University of Sydney – Law I
Foundations of Law

THE RULE OF LAW AND THE SEPARATION OF POWERS - SLOGANS OR SUBSTANCE?

Notes for a lecture - 5 May 2008

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 first I should tell you something about that office. I can do so in an introductory way under four headings.

I shall then say something about crime and how we treat it in our legal system, about the separation of powers more generally, about the rule of law and what can happen when that is not observed and I conclude with some comments on the lawmaking process in our jurisdiction.

My hope is that you will see in those areas something of the foundations of law – something of the building blocks on which the law must rest.

SECTION ONE

"D" IS FOR DIRECTOR (and not "Department")

1. WHERE WE CAME FROM

In the bad old days (by which, for present purposes, I mean the time before the mid-1980s) the criminal prosecution process in New South Wales was not carried out to the same standards of transparency and accountability as are now observed (and there is still a way to go in respect of summary offences which are largely prosecuted by police).

From the very early days of English colonisation the police were involved in the investigation and prosecution of crime in what was then called the Police Court. The Attorney General [AG] took on the responsibility for prosecuting serious (or indictable) crime before the higher courts. That situation prevailed until concerns became stronger, particularly in the 1970s and into the 1980s, that a greater degree of independence should be demonstrated in the making of prosecution decisions (at least for more serious offences in the District and Supreme Courts). It is essential that the community, or at least a majority of it, have confidence in, or at least accept, the operation of the criminal justice system for it to be effective and not bypassed by

vigilantism. The community has delegated the criminal justice function to this system and it needs to know that it is serving it adequately. Therefore not only the reality, but also the perception, of freedom from improper or inappropriate political, media, sectional or individual influences in prosecution decision making need to be maintained.

In 1986 the *Director of Public Prosecutions Act* [DPP Act] was passed and the Office of the Director of Public Prosecutions [ODPP] commenced operations on 13 July 1987. It was not the first created in Australia – that distinction belongs to Victoria where the first Director was appointed in 1983 (or perhaps to the office of Crown Advocate in Tasmania which was earlier). Now there are nine Directors of Public Prosecutions [DsPP] in Australia: one for each of the six States, the two major mainland or internal Territories and the Commonwealth which has defined and limited jurisdiction in accordance with the constitutional powers of the Commonwealth.

2. WHAT WE ARE

In simple terms we are a public law firm. That is all. We operate like a law firm with in-house counsel and we have only the powers of any law firm in our community. We have no coercive powers. We are nothing like the Independent Commission Against Corruption, State Crime Commission, Police Integrity Commission or such bodies. We have no powers to interrogate people, to search peoples' places or property or to seize property. We cannot eavesdrop on people or intercept their telephones or mail.

But it is a law firm with a difference. It has the following unique features:

- there is only one client, the DPP;
- it does only one kind of work, the prosecution of crime and the conduct of related proceedings;
- the client, who is the CEO and therefore a sort of senior partner and managing partner, may direct the lawyers in the conduct of their professional work; and
- everything it does must be in the general public interest, not in the narrower interest of any individual or section of the community.

3. WHAT WE DO

Again in simple terms: we prosecute crime and conduct related court proceedings (appeals and other proceedings of various kinds). We do not conduct investigations – that is done by the Police Force and other investigative agencies that have the resources and the abilities to carry them out. We do give advice to police and other investigators, but limited to the sufficiency of evidence to prove offences and the appropriateness of particular charges – we do not give operational advice to police or direct or engage ourselves in their investigations. We are closely concerned in law reform – in constantly seeking to improve the criminal justice system and processes.

Initially the ODPP conducted all indictable prosecutions and a small number of summary proceedings. That has expanded over time. The conduct of all committal proceedings in NSW was taken over from the police in 1990-91. But while the ODPP

does prosecute some categories of summary offences (including, for example, all child sexual assault cases and the prosecution of police themselves), police continue to be responsible for the prosecution of the bulk of summary matters before the Local Court in NSW. The ODPP now deals with over 17,000 matters a year.

