had to its substance rather than its form (at 201).

The argument in Nicholas noted a tendency for legislation to avoid retrospective formulations, but also that there was no constitutional bar (as might be introduced by a Bill of Rights based on the ICCPR) to legislative retrospectivity. However the position in international law is different.

**Does the law breach human rights commitments?**

Commentators (eg Robertson and Merrills 1996) have noted the various regional human rights instruments which prohibit retrospective criminal laws. The *European Convention on Human Rights* bars retroactivity of the criminal law (Article 7). The *American Convention on Human Rights* declares freedom from retroactivity of the criminal law, while the *African Charter on Human and Peoples' Rights* supports freedom from retrospective punishment.

More importantly, for the purpose of this audit, the *ICCPR* gives special protection to its anti-retrospective provision, and holds prohibition of retrospective criminal law as one of the Covenant's non-derogable rights [Article 4(2)]. There is a qualification to the ICCPR's widely stated anti-retrospective principle [15(1)], that trial and punishment for international criminality shall not be prejudiced [15(2)], but that is not relevant to this issue.

In 1984 the Human Rights Committee decided in two Uruguayan cases that retrospective use of laws violated the Covenant [Luciano Weinberger Weisz v Uruguay, Communication No 28/1978 (29 October 1980), UN Doc CCPR/C/OP/1 at 57 (1984); and Alba Pietraroia v Uruguay, Communication No 44/1979 (27 March 1981) UN Doc CCPR/C/OP/1 at 65...
In these cases persons were arrested and then punished according to military law promulgated after their arrest. This is categorically similar to the case of those serving indeterminate life sentences for murder, then being potentially subject to a more severe judicial resentencing [per *Sentencing Act* s.13A(8)] after their offence (and after their trial).

An unresolved argument was held at the Human Rights Committee in 1982, over a Canadian criminal case [Gordon Van Duzen v Canada, Communication No R.12/50 (18 May 1979) UN Doc Supp No 40 (A/37/40) at 150 (1982)]. At issue was the applicability of a more lenient parole procedure, introduced after the commission of the offence, and whether Van Duzen should get the benefit of that, according to the final sentence of Article 15 (1). Argument turned on whether Article 15 (1) applied to penalties broader than a 'criminal penalty' as defined by Canadian law. The Human Rights Committee affirmed that it was not bound by national legal definitions, and must regard the terms and concepts of the Covenant as having an "autonomous meaning". This might have meant that they would accept Van Duzen's argument that the Article was about "punishment for crime", encompassing procedures wider than judicial sentencing. However as Van Duzen was released to early parole, the Committee avoided a conclusion on this matter. It seems to me that the answer to this question may have some bearing on the second question I have posed, whether the increased effective minimum qualifying period for an application for resentencing for some persons [*Sentencing Act* s.13A(3) (b)] also violates Article 15(1). There is probably a stronger argument here (than there was in Van Duzen), in that this section involves an increased barrier to what is an essential precondition for judicial resentencing. However with the unresolved argument over what is a criminal ‘penalty’, the argument against s.13A (3)(b) is not as quite clear as the argument against s.13A (8).

In my opinion, therefore, s.13A (8) of the *Sentencing Act*, by allowing for retrospective 'natural life' penalties, clearly breaches the Australian commitment to nonderogable Article 15(1) of the ICCPR. In addition, s.13A (3)(b) of the *Sentencing Act*, by introducing a 20 year bar to application for redetermination of sentence, possibly breaches the Australian commitment to nonderogable Article 15(1) of the ICCPR. The first clearly does so, and second possibly does so, by violating the principle that there shall be no retrospective application of the criminal law.
4.2 Compensation for victims of miscarriages of justice

The law and the possible breach

In New South Wales compensation has been paid to a number of people who have been pardoned after the disclosure of fresh evidence led to a special inquiry, and a pardon resulted. In New South Wales (but not in other Australian states) there has long been a special section of the Crimes Act 1900 (previously s.475, now s.474 or part 13A) which provides for such a special inquiry. This section predated, and now operates concurrently with the Court of Criminal Appeal Act 1912. In the early 1990s the section was amended to allow, amongst other things, for a pardon by the Government (an executive act) to be 'converted' into an acquittal by the Court of Criminal Appeal (a judicial act). In recent years all such pardons (whether 'converted' or not) have had the same factual basis as an acquittal, that is, the new evidence must have indicated that there was a reasonable doubt about the conviction. Thus all pardons in recent years have been the factual equivalent of an acquittal. There have been no 'compassionate grounds' pardons to confuse the matter.

