University of Sydney – Law I
Foundations of Law

THE RULE OF LAW: ITS SUBSTANCE AND REACH

Notes for a lecture - 4 May 2009

Nicholas Cowdery AM QC
Director of Public Prosecutions, NSW
Past President, International Association of Prosecutors

I am speaking to you as a lawyer, but more particularly as a Director of Public Prosecutions; so while I will say something about the substance of the rule of law, when I make remarks about its reach I may approach the topic in the context of the practical function of prosecuting. The rule of law is a notion that intrudes into all official action that I take and so it is a constant companion in my work – as it should be in the work of every lawyer. It should also feature more prominently in the lives of citizens generally.

First I should explain what I understand to be "the rule of law".

SECTION ONE

THE RULE OF LAW

Thomas Jefferson (who needs no introduction, but who was the third President of the USA and the principal author of its Declaration of Independence) wrote in 1795 that: *"It is to secure our rights that we resort to government at all"*. To him the greatest inalienable human right was liberty and he had written, some years earlier, that: *"The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is its natural manure"*. These days, fortunately, the rule of law is a more appropriate and even more potent fertiliser for freedom (but blood is still occasionally spilt in its cause).

Later in life (in 1819) Jefferson wrote of the law in this context, but in a way that, while valid on its face and in its time, does not in the end do full justice to modern notions of the rule of law (to which I shall come). He said: *"Of liberty I would say that, in the whole plenitude of its extent, it is unobstructed action according to our will. But rightful liberty is unobstructed action according to our will within limits drawn around us by the equal rights of others. I do not add 'within the limits of the law', because law is often but the tyrant's will, and always so when it violates the right of an individual"*.

What has happened since then to enable us to have confidence in the limits of the law – in its ability to secure rights and freedoms for ourselves and others – confidence in the rule of law itself? A great deal, indeed…

Democracy, human rights, the rule of law: three expressions that sit together like air, earth and water. They are elemental for all right-thinking people. They are inter-dependant. They are essential to good governance.

There can be no dispute (I would think) that democracy is desirable.

Sir Ninian Stephen (a former Justice of the High Court, Governor-General and international jurist) in his 1999 Annual Lawyers' Lecture for the St James Ethics Centre in Sydney said:

> *"Maintaining the rule of law is the true basis of democratic society. Without it democracy is a misleading and empty phrase."*

As Lord Woolf, a former English Chief Justice, has said: *"Human rights come with democracy, whether the government wants them or not"*.

So we have together, essentially as the means of securing our liberty, democracy, the rule of law and human rights, which in the words of the UN *Vienna Declaration* of 1993 are universal, indivisible, interdependent and interrelated. Therefore they should be protected and promoted in a fair and equitable manner. That requires something as fundamental as the rule of law, as has been recognised for a long time.

In **Ex parte Milligan**, 71 U.S. 2 (1866) Justice Davis, writing for the Supreme Court just after the Civil War, said:

> *"No graver question was ever considered by this court, nor none which more nearly concerns the rights of the whole people… By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people"*.

The Preamble to the Universal Declaration of Human Rights (1948) states that:

> *"it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."*

So it seems clear that both democracy and human rights are – and must be – protected by the rule of law.

WHAT DOES IT MEAN?

It is a notion that has evolved over centuries and a difficult notion to define comprehensively. It is both normative and descriptive. It is a universal ideal. It is a restraint on arbitrary power.

It is necessary to note that, while it may mean different things to different people and in different places at different times, the rule of law does not mean:

- rule by law (that is, so long as there is a law on the subject, the rule of law is operating – cf Nazi Germany; Soviet Russia; apartheid South Africa; the Khmer Rouge; etc – examples of abuse of a kind that Thomas Jefferson cautioned against nearly 200 years ago);
- the law of the ruler;
- "law and order" or related notions of the exercise of authority; or even (I hesitate to say)
- the rule of the lawyer.

In the Continental legal systems the expression "rule of law" is not endemic. It is mirrored, however, in the German "rechtsstaat", meaning a state under law – a law-governed state – and that is the way it has been approached in modern times in many European countries. But the rule of law means more than that literal phrase, as is recognised in Europe as well.

A clue to its real meaning would be given by the addition of just one word to the phrase: "the *just* rule of law". Justice requires the importation of principles that arise under other labels, such as peace, freedom, democracy, human rights and fairness. Such principles are echoed in the elements of the rule of law and are supported by it. The rule of law is as much concerned with process as it is with the content of laws: both with substance and with circumstances.

At the LAWASIA Biennial Conference on the Gold Coast in Queensland in March 2005, Chief Justice Li of Hong Kong, China described the rule of law as being like a song. A song has words and music, he said. The words of the rule of law come from the laws themselves – the black letter law of the statute books and the principles of the common law (in the case of jurisdictions like ours). But the words cannot be sung without the music – and that also comes, for the rule of law, in part from the underlying general principles of the common law; but also, more importantly, it comes from the background of acceptance and support for the rule of law from the community and its reinforcement in so many ways in daily practice. Lawyers of all descriptions, especially, have a vital role to play in ensuring that the music plays so that the words can sing the song they were intended for and can be heard again and again.

A slightly different slant was given to the question by the President of the Law Society of NSW, John McIntyre, in a message in the Law Society Journal the same year. He wrote about *"Green frogs and the rule of law"*. His message was, essentially, that the removal of even a small component of an ecosystem, such as green frogs in the rainforest, can have dire consequences for the whole system. He described the rule of law as being a fragile ecosystem *"made up of many parts, some complex in nature, some whose purpose is misunderstood and many which are not fully appreciated for the contribution they make to the wellbeing of the whole system"*. The independence of the judiciary, for example, is one such part and unwarranted attacks upon judges may therefore have significant detrimental effects on the rule of law itself. The independence and objectivity of the prosecution is another such part. An independent legal profession is yet another. Each is a green frog.