(In my view prosecution by police officers is an unsatisfactory situation and there is a move nationwide for all prosecutions to be conducted by the independent agency of the DPP. This has been the case in the Australian Capital Territory since the early 1970s and is the case in the Commonwealth jurisdiction nationwide. It is the case in the Northern Territory (where police prosecutors act at the direction of the DPP and are part of his Office) and in parts of Western Australia. The takeover process continues in various ways in various jurisdictions and in my view it is inexorable. There is a profound problem of principle in having investigators conduct prosecutions, especially if they are not officers of the court: ie. qualified legal practitioners. It is perhaps an example of the separation of powers not being observed, in the sense that police have one foot in the executive and the other in the operation of the judiciary where they do not belong. More importantly, it weakens the confidence that the community should have that prosecutions are run and prosecution decisions are made completely independently of executive considerations.)

Independence is the watchword of DsPP – independence in decision making in the course of the prosecution process and related legal proceedings. It is partly for that reason that we do not become involved in investigations. When the result of an investigation – the evidence – is supplied to us, we need to be in a position to assess it objectively, impartially and according to law and that would not be assisted if we had already made some personal investment in the investigation process, as police do.

In that context it is important to understand what the DPP does and how that relates to the functions of the AG. It can be seen that great care has been taken to set the foundations for independence in fact and in the public perception.

Section 7 of the DPP Act (available at www.legislation.nsw.gov.au) provides that the principal functions and responsibilities of the DPP are:

- to institute and conduct, on behalf of the Crown, prosecutions for indictable offences;
- to institute and conduct, on behalf of the Crown, appeals in respect of any such prosecution;
- to conduct, on behalf of the Crown as respondent, any appeal in respect of any such prosecution.

The DPP has the same functions as the AG in relation to:

- finding a bill of indictment (the formal charge that commences proceedings for serious offences) or determining that no bill be found where the person concerned has been committed for trial;
- directing that no further proceedings be taken against a person who has been committed for trial or sentence;
- finding a bill of indictment where the person has not been committed for trial (known as an *ex officio* indictment).

The DPP may also institute and conduct committal proceedings for indictable offences and proceedings for the prosecution of summary offences. The DPP can take over any private (or other) prosecution and either terminate it or continue it.

Section 4 of the DPP Act provides that the DPP is responsible to the AG for the due exercise of the Director's functions, *"but nothing in this subsection affects or derogates from the authority of the Director in respect of the preparation, institution and conduct of any proceedings"*. Section 25 provides for consultation between the DPP and AG. These are the principal provisions for ensuring the accountability of the DPP, the corollary of independence and, of course, another essential foundation.

Sections 26 to 30 provide for the exercise of powers by the AG. If the AG issues any guideline to the DPP it must be published in the Government Gazette and laid before each House of Parliament. If the AG exercises the function of finding a bill of indictment, directing no further proceedings or appealing against a sentence, the DPP shall include a report of it in the ODPP's Annual Report. The DPP may request the AG to exercise such functions in a particular case and that has occurred only once. The AG has appealed on only one other occasion where the DPP declined to do so, against an allegedly inadequate sentence. In both these instances the AG failed rather decisively. These matters have been reported in the ODPP's Annual Reports.

As noted above, independence in decision making does not mean that it is not an accountable process, conducted without any responsibility or oversight. There is frequent consultation (written and oral) between the DPP and the AG and the DPP reports annually through the AG to Parliament. The DPP is also accountable to the courts in the conduct of proceedings, to the Treasury in respect of financial matters and through supervision by the Auditor-General's Office and other government agencies. The media and the community keep a close eye on the conduct of the ODPP, much of which is carried out in open court. There are continuing checks to ensure that the ODPP operates efficiently and effectively in the public interest and active public engagement by the DPP and other senior officers is another contribution to this process.

In March this year the 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.

One can have too much accountability, however, and one must be on guard against accountability becoming 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 dropped.

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 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 DPP 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

4. HOW WE DO IT

The ODPP is organised and run like a large legal practice with branch offices and in-house counsel (but with the special features I have already described). It is also a legal practice that is funded not by fees, but by a one-line budget provided by the State. It therefore has administrative independence as well.

There are about 320 lawyers (solicitors) working in the ODPP, about 90 Crown Prosecutors (barristers or in-house counsel) and about 200 administrative officers – a total of nearly 620. There are 11 offices throughout the State: a head office in Sydney, three offices in Sydney West (at Parramatta, Campbelltown and Penrith) and seven offices throughout the State from Lismore in the north to Wagga Wagga in the south.

