

The Lawyer's Role in Defending and Challenging the Rule of Law in a Democracy

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1. Two Election Vignettes

Two vignettes during the last week of the 2007 election campaign attracted my notice in preparation for this evening's celebration of the lawyer's role in defending and challenging the Rule of Law in a democracy.

The Liberal Party's spokesman sent in to face Tony Jones on the ABC's *Lateline* following the appalling leafleting incident in the seat of Lindsay was none other than the Attorney-General Philip Ruddock. Jones wanted to know the names of those who had been expelled from the Liberal Party. Ruddock said he did not know who had been expelled. Jones asked, "How come?" Ruddock replied, "Because I didn't ask and I wasn't told." That one sentence reply from a senior politician delegated to defend his party in its hour of need was for me the distillation of much public administration this last decade - from Children Overboard to the AWB affair. The power of the State can be exercised capriciously and unaccountably when the "Don't ask; don't tell" approach to government is immune from parliamentary, judicial or public scrutiny.

Next day, the Prime Minister had to deal with the Lindsay fallout at the National Press Club. He was anxious to distance the sitting Liberal member and the Liberal party candidate from the doings of their husbands. He said:

"I would have thought that if this is the case, that we - I hope - live in a society where we treat husbands and wives, although we respect the closeness of their relationship, we treat them as individuals. We shouldn't automatically transfer blame for the deeds of one onto the other, and that we allow the other partner to the marriage the opportunity of being treated independently and respectfully."

Stephen Keim SC, counsel for Dr Haneef was reported next day in the *Sydney Morning Herald*: "What about second cousins?" No matter what our view of Minister Andrews' exercise of ministerial discretion in the Haneef case, we can all acknowledge that political self interest and community prejudice have played their part in creating irrational criteria for determining the fair treatment of persons.

In the year ahead, we will have contributed to the rule of law if it is more difficult for those exercising state power to invoke "Don't ask, don't tell" and if there are more rational criteria for distinguishing persons in the treatment they receive from those exercising Executive power.

2. The Rule of Law is More than Rule by Law

Tonight is a celebration of all that lawyers have done in trying times to ensure the application of the rule of law in the most difficult of cases. I salute those like Stephen Keim, Julian Burnside, Clare O'Connor, Lex Lasry and Colin McDonald who have conducted litigation and engaged in public advocacy, urging greater transparency, accountability and honesty from government, and justice for each in accordance with universally applicable principles of law.

The other night I was out to a concert with my parents and complete strangers approached my father to thank him for his recent public statements as a retired Chief Justice of the nation. The public has seen a need for a restatement of our commitment to "Law for All: Justice for Each"¹ and a recommitment to "The Role of the legal Profession in the Rule of Law"², getting right the balance between "Law and Liberty

¹ Law and Justice Foundation Justice Awards Dinner, 31 October 2007

² Law Council of Australia Symposium, Supreme Court, Brisbane, 31 August 2007

in the War on Terror”³. It is not my role this evening to repeat my father’s remarks in those three speeches though I share the gratitude of those strangers and commend those post-judicial utterances to you.

With the fresh winds blowing through the body politic since last Saturday night, it is timely to recall the 2006 observation of Lord Goldsmith, the UK Attorney General:

(The rule of law) is not simply about rule by law. Such a proposition would be satisfied whatever the law and however unfair, unjust or contrary to fundamental principles, provided only that it was applied to all. The rule of law comprehends some statement of values which are universal and ought to be respected as the basis of a free society.

...All the organs of state – the executive, legislature and judiciary – have a shared responsibility for upholding the rule of law. This is not to down play the responsibility of the courts – they provide the critical long-stop guarantee – but the rule of law will only have real meaning in practical terms in a society in which all organs of the state are mindful of their obligations to respect it.⁴

If we are to espouse the rule of law, we must accept that we are not all like-minded when it comes to political philosophy, party political preferences or scenarios for getting the balance right on vexed issues such as terrorism and border protection.

