

"Law and order" campaign in Australian state election

Labor to abolish right to silence before criminal trials

Mike Head
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With 10 weeks to go before the March 27 New South Wales elections, the state Labor government this week announced changes to criminal trials that undermine the presumption of innocence and fundamentally strengthen the hand of the police and the prosecution. Premier Bob Carr personally unveiled the measure last Sunday.

Under the proposals, those charged by the police will be obliged to present a written statement of their defence. They will be required to set out their line of argument and provide the names of their witnesses, together with a summary of their testimony, all well before their trial begins. No other state or English-speaking country has such a requirement. It scraps the right to pre-trial silence that has existed in Australia for 200 years and for longer in Britain.

This requirement will dramatically erode the rights of defendants. In the first place, they will not be allowed to alter their case or introduce new evidence in the course of a trial--unless the judge exercises a discretion to grant them an exemption. In the words of Trevor Nyman, the NSW Law Society's spokesman on criminal law: "They may be innocent of the charges, but forbidden to adduce evidence that demonstrates this."

Most disadvantaged will be those who lack the resources to hire lawyers and prepare a full defence--they have to rely on a legal aid system that is increasingly starved of funds, or face court unrepresented.

The prosecution, meanwhile, will be able to tailor its case with the benefit of knowing the accused's evidence in advance. It will have time to coach and train its witnesses, adjusting and modifying their stories. Such rehearsing of police witnesses already occurs, but the accused can expose inconsistencies, lies and outright frame-ups by cross-examining them with unanticipated questions.

The police will also be able to intimidate defence witnesses before the trial. This currently happens where an accused is relying on an alibi. He or she is obliged to disclose the details of the evidence, including the names of

witnesses. According to Nyman: "Experience has been that police frequently visit the witnesses, harassing and discouraging them. There is a serious danger of similar police misconduct if the new regime is implemented."

The changes will shift the focus of a trial from the requirement that the government prove its case beyond a reasonable doubt, to the demand that the accused provide a defence. In formal terms the burden of proof will remain with the government but by having to state a defence, the accused may unwittingly provide evidence that the prosecution can seize upon to establish or manufacture a case.

Nyman explained: "For 200 years in Australia, accused have had a right to silence until the trial begins. A plea of not guilty may be entered without more being said, forcing the prosecution to prove each ingredient of its allegations beyond a reasonable doubt. This is a special requirement for criminal trials, as opposed to civil litigation, because the sanctions imposed by the criminal law are very severe."

A concerned Sydney lawyer commented: "This will shift some of the burden of proof onto the defendant. In effect, the police and the courts will say, 'you prove that have not committed a crime'. Forcing accused to disclose their defences is requiring them to put forward a case. At the moment, they don't have to establish anything--it is up to the prosecution to prove the offence.

"It is an enormous setback for a defendant and is part of the whittling away of fairness and structures jealously guarded for centuries."

Carr and his Attorney-General, Jeff Shaw, backed immediately by some victims-of-crime groups, claimed that the changes establish a "level playing field" where both sides in a criminal trial are required to reveal their cases in advance. Even aside from the fact that the police and prosecution are notorious for revealing their case at the last minute and introducing new witnesses with the agreement of judges, this argument is completely misleading.

Those accused of crime--often poor, unaware of their legal rights and with language difficulties--are already at a disadvantage compared to the resources of the state and its trained prosecutors. The changes will shift the balance further in favour of the government, particularly under conditions where federal and state cuts to legal aid mean that many defendants have no legal advice or only last-minute assistance with poor preparation and no funds to obtain expert and forensic evidence.

Amid condemnation by the NSW Law Society and civil liberties groups, Shaw, a leading light of the Labor Party's so-called Left faction, argued that the proposal is a mere "procedural change". In reality, it is a major turning point in a decade-long process of grinding down the rights of the accused.

Both Labor and conservative governments in NSW have systematically undermined the presumption of innocence and the right to remain silent. Dock statements, whereby defendants could address juries and assert their innocence without being subjected to cross-examination, have been abolished. Defendants, often inexperienced and inarticulate, are now forced to either be interrogated by skilled lawyers or remain mute, possibly discrediting themselves in the eyes of a jury.

Committal proceedings have also been virtually scrapped. These preliminary proceedings gave accused the right to hear and cross-examine police witnesses, challenging the witnesses' stories and the prosecution case, without having to tender evidence themselves. They could then apply for the case to be dismissed for lack of evidence. These hearings have been replaced by "paper committals"--the submission of written testimonies by the prosecution. This provides no opportunity for defendants to orally test the witnesses, often crucial in a fabricated case.

Ideologically, these measures are bound up with strengthening the hand of the state as social conditions deteriorate, inequality becomes more blatant and discontent widens. The mass media, the politicians and the police have promoted one "law and order" campaign after another. Youth and alleged offenders are often demonised, presumed not only to be guilty but also responsible for the ills of society. Meanwhile, every effort is made to prevent ordinary people from considering the social causes of crime, including poverty, unemployment, drug abuse and the marginalisation of entire layers of society, particularly the youth.

Economically, these measures flow from the growing demand of business for cost-cutting in every area of social spending. Just as funding for social welfare, universities, schools, hospitals and public housing is being slashed, so is funding for legal aid and the court system itself. Fair

criminal trials, with full legal representation and safeguards, are increasingly regarded as unaffordable luxuries. Trials must be speeded up like all aspects of production.

In the legal field, as in every other, the gap between the rich and poor is widening dramatically. As recent cases involving media magnate Kerry Packer and businessman John Elliott have illustrated, the wealthy who face prosecution for taxation or corporate offences employ teams of highly-paid lawyers with unlimited resources to challenge every factual weakness and legal loophole in the Crown case. By contrast, working class defendants who have no hope of obtaining such assistance are being stripped of fundamental legal rights.

The Labor Party is playing the leading role in this offensive, as it is in Britain. In that country the previous Tory government curtailed the right to silence in criminal trials and the Blair government's Crime and Disorder Bill 1998 extended this to juveniles.

The NSW election is looming as a new "law and order" bidding war. Unable to offer any improvement in living standards and public services, the Labor and opposition parties are vying to outdo each other in scrapping legal and democratic rights. The Liberal-National Party opposition supported the Carr government's announcement as a "step forward," but said it was "piecemeal". Shadow attorney-general John Hanaford called for "a complete shake-up of the criminal justice system".

He plans to release a platform that will include the introduction of majority verdicts for criminal juries, a measure already introduced in neighbouring Victoria. Lawyers say Hanaford intends to call for the replacement of the whole adversarial judicial system with an inquisitorial one--doing away with the very concept of the accused having an independent case presented by his own lawyer.

Protections such as the right to remain silent until a case is proven were forged in the centuries-long struggle of the emerging capitalist class in Britain against the tyranny of the feudal-based absolute monarchy. The reversal of such historic principles is symptomatic of an economic and social order that has become completely incapable of providing even the most essential democratic rights.



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