

PROSECUTORS DO CARE ABOUT HUMAN RIGHTS – REALLY!

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INTRODUCTION

In my former life as a barrister I became interested in the protection and promotion of human rights on the domestic and international fronts, particularly in relation to the criminal law. The trigger for action (so far as there was one) was simply an informal talk given in the Bar Association Common Room one evening by the late John Coombs QC about the work of Amnesty International. I joined AI. Over time I became a member of various human rights bodies. Indeed, I was inaugural Co-Chair of the Human Rights Institute of the International Bar Association, the world's largest association of lawyers, and I remain Human Rights Adviser to the Law Council of Australia. However, I confess that I have never joined the CCL – perhaps because of my aversion to the expression “civil liberties” and my preference for “human rights”.

When I was appointed Director of Public Prosecutions in 1994 some people actually asked me: “What will this mean for your human rights work? Surely you’ll have to give that away?” That was a clear indication that much more needed to be done.

It should really go without saying that any criminal lawyer – especially a prosecutor – must operate on a foundation of appreciation of human rights and of their observance and enforcement in the criminal justice process and more widely. Prosecutors in NSW certainly know that – one of the last steps to be taken may now be to convince this audience.

PROSECUTORS AND HUMAN RIGHTS

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

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

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

Much earlier, in the Canadian Supreme Court case of *Boucher v The Queen* (1954) 110 CCC 263 at p 270, Rand J famously said (because it has been repeated often) of the role of the prosecution:

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

For at least the last 50 years prosecutors have been increasingly required to incorporate into the execution of their difficult duties the observance and protection of the human rights of all involved in the criminal justice process and to do that in the application of the just rule of law. There are some documentary imperatives for that.

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

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

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

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

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

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

HUMAN RIGHTS AS OBSTACLES?

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

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

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

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

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

GIVING EFFECT

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

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

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

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

1. Prosecutors when they enforce the criminal law must do so fairly. The ultimate aim of the criminal prosecution process is a fair trial – fair to the accused as well as to the community whom prosecutors represent (and which includes the victims of crime). Fairness is not something that can be precisely measured. It is a goal to be achieved in all legal systems – whether the purpose of a criminal trial may properly be regarded as a search for the truth (as the civil law system in its pure form, it is said, sets out to do) or as a contest between opposing cases (as the common law system in its pure form may be characterised).
2. Prosecutors, by reason of their place and role in the criminal justice system, are in a particularly powerful position to protect human rights. In common law systems some have little, if any, supervisory role over police; but they may affect the course of proceedings and the conduct of others by, for example, the attitude they take to the use of evidence that may have been illegally or

improperly obtained and in the advice they give to police about further inquiries. Those who are more closely involved in investigations may have a more direct effect. In civil law systems prosecutors may supervise the investigation from the outset, ensuring by the exercise of quasi-judicial powers that the rights of the suspect (and any victim and anyone else involved) are fully protected.

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

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

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

VICTIMS OF CRIME

My Office has recently been the subject of renewed comment in the media about its treatment of victims of crime. For the last decade or more – indeed, since well before the Victims Rights Act 1996 – this has been an increasingly important aspect of a prosecutor’s work (and I note that, unless I have missed it, the rights of victims of crime have not been the subject of campaigns by the CCL, although they certainly qualify as less powerful and disadvantaged members of the community.)

The Victims Rights Act 1996 applies, with the Charter of Victims Rights provided by section 6 and the Prosecution Guidelines (www.odpp.nsw.gov.au) address in some detail the obligations of prosecutors towards victims: the Charter is Annexure D and PGs 19 and 20, dealing with consultation with victims in relation to charge negotiations (sometimes called by others “plea bargaining”), especially apply. With increased workloads and reduced resources, the compliance of prosecutors with these obligations is stressed; but we do our best.

It must be remembered that almost all victims are in that position involuntarily. They are brought to a strange process without any choice in the matter, their rights having been violated in the most direct fashion. Society, which provides and conducts that process, has an obligation to assist them through it.

The Charter of Victims Rights is presently being considered in the course of a review of the treatment of victims generally, ordered by the government at the beginning of this month. My Office is participating in that review.