My election vignettes will have upset some from the right of the political spectrum. Let me now upset some from the Left by drawing not altogether Jesuitical distinctions between Nauru and Christmas Island when it comes to border protection and boat people. To me Nauru is an instance of unacceptable policy posited on excluding altogether the operation of the rule of law, whereas Christmas Island is an instance of policy posited on constitutionally minimalist compliance with the rule of law.

3. The Rule of Law and Political Calculation – A Case Study of the Pacific Solution

³ UNSW Symposium, Parliament House Sydney, 4 July 2007

⁴ “Government and the Rule of Law in the Modern Age” in the LSE Law Department and Clifford Chance Lecture series on Rule of Law 22 February 2006.

Labor is committed to abolishing the Pacific solution, while maintaining Christmas Island. Many refugee advocates want Labor to abandon Christmas Island as well.

There are three practical differences between Nauru and Christmas Island. Failed asylum seekers on Nauru have no right of appeal to any Australian court. Wisely, the Howard government in its last months did not make too much of this difference in public because it could lead to the inference that decent Australian public servants are more likely to decide that a person is not a refugee if their deliberations are immune from scrutiny by any court or tribunal. When you are trying to change the culture and the public image of a government department that has had a rough trot with cases like Cornelia Rau and Vivian Solon, this is not a good look — particularly for an earnest lawyer like Kevin Andrews. Second, Australian lawyers and do gooders can be more readily kept out of Nauru. Third, refugees on Nauru have never entered Australia and thus other countries may be willing to receive them.

The Howard government's Pacific solution was enacted because it was thought that even those boat people successfully claiming refugee status would never make it to Australia. But 95 per cent of them have eventually made it to Australia or New Zealand. They have just had to wait up to an extra five years. The justification for the Pacific solution has been the need to deter refugees from engaging in secondary movement by employing people smugglers.

This justification came horribly unstuck when the government tried to extend the Pacific solution to Papuan asylum seekers who would be engaged in direct flight without people smugglers. Bruce Baird, the leader of the backbench revolt in August 2006 on the extension of the Pacific Solution, told Parliament that the New Zealand government would no longer take refugees from Nauru if Australia tried to apply the Pacific solution to all boat people. The Pacific solution is incoherent. It is time for it to go.

Christmas Island is a different story. In response to David Marr's claim that the Christmas Island detention centre was established on such a remote island in the Indian Ocean 'to keep the cost of investigating these stories very high', Philip Ruddock, the political architect of both these offshore arrangements, responded, 'The truth of course is that the Christmas Island detention centre sends a very strong message to people smugglers and their clients. The message is that there is no fast-track to the mainland. There is no way to jump the queue.'

Those found to be refugees on Christmas Island will inevitably end up in Australia. Not even New Zealand will take them, and why should it? Though many refugee advocates are strong opponents of the new Christmas Island facility, I have continually conceded to government the place of such a facility in a border protection strategy aimed at isolating and detaining unvisaed boat arrivals until initial screening can occur, permitting immediate return of those with demonstrably unmeritorious asylum claims, and facilitating health and security checks of those asylum seekers whose claims will take some time to process. Many refugee advocates will continue to argue that failed asylum seekers on Christmas Island should have access to the Refugee Review Tribunal as well as the courts.

If there were no Pacific solution, those held on Christmas Island would fall into three possible theoretical categories:

1. Those who landed within the Australian migration zone who are then transported to Christmas Island (like the 43 Papuans). They would have access to the usual raft of appeal procedures including the RRT.
2. Those who landed at an excised place or who were intercepted at sea. They could not apply for an Australian visa until the minister exercised the 46A discretion. Once that discretion was exercised, the public servants making the decisions would be subject to s.75(v) constitutional review at the very least. They would be making decisions under a Commonwealth Act, subject to mandamus, (certiorari,) prohibition or an injunction.

3. Those who landed at an excised place or who were intercepted at sea and in relation to whom the minister was initially minded not to exercise the 46A discretion. They would not be initially covered by the *Migration Act* provisions. Public servants would be commissioned to assess them for the purpose of placement in other countries once they were found to be refugees.

However, it is inconceivable that there would be any category three cases, as other countries would properly view such persons as Australia's responsibility. As such a responsibility, the government would insist that they be assessed by the usual criteria for visas under the *Migration Act*. Therefore the 46A discretion would be exercised and thus all future decisions would be subject at least to 75(v) review.