It has been said that the rule of law is, in effect, an institutional morality which requires certain ethical values to be observed by those who govern and those who administer public affairs. In that respect (for those who may be interested) it sits alongside the notion of obedience to the unenforceable (the domain of manners) propounded by Lord Moulton in 1920 – but it differs from that, in that it may be backed up by legal sanctions in certain circumstances and enforceable in particular practical situations.

SOME MILESTONES

We are fond of invoking the Magna Carta as the source of all our rights and freedoms; but to do so is erroneous. The Magna Carta was in reality little more than a compact between the King and the Barons on the division of power between them at that time. The ordinary man was not even considered. It would require another 400 years for the next steps to be taken.

In the English common law tradition the notion of the rule of law probably began with John Locke (1632-1704). He argued that in the state of nature individuals enjoy perfect freedom and equality but are bound by the natural laws (or the rule of reason, as he also called it). Individuals then entrust executive power to government, but only on condition that government rule according to the natural law. For Locke the law was above both individuals and government.

Locke worked and wrote after the Putney Debates in 1647. By the middle of that year the Parliamentary Army was winning the civil war and King Charles I had been captured. Some of the combatants turned their minds to what, actually, they had been fighting for and in October an open meeting of the Army Council was held at the Church of the Virgin in Putney (now a suburb in southwest London). The case was argued for a transparent, democratic state: parliamentary seats should be distributed "according to the number of inhabitants" and not on the basis of property ownership; religion should be a matter of individual conscience; there should be equality before the law. Perhaps not surprisingly, Cromwell was dismayed at those ideas and nothing much changed for quite some time.

However, this was probably the first time when modern ideas of democracy and the rule of law were openly discussed and recorded in an English context. The church at Putney has on a wall the words in the Putney Debates of Colonel Thomas Rainsborough (who was to be killed by the King's supporters the next year):

> *"I think that the poorest he that is in England hath a life to live, as the greatest he; and therefore truly, Sir, I think it's clear, that every man that is to live under a government ought first by his own consent to put himself under that government; and I do think that the poorest man in England is not bound in a strict sense to that government that he hath not had a voice to put himself under."*

It was another almost 300 years before there was universal suffrage in England, when women won equality of voting rights in 1928. (Women first voted in this country, in South Australia, in 1896.)

Even the American Declaration of Independence in 1776 was only the beginning of a long process, slavery being abolished nearly 100 years later and desegregation taking another 100 years – but the Revolution was a major victory for the rule of law.

The French Declaration of the Rights of Man and the Citizen of 1789, although inspirational, also remained a work in progress for some time (and was amended a couple of times in its early life).

Montesquieu (1689-1755) [see Section Two below] equated liberty with a life lived under the law.

The "law" (that is mentioned often here) is also capable of colourful description. Plato described law as *"the God of the right minded person"*. Cicero proclaimed it as *"the bond which secures our privileges in the Commonwealth, the foundation of our new liberty, the fountainhead of justice"*. The Dutch philosopher Spinoza (actually a Portuguese Jew) described law as the *"mathematics of freedom"*. It has also been described as the engine of a civil society and lawyers as the engineers.

A DESCRIPTION

In the 19th Century, A V (Albert Venn) Dicey in *Introduction to the Study of the Law of the Constitution,* 1885 identified three key aspects of the rule of law:

1 **the supremacy of law over arbitrary power;**
2 **the equality of all before the law, and government under the law; and**
3 **there is no higher law than the rights of individuals as determined by the courts.**

The Rt Hon Lord Bingham of Cornhill KG, former Lord Chief Justice of England, in a lecture given at Cambridge on 16 November 2006, said of the rule of law:

> *"The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts."*

But he admitted of qualifications to that statement, before moving on to discuss eight sub-rules that should apply. They differ in some respects from the points raised below, so they should be set out for completeness.

1 **The law must be accessible and so far as possible, intelligible, clear and predictable.**
2 **Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.**
3 **The laws should apply equally to all, save to the extent that objective differences justify differentiation.**
4 **The law must afford adequate protection of fundamental human rights.**

5 **Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.**
6 **Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers.**
7 **Adjudicative procedures provided by the state should be fair.**
8 **The state must comply with its obligations in international law, the law governing the conduct of nations.**

Sternford Moyo, a former President of the Law Society of Zimbabwe and of the Lawyers' Association of the Southern Africa Community Association (and a staunch campaigner in Africa and elsewhere for the rule of law), at an IBA conference in 2008, posited five characteristics of a society in which the rule of law may be said to be observed (and these are reflected upon further below):

1 **a general clarity of the law;**
2 **the existence of a climate of legality;**
3 **the existence of an adequate and justiciable bill of rights;**
4 **the existence of an independent judiciary; and**
5 **the existence of an independent legal profession.**

There seem therefore to be two principal overriding features of the rule of law.

* The people (including the government) should be ruled by the law and obey it.
* The law should be such that the people will be able and willing to be ruled (or guided) by it.