Compensation paid to these victims of miscarriages of justice, however, has been by way of an 'ex gratia' payment. That is, it has been an act of 'grace' or favour on the part of the executive government that has led to compensation being paid. In some cases it appears that such payments have been made to avoid possible common law actions against the state. Although in recent times there have been attempts to make public some of the criteria on which these decisions are made, there remains considerable uncertainty about the process, eligibility for compensation and the amount which should be paid. Above all, compensation in these circumstances has been treated as a privilege and not a right.

Article 2(3) of the ICCPR provides that persons shall have "an effective remedy" when their rights are violated. Article 9(5) goes on to assert that victims of "unlawful arrest or detention shall have an enforceable right to compensation". In particular, on compensation for the victims of miscarriages of justice the Covenant says:

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him. (Article 14(6))

As NSW has no real system of compensation "according to law", the relevant question here is whether reliance on an ex gratia system of compensation is allowed by the Covenant, or
whether this practice breaches Article 14(6).

**Background**
There is currently no legally regulated way by which persons in NSW -- wrongly convicted but then exonerated -- can obtain compensation. Where compensation has been paid it has been by way of ex gratia payment from the government, with very uneven results. The difficult alternative is to pursue a common law claim, and prove a case against the state. This is even rarer than ex gratia payments. Access of victims of miscarriages of justice to the Victims Compensation Tribunal has not yet been tested, but would not appear generally applicable, as this system is open only to those who have been subject to an "act of violence".

In practice, the ex gratia system is extremely uneven. Large payouts have been made where a special inquiry has been instituted after the person has been exonerated. Thus Arthur Allan Thomas in New Zealand (who served 10 years for murder before being pardoned in 1979) was awarded $1.1 million and Harry Blackburn in NSW (who was not convicted and served no time in prison) received almost $1 million. Both had Royal Commissions into their cases after they had been exonerated. The Blackburn case was unusual in that compensation was paid despite the fact that no conviction or punishment had occurred. Lindy & Michael Chamberlain in the Northern Territory received a total of $1.3 million for wrongful convictions over the death of their baby daughter Azaria (Lindy had served 3.5 years in prison), but others pardoned in the 1980s and 1990s have received much less:

- Edward Splatt in South Australia received $270,000 for 6 years jail,
- Ziggy Pohl in NSW received $200,000 for 10 years jail,
- Douglas Rendell in NSW received $100,000 for 8 years jail, and
- Paul Alister, Ross Dunn and Tim Anderson in NSW received $100,000 each for their 7 years jail.

All ex-gratia payments are made with no fault admitted by the state, a move intended to head off any subsequent common law suit. Most of these claims took several years to resolve, on top of the many years which the victims had already spent seeking vindication.

In 1994 it was reported that Attorney General John Hannaford was preparing a system of independent assessment of compensation for people who had suffered miscarriages of justice. This was to replace the ex gratia system.

*Mr Hannaford told the Herald yesterday that a system introduced in Britain in 1988, which replaced an ex*
gratia scheme, was being examined.

"We are looking at the most effective and efficient way of dealing with these to minimise court cases with regards to disputes over compensation," he said.

"We have never anywhere in Australia had a statutory scheme for assessment of compensation. Here in NSW the ex gratia payments have not been compensation, but some payment to help a person get re-established in life."

He agreed that the proposed change was a radical shift in policy. One factor he had taken into account was the number of applications in the system for quashing of verdicts. (Brown 1994)

At this time two private members bills on compensation were before the parliament, both from Opposition Labor MPs. The first was from George Thompson (ALP) while the second was from John Mills (ALP), seeking independent assessment of compensation. A third was being contemplated by Peter Anderson (ALP), on behalf of Alexander McLeod-Lindsay, who was pardoned after having served nine years for attempted murder. However the then Coalition government made no such changes, and subsequent Labor Governments have rejected similar proposals. There has thus been no progress towards a system of compensation "according to law", as required by the ICCPR.