I concede that Christmas Island will be a physical hell hole. But given that it still enjoys the support of all major political parties, it is essential that we first knock off the Pacific solution and then look further down the track at redirecting the Christmas Island caseload. My own political assessment for what it is worth is: if we continue to insist on the closure of Christmas Island as well as the Pacific solution, key political actors (including key players in the Labor Party) will be in no hurry to close the Pacific solution as they will conclude that their critics will not be satisfied while Christmas Island is left operational.

Of course, we can all make different political assessments in good faith. I have always been prepared to concede to government the case for a facility within the jurisdiction, on an island, and on the route taken by most boat arrivals, permitting initial screening etc before passage to the mainland.

Though we might disagree on the political prognostications, it is important to clarify the legal presuppositions. It is essential that the new Rudd government abandon the Pacific solution which is posited on a denial of the rule of law.

4. The Rule of Law and the Application of Universal Principles – The Death Penalty

The pragmatic, consequentialist ethic in contemporary Australia has long wreaked havoc on outsiders not meriting our respect, but now it is turning on us. We are losing respect even for ourselves. Take the situation of parents who at the last minute feel helpless that their son or daughter may be caught up in a drug ring operating out of Indonesia. They or an intermediary contact the Australian Federal Police and seek assistance, wanting their child stopped at the airport or at least given a warning. We now know that the Australian Federal Police are instructed to co-operate with the Indonesian police up until the time that charges are laid even if there be a real risk that the death penalty will be imposed. Being a civil law country and not a common law country, Indonesia does not lay charges until the end of the investigation process. In common law countries like Australia, charges are laid much earlier in the investigation and prosecution process. If Indonesia were a common law country like Australia, the AFP would be much more restricted in their capacity to co-operate with the Indonesian police when an Australian citizen could be facing death.⁵

But there is something even more troubling than our police pursuing the forensic advantage of delayed charging of suspects in countries like Indonesia. In the case of the Bali Nine, a judge of the Federal Court of Australia commenced his judgment suggesting there was a need for the Minister “to address the procedures and protocols followed by members of the Australian Federal Police (‘AFP’) when providing information to the police forces of another country in circumstances which predictably could result in the charging of a person with an offence that would expose that person to the risk of the death penalty in that country. Especially is this so where the person concerned is an Australian citizen and the information is provided in the course of a request being made by the AFP for assistance from that other country’s police force.”⁶

The minister and the commissioner have said that they see no need for a review of the protocol and processes. The Commissioner has gone one step further and said that there is nothing the police can or ought to do in response to a parental request for

⁵ Justice Paul Finn, *Rush v Commissioner of Police*, [2006] FCA #53 made the following observation on AFP practice: “The Guide applies in relation to common law countries as well as civil law countries. In relation to civil law countries where a charge is usually laid only after a dossier is prepared, evidence is gathered and a case is made, the AFP will cooperate up to the point a charge is laid irrespective of whether the dossier is being prepared for a likely charge which will eventuate in the death penalty.”

⁶ Justice Paul Finn, *Rush v Commissioner of Police*, [2006] FCA 12 (23 January 2006)

assistance. According to Mr. Keelty, if anyone connected with the police did respond positively to the parental request, that person would be acting “dishonourably” and “corruptly”. Mr. Keelty has told Parliament: “What does that say to the parents of the other children who did travel – that because someone had a mate in the police, they got rescued but their children are subject to the circumstances of the Indonesian judicial system? It is simply a nonsense to even project that as being a way that the AFP should operate.”⁷ Bob Myers, the barrister and family friend, who had contacted the police on behalf of the parents of Scott Rush laments, “Certainly I know with hindsight now you can’t rely on our agencies, Australian agencies, to help us out in a crisis of that sort.”⁸ Mr Myers had requested a Queensland Police Officer who was working with the AFP’s Anti-Terrorism Squad “that if Scott did intend to depart (Australia) he be informed that the AFP was concerned that he would be ‘up to no good’ and that his activities outside of Australia would be monitored”. Myers “had no doubt that Scott would be approached and spoken to”. He “informed Lee that this would happen and expressed to him the thought that after Scott had been spoken to it would be unlikely that he would involve himself in criminal activity.”⁹

