

SUBMISSION TO THE NATIONAL HUMAN RIGHTS CONSULTATION

From Rosemary Nairn – individual.

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INDEX

Introduction

My general argument for a Human Rights Act

Migration Act 1958 and its multifarious amendments including the Migration Reform Act 1992

Great harm done to asylum seekers who sought protection from Australia

Anti-terrorism legislation

Clarke Inquiry

Rights in other Areas

Predicted effect of a Human Rights Act on legislative overhaul of statutes impacting negatively on human rights

Progressive Steps in Reform

Attachment 1 Listing of national security legislation (anti-terror legislation)

Attachment 2 Email to Right Rev Dr Tom Frame from Rosemary Nairn regarding Australia's responsibilities to refugees at sea

Attachment 3 Legal instruments making up the International Law of the Sea

SUBMISSION TO THE NATIONAL HUMAN RIGHTS CONSULTATION

Introduction

The following discussion will cover ground with which the panel is familiar. I mention them in the context of my assertion, and that of many others, that we must pass human rights legislation in this country. This issue has been obvious for some time – other western democracies have benefited from their advances in this direction. As you know we are the only western democracy without a Human Rights instrument. Since 1992 our law has moved further and further away from the law informed by Human Rights legislation in Europe, UK, NZ and Canada As put forward by Frank Brennan in a Eureka Street article in 2005,

‘Australia’s judicial isolation is now a problem. In the past the shortfall in scrutiny of the excesses of executive government could be corrected in part by a Senate which the government did not control. - -There was a time when Australian governments could also be reined in by the decisions and observations of international tribunals and UN bodies. But that corrective has also disappeared’.

It is easy in Australia to believe that all is right with the world until one is jolted into reality over the treatment of asylum seekers over the past 11 years, their incarceration, treatment in detention and half-life accorded through temporary protection visas. Over the NT intervention on Aboriginal communities there have been abrogation of rights to land, to equality and to control of their resources. The case of Dr Mohamed Haneef has drawn our attention to the defects in the anti-terror laws. I shall be concentrating in the main on legislation at the heart of the need for a human rights instrument namely refugee law and anti-terror legislation. My comments expand more fully into refugee matters as that is part of my primary experience.

Reservations held by some that a Human Rights Act would give more power to the legal profession have been widely discussed by lawyers such as Geoffrey Robertson.¹ I accept the argument that majority democratic governments cannot deal with the myriad and significant difficulties of minority groups and individuals and that lawyers over the centuries have been at the forefront in pioneering human rights when all other avenues have been closed. In present time human rights lawyers, eg Julian Burnside QC and David Manne have played an important role in the struggle to protect the rights of asylum seekers and refugees pushing the law as far as it can go without the support of a Human Rights Act.

¹ Robertson, Geoffrey, ‘The Statute of Liberty – How Australians can take back their rights, Vintage 2009, Sydney

My general argument for a Human Rights Act

But the need although urgent since the beginning of federation in relation to Aboriginal people, has over the past 11 years been highlighted by the actions of governments which have ignored international human rights impacting dramatically on the fate of Asylum Seekers to this country, to all Australians and non-citizens by the anti-Terror legislation and the ongoing undermining of the rights of Aboriginal Australians. A Human Rights Act will not solve all the problems by any means. But it will ensure that international human rights laws are incorporated into our domestic legislation at least within the Commonwealth jurisdiction and hopefully into State and Territory law as well. It will allow the Courts to review legislation and bring to the Parliaments attention when they contravene human rights instruments. It provides a comparative tool to lawyers when acting on behalf of an aggrieved person. The High Court has moved more and more to taking a hands off approach if the Parliament has legislated on a particular matter including decisions of the Executive.