Those features provide balance that would otherwise be absent. Democratic legislatures have plenary power – they can make laws about anything (subject to constitutional limitations) and provide for those laws to be enforced. But obedience to rules at the price of cruelty and repression is not the just rule of law. Sir Ninian Stephen in his lecture identified three factors that operate to resolve conflict between that plenary power and the rule of law in this country and to provide balance:

> *"First the general, if not constant and unanimous, recognition of and respect for the principles of the rule of law by our legislatures. Secondly, judicial interpretation … Thirdly, it is aided by our constitution's separation of powers doctrine and its distinction between legislative and judicial power."*

REQUIREMENTS

From the features to which I have referred, other commentators have deduced 12 more particular requirements to be met before it can be said that the rule of law is fully in operation in any jurisdiction.

1 There must be laws prohibiting and protecting against private violence and coercion, general lawlessness and anarchy.

The need for such laws is self-evident, for no members of society may be free to enjoy their rights unless a degree of social order is maintained. This is the extent of the "law and order" component of the rule of law.

2 The government must be bound (as far as possible) by the same laws that bind the individual.

As a corporate entity the government is required to take actions that affect its subjects and others. It is necessary that the same principles that bind individuals in their conduct towards others should also bind governments when they take action that will affect others. Principled behaviour is universally recognised and governments should not be exempt from it. (These principles applied to strike down the Kable legislation – **Kable v Director of Public Prosecutions (NSW)** [1996] HCA 24; (1996) 189 CLR 51 – see Section Two below.)

3 The law must possess characteristics of certainty, generality and equality. Certainty requires that the law be prospective, open, clear and relatively stable. Laws must be of general application to all subjects. They must apply equally to all.

These principles militate against the making of retrospective laws or laws that discriminate against sections of society. They prevent the manipulation of the lawmaking process for improper purposes, which disadvantages subjects of the legislature.

4 The law must be and remain reasonably in accordance with informed public opinion and general social values and there must be some mechanism (formal or informal) for ensuring that.

In a democracy it is essential that there be continuing consultation between the lawmakers and the community. The legislature makes laws for the community – so those laws should be what the community needs and wants. The difficulty, of course, is in reflecting *informed* public opinion and *general* social values, not the opinions and values of noisy elements of the society that may not be generally held. (Talkback radio is <u>not</u> a sound basis on which to fashion laws!)

Unless this requirement is fulfilled, the consent of the governed, on which the effective enforcement of the law is essentially dependent, will not be forthcoming. To be effective, laws must have the confidence of at least a majority of the people.

5 There must be institutions and procedures that are capable of speedily enforcing the law.

That is self-evident; but even in this country the speedy enforcement of the law suffers with the inadequacy of resources provided to the institutions involved (except, often, the police and prisons).

6 There must be effective procedures and institutions to ensure that government action is also in accordance with the law.

Mechanisms for the effective review of public administrative decisions are instrumental in enforcing this principle. Government must also be subject to the law and amenable to law enforcement.

7 There must be an independent judiciary, so that it may be relied upon to apply the law.

If government – or anyone else – has a thumb on one side of the scales of justice, litigants will avoid the courts and the community will not respect or abide by their decisions. That way lie anarchy and vigilantism.

Important in this context are the *Bangalore Principles of Judicial Conduct*, a UN initiative that saw principles formulated in 2001 and revised in 2002. They were endorsed by the UN Human Rights Commission in April 2003.

8 A system of legal representation is required, preferably by an organised and independent legal profession.

Access to justice cannot be assured if citizens do not have the means to maintain their positions – whether by pressing their claims through the proper channels or by defending their positions against attack. Courts and legal processes are not, by and large, "user-friendly". Again, independence is essential to ensure that the rights of citizens are not improperly compromised.

9 The principles of "natural justice" (or procedural fairness as it is called now) must be observed in all hearings.

Contests cannot be allowed to become "one-sided" by the denial of equal rights to all concerned.

10 The courts must be accessible, without long delays and high costs.

Even this country falls down badly on this one. "Justice delayed is justice denied" – to all the parties, it must be remembered, including in criminal cases the general community. If the costs of access are too high, access will be denied.

11 Enforcement of the law must be impartial and honest.

This is self-evident.

12 There must be an enlightened public opinion – a public spirit or attitude favouring the application of these propositions.

> This proposition has echoes of point 4 in it. In addition, it is a requirement that the community be kept informed of the state of the law, factors indicating any need for change to it, or to the way in which it is enforced, and the need to proceed in a principled way at all times in the general public interest. The media play a large part in the fulfilment of this requirement – so freedom of the press, of information and of communication are vital.

If all (or most) of these features exist, at least in large part, the climate will exist for democracy and for the protection and enforcement of human rights – those rights that are enjoyed by humans simply because they are human beings (and which are to be found in the great international instruments accepted by the commonwealth of nations). Moreover, procedures will be in place to bring that about in practical ways.

That climate will be one of acceptance, observance and incorporation into domestic law of those international standards and their enforcement in everyday life. Those 12 features also provide the internal mechanisms for that enforcement.

Professor Geoffrey Walker wrote in *The Rule of Law* (Melbourne University Press, 1988) that the rule of law:

> *"is plainly the essential prerequisite of our whole legal, constitutional and perhaps social order … The rule of law is not a complete formula for the good society, but there can be no good society without it."*

PROMOTION

The Council of the International Bar Association [IBA], the world's largest association of lawyers, passed a resolution in September 2005 that said, in part:

> *"An independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law; these are the fundamental principles of the Rule of Law. Accordingly, arbitrary arrests; secret trials; indefinite detention without trial; cruel or degrading treatment or punishment; intimidation or corruption in the electoral process, are all unacceptable.*
> *The Rule of Law is the foundation of a civilised society. It establishes a transparent process accessible and equal to all. It ensures adherence to principles that both liberate and protect."*

The IBA has since made the rule of law a centrepiece of its conferences and international outreach. This year LexisNexis published *The Rule of Law: Perspectives from around the Globe*, an IBA enterprise edited by Francis Neate, a past President of the IBA (to which I contributed and from which I have borrowed here).