All right thinking people applaud the efforts of law enforcement authorities taking a strong stand against those who exploit and profit from others’ addiction to illegal and harmful drugs. But some of the most honourable and non-corrupt law enforcement officers are those who can take the young person aside and warn them off. This cannot be done in every circumstance when an anxious parent seeks assistance as a last resort. But our sense of legalism is too stretched when the police commissioner can proclaim that any such instance of this would be dishonourable and corrupt.

We can maintain a respect for the noblest human aspirations including parents’ desire to protect their child, a friend’s desire to help a mate, a free and confident nation’s desire to spare even their foolish, selfish citizens from the firing squad. The federal police should be empowered to do their job but their desire to track down criminals and their willingness to sacrifice the life of our citizens should not permit co-operation with other police beyond what would be permitted were the other police in a

⁷ Hansard, Legal and Constitutional Affairs Committee, Australian Senate, 17 February 2006, p. 41

⁸ ABC, *Australian Story*, Interview with Bob Myers, Program Transcript, 13 February 2006

⁹ Personal Communication from Bob Myers, 7 October 2007

common law country where charges would be laid earlier than they are in countries like Indonesia.

The distinguished Victorian Supreme Court judge Murray McInerney told me when I was admitted to the Melbourne Bar 30 years ago that there was no finer citizen than the good police sergeant in a country town who was able to keep the peace, not primarily by enforcing the law but by having a quiet word to the young fellows around town. There must be a place even in our federal police for co-operation with parents and citizens of good standing wanting to avoid the firing squad for their children and their friends' children.

In his speech entitled “Don’t bury us before we’re dead” at a conference in Bali in July, counsel for Scott Rush, Colin McDonald QC with whom I was privileged to share Vatican Chambers in this city in 1981, put two suggestions for moderating AFP operational behaviour more consistent with Australian values, including espousing the right to life:¹⁰

The first practical suggestion is for Australia to domestically legislate and incorporate into domestic law the Second Optional Protocol to the *International Covenant of Civil and Political Rights*. This practical step would prevent any Government in Australia in the future, in the law and order auction world of Australian politics, from reintroducing the death penalty. It would also ensure that the exposure of an Australian citizen to the death penalty was a relevant legal consideration in administrative decision making which might expose such a citizen to the death penalty.

The second practical step involves the writing of one letter by the Minister for Justice to the Commissioner of the Australian Federal Police pursuant to section 37(2) of the *Australian Federal Police Act 1979*. That letter would be a direction to the Commissioner that AFP members are not to intentionally and predictably expose Australian citizens to the death penalty in AFP operations. By subsection 37(4) of the same Act, the Federal Police Commissioner is obliged to comply with such a direction.

¹⁰ C. McDonald, “Don’t bury us before we’re dead”, Criminal Lawyers Association of the Northern Territory Eleventh Biennial Conference, 5 July 2007, p. 42

Such steps would ensure that the AFP would be able to take more notice of nobly intentioned interventions such as that made by Lee and Christine Rush and their friend Bob Myers.

The arbitrariness of the death penalty for Scott Rush is highlighted by the life sentences given to the other three drug mules in the Bali Nine, and by the paucity of reasoning offered by the Indonesian Supreme Court which made no effort to analyse why death was warranted for Scott Rush and not for the other mules.¹¹

