Book Reviews

Editor: Angelina Gomez

AUSTRALIA'S GOLDEN ERA OF SOCIAL AND LEGAL REFORM 1965–1995

Reform: Australia's Golden Era of Social and Legal Reform 1965–1995, The Memoir of a Participant, by Terry Purcell, Connor Court Publishing, 2024, 392 pages: ISBN: 9781922815941. Softcover $39.95.

We might be tempted to say that 1965 was such a long time ago. But that would be offensive. I was born in 1965. And I still feel like I am 20.

And 1995.

Well that just seems like not that long ago at all. It's all a matter of perspective. Of subjectivity.

What's not a matter of subjectivity are the value of the reforms carefully chronicled in this fine book.

And let us not forget that Terry Purcell highlights entertainingly in this book, not as much has changed since 1995 as we might think.

As I read about the changes that have taken place in the law during the 30-year period this book covers, I was struck by how stable Australia was during those times, despite the obvious upheavals of the 60s and 70s. And how stable our democracy has remained since. In large part this is due to the civilising influence of the rule of law administered by our legal systems. Systems that we take for granted.

Terry has written an engaging and thorough account of an insider during this period, one who was very close to the development of landmark legislative reforms in New South Wales and the Commonwealth.

One of the valuable aspects of this account is its objectivity.

So, Terry recounts that despite the conservative reputation of the Askin Government, a lot of progressive law reform occurred under Askin's Attorney General Ken McCaw together with his Minister for Justice John Maddison, who was later *both* Attorney General and Minister for Justice.

This included legislating *legal assistance* and extending the availability of legal aid, the *Public Defenders Act 1969* (NSW), legislation to modernise the operation of the courts and in 1970 the introduction by legislation that provided for periodic detention.

In 1970, an independent MP, Jack Beale who represented the seat of South Coast became the Minister for Conservation in the Askin Government. Beale introduced modern environmental legislation which began in 1970 with the *Clean waters Act 1970* (NSW), the *State Pollution Control Commission Act 1970* (NSW), the *Waste Disposal Act 1970* (NSW) and the *Clean Air (Amendment) and* (*Further Amendment) Acts* in 1972.

I enjoyed further highlights such as reading about the Whitlam Government passing an Act to establish the Australian Law Reform Commission. This was quickly complemented by the announcement by Attorney General Lionel Murphy QC that an Australian Legal Aid office would be established.

As Attorney General I rely, we rely on the expertise now, of the NSW Law Reform Commission, headed up by Tom Bathurst.

In a further comparison to problems we share today, in 1975 then shadow Attorney General Frank Walker addressed the NSW Legislative Assembly, during a debate on a Coalition Government *Privacy Committee Bill* on a growing and concerning trend of invasion of privacy heightened he said, by the fact that there were more personal records were being stored on computers.

In these times when cyber security and cyber warfare a very real issues, I thought, not that much has changed has it? And as we know in the law, times often change much more quickly than legislative responses are brought to bear. The law is often lagging.

In 1983 the *Occupational Health and Safety Act* was passed with the intention of placing greater health and safety obligations on employers. In 2023, our government will continue that tradition with Industrial Manslaughter laws soon to be introduced to Parliament.

Terry also outlines the important role played by the Law Foundation under his leadership and the future-focused innovations it championed.

Some of these important reforms were internationally recognised in Canada, the United States and the United Kingdom. These related to the role of technology in making legal services and information more accessible, and the importance of empirical research in civil litigation disputes.

In the context of the Hawke-Keating Governments' micro-economic reform agenda, writing about the work of the Foundation in 1993, Terry wrote and I quote:

> the challenge facing the Law Foundation and legal profession involved more than just lifting standards of service. It involved finding a way to help smaller law firms achieve a level of economic viability through greater efficiencies and offering an expanded range of cost-effective services to an expanded client base.
>
> A key element of the project would focus on how computer-based information technology applications might assist in achieving these outcomes.