Some of the sense of Article 14(6) of the ICCPR is incorporated into the considerations apparently taken into account when making ex gratia payments. That is, payment is often made when a person is exonerated after all the normal processes (usually including a High Court appeal) have failed. Such exoneration usually happens by way of a Royal Commission or, in the peculiar case of NSW, an inquiry under s.474 (previously s.475) of the Crimes Act. In 1995 Labor Attorney General Jeff Shaw said that the considerations of the ex gratia system would include findings of wrong doings against the state or its witnesses, such as would be relevant to any common law action.

If it is found the evidence is fabricated or if the prosecution misconducts itself, then compensation would be paid. (Shaw 1995)

The Attorney General said this when rejecting a compensation claim by Jonathan Manley, who was acquitted of murder by the Court of Criminal Appeal, on the grounds that the verdict was unsafe and unsatisfactory. Manley had spent 12 months in prison and was acquitted because the case against him was hopelessly weak. Had there been a finding of fabricated evidence, then, according to Shaw, Manley may have been compensated. However this distinction had no real relevance to the actual wrong suffered by Manley.

In 1996 the NSW Council for Civil Liberties called for a tribunal to assess compensation,
The present system of providing compensation to the victims of miscarriages of justice is inadequate. To ensure equality of access and equity, an independent Miscarriages of Justice Compensation Tribunal should be established to assess the compensation to be paid to those wrongly arrested, detained, prosecuted, convicted or imprisoned for a crime. Founding considerations should be those of Section 14(6) of the International Covenant on Civil and Political Rights. Compensation should be based on (i) the impact of the wrongful arrest, detention, prosecution or conviction & (ii) the impact of any period of wrongful imprisonment. In determining the quantum, the Tribunal should be able to consider all aggravating and mitigating factors. However victims should not be required to establish any specific wrongdoing by the prosecution, other than to prove that there has been a miscarriage of justice (CCL 1996).

The suggestion here was not only to add prosecution misconduct to the 'fresh evidence' criteria of Article 14(6), but to extend compensation to all those who had been demonstrably victims of a miscarriage of justice.

In 1997, with support from several community groups including the CCL, Liberal Shadow Attorney General John Hannaford introduced a private members bill into the state's Upper House. The Criminal Appeal Amendment (Review of Criminal Cases) Bill 1997 was to set up an independent Commission which would review wrongful convictions. This followed a Royal Commission into the NSW Police which had revealed massive corruption, including wholesale fabrication of evidence to secure convictions. The Bill included a compensation provision. It sought to amend the Court of Criminal Appeal Act 1912 to insert section 23Q, providing a 'Statutory Right to Compensation' for victims of miscarriages of justice. The Bill was supported by Coalition and crossbench MPs and passed through the NSW Upper House in early 1998. However the Labor Government refused to pass it through the Lower House. An amendment to the Bill, put up by Greens MLC Ian Cohen and passed by the Upper House, had added "misconduct by the prosecution" (including that known at trial or appeal, as opposed to such misconduct as a "new or newly discovered fact") as a matter which "may" be considered by the Commission in determining payment of compensation for wrongful conviction. It was argued that the principles applied should not be less favourable nor less fair than those applied to the determination of ex gratia payments. Hence "misconduct by the prosecution" should be added to the basic considerations that create a right to compensation. The initial compensation provisions of clause 23Q were thus based on Article 14(6) of the International Covenant on Civil and Political Rights, but slightly expanded on amendment. The provisions were intended to replace the current system of ex gratia payments.
A proper legal system for compensating miscarriage of justice victims has thus been attempted, but has not yet been implemented in New South Wales. A new system has been attempted because there are demonstrable problems with the ex gratia system, and because it is recognised that our human rights commitments demand a legal system. In summary, the main problems of the existing ex gratia system of compensation are these:

- the ex gratia model limits itself to (i) those few who have exhausted all channels of appeal, have managed to secure a special inquiry and have then (by the longest route possible) been exonerated, or to (ii) those acquittals where there has been a finding of wrong doing by the prosecution or its witnesses, and therefore the state faces the prospect of a common law suit;
- there are long delays in the consideration of ex gratia matters;
- there are inexplicable inconsistencies in payments;
- there is no open process of hearings, or avenue for appeal;
- the common law route involves placing an unfair and extremely difficult burden of proof on a person already found to have been wrongly convicted (and usually jailed) by the state.

There can be little doubt that an independent tribunal or panel of assessors would act more rapidly, more transparently and with greater consistency than governments of any stripe, under the ex gratia system.