The American Bar Association also has an initiative called The World Justice Project – a multinational, multidisciplinary initiative to strengthen the rule of law worldwide.

Its first task is to develop a rule of law index to assess countries' adherence to the rule of law and the first to be studied will be Nigeria, India, Chile and the USA.

A PACIFIC DIGRESSION

It might be hoped that such initiatives will turn their attention to our neighbour Fiji. That country is now firmly established as a military dictatorship following its fifth coup on Good Friday, 10 April 2009.

Fiji gained independence from Britain in 1970. At that time the population was about equally divided between ethnic Fijians and ethnic Indians. The first Indian-majority government was formed in 1987 but a month later in May, Colonel Sitiveni Rabuka staged the first military coup and deposed Prime Minister Bavadra. In September there was a second coup which ended the monarchy and proclaimed a republic.

In 1990 a new Constitution was ratified, giving ethnic Fijians a disproportionate share of power, and in 1992 Rabuka was elected Prime Minister. The Constitution was amended in 1997 giving non-ethnic Fijians a more equal role in government and in 1999 an ethnic Indian (Mahendra Chaudhury) was elected Prime Minister.

In May 2000 the third coup was staged by George Speight in an attempt to favour, once again, ethnic Fijians. The military took power and Laisenia Qarase was appointed Prime Minister. This was ruled illegal and in fresh elections in 2001 Qarase again became Prime Minister. This government was also flawed and in 2006 another election was held. That was followed by the fourth coup in December 2006 which installed Voreqe Bainimarama as interim President (and later Prime Minister).

On Good Friday, 10 April 2009, following a Court of Appeal decision the day before declaring the government illegal and proposing a reasonable way forward to democracy, the President abrogated the Constitution, assumed absolute power (presumably then as a private citizen), declared a state of emergency for 30 days, dismissed all judicial officers and Constitutional office-holders and a day later appointed Bainimarama acting Prime Minister. Elections were promised in five years time under a new Constitution and electoral laws. The media were censored and Bainimarama publicly declared that free speech is dangerous (broadcast on New Zealand radio). The currency was devalued 20%.

Events of this kind had prompted the former Justice Shameem to observe at an earlier stage in 2004:

> *"The law is not strengthened by the fragility of the institution of Parliament, by the instability of the Executive (removed twice by violent coups d'etat) and by recurring incidents of civil violence…*
> *The upholding and strengthening of the rule of law then, both as to form and application is the acknowledged responsibility of the judiciary. It is often said that when Parliament and the Executive are weak as institutions, the judiciary comes into its own to protect the law and to actively protect the rights of the weak and the disadvantaged. I believe that this is the case in Fiji."*

Of course, in 2009 in Fiji that is difficult: in the absence of a judiciary of any kind.

SECTION TWO

PRINCIPLES OF GOVERNANCE

THE FOUNDATION

The soundest edifices, both concrete and abstract, are built upon solid foundations. So far as the prosecution is concerned, the values and procedures that ensure public confidence in - or at least acceptance of - the criminal justice process are built upon the law and prosecution guidelines in place, with the available admissible evidence in individual cases providing the context for their application. If recourse is had to those - and if they are sound - then issues concerning the operation and independence of the prosecution may be readily resolved.

They are the foundations - and the touchstones - of our operations.

GOVERNMENT

The prosecution service is a part of executive government and it is appropriate to say something of where we fit in that structure. In this country and in others based upon the English common law tradition, we generally have a modified Westminster system of government by representative democracy. We observe the separation of powers. In some cases (as in Australia) the head of state is a monarch.

We adhere to the rule of law – what (as I have mentioned above) I prefer to call the "just rule of law". It protects us. It is essential. An ancient Roman writer (to go back even further than the contributors cited above) wrote that the law was created to prevent the powerful from doing whatever they want; and that is not a bad way of looking at it. Nobody has been above the law in our system of government since at least the 17th Century. The law now protects human rights.

Harking back to Justice Davis' statement in **Ex Parte Milligan** above, it must be remembered that scope for tyranny rests not just with rulers – there can be tyranny of the masses also and we need to be on guard against both. Human rights must always be protected and not able to be avoided or destroyed by the powerful, whoever they may be.

SEPARATION OF POWERS

We apply the rule of law in Australia in a way that recognises the separation of powers – between the legislature (which makes the law, by and large), the executive (which manages the functions of the state) and the judiciary (which administers justice by adjudicating disputes and imposing penalties – and which occasionally also makes law). These are not optional arrangements, able to be altered at whim, but are the three separate structural arms of government itself and their relationships are well defined (even if they need to be recalled and reinforced from time to time). The independence of the prosecution flows directly from those arrangements.

There are very sound reasons why those who make the rules should not be the enforcers as well – and why there should be a body to review the rule makers and those who execute them. The origins of the modern doctrine of the separation of powers (into the legislative, executive and judicial arms of government) are usually attributed to the French political philosopher Baron de Montesquieu who wrote in 1748:

> *"Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizen would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge would have the force of an oppressor.*
>
> *All would be lost if the same man or the same body of principal men, either of nobles or of the people, exercised these powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals."*
> [It was also Montesquieu who said: *"The public prosecutor watches for the safety of the citizen; he proceeds in his office while they enjoy their quiet and ease"*.]