This could equally well have been written today as in 1983.

And it was the Hawke Keating Government, a Labor Government, who introduced the first *Sex Discrimination Act 1984* (Cth), reforms to Superannuation (which some Coalition numbskulls are still trying to bring undone) and Medicare.

As a Labor man, I loved reading about the first Wranslide in 1978 written by someone who was so close to law policy-making and the drafting of legislation both before and after the election. In 1978 the Wran Government went from a majority of one MP to a majority of 28 and in the October 1981 poll they increased their majority to 39 Members of Parliament.

This gives me great hope as a member of a minority government.

I commending this book can I thank Terry for his enormous contribution to making all our lives better.

I like to say to people that I have spent the best part of my adult life in service because I believe in it. I say that public service is not the only way to make the world a better place, but it is the surest.

And Terry, you spent so many years achieving all these important reforms that you chronicled that you can say, and we can all thank you for being a great servant of the public as well.

And so can I conclude in Parliamentary terms and say, "I commend this bill to the House!"

Remarks made by the Hon Michael Daley MP, Attorney General of NSW, at the launch of the book on 29 May 2024.

NATIONAL SECURITY LAW IN AUSTRALIA

National Security Law in Australia, by Danielle Ireland-Piper, Federation Press, 2024, 464 pages: ISBN: 9781760025205. Softcover $170.00.

The late Clive James once began a book review thus: "Here is a book so dull that a whirling dervish could read himself to sleep with it. If you were to recite even a single page in the open air, birds would fall out of the sky and dogs drop dead".[1] The reviewed book is nothing like that: it is riveting, and not just for the specialist. It is also important, and not just because the topic is dynamic, but also because the topic has come into its own. With over 130 new statutes this century, many significant judicial decisions including in the High Court, much academic commentary and regular law reform and oversight reports, Australian national security law is now properly seen as a stand-alone topic by the academy and the profession. Yet, apart from a special edition of this journal on the topic[2] there have been few attempts to cover its breadth in a single work.

[1] The Institute of Marxism-Leninism, *"A State of Boredom": Brezhnev: A Short Biography* (CPSU Central Committee, Pergamon Press) <https://archive.clivejames.com/books/brezhnev.htm>.

[2] Dr James Renwick CSC SC, "National Security and the Law" (2021) 95 ALJ 737.

This collection of 17 essays, edited by the ANU National Security College's Danielle Ireland-Piper, is thus a timely contribution to understanding this important and ever-changing area of law, both "in the round" and, in particular instances in great detail. Specific chapters cover such topics as national security agency powers and functions, separation of judicial power, human rights, counter-terrorism, espionage, foreign interference and foreign influence, cyberspace, biosecurity, law of the sea, citizenship, and international humanitarian law. The range of topics shows the difficulty of attempting to be comprehensive in this field but also demonstrates how many aspects of national security law were unknown in 20th century Australia.

Such is the importance of national security and counter-terrorism laws that they have their own oversight bodies: the Independent National Security Legislation Monitor (INSLM), the Parliamentary Joint Committee on Intelligence and Security (PJCIS) and the Intelligence Ombudsman, the Inspector-General of Intelligence and Security (IGIS). When legislation is considered by the INSLM there is a requirement to analyse whether the law is necessary and whether it "remains proportionate to any threat of terrorism or threat to national security, or both". The chapters in the book reflect many of the current key threats, including:

(1) Terrorism, whether religiously motivated, or as is now more common, the often idiosyncratic, and hard to categorise but perhaps best described as the "radical right wing" variety;
(2) espionage and foreign interference by foreign states and their many proxies, including organised crime, and,
(3) in our own region of the world, as the 2023 Defence Strategic Review put it "large-scale conventional and non-conventional build up without strategic reassurance … [c]ombined with rising tensions and reduced warning time for conflict, [means that] the risks of military escalation or confrontation are rising".[3]

