A BAD MOON on the rise

Jeff Giddings

Kennett's drive for power undermines effective democracy.

We all knew there would be major changes when the Liberal-National Party Coalition assumed control in Victoria in October 1992. All the same, there has been a sense of 'what are they going to do next?' about the very far-reaching reforms which have been instituted, especially after the abolition of the Law Reform Commission and the Accident Compensation Tribunal and the dramatic changes to Victoria's sentencing system. The Coalition then followed up with changes to the equal opportunity system and a very public feud with the Director of Public Prosecutions (DPP). Needless to say, that 'what next?' sense is still with us.

The clearest characteristics of the Kennett Government include a determination to be seen to be 'doing things', to make decisions and then carry them into effect, irrespective of strong, perhaps persuasive, arguments being raised in opposition to their proposals. There has been much concern not to be seen to be backing down, along with an unfortunate hypersensitivity to criticism. This article will outline several of the changes made and look at how the Government and the Attorney-General's office go about making decisions.

The Attorney-General, Jan Wade, has been under significant pressure to perform and she will no doubt be troubled by the view that she has been a non-performer in Cabinet. The *Sunday Age* (referred to by Kennett as 'the *Labor Star* in drag') in particular has singled Wade out for criticism, including her in a list of four ministers described as 'Cabinet's Non-Performers' (*Sunday Age* 3.10.93, p.13). This criticism intensified in late 1993 with the DPP controversy.[1] There are clearly several Liberal backbenchers who would be very interested in taking her place as the State's first Legal Officer. They include James Guest, Chairperson of the Parliamentary Law Reform Committee, Victor Perton, Chairperson of the Scrutiny of Acts and Regulations Committee and Robert Clark, MLA for Balwyn.

Fun and games for the legal profession

The legal profession has been disconcerted by the lack of consultation by the Attorney-General's Department in relation to a number of reforms. Traditionally, the profession has enjoyed regular access to government decision makers and has used this access to make many representations, both on a policy level and in relation to technical issues related to legislative proposals.

Quite naturally, the expertise of the legal profession has always been utilised in relation to technical legal issues involved with legislative proposals. The Law Institute of Victoria (LIV) has, through its extensive system of Committees, commented to government about many different legal reforms. Most of these have been non-contentious matters and have made effective use of the practical experience of the LIV's members to identify defects in draft legislation.

One difficulty with such a consultative model is that when contentious issues arise, groups like the LIV will lobby as hard as possible to protect the interests of their members and their more powerful client groups. It can

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be said that any inordinate access which such powerful lobby groups have to legislators should be curtailed so as to reduce the impact of self-interest on decisions. However, at the same time, such curtailment will also greatly stifle informed criticism and this is certainly the way in which the lack of consultation has been perceived by the legal profession. Put simply, if groups feel cut out of the key decisions, they are unlikely to bother to assist with other issues.

In February 1994, the then LIV President, David Denby wrote about the Institute's relationship with the Government and expressed concern at the Government's lack of consultation with the profession on many issues.[2] He then raised three points of concern:

- increasing inclusion of substantive law in Statutory Rules and Regulations;
- almost routine exclusion/limitation of the Supreme Court's review jurisdiction in areas subject to new legislation; and
- an almost complete disregard for the doctrine of the separation of powers: '[t]he checks and balances which make the Government accountable are being systematically dismantled.'

Denby's column prompted a very caustic (and illuminating) response from the Attorney-General.[3] The former Labor Government was criticised for having led the way in the use of rules and regulations and limiting the Supreme Court's review jurisdiction. This cannot be a rationale for perpetuating what were being acknowledged as bad practices.

The Attorney-General also noted:

> Too often . . . a call for 'real consultation' is less a genuine request for dialogue than an invitation to the government concerned to bend over and prepare to be kicked. True consultation is not a process whereby a government accords to inflexible opponents of a proposal ample advance warning, in order that they may marshal their forces to inflict maximum damage.

In relation to the separation of powers doctrine, reference was made to what Denby was presumably taught at law school and the fact that he should have understood that the Commissioner for Equal Opportunity and the Director of Public Prosecutions are not courts and do not exercise judicial power; hardly the point when the Attorney recognised herself that she was referring to the doctrine in its strictest sense. A more reasoned response which did not personally belittle Mr Denby would have been more appropriate. Clearly Denby was referring to the difficulties facing statutory office holders whose responsibilities bring them into conflict with government.

