Australian High Court widens use of secret evidence

Richard Hoffman
13 March 2009

The High Court, Australia's supreme court, last month accelerated the destruction of basic legal principles that has been carried out by federal and state governments—both Liberal and Labour—since the "war on terror" began. The court's decision in the case of *K-Generation Pty Limited*, handed down on February 2, extends the attack on democratic rights from the so-called "national security" arena to the civil courts.

The High Court ruled unanimously that secret evidence could be used in civil proceedings against an applicant who was denied the right to see or challenge the evidence presented against him.

Genargi Krasnov was the owner of a company, K-Generation, which applied for a liquor licence in the state of South Australia in October 2005.

In early 2005, under the pretext of preventing the infiltration of organised crime into liquor and gambling activities, the South Australian government introduced a provision in its Licensing Act permitting the Commissioner of Police to intervene in the court proceedings and put forward "Criminal Intelligence" evidence that the Liquor and Gambling Commissioner and the courts would be required to keep secret.

As a result of the amendments, an applicant or his legal representative would not be entitled to see, and therefore directly challenge, the evidence brought against him, yet the licensing commissioner and the court could nevertheless rely on the material to refuse a licence.

These changes to the Act were introduced during the height of the Howard government's escalating "anti-terror" legislation, which was carving inroads into civil rights and expanding police powers throughout Australia.

Similar legislation was being enacted by Labor governments in most of the Australian states at the time, and the various state Labor attorneys general intervened in the High Court proceedings to press for the extraordinary amendments in South Australia to be upheld.

In Krasnov's case, the Police Commissioner decided to intervene, and neither Krasnov nor his lawyers were permitted to see the "Criminal Intelligence" material tendered against him. The presiding judge in the Licensing Court, Judge Rice, described the secret procedure under the Act as "odd," noting that it contemplated the judge and police conferring in private in the absence of the applicant. "It seems to be draconian legislation... but that is what Parliament has said and I am stuck with it". On the basis of the "Criminal Intelligence," he ruled that Krasnov was not a "fit and proper person" to hold a licence.

Krasnov appealed, but the Supreme Court of South Australia upheld the validity of the legislation in a 2-1 decision. Dissenting from the majority, Justice Gray concluded that the secret processes subverted the independence of the judicial branch of government, in contravention of Chapter III of the Australian Constitution. The legislation forced the Licensing Court to "act as an arm of the executive" and dictated to the judiciary an unfair procedure that "cuts deep into judicial integrity and independence".

Likewise, the challenge in the High Court was based on the argument that the legislation improperly fettered or controlled the function of the courts, in breach of Chapter III of the Constitution, which prohibits legislation that

© World Socialist Web Site

emasculates the judicial character of a court.

In Australia, unlike the United States, there is no Bill of Rights providing for basic legal protections, including the right to due process. Accordingly, the legal debate in the High Court did not address the fundamental democratic issue of the rights of ordinary citizens against the state. The debate was limited to a consideration of whether the legislation altered the "judicial" quality of the court process and in that way breached the separation of powers between the judiciary and the Executive. It failed to even address the critical question as to whether a citizen in Australia has the right to a fair trial.

The High Court decided 7-0 that the legislation was lawful and that secret evidence could be used against the citizen without him being given an opportunity to see it. Justice Michael Kirby, generally perceived as a liberal judge, joined in the majority.

From a legal standpoint, the judgments were superficial and often specious. Basically, the court decided that the legislation did not detract from the judicial character of the Licensing Court's function, because it was not compelled to act on the evidence but could exercise its discretion as to whether it did or not. The High Court also observed that the appellant, notwithstanding the secret evidence against him, could still tender his own character evidence. In other words, the court argued that a litigant is in a position to rebut secret evidence by simply tendering general material, which is incapable, by its very nature, of specifically challenging the case against him. This argument is contrary to all accepted understanding of natural justice.

Furthermore, the High Court held, the legislation did not excuse the court from the duty to act "lawfully, rationally and fairly". However, Chief Justice Robert French said there was no objection to courts being involved in official and police policy-making of this kind. In a statement that underscored the political character of the judgment, he said: "[T]he intrusion of policy considerations in its decision making does not necessarily deprive a tribunal of the character of a court."

The idea that a court can act fairly where it deprives a person of the right to see secret government evidence, and challenge it, has not been accepted in jurisprudence since the abolition of the Star Chamber in England in the seventeenth century. Justice Robert Jackson of the US Supreme Court declared in *Knauff v Shaughnessy* in 1950, for example, that secret evidence "provides a cloak for the malevolent, the misinformed, the meddlesome and the corrupt to play the role of informer undetected and uncorrected".

Secret evidence allows unchecked victimisation and persecution by governments, police and other security agencies. The recent anti-terrorism laws permit trials in which the accused and their lawyers can be barred from access to confidential evidence against them. The *K-Generation* decision shows that this offensive against democratic rights is being directed more broadly, laying the foundation for authoritarian rule. It is also a sharp reminder that there is no inalienable right to a fair hearing or trial in Australia.

The extension of police-state style powers beyond the field of terrorism can also be seen in another recent legal development. The Labor government in New South Wales is enacting new search warrant powers that may be used in "normal" policing operations, going well beyond the powers that can be exercised against alleged suspected terrorists.

The "covert warrants" will permit police to secretly enter private homes to collect material, **remotely access computers for a month,** and not tell their owners for up to three years. The warrants, to be issued by designated Supreme Court judges, will also allow police officers to impersonate another person for the purposes of executing the warrant. Under present federal "anti-terror" laws, similar covert warrants are granted for only 72 hours.

These moves highlight how rapidly basic democratic rights are being eroded, and the powers of the apparatus of the state being strengthened, in preparation for the inevitable explosion of social tensions as the global economic crisis deepens.

To contact the WSWS and the Socialist Equality Party visit:

wsws.org/contact

© World Socialist Web Site