Montesquieu was recognising that the separation of powers addresses the points of confrontation between government, law and individuals and may thus be an effective barrier against abuse of laws by the government to the detriment of individuals.

Seventeen years later in 1765 and before the colonisation of Australia, the English jurist Blackstone wrote of the reasons for the separation of the administration of justice from the other two branches:

> *"Were* [the administration of justice] *joined with the legislative* [power], *the liberty and property of the subject would be in the hands of arbitrary judges, whose decisions would then be regulated only by their own opinions and not by any fundamental principles of law: which the legislators may depart from, yet judges are bound to observe.*
> *Were it* [i.e. the administration of justice] *joined with the executive, this union might soon be an overbalance for the legislative ... <u>Nothing is more to be avoided in a free constitution than uniting the provinces of a judge and a minister of state."</u>*
> [emphasis added]

Those final words are significant because the consequences may be more than just an overbalance for the legislature; yet uniting the provinces of a judge and a minister is precisely what some politicians and others in positions of power and some sections of the media sometimes try to do (at least notionally) by exerting improper influence over the administration of justice and especially judges and prosecutors.

While each arm of government, in its own way, makes laws or rules (the legislature or Parliament passes laws, the executive makes regulations and the judiciary makes decisions about legal principles or rules that can have binding effect in the future), they do so in very different ways and by very different processes. The judiciary is not

a “poor cousin” of the government – it is an equal partner with the other two branches and, moreover, it can assess and adjudicate upon the conduct of the other two branches. The legislature, on the other hand, by making constitutionally valid laws, can have an overriding effect on the conduct of the other two. The executive seeks to put the outcome of these processes into practical effect for the benefit of the community.

These propositions of Montesquieu and Blackstone, formulated before the English settlement of Australia, are now beyond argument in a society like ours. The High Court seemed to think so in **Kable v The Director of Public Prosecutions for New South Wales** (1996) HCA 24. That case affords a modern example of the application of the doctrine – and of the need for it.

Gregory Wayne Kable killed his estranged wife with a knife during an argument. He was charged with her murder but pleaded guilty to manslaughter and was sentenced. While in gaol, he was unhappy about arrangements made for his two young children and wrote threatening letters, mainly to relatives of his deceased wife. The authorities became alarmed that upon his release he might again be violent. On 2 December 1994 the NSW Parliament passed the *Community Protection Act* 1994 which, in reality, was an Act designed to provide a process via the Supreme Court by which Kable (and nobody else) could be kept in custody beyond the expiration of his sentence, simply because he was held to pose a risk of violent behaviour. The Act made the DPP the moving party. (I had been appointed to that position less than two months earlier.)

Various applications and orders were made under the Act until the High Court was invited (on appeal) to consider its constitutionality. It held, by majority, that it was unconstitutional because (shortly stated) the Act purported to vest in the Supreme Court a non-judicial power which was offensive to Chapter III of the Commonwealth Constitution, the source of judicial power for the Commonwealth that State Supreme Courts were also required to administer. The non-judicial power in question was the power to imprison a named person without any judgment of guilt of a (further) criminal offence.

Kable was eventually released, has not re-offended and sued for compensation.

The Parliament, while suffering that temporary setback, has not been deterred from venturing into new areas of this kind and that is one reason why these important questions of the separation of powers remain on the agenda. In **Fardon v Attorney-General for the State of Queensland** (2004) HCA 46 the High Court considered the Queensland Parliament’s enactment of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 under which the Attorney-General could apply to the Supreme Court for a continuing detention order or extended supervision order against a prisoner, after expiration of a sentence, if certain requirements were satisfied. The High Court held, by majority, that the Act was valid. This Act contained many safeguards of a conventional criminal trial and the application of a full judicial process before an order could be made, unlike the Kable legislation in NSW.

NSW then addressed this vexed area of unreformed serious sexual offenders and modelled the *Crimes (Serious Sex Offenders) Act 2006* on the valid Queensland legislation. It enables continuing detention or extended supervision beyond the

expiration of a sentence, subject to the judicial processes prescribed. The Attorney General is the moving party. Several orders have been made under the Act and there are further applications pending.

Many are concerned that legislation of this kind breaches basic principles of fairness that have traditionally required an allegation of criminal conduct, proof beyond reasonable doubt and a finite sentence (for that offence only). Nevertheless, it is now legal and not a breach of the doctrine of the separation of powers, for the legislature to provide for a judicial process, judicially administered, to enable some people to be dealt with for conduct that has not yet occurred and may never occur, because they are held to pose a danger to the community. Such a finding must necessarily be based on someone's prediction of future dangerousness. How that squares with the rule of law is a subject of ongoing debate.

Other subjects continue to arise in this area. In recent months in NSW we have seen legislation passed providing for covert search warrants and now for judicial orders against members of organisations that may have penal consequences (just to mention two).

BIKIES (AND OTHERS)

In relation to the latter, the *Crimes (Criminal Organisations Control) Act* 2009 has been passed into law with insufficient community consultation and over the deep concerns and protests of the NSW Bar Association and the Law Society (and others). While both the State government and the opposition may be right that something needs to be done about bikie gangs, especially when they involve themselves in drug manufacture and supply and crimes of violence – and other organised criminal groups – this very troubling legislation (which borrows from related legislation in South Australia) is another giant leap backward for human rights and the separation of powers. [I am indebted to Associate Professor Dan Howard SC of UoW for much of this commentary on the legislation.]

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.