Denby was right to speak out regarding the treatment of positions within the legal and related systems which must retain independence from government if they are to work effectively. There is clear potential for such independence to be compromised if such office holders are vulnerable to discipline or dismissal pursuant to public sector management legislation.

Already, concerns have been expressed in relation to the application of the *Public Sector Management Act 1993* to the Ombudsman and the Auditor-General. It was proposed that this legislation would also apply to the DPP. This proposal saw the Victorian Supreme Court Chief Justice write to the Attorney-General expressing his deep concern over the potential of the Act to undermine the employment of the DPP at a status equivalent to a Supreme Court judge by making it possible for him to be placed on an employment contract under that legislation.

In June, the Attorney-General released a discussion paper on reform of the legal profession.[4] This initiative is significant both in terms of its content and style.

The major proposals outlined in the discussion paper include:

- appointment of a legal ombudsman with power to deal with complaints against lawyers and investigate and report on anti-competitive practices and unreasonable costs;
- establishment of a Legal Practice Board to regulate the legal profession which would include 'a significant number of members drawn from the public at large';
- establishment of an independent Legal Professional Tribunal to deal with disciplinary proceedings against both solicitors and barristers to be constituted by equal numbers of legal and lay members under the chairmanship of a retired Supreme Court judge;
- voluntary membership of legal professional organisations; and
- subjecting the legal profession to competition principles.

While many of the proposals included in the discussion paper would be welcome reforms if they were, in fact, implemented, the focus is on processes to be used once difficulties arise. Very little emphasis has been placed on mechanisms such as the implementation of quality standards and improvements in legal education which would be designed to stop the problems arising in the first place.

Comments have been sought on the proposals and will be forwarded to the Attorney-General's Working Party on the Legal Profession. The discussion paper notes the need for appropriate consultation to take place with both the legal profession and the public at large once concrete proposals have been formulated. A Bill would then be introduced during the 1995 Autumn parliamentary session.

It appears the legal profession's complaints regarding lack of consultation may finally have been heeded. No doubt groups in other areas targeted for reform would appreciate similar consultation time before changes are put in place. Another explanation for the allowance of this uncharacteristic lead time is that the date of release of the discussion paper was influenced by a desire to steal some of the Commonwealth Government's thunder from the release of the Report of the Access to Justice Advisory Committee. This may have resulted in the Victorian proposals being released before they had been completely formulated.

The Kennett Government has shown a strong lack of tolerance of those who have made comments either criticising its agenda or whose official responsibilities have placed them in a position of conflict with the Government's desire to implement its policies. There has been an obvious reluctance to accept any criticism at all of the approach taken by the Government and this is perhaps most easily identified by several specific examples. I will review the circumstances surrounding two incidents: the sweeping reforms to Victoria's equal opportunity system and the report of Mr Justice Fogarty into the operation of Victoria's child protection services.

Changes to equal opportunity system

I honestly believe that they don't know the powers and responsibilities that I've got.

Moira Rayner, *Age*, 27.8.93, p.16.

It was not surprising that the Attorney-General was interested to see a review of the Victorian equal opportunity laws given that she had previously been a member of the Equal Opportunity Board. The Attorney referred this area to an all party sub-committee of the Scrutiny of Acts and Regulations Committee for consideration. Further, the outspoken actions of

the Equal Opportunity Commissioner, Moira Rayner, particularly in relation to the possible closure of Fairlea Women's Prison would have increased the Government's concerns in this area.

The Equal Opportunity Commissioner's involvement in the Fairlea Prison issue arose from an Inquiry which she commenced in July 1992 into alleged discrimination against women prisoners at Barwon Prison. It was asserted, and subsequently established, that women prisoners suffered from a very significant lack of access to various facilities within the Barwon Prison. Slow moving but ongoing negotiations ensued with the Government in relation to preventing this discrimination (either by way of moving the women prisoners or by altering arrangements at Barwon), but in mid-1993 these negotiations broke down.

On 26 July 1993, the Equal Opportunity Commissioner sought interim orders from the Equal Opportunity Board preventing the Government from closing down Fairlea Prison until the Board could consider claims of discrimination. The orders sought were not made as the Board considered they could only be made where complaints had been made by individuals to the Board rather than by way of the Commissioner conducting an Inquiry.

Moira Rayner would not have endeared herself to the Government with comments which she made in early October 1993 at a Society of Labor Lawyers conference in Hobart in relation to a major increase in the number of discrimination complaints in Victoria since 1987. She observed that there had been a 321% rise in discrimination complaints since 1987, with a 64% increase in 1992. The Government was very sensitive as many of the complaints were employment related and had arisen as a result of the radical employment law changes which the Government had introduced.