Migration Act 1958 and its multifarious amendments including the Migration Reform Act 1992

Less attention has been paid to the Migration Act which provides little in the way of checks and balances. Senator Bartlett made at least 12 attempts to introduce private members bills to address some of the worst aspects of this legislation. In relation to the Haneef case he states²,

‘Under the Act Haneef’s freedom was denied automatically and indefinitely the moment his visa was cancelled due to the mandatory detention provisions of the Migration Act. He had no scope to apply for bail and no right to see the evidence used to justify the decision; even the court appeal he can seek against the Minister’s decision can only review the lawfulness of it, not the actual merits of the decisions.

In the dissenting report to the Committee of Immigration Detention,³ Petro Georgiou MP, Senator Alan Eggleston and Senator Sarah Hanson-Young note the specific concerns of the UN Human Rights Committee.⁴ It was about the Migration Act permitting non-citizens to be detained simply if they do not have a valid visa, without reference to whether it is reasonable to do so because they pose a risk to the community. This violates the prohibition on arbitrary detention in Article 9(1) of the International Covenant on Civil and Political Rights. Article 9(4) of the ICCPR also provides that detained people should be entitled to appeal to the courts to decide whether their detention is ‘lawful’. This right is available to detainees but their lawfulness of detention is determined by their citizenship or visa status not whether the detention is reasonable. **Australian law does not provide the protection from arbitrary detention.** The dissenting three recommended that,

² Bartlett, Andrew: ‘Don’t sack the minister, change the migration act’ in Crikey.com 31/7/07

³ Federal Parliament’s Joint Joint Standing Committee on Migration. Inquiry into Immigration Detention, December 2008. 571/2008

⁴ The Human Rights Committee, UN body of 18 experts, meeting 3 times per year to consider the 5 yearly reports submitted by UN member states on their compliance to the ICCPR

‘ A person who is detained should be entitled to appeal immediately to a court for an order that he or she be released because there are no reasonable grounds to consider that their detention is justified on the criteria specified for detention ’

A person may not be detained for a period exceeding 30 days unless on an application by the Department of Immigration a court makes an order that it is necessary to detain the person on a specified ground and there are no effective alternatives to detention. This is consistent with the Minister’s commitment that under the new system the department will have to justify a decision to detain – not presume detention’.

Great harm done to asylum seekers who sought protection from Australia

The harsh and inhumane treatment of asylum seekers could quite easily be forgotten as that is the way of historical memory unless carefully and painstakingly documented and taught to future generations.. They have been detained in desert detention centers without access to courts to review their detention and more recently in other countries such as Nauru and Papua New Guinea. They have been cruelly treated and neglected. Justice J Finn stated in the case of ‘S’ and ‘M’ v DIMIA his conclusion that,

‘It was the Commonwealth’s duty to ensure that reasonable care was taken of S and M who, by reason of their detention, could not care for themselves. That duty required the Commonwealth to ensure that a level of medical care was made available to them which was reasonably designed to meet their health care needs including psychiatric care. They did not have to settle for a lesser standard of mental health care because they were in immigration detention’⁵

Whole families have been locked up without any end in sight. Children have witnessed terrible acts of self-harm and been affected by their own and their parents loss of hope. The Convention on the Rights of the Child⁶ which Australia has ratified was dramatically ignored. Even now they are taken to a remote location in the Indian Ocean, Christmas Island whether or not they are picked up in Australian waters or outside the ‘exclusion zone’. Those in the latter category still have no right of access to Australian law. Mandatory detention effectively allows people to be jailed indefinitely without charge or trial was introduced into the Migration Act in 1992. It was justified as necessary to ‘protect’ us against asylum seekers. In reaching the decision on Ahmed Al Ketab,⁷ the stateless Palestinian where no country would accept him, the majority of the High Court held that he could be held indefinitely in detention, as one Judge said ‘until hell freezes over’. It came on the heels of the decision on children in detention being unable to be released on the basis of the Act’s provisions.