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. 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 with another controlled member of the same organisation. A first offence is punishable with a maximum penalty of 2 years imprisonment; second or subsequent offences are 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 for our present purposes, 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 organised group whose members the Commissioner alleges *"associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity"* as defined. 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. Why should the responsibility for identifying which organisations warrant being declared under the Act be vested in the Police Commissioner, an unelected official? The spectre of a police state lurks here – an unacceptable slide from the separation of powers by linking the powers of the Police Commissioner with those of "eligible" judges.

- Only an "eligible" Supreme Court judge can declare an organisation under the Act. 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 open to serious misuse. It is also doubtful that the power to declare an organisation under this legislation is merely an administrative one - its ramifications for the organisation and its members are so serious that such an exercise of power may, in reality, more properly be regarded as an exercise of judicial power. Indeed, these provisions may offend the doctrine of the separation of powers also for that reason.

- 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 natural justice (procedural fairness). In combination with the power vested in the Police Commissioner by the Act and the use of "eligible" judges, this alarming provision constitutes a frightening aggrandisement of power – in effect judicial power – to the executive.

- 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 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 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?

- 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.

- 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 trend 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 a criminal offence.

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.

It matters not that the motives of the urgers or policy makers may be honourable. Justice Brandeis in 1928 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.”*

We all need constantly to be alert to the erosion of rights and be proactive in preventing it. In 2000 Justice 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 (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* [in apartheid times] *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.”*

SECTION THREE

PROSECUTION

PROSECUTION PROCESS

In amongst all this is the prosecutor. In our systems the prosecutor is a part of the executive branch of government but is an integral part of the administration of justice and has strong connections with the judicial arm (and even acts in a quasi-judicial manner in the exercise of prosecutorial discretion). The prosecutor acts on behalf of the whole community, not for any individual (such as a victim of crime) or for any special group in society or sectional interest. The prosecutor is not directed by other than the law, the evidence and whatever guidelines may be lawfully in place for the exercise of discretion in the general public interest. It is a part of the prosecution's role to uphold the rule of law in carrying out its functions.

In a monarchy, it is expressed that the prosecutor acts on behalf of the Crown; but the Crown is a symbol for the people - the community as a whole - and it is for the community as a whole that the prosecutor acts.

In this society we practise what is described as the adversarial system of litigation which derives from the English common law. That is a system in which it is intended that the truth will be found by putting one case forward - in the criminal justice process, the prosecution case - and allowing it to be tested and challenged and, if desired, met by an opposing case. It is a system that very much leaves the conduct of matters to the parties, with minimal interference by the judiciary and no formal standing for those who are not parties (such as victims of crime). The other two major systems of litigation are described as the inquisitorial - or civil - legal system and the socialist system. Of course, there is no such thing as a "pure" adversarial, inquisitorial or socialist system, but these are the broad descriptive categories adopted. They all borrow from each other these days.

It is said that the prosecutor acts in the general public interest and so it must be. That is where the prosecutor's ultimate loyalty must lie. Defining what is meant by that deceptively short phrase is not always easy in practice. What is "in the public interest" is different, of course, from what is "of interest to the public". The general public interest requires consideration of the present requirements for action, an appreciation of how such matters have been addressed in the past, and a prediction of the impact of a particular course in the future. There is an historical continuum to be considered and that often makes a controversial matter difficult to resolve in a way that is both in the general public interest and immediately acceptable to most, if not all, interested persons. Indeed, in many situations there will be ongoing controversy and maybe no resolution. In such circumstances there is sometimes a risk to the independence of decision making through the influence of extraneous and inappropriate considerations.

However, the prosecutor must strive to act by this principle in all situations. It is not part of the prosecutor's brief to be popular. It is no part of the prosecution function to set out to please a party to proceedings, or a government, or a media outlet or any section of society or individual or improperly to do its bidding (whether the views of

the person or persons concerned are communicated directly, indirectly or even by implication).

Principles of this kind may be found in prosecution guidelines adopted by individual agencies and they are also to be found in the minimum Standards adopted by the International Association of Prosecutors (IAP) and applied by prosecution agencies around the world.

INDEPENDENCE AND ACCOUNTABILITY

Independence in prosecution decision making is of crucial importance in our legal systems. It is the reason why Directors of Public Prosecutions have been created in many of our jurisdictions. It is the primary means by which community acceptance of and support for our work may be assured (whether in fact we practise as DsPP so described or as officers of Attorneys General or otherwise of government). But that independence must be defended and preserved. It is often under attack.

In a paper delivered to the International Criminal Law Congress in Melbourne in 1996 then Western Australian DPP (and now Supreme Court Justice) John McKechnie QC said of DsPP:

> *"The potential for ultimate dismemberment of the office by a government is so obvious it barely needs stating. If government or a parliament really wishes to destroy a prosecution service, each is capable of doing so. Parliament can abolish courts. Governments can withhold funding. Ministers can decline to reappoint troublesome directors who are therefore not immune from destruction."*

There are also less drastic threats that, nevertheless, can affect our independence. The tenure of Directors and other prosecuting officers is one point of sensitivity and different provisions apply in different jurisdictions. Police discontentment with prosecution decisions can lead to white-anting behaviour (with the media and politicians). Victim lobby groups can influence political decisions about the status of victims of crime in the prosecution process and attempt to influence prosecution decisions in matters such as prosecution sentence appeals.

In March last year the NSW Auditor-General published a report of an investigation into the efficiency of the ODPP. The criticism made in the report was that the ODPP was not able to demonstrate that it was efficient because it did not have systems in place to enable all its activities to be sufficiently measured, counted, valued and reported upon. That is very different from a finding of inefficiency, which the Auditor-General did not make. We continue to address the Report's recommendations.