The Interim Report of the All Party Sub-committee of the Scrutiny of Acts and Regulations Committee Review of the *Equal Opportunity Act 1984* (Vic.) was released on 19 October 1993. Its recommendations (which were endorsed in its final report tabled in Parliament on 25 November 1993) are very different to the changes which were announced by the Attorney-General only seven days later (26 October 1993) and included in the *Equal Opportunity (Amendment) Act 1993* which came into effect on 1 March 1994.

The legislation introduced by the Attorney-General contrasted sharply with the Committee's recommendations:

- abolition of the Office of Equal Opportunity Commissioner. This has been replaced with a five-member commission with a Chief Conciliator having administrative responsibility for the staff of the Office of the Equal Opportunity Commission. The other four members of the Commission are all appointed by the Attorney-General. The Committee, on the other hand, recommended that the Commissioner's position should be subject to an annual review by a parliamentary committee or other independent body rather than being answerable to the Attorney-General as was previously the case.
- Legal costs could be awarded against an unsuccessful party to a complaint while the recommendation of the Committee had been that the power to award costs be limited to where a party (note that this was not limited to an unsuccessful party) had acted unreasonably.
- The Attorney-General would be given power to refer matters of public importance directly to the Equal Opportunity Board rather than having them proceed initially through the Commission.
- No provision was made for class and representative actions and complaints by organisations to be brought although these had been recommended by the Committee.

The Attorney-General totally disregarded these key Committee recommendations. Clearly drafting of the legislation must have been well under way before the Committee's interim report was released. This is hardly the level of influence the public should expect from what has been described by its Chairman and fellow Victorian Liberal, Victor Perton, as 'the most powerful parliamentary committee in any Australian State'.[5]

It has also been revealed that only two days after Moira Rayner made her comments at the Labor Lawyers Conference in Hobart, the Employment Minister, Phil Gude sought 'full and complete details' of confidential complaints which the Commission had received in relation to the Government's employment laws (*Age* 28.10.93). It is hard to imagine a better example of the complete lack of understanding on the Government's part of the role of the Equal Opportunity Commissioner and, in particular, the confidentiality requirements on which the Victorian equal opportunity system depends.

At present, Victoria's equal opportunity system is clearly in crisis. Many complaints are being transferred to the Commonwealth system for hearing. Complaints of discrimination about sex, marital status, pregnancy, race and disability, of dismissal due to family responsibilities and of victimisation come within the Commonwealth legislation which uses informal, confidential conciliation processes like those which were in operation in Victoria. Further, there is no provision for the making of costs awards in the Commonwealth system. Only the most serious discrimination complaints are now being attended to. The system had already been under great pressure as a result of the rapidly increasing number of complaints. In the five years from 1988 to 1993, there was a 321% increase in the number of complaints while staff numbers had remained at the same level.

Fogarty report into child protection services

The release in September 1993 of a report on child protection services in Victoria[6] by Mr Justice Fogarty of the Family Court was followed by very strong personal criticism of Fogarty by the Premier, the Attorney-General and the Minister for Community Services. The comments made, especially those made by the Premier, reinforce the view that the Government is unduly sensitive to any criticism.

Mr Justice Fogarty's report had been commissioned by the Kennett Government in March 1993. Fogarty was well qualified to prepare such a report, being a Senior Judge of the Family Court and the author of a 1988 Report which reviewed Victorian services for abused children (*Age* 24.12.93, p.14). Legislation to implement mandatory reporting of child abuse was introduced in May 1993 following a concerted media and public campaign (*Children and Young Person's (Further Amendment) Act 1993* (Vic.)). Mandatory reporting was introduced for doctors, nurses and police from 4 November 1993. School teachers have been covered by the legislation since 18 July 1994. Application will be extended to pre-school teachers, childcare workers, social, welfare and youth workers, psychologists, youth and child care officers and probation and parole officers by November 1994.

Fogarty's report had been finalised and delivered to the Minister for Consumer Affairs, Michael John, by mid-July. However, the State Government did not release either the report or its response to the recommendations for more than two

months, until 24 September, which just happened to be the day before the AFL Grand Final.