⁵ Federal Court of Australia, South Australia Registry, 5/12/2005

⁶ Convention on the Rights of the Child, 1989

⁷ Al-Kateb v Godwin, (August 2004) HCA 37

There are issues too about the treatment of Asylum Seekers located at sea. One of them which came to my notice was the rights not to obey orders when they involve inhumane treatment (Nurnberg principles). It came to light over Siev 4 when the Navy left asylum seekers in the sea for a prolonged period of time awaiting 'Canberra' to provide them with instruction as to what action to take. Some of the naval personnel were visibly distressed at the delay in taking action. A consultant psychiatrist Dr Duncan Wallace who was on the naval ship prepared a statement to leading newspapers saying that what was happening in seas north of Australia and the hands of the ADF was 'morally wrong and despicable'.⁸ What used to be the inviolable 'law of the sea'⁹ is the right to be rescued at sea by the ship without prejudgements being made. What does this say about the absence of human rights in this country?

I am concerned about our current border protection policy. It endorses turning back asylum seekers to Indonesia if outside Australian waters even if it is assumed they are demonstrating if not actually articulating a need for protection. We just do not know how many fall into this category because there is no obligation on the part of the Navy or the Coastguard service to report publicly such interventions. I am unsure what international sanctions can be applied to an Australian government which forces asylum seekers back to Indonesia, underwrites the cost of their upkeep through the International Office of Migration and leaves them in total limbo. We know this happened to the asylum seekers who ended up on the Indonesian island of Lombok. Of the 400 refugees turned back by Australian in 2001 and placed there 200 refugees remain there after 7 years. They have no status in this country, the children have no right to an education and they are left to wither. The UNHCR overwhelmed by its duties is responsible for assessing these refugees but the numbers left speak for itself. If this continues Australia may well be described as using Indonesia as another 'Nauru' – out of sight, out of mind and with no access to Australian law.

In short A Human Rights Act is needed as a means of anchoring discussion and action with regard to matters currently relying on individuals, groups and non-government organizations to push without any framework of legislation to support them. We have seen the success of overseas overarching legislation as in Europe – the European Convention on Human Rights within which national human rights legislation as in England has developed.

Anti – terror legislation¹⁰

Julian Burnside QC points out that the Federal Police under the counter terrorism legislation can obtain a control order in the absence of the person affected, an order that they be held in preventative detention for up to 2 weeks. When given notice of the order, the person affected will not get the evidence on which the order was made, just a summary of the evidence and therefore difficult to challenge He concludes that this jailing is not because the person has committed an offence, not because they are thought to have committed an offence, but is case they were about to commit an

⁸ See attachment. Email to The Right Rev. Dr, Tom Frame from Rosemary Nairn 26/1/2005

⁹ See attachment. legislation and guidelines which constitute International Law of the Sea

¹⁰ comprises 30 pieces of legislation – see attachment

offence. When and if the person is released he/she is forbidden to tell anyone what happened to him/her - another example of curtailment of freedom of speech. The thirty components of this legislation clearly illustrate how difficult is the pursuit of justice for individuals and groups.

Clarke Inquiry¹¹

The Clarke Inquiry into the Case for Dr Mohammed Haneef recommended that consideration be given to the appointment of an independent reviewer of Commonwealth counter-terrorism laws. Britain has a current Independent Reviewer of counter-terrorism laws in the UK. Lord Carlile's annual reviews of the legislation and their application are publicly available as is the government's response. The Inquiry argued that it would ensure that the system is balanced between the need to endeavour to prevent terrorism and the need to protect our individual rights and liberties. This official would be a senior judicial officer with statutory independence and unfettered access to all classified information. This parallels the UK position on this matter. The current Government responded in December 2008 by means of the Parliamentary Joint Committee on Intelligence and Security¹² to the recommendation of an independent review of Security and Counter-Terrorism Legislation tabled 4 December 2006.

'supports the development of a framework for the regular reviewing of the counter terrorism legislation through the establishment of a new statutory office in Prime Minister's Portfolio, to be known as the National Security Legislation Monitor, reporting to Parliament. The Government believes that ongoing review of the legislation is consistent with the Government's policy imperative to ensure the laws operate in an effective and accountable manner'.

