Maintaining the rule of law

The role of the attorney general

The Hon Bob Debus MP, Attorney General of New South Wales, delivered the following address at the World Conference of Advocates and Barristers in Hong Kong on 15 April 2006.

The role of the attorney general in common law countries, it has often been pointed out, is a strange hybrid of lawyer and politician. We straddle the world of the parliament, the judiciary, and the demands of public life. As hybrid beasts, we may find ourselves hunted like the crocodile and ravaged in the corn (in the words of Bob Dylan): the universal target of hunting parties, our hooves, pelts and horns the proud trophies of some media baron or political rival.

As attorney general, I find myself called upon to explain and justify the peculiarities of the law to my parliamentary colleagues: to explain to the judges the foibles and irrationalities of the media. And explaining – and where possible justifying – what I may venture to call the foibles and irrationalities of the law to victims groups and the wider public.

In the words of another singer, the Man in Black, we walk the line. And an attorney who strays from the line – who veers too far in the direction of populism or of politics – can play a serious role in undermining the separation of powers.

To mix my metaphors still further, instead of a Jedi Knight striving to preserve the rule of law and the liberty of the subject, it is too easy to go over to the dark side of the force: to become Darth Vader.

I venture to suggest that the current attorney general of the United States, using his knowledge of the law to find legal ways to justify and exonerate torture of suspects in the name of the war on terror, is well on the way to presiding over the Death Star.

History and context

But before I elaborate on my ruminations on the role of the attorney general in modern society – for whatever value those may have – I should perhaps give you a little of the historical context as to the legal situation in the state of New South Wales.

NSW, like Hong Kong, is not only a former British colony, with the inheritance of English legal traditions and customs; but established as a former English penal colony, in effect a prison, our stately sandstone courthouses, police stations and prisons built on the labour and suffering of chained Irish revolutionaries, London pickpockets and Liverpool prostitutes.

The first attorney general of New South Wales was a half pay officer with service in the Napoleonic war, Saxe Bannister. Bannister arrived in the colony in 1824 and left two years later after fighting a duel with Robert Wardell, a lawyer and the editor of *The Australian* newspaper, an adventure from which both men emerged unscathed.[1]

The establishment of responsible government in 1856 altered the attorney general from a government official to an elected minister.

The question of whether the attorney general should be a member of the Cabinet was the source of some disagreement in the colony. The attorney was in and out of Cabinet until 1878, when the premier of the day (Farnell), having found it awfully difficult to convince a member of the Bar from the lower house to accept the office of attorney general without a promotion into the Cabinet, did so.[2]

'We are the Jedi Knights of the politico legal system'

Contrast with British AG

To this day the attorney general of NSW remains a member of the Cabinet. This is of course in contrast to the British circumstance.

Over the last 150 years the British position has moved closer to what has been described as 'independent aloofness'. This is taken to mean that the attorney general should not be involved in questions of government policy, should not engage in robust political debate except in relation to his portfolio, and should be generally non-confrontational with respect to party politics.[3] The attorney's role is intended to be that of a guardian of the public interest.

The present British attorney general, Lord Goldsmith, is perhaps best known for the advice he provided Prime Minister Blair on the legality of the Iraq War. He was widely reported at the time to have warned the prime minister that the use of force against Iraq may be illegal and suggested that UN approval be sought. What a sensible fellow.

The point perhaps is that detachment from the dictates of Cabinet solidarity can improve the transparency of critical decision-making processes. Much of course depends on the individual from whom the information is sought. The recent British experience stands in stark contrast to the apparent conduct of the attorney-general of the United States, who is in Cabinet and whose advice on a range of matters associated with the Iraq War was tendentious to say the least. I will return to this episode in US history shortly.

Australia / NSW

Although there are striking practical and political differences between a British

and an Australian attorney general, Australia's adherence to the Westminster system has been powerful and remains so.

Our Supreme Court judges parade through the streets at the start of law term in their scarlet robes and long horse hair wigs, after attendance at a ceremonial Anglican church service. Only recently have services at the churches of other faiths been added to the pageantry of the calendar.

Our judges are appointed by the governor on the recommendation of the attorney general of the day, after discreet consultation but no public process – unlike of course the American system. We do not have a process where judicial nominees are vetted by a public committee – some may say to our detriment.

On the other hand, we do not have the spectacle of judges running for election and conducting million dollar advertising campaigns attacking each other's sentencing record – I am bold enough to assert that this is to our very great advantage.

I shall try not to weary you much further with our particular circumstances but it is also relevant to know that New South Wales is Australia's most populous state, and the one most afflicted by tabloid journalism. Indeed, New South Wales has the distinction of having exported to London and New York eminent practitioners of the tabloid art of which one of the main staples is the law and order scare or moral panic. Lenient sentences, paroled paedophiles, overly comfortable prison conditions are their meat and drink. It has been an essential feature of recent election campaigns that the major political parties seek to outdo one another in calling for tougher sanctions against offenders.