The report was strongly criticised by both the Minister for Community Services and the Attorney-General. However, the comments of the Premier were most controversial. The Premier accused Fogarty of 'extraordinary behaviour' and sensationalism over the report (*Age* 28.9.93, p.1). It appears that the Government was particularly angered by the fact that Mr Justice Fogarty had briefed members of the media in relation to the contents of his report after he became concerned at the Government's attempt to 'bury' it.

The tone and intensely personal nature of the Government's response might have been predicted after the personal attack made by the Premier on the Chief Justice of the Family Court, Alastair Nicholson in August 1993. Nicholson had stated that governments were obsessed with economic rationalism and 'user pays theories' while being oblivious to the problems of children. His Honour singled out the Victorian Government for 'devoting its energies to an attack on spending and a reduction in spending on schools and kindergartens, which should be receiving more and not less support from the community' (*Age* 6.8.93, p.7). The Premier responded stating that he thought Nicholson was a frustrated politician and observed that:

> you can't have people who are sitting on courts, who are there to interpret the law, trying to then question publicly and argue against the process that the law makers are trying to put into place. Nicholson does this frequently. [*Age* 6.8.94, p.7]

The Fogarty report is quite clear in its criticisms of State Government policies on child protection. In particular, it levelled criticism at the $7.4 million cut to State Government funding of non-government child welfare agencies. It said that this would 'devastate the private sector' (p.31) and leave Victoria without a 'viable fully embracing, quality service' (p.26) of child protection.

Delays of up to six months in the investigation of reports of child abuse made in Melbourne's western suburbs had made a mockery of the child protection system. The report also noted that some abuse reports might never be investigated due to the lack of staff and that insufficient financial resources had been allocated to the system being established for the mandatory reporting of child abuse. The report described the Government as having 'virtually abandoned the care and protection' of homeless adolescents (pp.33 and 35). It also stated clearly that insufficient financial resources had been allocated to the system being established for the mandatory reporting of child abuse.

There was then further conflict in relation to the report, with Fogarty being supported by, among others, Chief Justice Nicholson, the Human Rights Commissioner, Mr Brian Burdekin and the Federal Attorney-General, Mr Lavarch. Each of these supporters viewed the comments by the Victorian Government to be an unreasonable attack on Justice Fogarty. The attacks were described as 'unconscionable'[7] and a 'knee jerk, head kicking'[8] response involving a case of shooting the messenger.

The Premier then turned his attention to Mr Justice Nicholson, stating that it was 'a little petulant' of the Chief Judge to have made comments and again criticising him for his 'ability to continually enter the political arena' (*Age* 24.9.93, p.6). The Premier appeared to be saying that members of the judiciary should not make any comment in relation to the operation of government policy. This rightly drew a strong response from the Federal Attorney-General who criticised the Premier for launching a 'full frontal assault on the independence of the judiciary' and stated that the 'highly personal' attack had 'gone too far' (*Age* 29.9.93, p.6).

Criticism was also made by the Attorney-General in relation to the description by Mr Justice Fogarty of the Melbourne Children's Court as primitive. Jan Wade stated that Fogarty must have been spending too long in the luxury of Commonwealth accommodation if he thought that the Children's Court was primitive. While the current Children's Court building is an enormous improvement on the old Batman Avenue court, there are still significant difficulties with the building and, more importantly, with the very limited resources provided for the proper running of the Children's Court jurisdiction. This issue was conveniently side-stepped.

It is clear that Mr Justice Fogarty continues to be most concerned about the state of child protection services in Victoria. He has commented at several public forums since the release of his report that there are major problems confronting the system. In November 1993, he stated that mandatory reporting, combined with the $7.4 million cut in funds to non-government support agencies, would mean that child protection services in Victoria would collapse. He expressed the view that this funding cut meant it was now reckless to proceed with a system requiring mandatory reporting of abuse (*Age* 2.11.93, p.7). This did not prompt any personal criticism from the Government. The Minister for Community Services stated simply that he was confident that resources available to underpin the system were adequate.

In December 1993, concerns were expressed both by Justice Fogarty and Inspector Vicki Fraser, Head of the Victoria Police Community Policing Squad. Fraser stated that there were not enough resources to investigate current cases of child abuse. Justice Fogarty's language was much stronger. He was most concerned that the Government had failed to heed the advice of welfare leaders, experienced child protection workers and its own advisers and had instead persisted 'in refusing to heed the advice of everyone in this area in adopting a bloody minded approach to the non-government sector which is becoming enormously and increasingly responsible in this area' (*Age* 4.12.93, p.5).