Whereas commendable as far as it goes, it does not address the crucial need for a balance between individual rights and right to security and safety. A Human Rights Act coupled with a monitor of the counter-terrorism laws would pave the way for individual and group challenge in controversial cases. This in turn would give rise to greater awareness of the need to modify and consolidate this diverse legislation and introject natural justice provisions. Over time it would become obvious to the legislature, administrators and the public of a need for that change. The withholding of information by government to the public is another matter which could be challenged by means of a Human Rights Act.

Rights in other Areas

Then there are the many other areas where there is no opportunity provided to Australian people to ensure respect for their human rights. Specific law or

¹¹ Clarke Inquiry into the Haneef case (March 08) established by Rudd Government and headed by Mr. Clarke, former judge of NSW Supreme Court and NSW Court of Appeal

¹² Australian Government response to PJCIS Review of Security and Counter-Terrorism Legislation – December 2008. See recommendation 2

administrative changes will not provide adequate remedies for extensive human rights problems requiring attention and are expensive to achieve. Some will be referred to now:

- Gays and Lesbian couples still remain unprotected in some states when it comes to inheritance laws, superannuation and having access to civil and marriage ceremonies recognized by Australian law. The Commonwealth has recently made it possible for equality to be accorded to this group through new Centrelink provision.
- Journalists have no right to protect their sources of information which curtails freedom of speech and the right of the population to know what is going on in government and other arenas affecting the populace. FOI provisions are totally inadequate. A News Ltd appeal to the High Court against the conclusive certificates issued by the Secretary of the Department of Treasury under the FOI Act 1992 (Cth) was not allowed.¹³ The decision left legal experts predicting that any appeal against a conclusive certificate would be almost impossible. The decision has actively discouraged journalists and media organizations from actively pursuing such requests in this country. NZ and Canada have no such limitations under the umbrella of human rights instruments. Iranian playwright Shahin Shafaei a refugee was ultimately granted permanent protection, but not before immigration officials in the final interviews accused him of deliberately appearing in politically sensitive plays to offend Iran and force the hand of the Australian Government. He responded,

*'I got in trouble for being an artist who wanted to express myself in a country like Iran because there was no freedom of expression. I assumed Australia had freedom of expression'*¹⁴.

- The right to freedom of discussion is curtailed through a federal law passed in 2005 making it a crime to use a telephone, fax, email or the internet to research assisted suicide.
- ASIO can state that someone is a security threat as occurred with two refugees Mohammed Sagar and Muhammad Faisal held for years on Nauru. But no one was apparently entitled to know what the accusations were or who had made them, Therefore they could not be challenged. This was the case also with Scott Parkin a peace activist from US who as a result of adverse assessments was incarcerated and deported. In another recent case a citizen returning from the Middle East had his passport cancelled. The lawyer on his clients behalf made an application to the AAT. On grounds of the 'national interest' the certificate from the AG barred both lawyer and client from either hearing the

¹³ Mckinnon v Secretary-Treasury Department 18/5/06. Used 7 public interest grounds first identified in re Howard v Treasurer of Australia (1985)

¹⁴ The Age 21/4/09, p4

Governments evidence or from being in the courtroom when it was being presented.¹⁵

- Then there is the awful treatment of Aboriginal people in Queensland known to us through the killings on Palm Island. A community leader Lex Wotton has been sent to jail for 6 years on the allegation that he incited unrest over the community's anger about the 'softly softly' manner in which the police officer Chris Murphy was dealt with over the violent death of Mulrunji Doomadgee. This is not the first killing of an Aboriginal man. Yet justice has neither been done or seen to be done by the indigenous population. Queensland does not have a state human rights Act. But by enacting a Federal Human Rights Act the Commonwealth could link in with the power it already has over Aboriginal people through the constitution. When Human Rights legislation is passed within the Commonwealth, Queensland would in time follow with its own legislation most especially when WA, SA, Tasmania, NSW and the NT follow the lead of the ACT and Victoria.