The staff are arranged in a hierarchical pattern in each place. Decision making of various kinds (legal and administrative) is delegated down to an appropriate level in each office, although some decisions remain with the Director. Generally, the more serious the ramifications of a decision (eg by way of penalty or impact upon police and victims of crime or by the level of public interest in the matter), the higher in the hierarchy it must be made. The Director has two Deputies and a chambers staff and secretariat; the Solicitor for Public Prosecutions heads the Solicitor's Office; there is a General Manager, Corporate Services responsible for all the support services; and a Senior Crown Prosecutor heads the Crown Prosecutors' chambers. Each regional office has a Managing Lawyer in charge, at least one Crown Prosecutor and a mix of the other staff at various levels. The Auditor-General, in the report to which I have referred, recommended the appointment of an Executive Director to do all the recording, measuring and reporting that modern governments require and that is under development.

Consistency in prosecution decision making statewide is essential and is actively pursued. It would be quite wrong for a person involved in criminal proceedings in one part of the State to be treated differently from a similar person in a similar position in another part of the State (although in programs like the Drug Court, Circle Sentencing and Criminal Case Conferencing that is precisely what happens – the ODPP can do nothing about that).

In the national context, the nine DsPP are in regular contact, meeting usually two or three times a year and discussing issues that are common to their practices, attempting to standardise procedures as much as possible (notwithstanding differences in legislation and local court rules) and lobbying for improvements in the criminal justice process nationally. We participate actively in national and international legal conferences where ideas are exchanged and valuable contacts made for future cooperation.

At the international level, all the OsDPP are represented in the International Association of Prosecutors, of which I am a Past President. This forum facilitates the exchange of information and ideas between all systems of criminal prosecution in a wide variety of circumstances and by providing professional support encourages solidarity amongst prosecutors in the pursuit of their difficult and challenging tasks.

The Deputy Attorney General of Canada said at the 2000 Annual Conference of the Canadian Federal Prosecution Service:

> *"Carrying out the duties of a prosecutor is difficult. It requires solid professional judgment and legal competence, a large dose of practical life 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."*

SECTION TWO

CRIME

Ever since humankind came together and made rules for living harmoniously in a community there have been rule breakers. There always will be – it is human nature – so crime will always be with us and we need to deal with it in a manner that is acceptable to the general community. The most that any of us can do is to try to keep the rule breakers' activities within generally tolerable limits by the range of options available to us: prevention, detection, deterrence, isolation, punishment and reform. It is important to realise that the criminal justice system – with its functions of detection, adjudication and correction – is extremely limited in its capacity to regulate human conduct and whenever we hear claims to the contrary by politicians and the media we must be sceptical.

Societies of humans are ordered by rules. That is essential if we are to live in peace. There are differences from one society to another in the nature and content of the rules, the ways in which they are created and the ways in which they are enforced; but there are more similarities than differences because humans are humans wherever they are. We need rules in order to live together; and even when we live alone we tend to make our own rules.

In our society general rules, the laws, are made by Parliament, the legislature. (I say more about this process towards the end.) Many more rules – the ones which impose more detailed requirements on us – are made by other, less exalted, bodies. We are deluged constantly by regulations, for example – subordinate legislation – made by the executive. Courts also make law in limited and particular situations.

The rules which collectively are known as the criminal law are enforced by the criminal justice system, in which the players are usually the police (and other investigatory and regulatory agencies), prosecutors, defence representatives, judicial officers and the prisons and services associated with what is called, optimistically, "corrections".

Centuries ago people relied on self-help. If someone was wronged by another, personal retribution was exacted, usually with the assistance of family and friends. This was likely to become chaotic and in England (whence came our legal system) the fiction developed that any breach of the peace, any lawless conduct, was a breach of the monarch's peace and laws. The responsibility for exacting retribution and dealing with the situation generally was taken over by the state. It now acts through the players I have mentioned, divided in our system of democracy among the three arms of government. In particular, judges now decide when and what penalties are to be imposed – not individuals who are wronged or groups of their friends or, indeed, their elected representatives in Parliament. Where the public resources of the executive are deployed against an individual suspect or accused person, it is essential that a proper balance of rights and responsibilities of all concerned be maintained. The rule of law plays a vital part in ensuring that happens in an orderly way and in the general public interest.