In our system as in many other Commonwealth countries, the attorney-general of the day, as I mentioned earlier, is called upon to straddle law and politics with differing degrees of ease and success.

The Hon Bob Debus MP, Attorney General of New South Wales delivers his address at the conference in Hong Kong.

Powers of a NSW attorney general

The attorney has the right to represent the state in major constitutional cases and indeed retains the right of appearance in a private capacity. My predecessor, an eminent QC, exercised the right to argue a case in person from time to time. It must be said to have had a very alarming effect when he appeared in full regalia, without warning to argue a routine case before a local magistrate or a perplexed Fair Trading Tribunal.

The attorney general in NSW until very recently decided who among the leaders of the Bar would be elevated to the ranks of silks or QCs. Several were audacious enough to confer this privilege upon themselves.

More seriously, the attorney in NSW until recently had the power to make key prosecution decisions, including the ability to 'no bill' cases. The creation of the director of public prosecutions in 1986 has greatly reduced the potential for politicisation of prosecution decisions, although the attorney retains residual powers which could be misused and are generally held in check more by convention than legislation.

The dangers inherent in political interference in prosecutions are, of course, only too acute.

Role of modern attorney general

Having now mentioned some of the mysteries of attorneys general past I propose to sketch an outline of what I consider to be the mark of a very modern attorney general.

I am a person of the left, a pre-New Labour Labor Party person who believes that in general the solutions to social problems do not lie in putting more disadvantaged people in prison. I am a person who believes in investing in more teachers rather than more police, more assistance for the poverty stricken single mother rather than alleging welfare theft. In the modern world these views are so marginal as to be extremely eccentric.

However, I have found that among other civil libertarians, like minded and educated people, there can be a very limited understanding of the media and the political process that result in increased sentences and a more punitive approach. The legal profession, and middle class professionals generally, I believe do not sufficiently understand the power and sophistication of forms such as talkback radio or tabloid newspapers.

As a lawyer I was trained in a rather stern black letter law school, which valued adherence to the principles of English law as back far as the Magna Carta and beyond. Our general credo was that if a

legal principle was good enough for William the Conqueror, it was good enough for us.

However, as attorney general I have also found it to be my role to ensure that legal principles are not preserved simply because they are venerable or reflect the stature of the court.

Sexual assault

In NSW less than 10 per cent of the more than seven thousand reports by victims of sexual assault result in guilty verdicts.

It's an entirely unacceptable record. And it is cold comfort to note that of other jurisdictions. *The Guardian* newspaper for example recently reported (30 March 2006) that about five per cent per cent of rapes reported in England and Wales ended in a conviction.

While the great majority of these complaints do not proceed as far as charges by police it is undeniably the case that for the small percentage of alleged sexual assault victims whose case reaches trial, the processes of the court and the legal profession can have a most traumatic effect.

The court's processes can be unsettling and can defeat the will of a spirited, honest complainant.

The adversarial system can mean that the victim is treated as at best an irrelevance, whose interests are not consulted in the process of prosecution or of scheduling court dates. At worst, the victim of sexual assault will be treated by defence counsel as the enemy and be subjected to massive and hostile attack under cross examination.

The justifiable – indeed laudable – concern of our criminal justice system to preserve the rights of the accused and the presumption of innocence can and has resulted in multiple trials, retrials and appeals.

These cases have a propensity to become the catalyst for powerful media attacks upon the judiciary and the courts, the genesis of easy slogans attacking our legal system.

Many lawyers, and certainly the defence Bar, are inclined to dig in at this point. They see the protection of the rights of the accused as the pinnacle of the criminal law, and resist what they see as any erosion of those rights.

I on the other hand don't see much point in a sexual assault victim having anxiety and fear levels elevated as a result of arcane courtroom processes.

Victims of crime should not be treated as simply another witness in the parade of witnesses. This is not to say they should be treated with deference, but with simple respect and courtesy.

The Attorney General chats with Eric Martinega of the Zimbabwe Bar.

In NSW we have made changes to prevent – as best we can – the re-victimisation of a complainant. These include:

- preventing an unrepresented accused from cross-examining victims and ensuring that improper questions put to witnesses in cross-examination are disallowed
- enabling victims in sexual offence proceedings to use alternative arrangements for giving evidence, including CCTV or video link, and screens or other seating arrangements to shield the complainant from the accused.

Although these measures are opposed by various legal purists, they do not frustrate or distort the justice process. They assist it. Ultimately, we hope that a range of reforms – encompassing health, law enforcement and court processes – will see more people come forward and more safe convictions.