The rights pertaining to the protection of children and womens rights I shall leave to those making submissions currently engaged in those areas.

Predicted effect of a Human Rights Act on legislative overhaul of statutes impacting negatively on human rights

The point is that although the policies have recently changed, the Migration Act and anti-terror legislation remain with its current powers, dangers and absurdities. The legislation can be trotted out by this or any other Government when it suits them. The Migration Act and the anti-terror legislation need to be totally overhauled and this is unlikely to happen without a focus on the implications and outcomes. A Human Rights Act would allow cases to be heard where there have been negative and unfair impacts on individuals and groups of individuals. Over time this must inevitably lead the legislature to examine the legislation which has given rise to the case being heard or so we would hope.

The whole atmosphere in Australia will transform once its citizens realize that they have the power to change things. During the period of the last 11 years it was only unmitigated perseverance on the part of refugee groups, refugee organisations and certain lawyers such as Julian Burnside, David Manne, the staff of Maurice Blackburn Cashmen and humane and brave parliamentarians such as Petro Georgiou, Judy Moylan, Russell Broadbent and Bruce Baird within the government that kept hope burning that change was possible. In Opposition these same parliamentarians are exhorting their party not to return to some of the inhumane features changed by the current government. But all this was done with no tools to assist like in Europe with the Convention on Human Rights and a domestic Human Rights Act in UK. Canada and New Zealand.

¹⁵ Maurice Blackburn Cashman cases 2005, 2006 and ongoing as ASIO will appeal Federal Court Justice Ross Sundberg's ruling that litigants were entitled to be given a list of documents relied upon by ASIO to make their assessments

I find it extraordinary to learn from Geoffrey Robertson¹⁶ about how our Constitution is not able to protect the human rights many of us have assumed are protected. I shall quote his summary¹⁷ After pointing out that our antiquated constitution has been made to work by inventive and activist High Court decisions and sensible agreements between the Commonwealth and the States he makes the following summary,

‘But unlike other countries, the federal government offers no legal guarantee to its citizens of right to live free from torture or inhumane treatment; to speak freely and meet with whomever they choose; to have fair trials held in open court before independent and impartial judges; to enjoy a measure of privacy for home and family life; to be free from oppressive searches and seizures of private property; to be presumed innocent until found guilty; or to live free from discrimination on grounds of gender, race, ethnicity or sexual orientation. If laws of the Commonwealth breach these principles – and some of them do- there is no basis for challenging them’.

Constitutional change is very difficult to achieve in this country due to the referendum formula. A Human Rights Act is the way to go. This will open the eyes of Australians to the benefit of having a constitution which we can be proud of and which protects the rights of all Australians. It is at this stage that constitutional change will more likely be achieved.

Progressive Steps in Reform

A step toward a Human Rights Act in Australia would be expedited if all jurisdictions Commonwealth, State and Territory specifically incorporated International Human Rights conventions which Australia has ratified into domestic legislation. eg ICCPR, ICESCR, Declaration of the Rights of the Child, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and in April 2009 the UN Declaration on the Rights of Indigenous Peoples.

While we are waiting for human rights legislation we should at least ensure that parliamentary committees, senate select committees and joint house and senate committees are mandated a reasonable time frame to consider the reference given to them by the Parliament. Recently the time accorded has been totally inadequate. This is one form of checks and balances that we have at present and must be given a chance to work by the Government, the Opposition and all Parties.

I would like to see Australian law apply to institutions working under the Australian Government outside Australia eg on Christmas Island. Currently Australian laws do not apply in this place if the asylum seeker is picked up outside the exclusion zone. We have seen this applied so illogically to the recent Siev 36 refugees after their boat exploded. The ones taken to hospital in Darwin can apply automatically for refugee status; the others cannot.