One can have too much accountability, however, and it can become a substitute for responsibility. Persons may be tempted to evade responsibilities by claiming that their actions (even incompetent or corrupt actions) are the ultimate responsibility of someone else. In the past it has been the policy of the present NSW Opposition to establish a parliamentary oversight committee over the ODPP. Not only would that have infringed upon our independence, it would have shifted some degree of

responsibility to Parliament and would have introduced the legislature into decision making by an arm of the executive – another breach of the separation of powers. Fortunately, that policy has now been abandoned.

Independence is also aided by the conditions of employment – the tenure – of the DPP, which in NSW is presently on terms similar to those of Supreme Court Judges. In 2007 the legislation affecting the employment of the Director, Deputy Directors, Solicitor for Public Prosecutions, Crown Prosecutors, Public Defenders and the Solicitor General was amended to make all future appointments for fixed terms (present officeholders being unaffected). Properly handled, that need not compromise the independence of those offices; but it was an unwelcome and retrograde step and the implementation of these measures will need to be carefully managed and monitored.

Accountability for the ODPP's conduct and consistency of decision making, over time and place, is aided by the Prosecution Guidelines. These are furnished by the DPP (under section 13 of the *Director of Public Prosecutions Act*) and are published in a form that is freely and readily available to any person. They describe, among many other things, the tests that are applied when a decision is being made whether or not to institute or continue a prosecution or appeal. They are a guide to prosecutors and a source of information to the community about what considerations should be borne in mind at all stages in the prosecution process. They are available, along with much other information (including Annual Reports), on the ODPP website: www.odpp.nsw.gov.au .

In Queensland the recent Palm Island prosecution was an example of politicians ignoring the basis of prosecutorial independence that I have described. In South Australia the Auditor General has, in the past, overstepped the mark and brought undeserved political interference upon the DPP. In NSW the former Attorney General twice stepped in (unsuccessfully, as it happens) when I had refused to appeal in cases. The Commonwealth DPP determined that a certain Indian doctor in Brisbane should not be prosecuted. A Commonwealth Minister at the time seemed to feel that the doctor was nevertheless a bad man and had him deported. What would have happened to that DPP if, instead of determinedly heading into prearranged retirement, he had been hoping for reappointment at the end of his term?

Independence is made manifest in many practical ways and some standards have been agreed.

- There should be legislative prescription of the functions and accountabilities of the prosecutor.
- There should be tenure in office of the prosecutor, preferably on similar terms to those for judges. Protection against arbitrary dismissal is a minimum requirement and provisions for reappointment need to be carefully crafted and their implementation closely controlled and monitored (imposing additional burdens).
- Appropriate resources must be provided to the prosecutor to enable that function to be carried out effectively and efficiently.
- Measures need to be in place for continuing professional development and the maintenance of appropriate professional standards.
- Publicly available guidelines should be promulgated to serve as benchmarks against which the performance of prosecutors may be assessed.

- Politicians and public commentators should learn and respect the rules that surround the execution of the prosecution function and refrain from inappropriate attack, directly or indirectly.

The other side of the independence coin is accountability – the prosecutor must not have a completely free rein to do as he or she feels like doing. Unless the function is properly accountable to the people, then the people will not know what is being done and how it is being done and they will not be able then to respect and support its execution. Disorder and vigilantism will gain a hold.

Accountability of DsPPs is ensured through their relationships with: Parliament; the Attorney General; the courts; the media; the prosecution service itself and its internal mechanisms; the local profession; police; victims of crime and witnesses; and the general public who observe the prosecution's performance in the courts. It is also ensured by the measurement of performance against the law and prosecution guidelines.

Transparency of decision making is a vexed issue, however. The most obvious way in which it is achieved is by the giving of reasons for decisions; but there may be sound arguments against such a course in a particular case (or for giving only the briefest of indications) based on privacy considerations, operational concerns, legal professional privilege, public interest immunity or the personal situation of those directly involved in matters. Nevertheless, the right balance must be struck. Accountability may be otherwise ensured by proper reporting relationships to the Attorney General or other appropriate Minister and to the legislature. Prosecutors should also be factual, clear and direct in responding to criticism and if they are wrong, then they should admit it, apologise and do everything reasonable to avoid error in the future.

THE PROSECUTOR'S TASK

In the Canadian Supreme Court case of *Boucher v The Queen* (1*954)* 110 CCC 263 at p 270 Rand J said 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 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 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."*

Also from Canada but much later, in an address during the 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*

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. These are, in a sense, merely different ways of describing the need for principled independence of the prosecution in the application of the Rule of Law.

A KOREAN STORY

In September 2004 the International Association of Prosecutors (IAP) held its 9th Annual Conference in Seoul, Republic of Korea. The conference theme was *"Different Systems, Common Goals"* and it provided an opportunity for prosecutors from 91 countries to discuss the different ways in which we carry out our prosecution functions and some of the features and problems we encounter as we do it. As well as providing the comforting support for each other that results from sharing complaints and tales of woe, there was the chance for practical suggestions from one place to be gathered and taken home to be applied in another place, in the hope that overall improvements in our systems would result.

One of the recurring themes during the conference week was the question of the independence of the prosecutor and the other side of the same coin - the accountability of the prosecutor.