It must also be remembered, however, that in the adversarial common law system there is no satisfactory jurisprudential “home” for victims of crime – traditionally they were treated as just another witness and in modern times that is not enough. Prosecutors, however, do not represent them. The only parties to a criminal proceeding are the prosecution and the defence – there is no right of audience for a victim, unlike in civil law systems, except in relation to a victim’s impact statement. (Indeed, in some inquisitorial systems victims are parties to the proceedings, represented by state funded counsel and entitled to claim for compensation in the prosecution proceedings.)

So the most important action to take in relation to victims in our system, in addition to providing assistance through the physical process involved of preparation for court, going to court and dealing with the events there, is consultation during the prosecution process – informing victims about what is happening, what is likely to happen and why and seeking the views of victims: not to form the basis of instructions, but to be included appropriately in the decision making process. This is a difficult, time consuming and challenging role for prosecutors as they seek to recognise and protect the rights of victims of crime; and, as I have said, with less time available because of increased workloads it is an increasingly demanding responsibility.

The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), which applies to all legal systems, includes the minimum rights:

- to be treated with respect and recognition;
- to be referred to adequate support services;
- to receive information about the progress of the case;
- to be present and to be involved in the decision-making process;
- to counsel and professional advice;
- to protection of physical safety and privacy; and
- to compensation, from both the offender and the state.

Not many jurisdictions could confidently claim to guarantee all those rights. Even in NSW victims are not provided with counsel or professional advice (except at their own cost) and compensation is not available in all circumstances. But failure to enforce those rights does not have consequences for the criminal process itself, unlike failure to enforce the rights of the accused – for example, evidence is not excluded as a consequence of a breach such as failure to consult with a victim, or an acquittal directed: both being possible consequences of breaches of the rights of the accused.

But what of the rights of the community at large, the collective victims, represented in all systems by the prosecutor? There are some practical issues confronted by

prosecutors as they attempt to accommodate those. For example, what if a victim is unwilling to testify in a public court (perhaps because of the sensitive personal nature of the evidence)? Or the victim is unwilling to testify because a private settlement or accommodation has been reached with the offender? What if the offender is fined, but the victim is not awarded compensation? What if the victim disagrees with a decision by the prosecutor (perhaps to discontinue a charge)? The prosecutor may in some cases be obliged to disregard the individual victim's wishes in order to satisfy his or her obligations to the community at large and to act ethically within the principles of the system that we have.

In all systems the agents of the community in the initiation of criminal justice – the police and prosecutors – must be held accountable to the community at large for their conduct in the course of investigating and prosecuting the accused and seeking redress for the victimisation that has occurred – and they are, sometimes in a very public way. Human rights of all involved must be respected all along the line and the rule of law applied and prosecutors must be able to demonstrate that has been done.

NEED TO BE ALERT

We all (including prosecutors) need to be alert to the erosion of rights and be proactive in preventing it. This is particular so, as I have said above, when the community feels itself under threat from particular forms of usually transient offending. It is exactly when the risk of abuse is at its highest that particular efforts need to be made to ensure that the balance between community protection and the protection of individual rights is generally acceptable (and almost all aspects of criminal justice involve balance).

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

“... (C)ourts are the institutions to which people in democratic societies turn for the protection of their rights and no one has greater responsibility for promoting and protecting human rights than judges and lawyers. If that protection is lacking, if institutions fail, the consequences can be catastrophic. ... Although South Africa was ruled by a minority regime the same course could (also) be followed ... by majority governments, where the opposition is weak and the courts and the legal profession are either not powerful enough nor vigilant enough to resist incursions upon freedom. ... (F)irst incursions into the protection of human rights are often the most dangerous, for they begin a process of erosion which is difficult to stop once it has begun. ... (T)he erosion of the power and independence of courts, and the lack of vigilance by lawyers, judges, and organs of civil society, permit those who should be held accountable for their conduct, to go free.”

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

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

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

It matters not that the motives of the urgers or policy makers may be honourable. This is not a new challenge; and many years ago in 1928 Justice Brandeis warned in *Olmstead v United States* (277 US 438,479):

"Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent... The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

Are there signs for concern in NSW or in Australia generally? And if so, should we be doing something about it? (Perhaps the National Human Rights Consultation will help.)

AFTERMATH OF THE TERRORIST THREAT

Australia (and NSW) acquired anti-terrorism laws after the "9/11" events and the Bali bombings. I do not pause here to address the necessity for or the appropriateness of the legislation. However, its passing at federal and state levels seems to have been received as a signal for the legislators to expand the operation of such measures into areas of what might be described as "ordinary crime" – to push the envelope of measures available to law enforcement with the anti-terrorism laws as a guide. I query the desirability, effectiveness or legitimacy of such a course.