¹⁶ Robertson, Geoffrey ‘The Statute of Liberty – How Australians can take back their rights’, Vintage 2009, Sydney

¹⁷ ibid p 66

For those whose refugee applications have been refused, the Australian Government must take responsibility for the asylum seekers they deport and ensure that they will be returning to a safe country where refoulment cannot occur. It would be a contravention of International Law to not adhere to this principle and practise. The Edmund Rice Centre in Wollongong has followed up refugees returned by Australia to Afghanistan and Pakistan and has demonstrated that Australia has breached International Law in this regard. Over 200 returned asylum seekers have been killed on 'forced' return to their country of origin.

It should be noted that the many amendments to the Migration Act and the anti-terror legislation have been supported by the two major parties. The glaring lack is a human rights instrument that can confront the parliament with the implications, intended and unintended consequences of these laws and amendments.

I put these issues before the panel for your consideration.

Rosemary Nairn
28/4/09

Attachment 1

Key pieces of Australia's national security legislation taken from Attorney-General's Department – last updated 30/9/09

Anti-Terrorism Act (No. 2) 2005

amends the Criminal Code to allow for the listing of organisations that advocate the doing of a terrorist act as terrorist organisations, establishes procedures for preventative detention and control orders, updates the offence of sedition and other measures.

The Anti-Terrorism Act 2004

legislation which includes amending the Crimes Act 1914 to strengthen the powers of Australia's law enforcement authorities, setting minimum non-parole periods for terrorism offences and tightening bail conditions for those charged with terrorism offences as well as other initiatives.

The Anti-Terrorism Act (No. 2) 2004

legislation which amends the Criminal Code Act 1995 to make it an offence to intentionally associate with a person who is a member of a listed terrorist organisation as well as other initiatives.

The Anti-Terrorism Act (No. 3) 2004

legislation which amends the Passports Act 1938, the Australian Intelligence Security Act 1979 and the Crimes Act 1914 to improve Australia's counter-terrorism legal framework as well as other initiatives.

The Australian Security Intelligence Organisation Act 1979

legislation which sets out the functions of the Australia Security Intelligence Organisation (ASIO) – Australia's security service.

The ASIO Legislation Amendment Act 2003

legislation which amends the Australian Security Intelligence Organisation Act 1979 to ensure ASIO has the ability to effectively collect information which is necessary to prevent a terrorist act.

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003

legislation which empowers ASIO to obtain a warrant to detain and question a person who may have information important to the gathering of intelligence in relation to terrorist activity.

The Border Security Legislation Amendment Act 2002

legislation which deals with border surveillance, the movement of people, the movement of goods and the controls Customs has in place to monitor this activity.

The Crimes Act 1914

legislation which deals with crime, the powers of the authorities to investigate it and many other related issues including sabotage, treachery, disclosure of information and other issues.

The Crimes Amendment Act 2002

legislation which allowed forensics to be used to identify victims of the Bali bombings.

The Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002

legislation which amends the Criminal Code Act 1995 to insert new offences directed at the use of postal and similar services to perpetrate hoaxes, make threats and send dangerous articles.

The Criminal Code Amendment (Espionage and Related Matters) Act 2002

legislation which enhances Australia's national security legislative framework by strengthening Australia's espionage laws.

The Criminal Code Amendment (Offences Against Australians) Act 2002

legislation which amends the Criminal Code by inserting new provisions to make it an offence to murder, commit manslaughter or intentionally or recklessly cause serious harm to an Australian outside Australia.

The Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002

legislation which amends the Criminal Code Act 1995 to make it an offence to place bombs or other lethal devices in prescribed places with the intention of causing death or serious harm or causing extensive destruction which would cause major economic loss.

The Security Legislation Amendment (Terrorism) Act 2002

legislation which amends the Criminal Code Act 1995 to create new terrorism offences, modernise treason offences, creates offences relating to membership or other specified links to terrorist organisations and other initiatives.