**Does the law breach human rights commitments?**

Nowak (1993: 269-271) says that, in the drafting process, 14(6) of the *ICCPR* was the most controversial provision of Article 14. It was first attacked by the USA, then by several European countries. However by 1984 the European Convention on Human Rights had created a nearly identical provision to that of 14(6). One reason for the initial controversy was that a 'pardon' in some countries meant a remittal of sentence on humanitarian grounds, rather than an effective reversal of conviction, though the final wording makes it clear that the only pardon which attracts compensation under 14(6) is one which occurs as a result of a finding that there has been a miscarriage of justice.

Five elements must be satisfied, to meet the needs of the provision. First, there must have been a conviction by a final decision; that is, all normal avenues of appeal must have been exhausted. Second, the conviction must have been reversed in circumstances where it has been acknowledged that there has been a miscarriage of justice. Third, a new or newly discovered fact leads to that reversal, Fourth, the person was suffering some punishment for
the conviction. Fifth, the person convicted was not responsible for non-disclosure of the new fact. Nowak (1993: 271) says that this latter provision was inserted at the initiative of France, to rule out cases where a person allows himself to be convicted to shield the really guilty party. In one case against the Netherlands (W.J.H. v The Netherlands 408/1990) the Committee found that a person convicted and subsequently acquitted was ineligible for compensation because he had not been punished. In a case against Finland (Muhonen v Finland 89/1981) the claim for wrongful imprisonment was rejected because the pardon was not based on newly discovered facts.

However it is very clear that the compensation is to be "according to law" so as "to regulate in detail the modalities for granting compensation, as well as the amount, particularly in the case of non-pecuniary damages (eg. with prison sentences)" (Nowak 1993: 271). In its General Comments on Article 14 (6) the Human Rights Committee (1994) says that in many states "this right is often not observed or insufficiently guaranteed by domestic legislation. States should, where necessary, supplement their legislation in this area in order to bring it into line with the provisions of the Covenant." These comments could well have had New South Wales in mind. The state's ex gratia system is not supplemented by victims compensation law (the Victims Compensation Act 1996 only applies to victims of "an act of violence") and the difficult but possible common law remedies do not meet the state's responsibility to provide compensation according to law.

In my opinion, therefore, the ex gratia system of compensation for victims of miscarriages of justice does not meet the requirements of the Covenant for a system of compensation "according to law". The current practice is therefore clearly in breach of Article 14(6) of the International Covenant on Civil and Political Rights.

5. Equality before the law

In examining the human rights compliance of a range of criminal justice laws we must also consider the question of equality before the law. In particular, the human rights instruments suggest this question:

4. To what extent does the law ensure that persons are treated as equals before the law? [ICCPR 2 91) & 14 (1); CROC 2 (1)]
As an example in this area I consider the general police immunities granted under ‘controlled operations’ legislation.

### 5.1 General police immunities

**The law and the possible breach**

In 1997 the NSW Government introduced a bill which allowed for general immunities from prosecution for police engaged in 'controlled operations'. The bill was supported by the Opposition and passed without much debate. It followed the High Court case of Ridgeway, where evidence was excluded because of the criminality of undercover Australian Federal Police. The result of the Act is that there is now a process whereby senior executive officers of the NSW Police Service can authorise 'controlled operations', in the course of which law enforcement officers gain a general immunity from any criminal charge or civil claim.

Previously, undercover or other operational police officers acting improperly or illegally have avoided prosecution because of their lack of intent to commit a crime (criminal intent being a component of most crimes) and because of the selectively applied discretionary powers of their fellow police and prosecutors. Through such practice, any question of illegality was said to be resolved by consideration of the facts of the individual case. 'Controlled Operations' legislation changes all this, by creating a formal blanket immunity for police engaged in an operation authorised by a senior executive officer. The problem is that the potential crimes for which police are indemnified include crimes which have victims (eg. assaults, serious assaults, up to and including manslaughter and murder) and thus may involve serious violations of rights of other citizens, for which the potential sanctions or remedies have been removed. Further, general immunities tend to create a class of citizen which is above the law.