SECTION THREE

THE SEPARATION OF POWERS

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."*

Seventeen years later (in 1765) in England, Blackstone wrote:

> *"Were* [the administration of justice] *joined with the legislative* [power], *the life, 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* [the administration of justice] *joined with the executive, this union might soon be an overbalance for the legislative … Nothing is more to be avoided in a free constitution than uniting the provinces of a judge and a minister of state."*

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 valid, constitutional laws, can have an overriding effect on the conduct of the other two. The executive tries to put the outcome of these processes into practical effect for the benefit of the community.

These propositions, 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.

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 AG 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.

SECTION FOUR

THE RULE OF LAW

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

Democracy is a given and human rights come with it. In the words of the UN *Vienna Declaration* of 1993 they are universal, indivisible, interdependent and interrelated and therefore should be protected and promoted in a fair and equitable manner by something as fundamental as the rule of law.

In **Ex parte Milligan**, 71 U.S. 2 (1866) Justice Davis, writing for the Supreme Court, 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."*

Sir Ninian Stephen 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."*

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 <u>not</u> mean:

- rule by law (that is, so long as there is a law on the subject, the rule of law is operating);
- the law of the ruler;
- "law and order" or related notions of authority;
- the law of rules; or even
- the rule of the lawyer.

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 and fairness. Such principles are echoed in the elements of the rule of law and are supported by it.

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 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.

It is a difficult notion to define comprehensively. It is both normative and descriptive. It is a universal ideal. It is a restraint on arbitrary power.

There are two principal 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:

> *"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 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.)

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 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 not a sound basis on which to fashion laws! I say more about this later.)

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.

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.

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 lies anarchy.

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) 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. 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).

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."*

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 lobbying. 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.

IGNORING THE RULE OF LAW – "GITMO"

When the rule of law is cast aside anywhere, we all have reason for concern.

Following the attacks in the USA on 11 September 2001 legislation has been passed in many countries that seriously interferes with the previously accepted rights of the citizenry (the *Patriot Act* in the USA being one example; the later ASIO and accompanying legislation in Australia being another); but action has also been taken without legislation, notably in relation to "enemy combatants", the non-US citizens detained at Guantanamo Bay, and the US citizens detained in the USA since the early days of the "war on terror/ism".

The term "enemy combatant" seems to have been appropriated from the case of **Ex parte Quirin**, 317 U.S. 1 (1942). In that case German saboteurs landed in New York and Florida, buried their uniforms and proceeded inland in civilian dress. They were convicted by military tribunals. On appeal, the US Supreme Court said that: *"an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property* [would exemplify] *belligerents who are generally deemed not to be entitled to the status of prisoner of war, but to be offenders against the law of war subject to trial and punishment by military tribunals."*

In accordance with the *Third Geneva Convention* of 1949, the expression "enemy combatant" encompasses lawful and unlawful combatants, each of which is subject to capture and detention for the duration of a conflict. They are different, however. Lawful combatants become prisoners of war and subject to the internationally recognised protections (such as keeping personal effects, corresponding with people outside detention, practising religion, having living conditions equivalent to the armed forces of the detaining power). Unlawful combatants do not have these protections and, in accordance with **Ex parte Quirin**, may be *"subject to trial and punishment by military tribunals for acts which render their belligerency unlawful"*.

The **Quirin** case, however, does not stand for the proposition that any detainees may be held incommunicado and denied access to counsel. In that case the defendants had counsel, were put on trial within weeks of capture and, patently, were able to appeal to the US Supreme Court.

In **Johnson v Eisentrager**, 339 U.S. 763 (1950) the Supreme Court said: *"The contention that enemy alien belligerents have no standing whatever to contest conviction for war crimes by habeas corpus proceedings has twice been emphatically rejected by a unanimous Court. In **Ex parte Quirin** … we held that status as an enemy alien did not foreclose 'consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission'. … This we did in the face of a presidential proclamation denying such prisoners access to our courts."*

President Bush's Military Order of 13 November 2001 is restricted to non-citizens. There is no provision in US law for the detention of US citizens as "enemy combatants". However, in 1971 there was a law passed[1] which provides that "[n]*o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress"*.

Of course, even if either class of detainees could gain access to the courts, the non-citizens do not even have this argument.

Once imprisoned, any detainee – US citizen or not – should have the right of habeas corpus. The US *Constitution* provides that *"the privilege of the Writ of Habeas Corpus shall not be suspended"* except by Congress, and then only *"when in Cases of Rebellion or Invasion the public Safety may require it"*. There is no rebellion; there has been no invasion; and Congress has not acted to suspend it.