Victims

Very often, as I have already hinted, innovations are criticised by the legal profession as simply pandering to the mob. My experience, to the contrary, has been that it is more than possible to make reforms which accommodate legitimate community views without doing violence to principles we lawyers hold dear. Reforms of which even William the Conqueror would see the good sense.

The New South Wales Government has, for example, systematically introduced Victim Impact Statements into the courts. When these measures were first adopted, there was strong criticism from the profession that these statements would dangerously distort the conduct of a criminal trial. It was alleged that statements about personal loss would see an escalation of sentences and give too much weight to the victim's interests.

What has instead happened is that victims and their families are contented to read a short, court-approved statement that means they have not been entirely excluded from the trial process.

As another example, a matter now before the New South Wales Parliament is the introduction of majority verdicts in criminal trials. My government has proposed verdicts of eleven-to-one. There is considerable debate about this measure, with some claiming the change will result in the certain imprisonment of the innocent. I have had a most lively public debate with my local Bar Association on the subject, with whom I normally have the most cordial relations. We have been reduced to quoting bits of the Henry Fonda movie *Twelve Angry Men* at each other in the broadsheet press – to the bafflement of almost everyone under 40.

Others see it as an appropriate administrative reform that will have no impact other than to ensure that lengthy criminal trials are not aborted at the last minute due to one eccentric or frankly mad juror holding wildly insupportable views. I subscribe to the latter view.

In these situations, I see it as the role of the attorney to press for principled and well thought out law reform, alert to the legitimate concerns of the public but without succumbing to the more simplistic solutions, which may be proffered on talkback radio. This is not always an easy line to draw, and in my own case it will be for others, and history, to judge, as to whether I have succeeded.

Tabloid media

Talkback radio is a powerful phenomenon in Australia, as it is in a number of other countries. And it is a phenomenon we ignore at our peril.

Talkback radio is an important means by which conservative opinion, especially in the area of law and order, is galvanised. I have seen it described in a recent book by David Foster Wallace[4] as a form of electronic town meeting where emotions are inflamed and arguments are refined.

On talkback radio opinions about courts, judges and the law are aired, rephrased and boiled down to a series of propositions with which one may disagree but which are coherent in their own terms and which are espoused in daily life with enormous confidence and energy. The liberal intelligentsia – at least this is true in Australia – are meanwhile reading broadsheet newspapers and listening to classical music on FM radio, oblivious to the debates raging elsewhere.

I know from personal experience that an intelligent and articulate talkback radio host, or tabloid newspaper editor, can muster a campaign virtually overnight of thousands of letters or hundreds of telephones and faxes. In one case in my personal experience after a magistrate imposed what was widely considered to be a lenient sentence upon a young man who had tortured a kitten, more than fifteen thousand letters were received in a week. I might say that this is fourteen thousand, nine hundred and fifty more letters than were ever received in my office protesting about atrocious treatment of a human being. But this is a curiosity of human nature.

The response of a lawyer in such a case may well be to ignore the fifteen thousand letters about the kitten: to say that under no circumstances should the torture of a kitten be accorded a harsher penalty under the law than the torture of a human being.

The response of a politician will be to assume that for every hundred people writing letters about the kitten, there will be ten thousand in the silent majority who think that the torture of a kitten is abhorrent, and who will welcome the announcement of new laws incarcerating perpetrators. And vote accordingly.

The thankless task of an attorney general is, somehow, to produce a principled outcome which nevertheless addresses the deeply felt concerns of the public.

The response of many well educated, liberally minded legal professionals to dilemmas of this kind is to adopt a tone of vague hauteur about the tendencies of the mass media and a lofty view that politicians should simply take the high moral ground and ignore such campaigns. As a twenty year veteran of this sort of culture war, I can say that such an attitude is simply impractical.

In a democracy, the public will not tolerate being told that its fundamental beliefs about law and the judicial system are wrong and that they should trust their betters to know what is good for them. We have to engage with publicly held beliefs and address, if we can, the underlying problems of social unrest and public disorder which are the circumstances that actually make people receptive to punitive and simplistic solutions. But this can never be at the cost of compromising our obligations to ensure the fairness and impartiality of the law.

Judicial and prosecutorial decisions in their nature depend on the fine balance of the use of discretion and of insight, based on the evidence, into individual circumstances. When the use of such discretion is tainted by raw political considerations – the desire to punish a political rival, to show leniency to a political enemy – the system totters.

The same is true when an offender is given a harsh sentence simply because his or her trial is heard in an election year.

For this reason, although many other politicians may never understand such a position, it is the traditional role of an attorney general to defend and preserve the independence of the judiciary. In Australia, this function has been the occasional subject of lively debate. The convention is that judges do not comment on their decisions outside court. Their reasons are given in their judgments, from the bench, and it would be entirely inappropriate – and possibly appellable for them to expand upon those reasons outside the courtroom.