The Suppression of the Financing of Terrorism Act 2002

legislation which amends the Criminal Code Act 1995, the Extradition Act 1988, the Financial Transactions Reports Act 1988, the Mutual Assistance in Criminal Matters Act 1987 and the Charter of the United Nations Act 1945. The amendments insert a new offence which targets persons who provide or collect funds and are reckless as to whether those funds will be used to facilitate a terrorist act and other initiatives.

The Surveillance Devices Act 2004

legislation that establishes procedures for officers to obtain warrants, emergency authorisations and tracking device authorisations for the installation and use of surveillance devices in relation to criminal investigations and other initiatives.

The Telecommunications Interception Legislation Amendment Act 2002

legislation which amends the Telecommunications (Interception) Act 1979 to permit law enforcement agencies to seek telecommunications interception warrants in connection with the investigation of terrorism offences and other initiatives.

The Criminal Code Amendment (Terrorism) Act 2003 (Constitutional Reference of Power)

legislation which removes any uncertainty regarding the constitutional status of the counter-terrorism legislation.

The Crimes (Overseas) Act 1964

legislation which provides that certain Australian criminal laws apply to conduct committed by Australian civilians who are serving overseas under an arrangement between the Australian Government and the United Nations.

The Australian Federal Police and Other Legislation Amendment Act 2004

legislation which amends the Australian Federal Police Act 1979 and the Crimes Act 1914 to finalise integration of the Australian Protective Service into the Australian Federal Police and other initiatives.

The Australian Protective Service Amendment Act 2003

legislation that gives Australian Protective Service and Australian Federal Police the powers to request a person's personal details, stop and search a person suspected of possessing a weapon, seize weapons and other initiatives.

The International Transfer of Prisoners Amendment Act 2004

legislation which put in place arrangements to work with the US to transfer Australian citizens convicted by a military tribunal to serve any sentence of imprisonment in Australia.

The Maritime Transport and Offshore Facilities Security Act 2003

legislation which establishes a scheme to safeguard against unlawful interference with maritime transport and establishes security levels.

The Aviation Transport Security Act 2004

legislation which establishes a number of mechanisms to safeguard against unlawful interference against aviation.

The Aviation Transport Security (Consequential Amendments and Transitional Provisions) Act 2004

legislation which introduces a number of amendments and transitional provisions.

The Crimes Amendment Act 2005

legislation which amends the Crimes Act 1914 to enable Commonwealth participating agencies to request assumed identity documents.

The National Security Information Legislation Amendment Act 2005

legislation which extends protection of security sensitive information under the *National Security Information (Criminal Proceedings) Act 2004*.

The National Security Information (Criminal and Civil Proceedings) Act 2004

legislation which protects information from disclosure in federal criminal proceedings where the disclosure would be likely to prejudice Australia's national security.

Attachment 2

26th January, 2005

The Right Rev. Dr. Tom Frame
Bishop to the Australian Defence Force

Dear Dr Frame

I listened to the repeat of Terry Lane's interview with you in December 2004. I originally sent my responses by email but it bounced back. I want to respond to the part of the discussion you had with Terry Lane about obeying an order. You took the strong view that under no circumstances could a member of the armed forces refuse to follow a command. I wonder what happened to the Nurnberg principles which changed our views of obeying authority at any cost. In 65 years we may be forgetting what occurred in Germany and how the awareness about what occurred there has shaped and developed international law to ensure that there are checks to the executive power of national governments. To show the potential relevance of these principles to our Australian armed forces today I shall quote a real example of something which happened on the high seas which we could never envisage in our comfortable living rooms. It concerns SIEV 4 (suspected illegal entry vessel - no 4)

In February 2002 a Senate Select Committee known as the CMI committee was set up by Labor basically to investigate the truth or otherwise of the children overboard allegations. Operation Relex was about stopping boat people from reaching our shores. As you know the Navy basically had the task of intercepting these leaky boats, towing them into international waters and ordering them back to Indonesia from whence they mostly came.