The international law of human rights is also being flouted. Rights of detainees to counsel and judicial review of detention are firmly entrenched in the International Bill of Rights[2] and in the UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (1988).

There is further reinforcement of the paramountcy of the law and courts, even in times of emergency, to be found in the legacy of the famous English case of **Liversidge v Anderson** (1942) AC 206. The strong dissenting judgment of Lord Justice Atkin has since become law (indeed, Lord Justice Diplock has since proclaimed that the majority decision in **Liversidge v Anderson** should be "buried six feet deep"). Lord Atkin said in 1942:

> *"In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law"*.

David Hicks did not have such protection, from the USA or even from Australia. He has now returned to Australia and stories about his progress surface from time to time. Of course, since then we have also had a change of Government at the Federal level.

---

[1] 18 U.S.C. &4001(a)

[2] Universal Declaration of Human Rights, Articles 8 and 9; International Covenant on Civil and Political Rights, Article 14

In his Melbourne University Chancellor's Human Rights Lecture on 29 November 2005, former Prime Minister Malcolm Fraser referred to our Government's treatment of Hicks as *"the abandonment of an Australian citizen who has not breached Australian law. It is also assumed that David Hicks is guilty, that the presumption of innocence is irrelevant. It denies the right to a fair trial. The Government has turned itself into prosecutor and judge in relation to David Hicks, before even the process of the Military Commission, which has been described by former prosecutors as being 'rigged', is fully under way."*

In his Law and Justice Address in NSW on 31 October 2006 he followed this up, saying: *"A suggestion from the Australian Attorney-General that David Hicks should plead guilty to enable a speedy trial and sentencing to take place, is tantamount to pressuring an accused into making an involuntary plea. It is unacceptable for the first law officer of the Commonwealth to promote a course of action that is utterly incompatible with the presumption of innocence and the right to a defence."* Yet that is exactly what occurred, as we all now know.

At various times (it is reported) Guantanamo Bay has contained up to about 750 male prisoners. In the early times in 2002 some 647 were transported there from 42 countries, ranging in age from children to 98 years. They were designated "enemy combatants", the intention being that they could be held until this or another US President declares that the war on terror/ism is over. Fifteen of the Guantanamo Bay detainees have now been charged with criminal offences – the most recent brought to notice being Ahmed Khalfan Ghailani, captured in 2004, for involvement in the 1998 attack on the US embassy in Tanzania (where 11 people died). The Pentagon claims that Ghailani worked for al-Qaeda after the bombing as a forger, trainer and as a bodyguard for Osama Bin Laden. Trials are expected to begin at Guantanamo Bay later this year.

But this is not the only unprincipled conduct by the USA to be witnessed in this so-called war. We have also had:

- "rendition": otherwise known as kidnapping and forced transportation to places, including CIA "black sites" in Eastern Europe and elsewhere, where interrogation techniques frowned upon by adherents to the rule of law may be carried out;
- indefinite detention (sometimes under the material witness excuse);
- torture: condoned by the highest legal authorities in the USA (if the cause is adjudged sufficiently "noble");
- unauthorised wiretapping and eavesdropping on persons in the USA;
- anti-terrorism legislation that significantly curtails human rights.

In Australia, as well, we have had passed legislation that severely compromises rights that we have previously taken for granted and we saw the revival, for a time, of the discredited and disused law of sedition (an issue referred to the Australian Law Reform Commission). In a paper presented late in 2006 former Justice of the High Court, the Hon. Michael McHugh QC, referred to over 36 laws made by the Federal Parliament in this area since September 2001, following the referral of specific powers by the States. He said: *"It is the doctrine of the separation of powers and the*

provisions of Ch III [of the Constitution] *that pose the greatest constitutional challenge to the validity of some provisions of the terrorist legislation."*

In his Law and Justice Address last year Malcolm Fraser identified features of the legislation that were most objectionable, enabling a person to be arrested and isolated not because of anything done, said or even thought, but because the authorities believe that he or she knows something of relevance to their investigations and they want to find out about it.