However Article 2 of the International Covenant on Civil and Political Rights provides that all are to be considered equal before the law, are entitled to equal protection of the law and are entitled to an effective remedy if their rights are violated:

*Each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status ... [Article 2(1)]*

*Each state party to the present Covenant undertakes:*

(a) to ensure that any person whose rights or freedoms as herein recognised are violated shall have an
effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity ... [Article 2(3)]

Article 2(3) goes on to reinforce this initial proposition, by asserting that the "effective remedy" shall be determined by a competent authority and shall be enforced. Article 26 then reinforces the principle of equality before the law and equal protection of the law:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law ... [Article 26]

In addition, Article 6 (1) asserts a special protection of the law, that of the right to life:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

The relevant question here is whether the system of general immunities, provided to police by the NSW Law Enforcement (Controlled Operations) Act 1997, is allowed by the Covenant, or whether it breaches the principles of equality before the law, access to an effective remedy and the right to life (ICCPR Articles 2, 6 and 26).

Background
In the case of Ridgeway v The Queen, the High Court (1995) restated the common law principle that illegally obtained evidence might be excluded from a criminal trial on public policy grounds. In this case, Ridgeway's possession of 140g of imported heroin would not have occurred without the deep involvement of police in the importation.

The illegality of [the police] importation was not only calculated. It was necessary to procure the commission of the appellant's offence.

While the majority of the High Court (Mason CJ, Deane and Dawson JJ) found that there was no common law defence of 'entrapment' (as there is in the United States), the criminal activity by police officers might require that their evidence be excluded from a criminal trial on discretionary grounds.

The critical question was whether .. the considerations of .. the public interest in maintaining the integrity of the courts and ensuring the observance of law and minimum standards of propriety by those entrusted with powers of law enforcement, outweighed the obvious public interest in the conviction and punishment of the appellant of and for the crime (HCA 1995).

The High Court decided that, in view of the extent of police illegality, public policy required that Ridgeway's conviction be quashed and that there be a permanent stay of proceedings against him.
Alarmed by this decision, police bodies around Australian pressured governments to change their laws to specifically authorise undercover and other law enforcement activities which involved illegality, so that police evidence would not be rejected by the courts. The law could also ensure that police were not prosecuted or sued for their illegal activities. The High Court majority in Ridgeway had foreseen such a possibility, saying:

> it is arguable that a strict requirement of observance of the criminal law by those entrusted with its enforcement undesirably hinders law enforcement. Such an argument must, however, be addressed to the legislature and not to the courts. If it be desired that those responsible for the investigation of crime should be freed from the restraints of some provisions of the criminal law, a legislative regime should be introduced exempting them from those requirements. In the absence of such a legislative regime, the courts have no choice but to set their face firmly against grave criminality on the part of anyone.

This may be the constitutionally correct position, but it persists with the modern myth that parliaments are 'sovereign', and may reshape public policy as they like, according to administrative convenience and without boundaries defined by rights. A human rights analysis does not share this mindset.

The Federal Government was first to develop a legislative response to Ridgeway's case. The Cth Crimes Amendment (Controlled Operations) Act 1996 (which became Part 1AB of the Cth Crimes Act 1914) deals only with 'controlled operations' related to offences under the Customs Act 1901 and the import of narcotic drugs. By this law a 'controlled operation' authorises law enforcement officers to engage in conduct which would otherwise be a narcotic drug offence (s.15H). Law Enforcement Officers are not liable for prosecution if they had in force a certificate under s.15M which authorises the controlled operation (s.15I). They can obtain such a certificate from the Commissioner, the Deputy Commissioner or an Assistant Commissioner of the Australian Federal Police or a member of the National Crime Authority (s.15J). The indemnity does not apply if the officer induces the target to commit an offence (under s.233B Customs Act) and the person would not otherwise have committed that offence (s.15I). In case of urgency an application for a certificate may be by phone or by "any other means of communication" (s.15L). Evidence of an import of narcotics is not to be disregarded by a court because a law enforcement officer has committed an offence in importing the narcotics, provided that the import was part of a controlled operation and had been authorised by an AFP Regional Director (s.15X). The Commonwealth law thus responds to the specific drug operation in Ridgeway's case, and creates an indemnity for strict liability drug offences.
The NSW law goes much further than this, by providing a general immunity for all crimes and all civil actions. Introducing the Bill, Attorney General Jeff Shaw claimed that, on the one hand, police would be allowed access to "any methods" yet, on the other, there would be "strict" accountability:

_Criminals will use any methods to commit crimes and protect themselves and their ill gotten gains. The purpose of this bill is to allow law enforcement agencies to use similar methods to fight crime, while at the same time providing a strict system of accountability for the use of otherwise unlawful activities._

The new law would "legitimise the actions of undercover officers" and ensure that their evidence would remain admissible in criminal trials (Shaw 1997: 3035). The Opposition supported the new law.