We have seen measures taken against asylum seekers; against Vivienne Solon and Cornelia Rau and children in immigration detention.

We have seen the bold moves of the *Kable* legislation in NSW follow through to serious sex offenders, fortified by the High Court's decision in *Fardon*.

In South Australia and NSW we have seen legislation described as laws against "bikie gangs" and as "gang laws". However, it is not confined in its terms to "outlaw motorcycle gangs" and its potential reach is much broader. [I have expressed my personal views, as follow, on my Office's website with the qualification, of course,

that if my Office is required to prosecute in accordance with this or any other law, that will be done.]

The *Crimes (Criminal Organisations Control) Act 2009* [“the Act”] became law with insufficient community consultation and over the deep concerns and protests of the NSW Bar Association, the NSW Law Society, academics, the CCL and many others. While both the State government and the opposition may be right that something more needs to be done about bikie gangs and criminal groups, especially when they involve themselves in an organised manner in drug manufacture and supply and crimes of violence, this very troubling legislation (which in NSW borrows from related legislation in South Australia) is another giant leap backward for human rights and the separation of powers – in short, the rule of law in NSW. One questions the need for further legislation in this area at all. There is already anti-criminal-group legislation in Division 5 of Part 3A of the *Crimes Act 1900*, enacted in 2007, under which successful prosecutions have been brought (including pleas of guilty). There may be more a need for better enforcement, than for new legal powers.

The Act introduces a system of control orders whereby members of declared organisations can be ordered not to associate with other members subjected to control orders. This is not legislation directed, in terms, at “bikie gangs” – it can apply to any organisation, defined in a manner to include any formal or informal grouping of persons suspected of serious criminal activity, wherever it may be based and wherever those persons may reside.

The machinery of the Act works in two stages. First, the Police Commissioner may apply to have an organisation declared under the Act by an “eligible” Supreme Court judge. That judge must be satisfied (section 9(1)) that members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity and the organisation represents a risk to public safety and order in NSW. “*Serious criminal activity*” is defined to connect with “*serious indictable offences*” which are offences punishable by imprisonment for 5 years or more.

Secondly, once a declaration is made against an organisation, any judge of the Supreme Court can, on application by the Police Commissioner, make an interim and then a final control order against a person, if the court is satisfied that the person is a member of a particular declared organisation and that “*sufficient grounds exist for making the control order*”. (The Act gives no useful guidance as to what constitute “*sufficient grounds*”).

Section 26 of the Act makes it an offence for a controlled member of a declared organisation to associate (*simpliciter*) with another controlled member of the same organisation. The purpose of any such association is irrelevant to liability. A first offence is punishable with a maximum penalty of 2 years imprisonment; a second or subsequent offence is liable to a maximum penalty of 5 years imprisonment. Certain reasonable circumstances of association are exempted (for example, between “*close family members*” or in the course of a lawful occupation, business or profession, during education courses, etc – including in lawful custody), but the onus is on the controlled person to prove that the association falls within such a reasonable exemption. The making of a final control order has the effect of revoking any

authority or licence that the person had to carry on any prescribed activity (for example, operating a pawn broking business, a tow truck, selling or repairing motor vehicles, selling liquor, possessing a firearm, acting as a security agent, operating a casino).

The legislation has a number of troubling features, including the following.

- The legislation does not apply only to bikie gangs, but to any “*particular organisation*” in respect of which the Police Commissioner chooses to make an application. Where will the line be drawn? This legislation could be applied to any, even small, informally organised group whose members the Commissioner alleges “*associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity*”. These words cast a very wide net - far wider than the elements of conspiracy, one of the most broadly defined crimes in the criminal calendar.

It is curious to note that the Act does not apply to organisations organising, planning, facilitating, supporting or engaging in criminal activity that does not satisfy the definition of “*serious criminal activity*” – arguably for example, gangs of organised shoplifters or street drug dealers.