Scott Rush does not deserve to die. He did not commit the worst of offences; he has been arbitrarily singled out for the death sentence by the Indonesian courts; his criminal act if successfully executed would have caused direct harm in Australia rather than Indonesia and our courts would probably have imposed a 10 year sentence and a minimum of 5 years to serve. Now that Scott's final appeal to the Indonesian Constitutional Court has failed, the Australian government should plead clemency not just because we oppose the death penalty in principle but also because a death sentence imposed in these circumstances would have adverse consequences for us in the fight against illegal drugs. This death sentence would either unreasonably hamper Australian law enforcement officers co-operating with Indonesian authorities in busting future drug rings attempting to move drugs from Indonesia to Australia or place Australian law enforcement officers in the invidious position of routinely handing Australian drug mules over to death regardless of our principled opposition to the death penalty. Killing our impressionable young drug mules, even at Indonesian hands, is too high a price for Australia to pay in combating the importation of illegal drugs. Our government should stop the AFP from cutting corners when it comes to the death penalty. Let's hope Kevin Rudd will now make it clear to the Indonesians that we can co-operate closely in defeating drugs provided only that the Indonesians respect our opposition to the death penalty, especially for what ought be non-capital offences.

¹¹ The Indonesian Supreme Court simply said:

“The characteristics of the Accused's action and his friends are:

- The narcotic abuse (sic) endangers very much and constitutes serious danger for human life, community, nation and Indonesian Country as well as other countries; and
- That the total heroin exported in an organised manner is big, namely carried by the Accused 888.90 grams + 414.37 grams + 389.90 grams in addition to be carried by his friends.”

I commend those lawyers, community leaders and politicians including our new federal Attorney General Robert McClelland who have been working tirelessly in and out of electoral season to spare the lives of Scott Rush and all those sentenced to death by the State when there are non-lethal means available to protect us from their past or future wrongdoings, whatever they may be, whatever they could be. If we are to live by the rule of law and not simply rule by law, justice must not kill.

5. The Rule of Law Espoused by a principled Profession

If we are to espouse unpopular principles derived from the rule of law to populist government bent on consequentialist policies, we must first be seen to be the most principled of professions.

The AWB affair has revealed the immoral and unacceptable behaviour of many of our senior, well paid executives. But there has been little attention paid by the media, or by us lawyers, to the Commissioner's adverse observations about the senior, respected lawyers who were involved. I am not referring to those eminent persons who gave legal opinions which were carefully circumscribed in accordance with the tortuous, limited instructions they were given, having been asked to advise on the assumption that "payments were made pursuant to bona fide commercial arrangements".

The solicitors for AWB played a critical role in facilitating AWB's non-cooperation with the inquiry. Admittedly, even though AWB had stated in its annual report that it would co-operate fully with the inquiry, it was not legally obliged to cooperate with the inquiry. It decided on a PR strategy of claiming full cooperation while working with their lawyers on a strategy of non-cooperation. AWB's lawyers had collated the key statements by witnesses more than a year before providing the inquiry with a series of statements which "were of no use to the Inquiry". The Commissioner noted that "AWB's lawyers were...in a position to provide useful statements had they wished to do so". When the Commissioner expressed public dissatisfaction with this non-cooperation in January 2006, senior counsel for AWB submitted that the commissioner's concerns were unreasonable and that he was conducting the inquiry unfairly. Senior counsel claimed that there had been insufficient time to draw up

adequate witnesses' statements and that there was "restricted availability of the documents". The Commissioner had no option but to accept these reasons. It was only later once an unsuccessful attempt was made at legal professional privilege that it emerged that "AWB had collated much of the relevant material more than 18 months before the inquiry began, yet chose not to produce it to the Inquiry until compelled to do so, and then not in its assembled form". The Commissioner found that the "reasons advanced by (senior counsel) for the absence of cooperation were not factually accurate". Presumably senior counsel and/or his instructing solicitors knew this at the time the submissions of unreasonableness and unfairness were put.

The public is left with the perception that in a royal commission, lawyers (even senior counsel) have no duty other than the representation of their client's perceived self interest even if such representation involves material misrepresentation of the facts and even if the lawyers know of and facilitate their clients' dishonesty before the commission. In such a commission, do we as a profession have a duty to the commission and to the public? Or are we simply well paid clever people available to dishonest clients assisting them to hoodwink and misguide the commission and the public?

6. Conclusion – Celebrating the End of Mandatory Detention for Asylum Seekers

There was controversy and publicity in medical circles caused by the publication of Sultan and O'Sullivan's 2001 article in the *Medical Journal of Australia* concluding:¹²

It is therefore difficult to avoid the conclusion that the policy of mandatory detention of asylum seekers is leading to serious psychological harm. Even if many of those who spend long periods of time in detention are not deemed by the strict criteria enforced to have proven their refugee claims, this administrative decision should not be grounds for inflicting grave ongoing psychological injury on the applicants.