The **Law Enforcement (Controlled Operations) Act 1997** creates a wide criminal and civil indemnity for law enforcement officers (and at times civilians) engaged in 'controlled operations'. Officers (of the NSW Police, the Police Integrity Commission, the Independent Commission Against Corruption and the NSW Crime Commission) may apply to the chief executive officer of their agency for authority for a controlled operation. When doing this they must specify the nature of the controlled operation and of the criminal or corrupt activity in which they propose to engage (s.5). The CEO may then authorise the activity, subject to being satisfied that several criteria are met. The officer is then subject to a code of conduct (s.6). Then the general immunity applies. "Despite any other Act or law", an activity of a controlled operation "does not constitute an offence or corrupt conduct" so long as it is authorised and engaged in according to authority for the operation (s.16). There are some matters which are not to be authorised: (i) inducing another person to engage in a crime, which would not otherwise have occurred (ii) engaging in conduct likely to "seriously endanger the health or safety" of any person, or to result in "serious loss or damage to property" (s.7). However if the operation is authorised, activity within it will not constitute an offence (s.16). Authority for criminal conduct may be granted retrospectively in case of a life threatening situation, if applied for 24 hours after the event and if meeting certain criteria (s.14). Retrospective authority does not apply to "conduct giving rise to the offence of murder or of any other offence for which the common law defence of duress would not be available" (s.14). Creation and use of false documentation may be authorised (s.17). The CEO and participants in an authorised operation "if the conduct was in good faith and for the purpose of executing this Act" will not be civilly liable for any action, claim or demand (s.19).
Additionally, the Drug Misuse and Trafficking Amendment (Controlled Operations and Integrity Testing Programs) Act 1998 authorises controlled operations under the Drug Misuse and Trafficking Act 1985. This amendment allows the Commissioner of Police (or the Deputy) to direct the use of prohibited plants and drugs in controlled operations and integrity testing operations (s.39RA). However in these operations use of illegal drugs need not be linked to an identified controlled operation or integrity testing program, before a direction is made (s.39RA).

Since the introduction of the federal and NSW controlled operations laws there have been attempts to further extend police powers under these Acts. In late 1999 the Joint Committee on the National Crime Authority, at the request of the NCA, was considering extending the federal law to allow the NCA to be formally immune from laws other than the Customs Act. At the same time, the NSW Law Enforcement (Controlled Operations) Amendment Bill 1999 set out to extend the state law. The amendment would make the law apply to the NCA, the Australia Federal Police and the Australian Customs Service; would allow telephonic authorisations; and would allow delegation of the authorising functions to middle ranking officers. Controlled Operations laws have now been introduced in Victoria, Tasmania and South Australia, though not Queensland.

The approach of offering general immunities to police has been supported by police agencies but condemned by civil libertarians. At hearings of the Joint Committee on the National Crime Authority (1999), for example, NCA and police representatives argued the need for wider immunities under controlled operations law, while the NSW Law Society and the NSW Council for Civil Liberties argued the Act was entirely misconceived.

While we may have few objections to [independently authorised phone taps and] police officers using aliases in undercover operations, we strongly oppose regimes which allow executive authorisation of breaches of privacy and serious criminality. This is simply the dangerous process of licensing arbitrary power (NSW CCL 1999).

In practice there have been very few (if any) occasions where operational police have been successfully prosecuted, but the formalising of a regime of general immunities does represent a significant change. As the CCL noted:

We also oppose regimes which create some groups of citizens (in this case law enforcement officers) able to hold 'superior' rights, and consequent immunities from the legal process ... we note a parallel trend to create other groups of citizens (such as prisoners) with subhuman rights. This formal fragmentation of citizen's rights, we believe, is deplorable. It is true that such disparities have de facto existed for a very
long time. However to formalise them, we believe, exacerbates the fracturing of civil society (NSW CCL 1999).