> *"The new security laws diminish the rights of all Australians. I do not know of any other democracy that has legislated for the secret detention of people the authorities know to be innocent. You are not allowed to make a phone call. You cannot ring your wife or husband to say where you are. You just disappear. You are not allowed to ring a lawyer unless that is specifically conceded in the warrant for your detention. If you answer questions satisfactorily that's fine. If you don't, you can be prosecuted and go to jail for 5 years. There is a defence against that prosecution, if you can prove you never knew anything, it is not an offence, but how can you prove you did not know something if you don't even know what they are talking about?"*

We saw how that law could work in the case of Dr Haneef.

In times of emergency there is a temptation on the part of the citizenry to give the executive its head. That may be appropriate, to a point; provided it is done within the law and with foresight of possible consequences. But emergencies do not last forever and special measures put in place at those times must be wound back as the circumstances permit. Indeed, in Australia, we have not had an emergency of any kind that would justify such extraordinary measures. (True it is that "terrorist" trials are proceeding in Sydney and Melbourne, but there has been no terrorist attack on Australian soil since 11 September 2001.) If ordinary citizens were to be polled, it would be found that they were much more concerned about break and enters and dangerous drivers than about the threat of a terrorist attack.

An open-ended, undefined "war against terror/ism" is little more than an excuse for executive excess. How does one wage war on an abstract noun? How does one know when the war has ended or who has won? The ramifications may be felt domestically and internationally. Real harm may be done to the fabric of society and to the fabric of international relations that may take decades to overcome and repair. Importantly, also, that conduct may in fact increase, not diminish, a state's exposure to terrorist acts.

Another consequence of adopting the war paradigm is the effect on the web of relations between states and the international mechanisms that bring them together, such as the UN. Chris Patten, External Relations Commissioner for the European Commission and the last British Governor of Hong Kong, said of US involvement in Iraq at the Commonwealth Law Conference in Melbourne in April 2003:

> *"I do not believe that there is any other or better way of dealing with these matters than through the mechanisms and procedures of the United Nations. That may not always produce a consensus, as we can see today. But if we do*

not try to apply the matrix of international agreements and institutions to the resolution of these issues, we will find ourselves increasingly living in a world where might is confused with right, and double standards are seen to reign supreme."

In other words, where the rule of law no longer applies.

In matters of security and in criminal justice there must always be balance. It is impossible in either field to achieve final certainty. There must be room for trust, properly based, between the guardians and the guarded. If the balance of powers is destroyed, then trust will also be lost, rights will be put at risk and life will become intolerable.

In his 2006 Address Malcolm Fraser, acknowledging the reality of the threat of terrorism, said: "*…if terrorism is going to be overcome it will be overcome by wise policy, much better intelligence than we have had to this point and good policing… We do not need to overthrow our principles."*

The DPP for England and Wales, Sir Ken Macdonald, said in a speech to the English Criminal Bar Association in January 2007:

"Legislation passed by some countries in the wake of the 9/11 attacks on the United States was inconsistent and even hostile to 'traditional rights'. We wouldn't get far in promoting a civilising culture of respect for human rights amongst and between citizens if we set about undermining fair trials in the simple pursuit of greater numbers of inevitably less safe convictions…

London is not a battlefield. Those innocents who were murdered on July 7 2005 were not victims of war. And the men who killed them were not, as in their vanity they claimed on their ludicrous videos, 'soldiers'. They were deluded, narcissistic inadequates. They were criminals. They were fantasists. We need to be very clear about this. On the streets of London, there is no such thing as a 'war on terror', just as there can be no such thing as a 'war on drugs'.

The fight against terrorism on the streets of Britain is not a war. It is the prevention of crime, the enforcement of our laws and the winning of justice for those damaged by their infringement."

SECTION FIVE

POLITICAL RESPONSES AND LAWMAKING (LAW REFORM)

Point 4 under the Rule of Law heading above refers to the law being and remaining reasonably in accordance with informed public opinion and general social values and

to the need for some mechanism (formal or informal) for ensuring that. Regrettably, in this State and others, that requirement is often not met. Law is often made in response to the day's tabloid headlines.

For example, in 2002 the government decided that it would provide further guidance to sentencing courts by prescribing "standard non-parole periods" to be imposed in relation to a list of specific offences. Clearly the government thought that sentences for these offences were generally too low. It was mindful that it should not prescribe mandatory sentences (which even this Government recognises as objectionable in principle and ineffective in practice), so this course was followed. On the morning that the legislation was to be introduced to Parliament there was a tabloid story about a sentence for a particular offence that many thought inadequate. That offence was added to the list in the Bill that day and it became law.