¹² "Psychological Disturbances in asylum seekers held in long term detention", *Medical Journal of Australia* 2001, 175: 593 at p. 596

Mr Ruddock then Minister for Immigration alleged that the authors were guilty of a distortion and half-truth. He claimed that the authors had claimed that detention was arbitrary. He retorted: “Detention is not arbitrary. It is humane and is not designed to be punitive.” This was in the days when unvisaed asylum seekers including children were being held in hell holes like Woomera. Sultan and O’Sullivan replied modestly that “prolonged detention of asylum seekers appears to cause serious psychological harm”.¹³ Though they had not claimed detention was arbitrary in their original article, they then invoked the earlier 1998 observation of the Human Rights and Equal Opportunity Commission that “In some instances, individuals...have been held for more than five years. This is arbitrary detention and cannot be justified on any grounds.”¹⁴

The Palmer review placed immigration detention in the public spotlight. A handful of Coalition backbenchers led by Petro Georgiou finally convinced the Prime Minister that children should be detained only as a matter of last resort, and that there was a need for some review mechanism to ensure that persons held in long term immigration detention were not being wrongly or unduly detained. On 17 June 2005, John Howard relented and four days later the *Migration Amendment (Detention Arrangements) Bill 2005* was rushed into Parliament. The government backbencher Bruce Baird echoed much of the community outrage at mandatory detention of children when he told Parliament:¹⁵

I am sure that all members from both sides of this chamber would absolutely endorse this as fundamental. Let us never again see children in detention in this country. They should not be behind barbed wire or razor wire. It is an indictment that we have let it happen. Both sides of the House have been involved in that but we are changing this process through the bill. I really stress the importance of these changes.

There were good grounds for thinking that the time had passed for government to use the detention of children as part of a comprehensive strategy designed to send a double signal, with the first signal being directed to people smugglers and their clients

¹³ Aamer Sultan and Kevin O’Sullivan, “In reply: Asylum seekers and health care”, *Medical Journal of Australia* 2002; 176 (2) 85

¹⁴ HREOC, *Those who have come across the seas*, Canberra, HREOC, 1998, 182

¹⁵ 2005 CPD (HorR) 91; 21 June 2005

to deter them, and the second to voters concerned for strict border security so as to attract their electoral support. The long term detention of persons without a court order and without regular supervision was seen to be problematic. The Commonwealth Ombudsman is now required to assess the appropriateness of ongoing detention for all persons held in immigration detention for more than two years.

There is still work to be done in extending the rule of law to those entering Australia without a visa. But tonight I salute those lawyers who have insisted that the way we treat the child in immigration detention, the way we treat David Hicks, the way we treat Scott Rush, the way we treat Dr Haneef, and the way we treat Jack Thomas matter ultimately in determining how we are all treated. Are we subject to the rule of law, or simply rule by law? None of us will be so naïve as to presume that this is no longer a live question simply because there has been a change of government in Canberra. All of us can take heart that there are lawyers prepared to stand up and be counted, espousing the rule of law for all so that there might be justice for each and every citizen of this free and confident nation.

You will forgive my one indulgence in filial pride quoting with approval Sir Gerard Brennan who recently said to a group of Sydney lawyers:

On nights like this, when men and women devoted to the cause of justice gather to celebrate their commitment and to validate the rights of the outcast and the underprivileged, there are grounds for optimism. It is their work which employs the law in its most important role – the equal application of the law to all, irrespective of class, creed, ethnic origin, popularity or lack of it, status or wealth. Ultimately, political rhetoric about the rule of law may be exposed to be as genuine as the electoral kissing of babies, but there is a brave core of Australians, including many in the legal profession, who are truly devoted to the rule of law and the securing of justice for all. They are the ones who see the law as a way to justice, who give real meaning to the notion of a fair go. They represent the values of a free and confident nation. We greet you, we thank you and we wish you well in your noble endeavours.