Controlled operations regimes do not simply allow for more convenient law enforcement, they remove the rights of others (suspects, offenders or bystanders) who may be assaulted, seriously injured or killed by police with an operational general immunity. Human rights opponents of controlled operations law are entitled to ask ‘where is the "effective remedy"?’ (ICCPR article 2(3)) if the perpetrator is a state official with a certificate of immunity. Further, regimes of general immunity create such a certainty of legal impunity, in the minds of police officers, that they will be encouraged to believe they are indeed above the law. In this way such regimes may well encourage arrogance, corruption and serious abuse of power.

**Does the law breach human rights commitments?**

It is hard to see, in the NSW controlled operations legislation, where there is there support for the consideration, expressed in *Ridgeway* by Mason CJ (HCA 1995):

> Circumstances can arise in which the need to discourage unlawful conduct on the part of enforcement officers and to preserve the integrity of the administration of criminal justice outweighs the public interest in a conviction of those guilty of crime.

A system of general immunities must seriously diminish this ‘discouraging’ capacity of the courts. Under NSW controlled operations law such discouragement is therefore now less likely to come from the courts, and must instead be expected (if at all) from supervising police. Similarly, the "high level of accountability" in the law, spoken of by the Attorney General (Shaw 1997: 3037), can only be found (if at all) in hidden, executive police processes, far removed from the public law.

Does the system of general immunities, provided to police by the NSW *Law Enforcement (Controlled Operations) Act* 1997, breach the principles of equality before the law and access to an effective remedy? It might be argued that law enforcement officers have special responsibilities which at times may require some breach of the law, but that provided this is measured and proportionate, and does not intend harm to others, the temporary supralegal status is justified. Such justification, to be consistent with the 'equality before the law' of Article 26, would have to be a temporary measure, solely for the purpose of a particular law enforcement operation. Supporters of controlled operations law (eg. Shaw 1999) would argue this is precisely what the authorisation and accountability measures within the NSW law provides. However, in practice, this would depend on whether the immunities extend to a
wide category of offences, and on their scope in time. In other words, the NSW 'controlled operations' model might breach the principal of equality before the law if in practice it offered extensive immunities or was loosely administered. But there remains the problem of an effective remedy. Even in a carefully targeted and supervised 'controlled operation', what if a person were seriously injured by (for example) negligence on the part of a police officer? There is little doubt that the officer would claim his or her immunity from prosecution, under controlled operations law. There is then the possibility that the state might (as a matter of good policy and to meet the deficiency in the law) step in and pay compensation. But it might also not do this. In either case, it seems to us, this is not an "effective remedy" in the terms of Article 2(3).

What of the right to life? What if someone were killed in the course of a 'controlled operation'? In past NSW practice, there has been little recourse for innocent persons maimed and killed in police operations. They have generally sought ex gratia payment from the State Government, as with the family of David Gundy, an innocent Aboriginal man killed in a police raid in Marrickville in 1989. Effecting civilian remedies against police has always been difficult, for a number of reasons. However the difference with 'controlled operations' law is that there is formally no possibility of a remedy, and that may encompass no legal protection for the right to life. The Human Rights Committee (1994) in its general comments calls the right to life "the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation". Article 6(1) requires that this right be protected by law. The NSW Law Enforcement (Controlled Operations) Act 1997 does not countenance the authorisation of conduct likely to "seriously endanger the health or safety" of any person (s.7), but if police do kill a person in the course of the controlled operation, they have a blanket immunity from prosecution or civil suit (s.16). In my view, this is an inadequate protection of the right to life, as well as the denial of an effective remedy in case of a breach of rights.

In my opinion, therefore, the system of general police immunities, provided by the NSW Law Enforcement (Controlled Operations) Act 1997: possibly breaches the Australian commitment to the principle of equality before the law (ICCPR Article 26), clearly breaches the commitment to provide an effective remedy for breaches of citizens' rights (ICCPR Article 2(3)) and fails to adequately protect the right to life (ICCPR Article 6).
6. Conclusion

This paper has analysed eight criminal justice laws applicable in New South Wales -- six were matters of state legislation, one was the absence of state legislation and one was a High Court decision. The cases were chosen for their currency and the degree of concern expressed about them. In each case the law about which there was concern was identified, the suggested human rights breach was noted, some background to the development of each law was given, and then the international jurisprudence was applied, leading to a provisional conclusion. In almost every case clear or probable breaches (in two cases possible breaches) were found of relevant human rights standards.