> The threats may manifest in many ways, to give examples at opposite ends of the spectrum of technical sophistication: at one end there is the lone attacker using a knife or car to kill or wound, at the other a nation State using kinetic force or acting in the cyber realm. And the legal profession is not immune. As ASIO Director-General Mike Burgess AM said in his 2023 Annual Threat Assessment speech:
>
> In the last year, a small number of Australian judicial figures have been subjected to suspicious approaches. While we are yet to conclusively conclude they were targeted by foreign intelligence services, we do know spies want insights into court cases relevant to their governments, and are seeking to use litigation as an intelligence collection tool.[4]

The book considers aspects of the vast amount of 21st century law in this field, both statutory and judge-made. "Hyper-legislation" by the Australian parliament is not limited to this field – it has been called our national pastime – but it certainly includes it, and there are over 5,500 pages of specific legislation now in force, covering this wide field. So, while many will be aware of the existence of counter-terrorism laws, Ch 5 of the *Criminal Code Act 1995* (Cth) "The Security of the Commonwealth" extends well beyond such laws, including (Pt 5.3) to Treason (Pt 5.1), Espionage and Foreign Interference (Pt 5.2), Preventative Detention Orders (Div 105) and Post Sentence Orders (Div 105A). Sentencing law (Pt 1B of the *Crimes Act 1914* (Cth)) – has now become more complex than the law creating the offence in question, a development of doubtful utility.[5] And surveillance laws are ever expanding – they include special powers for, but not limited to, the National Intelligence Community (NIC). And that is before getting to consider the *Biosecurity Act 2015* (Cth), the *Security of Critical Infrastructure Act 2018* (Cth), the *Foreign Influence Transparency Scheme Act 2018* (Cth), or the *Data Availability and Transparency Act 2022* (Cth). The Intelligence Services Legislation Amendment Bill remains just that at the time of writing, but will likely be enacted.

[3] Australian Government, *National Defence: Defence Strategic Review 2023*, 5 <https://www.defence.gov.au/about/reviews-inquiries/defence-strategic-review>.

[4] Australian Security Intelligence Organisation, *Director-General's Annual Threat Assessment* <https://www.asio.gov.au/director-generals-annual-threat-assessment-2023>.

[5] Compare the Hon Mark Weinberg AO, "Sentencing Terrorist Offenders – The General Principles" (2021) 95 ALJ 766.

In this book Jake Blight, now the INSLM and previously Deputy IGIS, writes a key chapter on powers and functions of national security agencies. This would be a good place for any reader of this work to begin, for it considers the functions and powers of each component of the National Intelligence Community. It draws attention to the surge in foreign interference, counter espionage and counter-terrorism laws, and notes that powers conferred early this century for combatting terrorism, then described as *exceptional*, "have become a model that is used for a broader range of purposes" by the NIC.[6] Perhaps the greatest achievement in this chapter is a clear explanation of NIC warrants, especially for ASIO. He cites Lord David Anderson KC (who held the UK's counterpart role to the INSLM), who wrote that comparable UK powers were "obscure since their inception … [and] incomprehensible to all but a tiny band of initiates"[7] a state of affairs which he later wrote "is undemocratic, unnecessary and – in the long run – intolerable".[8] So, it is now in Australia. Remedying this is necessary but not simple. Recent intelligence reviews did not provide convincing answers. There is now a federal departmental review on the topic. Although that review states that "The reform of Australia's electronic surveillance legislative framework is a significant long-term undertaking", indeed, the review is entering its 5th year, it is puzzling that such a significant and difficult task is not being conducted by the Australian Law Reform Commission, or a public inquiry. Despite changes in governments, there has been an unfortunate tendency in the past decade or so to have private consultation on draft bills in this area rather than the traditional approach of a green and then white paper, and for the eventual bill's enactment then to be treated as urgent, with any defects to be fixed or at least commented on post enactment by INSLM and PJCIS reviews. It is to be hoped any resulting "stand-alone" surveillance bill will not be dealt with this way.