When an individual judicial decision – a sentence perceived to be lenient, for example, causes outrage and front page headlines – convention has it that it is for the attorney-general of the day to speak out and defend the institution.

This is a convention that I have adhered to, I would say, with more zeal than many of my generation of attorneys general. In fact, my contemporary as Commonwealth attorney general, a

prominent QC in his own state and one steeped in the conventions of the law, explicitly took the view that in the modern age it was for judges to defend themselves as they may. He encouraged them to speak out if they felt so moved, but strongly asserted that if he disagreed with a judicial decision, far from defending the judiciary, he preserved his right to attack the errant judge on behalf of the executive.

As a contemporary attorney general, my view has been that it is not the role of the attorney to defend each and every decision. Some decisions can be in fact puzzling, and in that situation one can only throw oneself on the mercy of the appellate courts.

But I do defend the institution of the judiciary, and will stand against the torrent of ill informed and emotional attacks upon judges which pour out every day. Attacks often made by those who have not sat through a single day of evidence.

Why does this matter? I think it matters because we are at a juncture in our history when, under the threat of terrorism, the liberties of ordinary citizens are being stripped away. The judiciary is one of the vital defences of the liberty of the subject.

When preparing for today's discussion, I had before me some articles denouncing the recent role played by the attorney general of the United States, Alberto Gonzales, to whom I alluded earlier.

Thirty years ago President Richard Nixon and his attorney general were brought to ruin and disgrace when it was disclosed that they had supported illegal surveillance activities.

Today's White House has 'pushed the boundaries of executive power in ways that make Richard Nixon's White House look like a model for the system of checks and balances'.[5]

Under the ever expanding umbrella of response to terrorism, attorneys general across the Western world are being asked to sanction unprecedented expansions of police power.

Frequently, those who are to be the subject of torture, of surveillance, of preventative detention are unattractive, marginalised members of society. The ordinary citizen, seized by an entirely legitimate fear of bombs in subways and hijackers on planes, is very sympathetic to the claim that police need unprecedented powers.

It is the task of an attorney general, in my experience, to point out that there is no guarantee that such extraordinary powers will not be used in due course against the ordinary citizen. That they will not be used corruptly. It is all too easy for those engaged in the war against terror to erode and undermine the application of judicial scrutiny, the requirements for due process, for evidence, for checks and balances.

And I would argue that they are aided in this quest by the too easy acceptance of various popular slogans abusive of the judiciary.

There has probably never been a time in modern history that judges and individual judicial decisions were not criticised in newspapers, on street corners and in pamphlets. Some such criticism is surely an indicator of a healthy democracy.

But we ignore at our peril the vital role of the judiciary in protecting the freedoms of the citizen.

In the United States, we have recently seen the unedifying spectacle of an attorney general assisting the president in evolving a legal framework for torture and secret prisons; for warrantless surveillance of American citizens. He has done so in the face of opposition, particularly from Senator John McCain, a man who withstood violent torture over a period of five years by his captors in North Vietnam (withstood it, not least, because of his belief that his own side would not stoop to such barbarism).

Conversely, I was recently reminded by the American historian, Alfred McCoy[6], who has written extensively on this subject, that late last year, the English House of Lords, when asked to consider the deportation of Muslims convicted on evidence which had been procured by torture by foreign officials, set down as a 'bedrock moral principle' that torture was anathema to the English legal system.

Conclusion

The rule of law is the foundation of civil society. Without it, we are reduced to a Hobbesian state of nature, red in tooth and claw. It is all too easy to undermine the faith of the citizen in the fairness and integrity of the courts, and also all too easy for an astute politician to distort the law and legal processes to his or her own ends.

Our present system to an extent depends on the creative tension between the courts and the parliament, and the scrutiny of the media. The role of the attorney general in many ways traverses this web of countervailing forces. From personal experience I can say that in the heat of battle the 'creative' element of creative tension is not always readily apparent. However, after more than a decade at the centre of the most heated Australian law and order debates, I can say that very few attorneys general have gone to the dark side. We are the Jedi Knights of the politico legal system and will strive to remain so.

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1 CH Currey, *Australian Dictionary of Biography*, Vol 1, 1788-1850, pp. 55-56.

2 'Parliamentary reports', *Sydney Morning Herald*, 29 March 1878, p.3.

3 LJ King, 'The attorney general, politics and the judiciary' (July 2000) 74 *ALJ* 444 at 445.

4 David Foster Wallace in *Consider the Lobster and Other Essays*, Abacus Books, 2005.

5 see Ratner, M. *Above the Law* www.salon.com/opinion/feature/2006/03/31.

6 McCoy's latest book is *A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror* (Metropolitan Books, The American Empire Project, 2006). [Editor's note: A copy of McCoy's book will be reviewed by Toner SC in the next issue of *Bar News*].