In the course of the intervention with SIEV-4 Senator Collins a member of this committee had this to say:

"I would like to reflect on the management of the People-Smuggling Taskforce and of course its Manager, Ms Jane Halton. Ms Halton was involved in a policy that was playing chicken with peoples lives.

In respect of SIEV 4, at 7.51 ... the boarding party 'request to move children and women off'. But at 10.09 ... they are still on the ship, and we have the recommendation to 'put people in the water' on the double. At 10.36, the ship is 'contacting parliament on the crisis'. We have people in the water and we are contacting parliament on the crisis, according to this log. Finally at 11.00... which is 51 minutes after these people were put in the water - HMAS Adelaide's RHIB's (rubber dinghies) were instructed to bring children on board the Adelaide. How can it be that the discussions that were going through the taskforce and through PM&C (Prime Minister and Cabinet) in relation to how to manage these asylum seekers allowed people to be put in the water for 50 minutes'. (quoted from an excerpt in Tony Kevin's book ' A Certain Maritime Incident p 122)

Is this not a classic 'safety of life at sea' situation? What are the new rules of engagement under the Border Protection Act 1999? Does it involve ignoring the plight of desperate people? What is your view about orders to Commander Banks which directly fly in the face of international obligations to intervene when safety of life at sea is threatened?

In the book 'A Certain Maritime Incident' Tony Kevin the author provides the following information:
'Commander Banks of HMAS Adelaide testified that during the interception of Siev 4 he understood himself to be under guidance from his immediate commanding officer, Darwin based Brigadier Mike Silverstone, commander Northern Command, RAN. not to be 'suckered' by the people on Siev 4 into a 'safety of life at sea situation'. p 119

'On 7 November, a senior Naval Reserve commander, consultant psychiatrist Dr Duncan Wallace, disembarked from HMAS Arunta in Darwin at his own request, after 30 days service on that vessel engaged on border-protection duties. He sent a prepared public statement to leading newspapers, saying that what was happening in seas north of Australia at the hands of the ADF was 'morally wrong and despicable'. Wallace wrote, 'I participated in the boarding, attempted removal and actual forced removal of suspected illegal immigrant vessels to Indonesia.... Nearly everyone I spoke to that was involved in these operations know that what they were doing was wrong'.p 110 He wrote that the ADF always performed with skill and professionalism but ' they should not be asked to perform these reprehensible duties'. Wallace's outspoken protest was little noticed at the time, and he never publicly returned to it.'

You are the Anglican Bishop of the ADF. I would like to know what your moral position is on these events. I am sure that you would have read ' A Certain Maritime Incident' the sinking of SIEV X by Tony Kevin. But if you by any chance have not - then I would be happy to ensure that you receive a copy. The book raises important factual and moral issues which primarily relate to our Defence Forces but also to us as Australian citizens.

Yours sincerely,

Rosemary Nairn

cc Terry Lane ABC; Tony Kevin –author of Siev-X

Attachment 3

INTERNATIONAL LAW OF THE SEA

United Nations Convention on the Law of the Sea 1982

Convention on the High Seas, 1958

International Convention on Salvage, 1989

International Convention for the Safety of Life at Sea, 1974

International Convention on Maritime Search and Rescue, 1979

Amendments to the Convention on Facilitation of International Maritime Traffic, 1965, adopted in January 2002

IMO guidelines

IMO Resolution MSC. 167(78) Annex 34, Guidelines on the Treatment of Persons Rescued at Sea, adopted May 20, 2004

IMO Resolution A.920(22), Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea, adopted November 29, 2001

IMO Circular MSC/Circ. 896/Rev. I, Interim Measures for Combating Unsafe Practices Associated with the Trafficking and Transport of Migrants at Sea, adopted June 12, 2001

IMO Resolution A.871(20) Guidelines on Allocation of Responsibilities to Seek the Successful Resolution of Stowaway Case, adopted November 27, 1997