These case studies were not a representative group, they were selectively chosen. But these cases alone represent an alarming institutional failure of the New South Wales politico-legal system to come to terms with its human rights commitments. When coupled with the increasing rights jurisprudence and rising awareness of rights in this country (and in the region and in the world) these are the symptoms of a rising crisis of state legitimacy. Institutions of state will fast lose credibility and relevance if they do not move quickly to meet this challenge.

I could have chosen to focus on some of the examples of good practice in New South Wales criminal justice law, but I did not. I have mentioned in passing the case of Dietrich (1992), where the High Court recognised a limited right to legal representation. I have also mentioned the sound principles which founded the NSW Bail Act 1978, and the NSW Young Offenders Act 1997 -- but I have also noted the degradation of these principles through subsequent amendments. Their high standards were not maintained. This degrading process illustrates the problems of a weak human rights culture and the virtual absence of institutional support for legislation based on sound principle.

In looking for criminal justice law to scrutinise, suggestions from a variety of community groups were sought and received. I was only able to deal with a small fraction of the wide range of matters (both administrative and legal) drawn to my attention. Apart from the matters I did examine, the Law Society of NSW (1999) suggested examination of offensive language and offensive behaviour matters, where juveniles and young offenders were taken to
Criminal Oversight: a human rights review of criminal justice law in New South Wales

police stations over matters which did not carry a custodial penalty. The Youth Justice Coalition (1999) suggested examination of (i) the Young Offenders Act 1997, in particular the 1999 amendments which made both ‘cautions’ and ‘warnings’ matters of greater legal consequence; (ii) the proposals to name and shame young offenders; (iii) the Children (Protection and Parental Responsibility) Act 1997, which removes children’s right to freely associate and assemble in certain rural areas (this is directed almost exclusively at Aboriginal children and has already been subject of criticism by the UN’s Committee on CROC); (iv) the impact of the Young Offenders Act 1997 on Aboriginal children and young people; (v) the “drift from care to juvenile justice”; (vi) the victims compensation restitution scheme, where those in prison are taxed for a general victims fund; (vii) the powers of security guards as used against young people, in public and quasi-public space. The NSW Young Lawyers (1999) suggested some of the above issues be examined, and as well (i) the rules which authorise routine police strip searches; (ii) the move on power under the Crimes Legislation Amendment (Police and Public Safety) Act 1998; (iii) the ‘no loitering’ proclamations, organised by police and some local councils, under the Local Government Act; (iv) bail problems for wards of the state, bail problems for those without substantial sureties, and onerous or unreasonable bail conditions (v) unreasonable delays in criminal hearings and trials, particularly in the District Court and in some Children’s Courts; (vi) guideline sentencing judgements, which “may compromise the right to a fair hearing by an independent and impartial tribunal”; (vii) the designation of some persons as “habitual traffic offenders”, resulting in some elements of mandatory sentencing; (viii) a lack of non-custodial sentencing in rural areas; (ix) inadequate legal aid funding, and inadequate legal advice for young people and those held in police custody; (x) overcrowding and substandard conditions in prisons, poor communication and visiting facilities for prisoners, sudden transfers within the prison system, poor care and management of transgender inmates, inappropriate custodial facilities for juveniles, especially in rural areas; mistreatment of juvenile prisoners and people held for excessive periods in police custody; (xi) draconian (‘zero tolerance’) policing practices, especially applied to children and young people; (xii) inappropriate treatment by police of those with an intellectual disability, inadequate law regarding the defence of mental illness and other problems in the treatment of those with an intellectual disability as victims and witnesses, and as defendants and prisoners. The Children of Prisoners Support Group (1999) suggested a look at the rights of children to visit their parents in prison, the rights of children of prisoners to be cared for by their imprisoned parents, and parents’ rights to contact and to be with their child whilst serving a sentence of imprisonment. Others suggested examination
of discriminatory age of consent laws, inadequate health care options (especially drug treatment options) for prisoners. Unfortunately I did not have time to consider these additional matters in any detail.

The case studies of this paper heighten concern that the human rights of Australian citizens (and especially citizens in New South Wales) are inadequately protected, and that there is an urgent need for state parliament to play a leading role in initiating legislation to recognise and protect those rights.
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Criminal Oversight: a human rights review of criminal justice law in New South Wales
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