An impressive chapter by Sangeetha Pillai concerns citizenship and national security. She explains how statutory provisions concerning citizenship stripping for terrorist activity were significantly recast for use against Australian dual citizens, invalidated by operation of Ch III of the *Constitution* by the High Court in *Alexander v Minister for Home Affairs*[9] and *Benbrika v Minister for Home Affairs*,[10] but rapidly re-enacted. While it is true, as she writes, that some doubts were expressed at the time of enactment by some commentators about the validity of the draft citizenship stripping laws, it is also true that the High Court by now treating such laws as punitive rather than protective significantly changed the jurisprudence, just as it did by overturning the longstanding decision of *Al Kateb v Godwin*[11] in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*,[12] and most recently *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*.[13] This chapter should be read together with Rebecca Ananian-Walsh's chapter on separation of judicial power, which also considers secret evidence and hearings and preventive justice more generally, and Maria O'Sullivan's chapter on human rights – a topic frequently touched on by law in this field. Balancing of rights is an intractable, indeed an insoluble problem. As then IGIS the Hon Margaret Stone AO wrote in her last article "Reflections on Oversight of Intelligence Agencies":

> The tension between secret intelligence and civil rights and liberties is not reconcilable; inevitably, secrecy threatens rights, and rights weaken secrecy. Each is compromised. In broad terms, it is for government and the Parliament to decide what is an appropriate compromise between the secret collection of intelligence and the protection of civil rights and liberties and to embody that compromise in legislation.[14]

[6] Danielle Ireland-Piper, *National Security Law in Australia* (Federation Press, 2024) 41.

[7] *Regulation of the Investigatory Powers Act 2000* (UK).

[8] David Anderson KC, "A Question of Trust: Report of the Investigatory Powers Review" (Paper presented to the Prime Minister pursuant to section 7 of the *Data Retention and Investigatory Powers Act 2014*, June 2015) 8 [35] <https://assets.publishing.service.gov.uk/media/5a7f9b66ed915d74e622b7ca/IPR-Report-Web-Accessible1.pdf>.

[9] *Alexander v Minister for Home Affairs* (2022) 276 CLR 336.

[10] *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899.

[11] *Al Kateb v Godwin* (2004) 219 CLR 562.

[12] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005.

[13] *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1.

[14] The Hon Margaret Stone AO, "Reflections on Oversight of Intelligence Agencies: Promoting Compliance, Trust and Accountability" (2021) 95 ALJ 781.

A number of chapters touch on the challenges of technology: keeping laws technologically neutral is much harder than it sounds as technology changes so much and so rapidly. Take this example: a number of statutes require an inevitably busy judge or tribunal member, acting *persona designata*, to consider applications for an intrusive search warrant over the computer or electronic communications of a suspect or someone who might interact with a suspect. But how are they realistically to consider whether the warrant utilises the least intrusive technological method, or ensure that seized material the subject of parliamentary, religious, legal or journalistic privilege is not deliberately and unnecessarily obtained, and, if obtained, not further used? The United States has far more searching processes as there must be compliance with the fourth Amendment – involving a judge considering whether there is probable cause to issue such a warrant. The United Kingdom is also well ahead of Australia here: there the official or Minister issues the most intrusive warrants but the warrant does not issue until the second part of the "double lock" has been met – when the Investigatory Powers Commissioner (Sir Brian Leveson) and his team of other retired senior judges have considered the application themselves with the assistance of their own technical experts, measured for necessity, proportionality and legality. The customary answer to that criticism is that Australia does not need a double lock as it has an Intelligence Ombudsman in the form of the IGIS. But it is no reflection on the many distinguished occupants of that position to note that its powers cannot compare with these, although the IGIS is well placed to receive such powers should Parliament so decide. And, important as the IGIS is, it only makes recommendations, cannot consider any actions by Ministers, nor those which may be reviewed by the new Administrative Appeals Tribunal, and although itself having unfettered access to all material held by the NIC, is subject to strict secrecy obligations on what can be disclosed to any complainant.