Law is made principally by Parliament – in the form of legislation (Acts) and subordinate legislation (eg Regulations). A secondary source of law is the superior courts – where in the context of making decisions in individual cases it is necessary to declare a legal principle for the first time or a variation on an existing principle (inherited from the operation of the common law system). Courts also interpret legislation, sometimes making new law in that process.

As the law is made, so it is reformed. That is an ongoing process in response to a multiplicity of pressures and especially in the criminal law it can become very much an exercise *ad hoc*.

There is a standing Law Reform Commission in NSW (as elsewhere). It works by reference from the Attorney General, addressing large issues in the law generally, conducting research and consultation and advising on reforms in the areas referred. It is then a matter for the government whether or not recommendations are implemented.

In the Attorney General's Department there is a Criminal Law Review Division, one of whose functions is to examine and report on proposals for reform and to advise the Attorney General. Anybody may refer issues to it and the Attorney General often initiates reviews. It is able to consider even small changes to both substantive and procedural criminal law and each year a Bill containing miscellaneous provisions for enactment affecting the criminal law is introduced to Parliament.

Bodies such as the Sentencing Council (and many others) also make recommendations to the Attorney General for reform in their particular areas of interest. Again, the Sentencing Council operates on specific references from the Attorney General. (At present it is working on or has recently provided reports on: fines as an effective penalty; periodic detention; public attitudes towards the criminal justice system; penalties for sexual assault offences; provisional sentencing for young offenders; and sentencing discounts. Clearly enough, these include some areas where public expectations may not coincide with the present law and reform may be required.)

Ad hoc inquiries are conducted from time to time. In 2005 there was a long-running Criminal Justice Sexual Offences Taskforce that inquired into aspects of both

substantive and procedural law relating to the trial of sexual assault offences and some recommendations have been implemented (eg videorecording of complainant's evidence, no direct confrontation between complainant and accused, CCTV, directions to juries, etc).

Sometimes reforms are introduced provisionally by way of trial or "pilot" schemes: eg the Drug Court, Circle Sentencing and now Criminal Case Conferencing. If they are proven to be beneficial, they may be implemented more widely or permanently.

Society is constantly changing. If reforms to the criminal law were always in response to changing and generally accepted values and expectations in the community, all would be well; unfortunately, however, often reforms to criminal law are driven by tabloid media pressure and political expedience.

Laws connected with sexual morality have changed periodically. Not so long ago, homosexual conduct between consenting adults was a criminal offence. It is no longer. Laws connected with the status of women have changed over the decades. Laws do move to reflect changes in the value systems of the societies they serve. In that area, in particular, it usually changes slowly, in a conservative fashion and a little behind the play, but that is no bad thing.

Sometimes law needs to change to address developing technology. In the area of crime facilitated by information technology, for instance, new offences and new evidence laws have been required to deal with it.

Sometimes law changes to meet international developments. For example, the OECD has a treaty against foreign bribery in commercial transactions. The Commonwealth has legislated to make that an Australian offence, wherever carried out, if done by an Australian.

When push comes to shove, however, the last word is with Parliament and if one party is dominant, it can pretty much do what it wants.

Opinion polls often drive political policy and they can lead to serious error. The questions asked need to be analysed carefully; there still needs to be public debate about them and about the responses; emotional and ill-considered responses need to be identified. When Government reacts inappropriately to such influences it follows, not leads, the community (or at least follows an unrepresentative part of it).

Another form of public opinion poll, talkback radio, has become vital in the strategies of some politicians, both State and Federal, although perhaps its influence is waning. In 1997 the Prime Minister even argued that talkback hosts set the political agenda (but he has moved on). In this State the government's media advisers used to monitor Alan Jones' early morning program and (I believe) were required to respond to any problem raised before he went off air at 9.00 am; but the Iemma government does not seem to be so slavish towards Mr Jones.

When politicians enter the information (or misinformation) loop between broadcaster and participant they may both feed into and take from that loop. When they do so, they are not entering informed public debate; they are entering usually a highly

charged emotional outpouring fuelled by both unrepresentative and uninformed sides (one of which has often deliberately selected the other) for its immediate entertainment value in the pursuit of ratings and therefore advertising and profit. Politicians make commitments to the process and also take away from it impressions based on selective material and emotionally directed declarations that are not necessarily broadly representative. They also make commitments to action – instantly – in a way that they hope will attract votes at the next election.