- Only an “*eligible*” Supreme Court judge can declare an organisation under the Act. (Similar officers have been described in legislation relating to anti-terrorism, covert search warrants and surveillance devices.) To be eligible a judge must first consent to being declared eligible for this purpose and then be so declared by the Attorney General, who has the power to declare (or not to declare) him or her eligible and to amend or revoke the declaration of eligibility at any time. In other words, if an Attorney General should so desire, he or she has unfettered power to “stack” the hearing of applications for declarations of organisations under the Act with judges willing to enforce it and to revoke or qualify the authority of a judge to determine applications for declarations if he or she does not perform to the government’s satisfaction. This may not be the intention of the present Attorney General, but a provision so drafted left on the statute books is extremely dangerous and potentially open to serious misuse.
- Whereas section 24 of the Act creates a right of appeal against the making of a control order against a person, section 35 purports, in the widest possible terms, otherwise to oust any review by the Supreme Court or any other review body (excepting investigations or proceedings under the *Independent Commission Against Corruption Act*) of a declaration or order made against an organisation or a person and to deny any right of appeal or review even when there has been a breach of the rules of procedural fairness (natural justice).
- An “eligible” judge (in the case of an application for a declaration against an organisation) or any Supreme Court judge (in the case of an application in respect of a control order against a member of a declared organisation) hearing an application, is by section 28(3) “*to take steps to maintain the confidentiality of information that [they consider] to be properly classified by the Commissioner as criminal intelligence, including steps to receive evidence*

and hear argument about the information in private in the absence of the parties to the proceedings and their representatives and the public". One can only wonder what "argument" there can possibly be when affected parties and their legal representatives are excluded from the proceedings.

- Part 3 of the Act empowers any judge of the Supreme Court to make control orders against an individual member or former member of an organisation. The definition of "member" of an organisation in section 3 is alarmingly wide – for example, it includes a "*prospective member (however described)*". It also includes "*a person who is treated by the organisation or persons who belong to the organisation, in some way, as if he or she belonged to the organisation*". This is extraordinarily broad-reaching – this criterion could be fulfilled without the person himself having any intention of being part of the organisation and could be established without any direct evidence of that person's actual involvement with the organisation.
- Section 13 provides that the rules of evidence do not apply to hearings of applications for a declaration of an organisation. Are organisations to be declared on the basis of hearsay upon hearsay, or a police intelligence officer's "hunch", or a report of an anonymous telephone call? No limits are set.
- Section 32 provides that "*Any question of fact to be decided in proceedings under this Act is to be decided on the balance of probabilities*" (this does not apply to proceedings for offences under the Act). Such a standard is insufficiently rigorous for the removal of a right as fundamental as the right to freedom of association. Indeed, the Act purports to remove the rights to freedom of association and expression in circumstances that do not come within the permissible exceptions described in the ICCPR – for national security, public order, etc.
- Section 13(2) of the Act provides that an "eligible" judge is not required to provide any grounds or reasons for his or her decision in respect of a declaration against an organisation (except to the Ombudsman conducting a review under section 39). This is entirely contrary to the general practice in modern jurisprudence that judges should give public reasons for their decisions.
- The placing of the burden of proof upon a controlled person to establish that an association with another controlled person falls within the exemptions under the Act (for example, close family members), is a draconian measure, reminiscent of reverse onus provisions that were in place for a time in Northern Ireland during the "troubles". This is highly unusual and almost always inappropriate in the context of legislation creating criminal consequences.
- The Act criminalises conduct other than by rules of general application in the community – another infringement of the rule of law.

Further legislation was passed targeting the recruitment of a person to be a member of a declared organisation, enabling the substitute service of notices on those subject to

applications to be placed under control orders and authorising search warrants to be issued by “eligible” judges upon reasonable suspicion (rather than reasonable belief).

The APEC legislation [*APEC Meeting (Police Powers) Act 2007*] was a recent example of a response to the perceived need for extraordinary measures for public control. The so-called World Youth Day was another – when Ian Bryce put out his fake “Popemobile”, was charged with an inappropriate offence (causing unreasonable annoyance after an even more inappropriate traffic charge was withdrawn) and ultimately had the charge withdrawn – with the involvement and assistance of the CCL. The V8 Supercars arrangements are another example of the compromise by government of the rights of sections of society. One must question the need for such action.

At a time when bail laws operate to swell prison numbers in both adult and juvenile prisons (some of which are privatised – to be run for profit to owners), when punishment takes priority in public policy and expenditure over crime prevention and when small scale drug possession and use remain criminal – and much else is not well in criminal justice in the state – it cannot be said that there are not other things to think about.