The long list of international instruments in the book's index is a reminder of the importance of public international law. The chapters on the law of the sea, space law and international humanitarian law are most significant in this context and they often involve defence actions and capabilities.

Overall, the publication is excellent. Of course, further chapters could be included in a second edition or a sequel, and there will be many future developments which could be covered. Here is a limited selection of topics which could fill a similarly sized sequel.

First, the surveillance reforms mentioned above.

Second, the impact on national cohesion of the recent rise in anti-semitism which seems likely to result in new or updated laws.

Third, military call out as contemplated by s 119 of the *Constitution*, a topic which will likely be significantly informed by the imminent release of the Independent Review of Pt IIIAAA of the *Defence Act 1903* (Cth) by Sophie Callan SC.

Fourth, war crimes and aspects of the jurisdiction and practice of the International Criminal Court. This is of significance for Australia and the United Kingdom in view of the inquiries, completed in Australia, and currently underway in the United Kingdom,[15] into allegations of war crimes by each country's special forces in Afghanistan. Such inquiries should attract the principle of complementarity, that is, the notion that the ICC's jurisdiction – which is supplementary to that of State parties – cannot be exercised in the face of, for example, a bona fide inquiry. Or take the topic arising from the arrest warrants issued against Israeli Prime Minister Netanyahu and former Defence Minister Gallant, namely, what is the extent to which the international law obligation on State parties to the Rome Statute of the ICC (such as Australia) to arrest and surrender to the ICC a person subject to an ICC arrest warrant who is both an official of a non-State party and is otherwise entitled to diplomatic or State immunity. This is an area of controversy not least as relevant decisions of the ICC may not reflect international law.[16]

Fifth and finally, what legislation would be urgently required if Australia was drawn into a major international armed conflict: in World War II, s 5 of the *National Security Act 1939* (Cth) conferred an extremely wide power to make regulations for "securing the public safety and the defence of the

[15] By former Court of Appeal Judge Sir Charles Haddon-Cave: see <https://www.iia.independent-inquiry.uk/>.

[16] See Lord Verdirame KC and Professor Elkins, "State or Diplomatic Immunity and the Limits of International Criminal Law" (2025) <https://policyexchange.org.uk/publication/state-or-diplomatic-immunity-and-the-limits-of-international-criminal-law/>.

Commonwealth and the Territories of the Commonwealth" including, specifically the following powers which allowed the Commonwealth extraordinary intervention, for example (emphasis added):

(*b*) for authorizing –
the taking of possession or control, on behalf of the Commonwealth, of *any* property or undertaking; or
(ii) the acquisition, on behalf of the Commonwealth, of *any* property other than land in Australia;

(*c*) for prescribing *any* action to be taken by or with respect to alien enemies, or persons having enemy associations or connexions, with reference to the possession or ownership of their property, the conduct or non-conduct of their trade or business, and their civil rights or obligations;

(*d*) for prescribing the conditions (including the times, places and prices) of the disposal or use of *any* property, goods, articles or things of any kind;

(*e*) for requiring or authorizing *any* action to be taken by or with respect to aliens, and for prohibiting aliens from doing *any* act or thing;

(*f*) for applying to naturalized persons, with or without modifications, *all or any* of the provisions of any regulations relating to aliens;

(*g*) for requiring *any* person to disclose *any* information in his possession as to *any* prescribed matter;

(*h*) for preventing money or goods being sent out of the Commonwealth except under conditions approved by any Minister of State;

(*i*) for authorizing the entry upon or search of *any* premises.

What might a modern version of this 1939 law look like and should there be a draft available for consideration?

Finally, if there is not to be a textbook there should at least in future be a casebook with key legislation and cases, each would likely have a large audience, although each would likely need to be updated frequently.

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