At the beginning of the Seoul conference, as President of the IAP, I presented some awards to various prosecutors who were deserving of international recognition by reason of the special service they had rendered or the exceptional hardships they had encountered and resisted. One of those awards was to a team of prosecutors and investigators from the Central Investigation Department of the Korean Public Prosecutors' Office. The case for which they earned the award involved a political slush fund financed by businesses for the benefit of certain politicians and parties during a presidential election campaign (with the prospect, of course, of future corrupt financial advantage to those businesses if "their" candidates were elected). A fund of over USD 70m had been accumulated illegally with the intention of its being used to influence the outcome of elections. The remarkable result of the work of the prosecutors was that 74 politicians (including 27 serving members of parliament) were implicated in the case and were successfully prosecuted.

One reason I tell this story is to highlight the serious challenges for the prosecutors that had to be overcome while achieving that result and the lessons to be learnt from that process. During the investigation the business community generally, initially drawing some support from the media, protested that the investigation was hampering their business activities. The political establishment also tried to use its combined influence to have the investigation stopped. Whenever a large deposit of funds was discovered the political parties connected with it claimed that the investigation was

biased and politically motivated. The campaign of interference was very strong, well resourced, very public and quite personal.

Interestingly, the general community soon developed a different view and expressed it clearly. Korea has had a true democracy only since 1988 - before then there was autocratic rule of various forms - so comparatively recently won democratic rights and freedoms are still precious to the hearts and minds of 47 million Koreans. Among those treasures is the rule of law as we would also understand it. The public, keen to foster and maintain a clean and transparent society, strongly supported the investigation and prosecution. Ordinary citizens even formed a fan club for the Prosecutor General Mr Song Kwang-soo and the prosecutor in charge of the matter Mr Ahn Dai-hee. Responding to this community pressure and abandoning their business allies, the media then swung behind the investigation and one of the leading newspapers even selected Mr Ahn as its Man of the Year in 2003.

There are lessons to be learned from this story. One is the need for prosecutors to remain resolute in the face of unprincipled attack. Another is the capacity of a properly run criminal justice system to do justice, even in the face of adversity. Another is the importance of the application of clearly defined powers in an orderly way in accordance with the rule of law. Another is the importance of teamwork - in a large team of investigators and prosecutors, ensuring that the junior members are supported and encouraged by the senior members and imbued with the right values to do the job in a principled way.

Another is the direction the media may take in its campaigning as it reads the changing winds. And another lesson - perhaps the most important one from this episode - is the need for and the significance of community support for the criminal justice process and how that might be maintained. Prosecutors cannot expect continuing acceptance (at least – if not approval and support) from our communities unless we remain independent from inappropriate influence and people can recognise that. Community support in turn reinforces the independent manner in which we work, by providing endorsement for our independent conduct. A feedback loop operates between the prosecution and the community we serve. (But it must be remembered that we must also be appropriately accountable to that same community for what we do.) Ultimately the prosecution can achieve satisfaction in its task - the satisfaction of knowing that the job has been done well and, with it, the recognition and approval of the community that is served.

SECTION FOUR

POLITICAL RESPONSES

The impact of the media on political action is significant and sometimes difficult to address. In the longer term, a better-informed constituency may have some useful influence on the directions taken by its political representatives. But with a short election cycle and the general attraction of vengeance to the public mind, we are all in for many more “law and order auctions” at election time, fuelled by the “shock jocks” of talkback radio.

In his "Message from the President" in the June 2001 issue of *The Reformer* (the journal of the International Society for the Reform of Criminal Law), the late Michael Hill QC, an immensely experienced criminal lawyer of international repute, said this – and it remains current today:

> *"Under the social contract between state and individual. The latter surrenders to the former the right, and, perhaps, the power to exact penalties upon those who do him/her harm and, in return, expects to receive from the former the freedom to live an unthreatened life within the limits of the social consensus and the law. As politicians and citizens move further and further apart, the politicians seek ever more stridently to tap into what they call 'public opinion'. Whether the opinion they aim at is genuinely that of the public and not merely an echo of the tabloid screech is not important. For the politicians, there is no difference. There is nothing very difficult in recognising that if citizens feel unable to live within their own society without threat or fear, law and order becomes a totem for the politicians.*
>
> *And, so, the criminal law, its enforcement, the administration of criminal justice, the penal system become the stuff of party politics. Slogans such as 'tough on crime and tough on the causes of crime' ring through the chattering classes and pound at the remainder of society through the media. The statistics of crime are massaged to show that the government of the day has or has not been successful in 'returning the streets to the residents'. No government in any jurisdiction of which I have any experience shows any sign of stepping back from the puerile superficiality of the debate to think beyond giving the state and its agents increasing powers and visiting punishment of increasing severity upon those defendants who actually emerge from investigation and trial as convicted criminals. The fallacies have been known to us all for decades."*

As Jeff Shaw QC, the former Attorney General of NSW once said (just before he retired from the post): *"Law and order is an easy thing for politicians to push"*.

Would that they could focus on the rule of law, instead…

SECTION FIVE

CONCLUSION

The rule of law is not an optional consideration if human rights and democracy are to be assured. It requires a strong, independent and principled judiciary. (Conversely, a weak or compromised judiciary contributes to the erosion of the rule of law.) It requires an acknowledgement of the separation of the judicial power from both the legislative and the executive and of the role of the judiciary in the constitutional enforcement of the law – including observance of the law by the other two branches of government. The consequences of failure of the rule of law are felt most keenly in criminal justice, where the liberty of the subject is at risk and the consequences of corruption of these principles can be dire.

Accordingly, constant vigilance is required to ensure that these principles survive. We cannot afford to be complacent or to place uncritical trust in our political representatives and rulers. To them these may be no more than slogans – to us, they are of essential substance and have practical consequences.

And we need a charter of rights and responsibilities… but that is an argument for another day.