On that basis, policy is made and policy often leads to law, even criminal law. It is made in large volumes. In his farewell speech to the NSW Parliament on 23 November 2006 the former Attorney General, Bob Debus, noted that in the previous six years there had been 258 legal Bills through the Parliament, being one third of the Bills passed by the Legislative Assembly. He said it with some pride.

In the context of the criminal law, talkback radio, the tabloid press and low IQ "current affairs" television stress persistent themes:

- that there are not sufficient police on the job;
- that there is a continuous crime wave that makes living unsafe;
- that new offences should be created instantly to meet new types of law-breaking;
- that penalties prescribed for offences are not severe enough;
- that judges are wimps and, being unelected, are not representing community wishes and the penalties they impose are inadequate;
- that the politicians should be telling the decision makers in the system how to respond.

All of this rates well because it is cloaked in emotional rhetoric and preys on people's fears and insecurities and the disconnectedness many members of the community feel from the public decision making process. It trades on irrationally based fear of often inconsiderable threats. It is cheap and easy to produce. The most obtuse journalist – even "entertainer" of the talkback kind – is capable of grasping the ideas behind these stories and there are plenty of precedents in the files to be plagiarised. It makes the story-tellers seem tough (which, they think, is a better public image than that of a caring, sensitive, evidence-based, thoughtful and questioning commentator) and it makes them seem brave, not afraid to level a broadside at the institutions of society.

These stories create an inaccurate – sometimes completely false – perception in the minds of the public about what the criminal justice system is, how it operates, just what it is capable of achieving and how it should be going about its tasks. They therefore construct a completely unsuitable base from which to criticise judges and from which to develop policies for law reform. They prompt unwise, kneejerk reaction by law-makers, especially in the area of sentencing law – sometimes reflected in legislation without consultation of any sufficient kind. They help to undermine public confidence in the criminal justice system. These are the real dangers.

In my view politicians are not responding in this and other areas to community concerns, they are trying to create community concerns – and to do so in an area where a supposed "quick fix" solution has immediate community appeal that can be

reflected at the ballot box. The public lust for vengeance is strong – particularly if someone else is exacting revenge on its behalf. And it is far easier and cheaper and attractive to the unthinking to lock up people who are "different", to build two more prisons, than to provide truly comprehensive health care, housing, employment and education of a universally high standard to all members of the community, to study in depth the factors contributing to the commission of crime and to engineer truly effective prevention strategies.

Apparently it was thought last month that it would be effective and politically appealing to imprison the parents of truant children. Apart from the obvious difficulties in such a course, did anyone stop to think that the most serious truants are probably children in care – in the official custody of the Minister for Community Services?

In the case of common crime it is not as if there is even a considered community desire for longer prison sentences for those offenders who are unlucky enough to be caught. Some people say that they regard the general level of sentencing as too lenient – but surveys in many countries like ours have shown time and again that when those same people are given the facts of individual cases and other information provided to the courts, they usually nominate as appropriate, sentences more lenient than those that were actually imposed.

Sometimes, however, the quick fixes adopted can be even cheaper than a couple of extra prisons. A few years ago the NSW Parliament, with great fanfare, pretended to introduce mandatory life sentences for really bad murder and drug trafficking in NSW. Those provisions were never used and have now quietly been repealed. Other existing laws provided quite adequate scope to sentencing judges to impose life sentences if they thought them appropriate – and they still do. That was just another example of political "Clayton's" toughness.

Similarly, not so long ago the maximum penalty for serious sexual assault was increased from 20 years imprisonment to life. It remains to be seen whether or not such sentences are imposed in any cases; but it is worth noting that the maximum penalty for offences of that kind (formerly known as rape) have gone from death in the 1950s to life imprisonment, to as little as eight years, back up to 20 years and now to life again. Throughout all these changes however, the gaol time actually served by offenders has not varied greatly, nor has the incidence of offending.

The impact of the media on political action is 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 said this:

> *"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"*.

These activities have real implications for the application of the rule of law as we understand and practise it in our liberal democracy. In her final President's Column in the NSW Bar Association's newsletter Ruth McColl SC (now Justice McColl of the Court of Appeal) wrote:

> *"Lawyers tend to take these core values* [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."*

SECTION SIX

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 two other 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…