On 18 February 1994, Fogarty stated that the number of reports of suspected child abuse had increased by 40% on the same time in 1993:

> we have a 40% increase in notifications and cuts in services. The Government just has to stop this ego thing where they won't change their mind even though they know they are wrong . . . they are deluding themselves if they think they are doing more than simply putting off another disaster. [Age 19.2.94]

Strong words indeed from a member of the judiciary. This increase in the number of reports was double that which Fogarty had predicted in his report and five times greater than the size of the increase in reporting which had been forecast by the Government.

Further startling statistics were made public the following month. An internal Department of Health and Community Services Report stated that the number of suspected child abuse cases reported in the western suburbs had leapt by 159% since the introduction of mandatory reporting (*Age* 3.3.94, p.3).

Conclusion

So long as the Kennett Government refuses to consult and responds so negatively and personally to criticism, it is bound to continue to face problems with many of the groups and individuals who see themselves as having an interest in 'the law'. Unfortunately, it appears unlikely that the Government's approach in this area will change significantly in the near future.

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blurred distinction between public and private legal service provision. They are also the world that legal aid will be part of if it survives. And, if it does survive, it is unlikely to be in the form of schemes that simply employ salaried lawyers or pay private lawers to provide legal services. Legal aid is likely to include franchising, forms of legal insurance, public legal aid generating profit from the private sector, and extensive use of mediation type processes.

And it may not be all bad. In fact in many ways it may be a vast improvement on what exists now with the slow decline of publicly funded legal aid. The challenge will be for commentators and researchers to study the interactions between the different forms of legal service provision to try to identify whether groups are missing out.

The future

The future for legal aid in the rich countries is pretty clear. Publicly funded and provided legal aid will continue to exist, but as part of a more diverse pattern of provision of legal services within a more flexible legal system than we have known. In addition to a small publicly provided legal aid, some governments may look to an expanded role for community-based legal aid as a cheaper alternative to both public lawyers and the private profession. But community-based legal aid was not central to the discussions in The Hague to its relatively small role. Few countries have the number of community legal centres that Australia has, and many have none. In the countries where they do exist, such as England, they appear to be in decline or static along with legal aid generally. At present no society is placing as much faith in this form of aid as Australia is doing.[3]

The future will almost certainly also involve an increasing use by many societies of low cost legal clinics, legal expense insurance and mediation processes in court and community settings. Interestingly, very few societies are showing the same interest in contingency fees that Australia is currently.

Is it then a good or bad future? As with many of these complex issues it depends on how you look at it. The idea of extensive publicly finded legal aid is history, that is certain. We will never see again the legal aid schemes covering 70% of the population as they did originally in England and Wales and The Netherlands. And in some ways that is good. In principle there is no reason why legal aid should be expected to provide all the help needed, nor why there was little thought given to ways of processing disputes other than using lawyers and going to court.

It may also be a better future for the citizens in some important respects. First, the trends indicate a de-emphasising of court-based dispute resolution and that is a good thing (within limits). Second, there should be some degree of choice for citizens as to where and how they purchase their legal services Third, the mix of public, community-based, insurance and private market provision of legal services may be very useful. One of the benefits of a range of providers from public to private legal services is that they may act to keep each other honest, introduce a bit more competition, and perhaps even improve the quality of the services that consumers receive.

But on the other hand there is no guarantee that low income earners will be as well served as they would be by a thriving, comprehensive, and well-funded legal aid scheme. The ideal would probably be to have a healthy diversity in legal services provision, an expanded range of dispute processing mechanisms, and a healthy legal aid scheme. The first two parts of this model seem to be almost inevitable in Europe and Australia. It is only the third part, the future of legal aid that is still up in the air. But the big fear is that if our societies do emphasise the first two parts will they slowly let the third part wither and die?

References

1. The recent report *Access to Justice: An Action Plan*, Canberra, AGPS, 1994 (chaired by Ronald Sackville) was but the most recent of many reports canvassing reforms in the general area of access to justice, including legal aid.
2. The authors were part of a group of four Australians who attended the 'Legal Aid in the Post Welfare State Society' Conference sponsored by the Dutch Ministry of Justice, held in The Hague, The Netherlands, in April 1994.
3. This observation is made on the basis of discussions at The Hague Conference, and at the 'Symposiun on the Future of Community-Based Legal Aid' sponsored by the London-based Legal Action Group at which there were speakers from North America, England and Australia. The authors also visited law centres in London and met with staff from the UK Law Centres Federation. The total number of law centres in the UK has declined over the last few years but may now have stabilised.

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