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THE RULE OF LAW AND A DIRECTOR OF PUBLIC PROSECUTIONS

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The title of this conference is ***"The rule of law, the courts and constitutions"***. That title embraces the role of governments which are based upon constitutions and, in our system, the separation of powers as a feature of the structure of government; it embraces the courts and an independent judiciary; and it embraces prosecutors, who are part of government and who work in the courts, applying and observing the rule of law in particular ways.

In this address (aided by Richard Gilbert's suggestions about what I should include) I propose to say something about my understanding of the rule of law and its relevance to prosecutors; about some aspects of the criminal justice system in that context; about the independence and accountability of the prosecutor – including some of my experiences over the last 16 years as a Director of Public Prosecutions and my own "wish list" for the future (if, as Richard put it, I could wave a legislative wand and make the changes I would like).

RULE OF LAW

I would add one word to the description we use and make it "the just rule of law". I commend that for consideration.

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

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

So: music or green frog – the rule of law itself is part of our lives and must be applied for our lives to be properly lived and our rights protected. So far as the criminal justice system is concerned, I think there are at least six features of the just rule of law (among many more) that should be noted for present purposes.

1. The government must be bound (as far as possible) by the same laws that bind the individual: that extends to prosecutors as agents of the community.
2. The law must possess characteristics of certainty, generality and equality. Certainty requires that the law must be prospective, open, clear and relatively stable. Laws must be of general application to all subjects – and they must apply equally to all.
3. 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.
4. There must be an independent judiciary, so that it may be relied upon to apply the law.
5. The principles of procedural fairness must be observed in all hearings.
6. There must be an enlightened public opinion – a public spirit or attitude favouring the application of these propositions.

CRIMINAL JUSTICE

Government seeks to impose order and to resolve disputes by the criminal justice system. That is a manifestation of the requirements of the rule of law that there be laws prohibiting and protecting against private violence and coercion, general lawlessness and anarchy and that there be institutions and procedures that are capable of enforcing the law. State action in those respects is taken in the following areas and must also be subject to the other principles of the just rule of law.

Laws

Government makes criminal laws (among many others). We should ask why – what is the role of the criminal law? Its overall purpose must surely be the protection of the community, including the protection of the human rights of all affected by the law. *"The role of law is not to impose a particular moral or political agenda, but to*

maintain order, facilitate government, and protect human rights. The criminal law, in particular, should generally be governed by the 'harm principle', expanded to permit the protection of the vulnerable and to prevent serious alarm or offence… The system of justice should be fair, and penal sanctions accepted as a form of communal self-defence, subject to the constraint that responses should not exceed those reasonably necessary to protect the community and its members."[1] That approach to the purposes of the criminal law provides strong guidance for the work of prosecutors generally.

The protection of human rights has been for centuries one of the main objects of the application of the rule of law by government. As Thomas Jefferson wrote in 1795: *"It is to secure our rights that we resort to government at all."* To him, liberty was the greatest inalienable human right and the *raison d'etre* of government was to preserve liberty; not absolute liberty but freedom circumscribed by the observance of the rights of others, sometimes called responsibility.

One feature of the just rule of law that I have mentioned is that the law should be and remain reasonably in accordance with informed public opinion and general social values and there must be some mechanism (formal or informal) for ensuring that.

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

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

However, our experience of lawmaking in modern times is at odds with these requirements. It is not overstating the situation to say that on occasions the criminal lawmakers have taken their drafting instructions from the most prominent current ranting of the tabloid media. There have been many examples of inappropriate knee-jerk political reaction producing legislative responses, often ultimately demonstrating the truth of the old adage that "bad cases make bad law"; but one will suffice. When legislation was being introduced for standard non-parole periods (Division 1A, Part 4 of the *Crimes (Sentencing Procedure) Act* 1999) a report of a particularly nasty case appeared the same day on the front page of the Daily Telegraph with a complaint about the leniency of the sentence imposed. That is how sub-sections 61M(1) and (2) of the *Crimes Act* 1900 came to be included in the Table of Standard Non-Parole Periods (numbered as 9A and 9B at the last moment and still so numbered).

Sometimes legislation is the product of the most informal and/or obscure of procedures. Section 51B of the *Crimes Act* 1900 relating to police pursuits was inserted this year and became operational on 18 March 2010. It was driven by Police

[1] "*The Quest for Justice*", Ken Crispin, Scribe, 2010 (page 54)

Association representations to the Attorney General in which draft legislation was suggested, drawing upon the Queensland version, that would have been substantially unworkable and by the Association's calls upon the Premier to act in response to an individual (and tragic) case. Direct consultations by the Attorney General, fortunately, resulted in legislation that can be effective (and has been used frequently). I suspect that the consultations were made primarily to strengthen the Minister's hand in dealing with the Police representations, but they did serve a useful purpose. That is an instance, however, of lawmaking with minimal consultation and in great haste. Sometimes my Office is not consulted at all about planned criminal legislation. At other times, however, we have been able to have substantial input and I suggest that prosecutors have a proper role to play in that process as part of the informed opinion that should be sought.

In his valedictory speech in the Legislative Assembly on 23 November 2006 the former Attorney General, Bob Debus, boasted of the 258 legal bills passed through the Parliament in the previous six years, being one third of all bills passed. The pace has not slackened under the present Attorney General. Much of this legislation, at least so far as the criminal law is concerned, has been to tinker at the margins of substance and procedure in an *ad hoc* fashion, often (as with changes to bail laws) in response to unusual and atypical situations that have attracted public attention and to appease the latest demand for ever more punitive measures to be applied in the criminal justice system. (I shall say more about that trend.)

Investigation

The rule of law raises its head at every stage of the criminal investigation process. So it is that we have both statute and common law affecting detention, search and seizure, interrogation, eavesdropping and the legal consequences for subsequent court proceedings of dealings with individual rights.

Prosecution

The conduct of prosecutors is guided by the principles of the rule of law, laid down in legislation, the common law and also prosecution guidelines with statutory force to be found in all modern prosecution agencies. The International Association of Prosecutors has prescribed minimum standards to which Australian Directors of Public Prosecutions (among many others) adhere. (I shall say more about prosecutorial independence and accountability a little later.)

Defence

The adversarial system of justice, especially, requires what is sometimes called "equality of arms". In this system the defended criminal process is not quite a search for the truth – rather, the prosecution makes its case and the defence seeks to attack it and/or to mount an alternative case. The result depends on whether or not the prosecution case is ultimately accepted as having been made out beyond reasonable doubt. Equal skills on both sides serve best to optimise the outcome of a contested hearing before an impartial umpire.

In NSW, with a system of Public Defenders, *pro bono* representation and reasonably available legal aid, this is not a major concern; although there is always room for greater legal aid funding (and funding of the prosecution, for that matter).

Judiciary

While each arm of government, in its own way, makes laws or rules (the legislature 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 as well as its own. It is obviously essential that it performs those functions independently of the other two branches of government and also independently of inappropriate media or other influence from outside.

Punishment

The criminal justice process ends, after a finding of guilt, with the imposition of a penalty. The limits of available penalties are set, these days, by the legislature. In order for justice to be able to be done it is essential that the discretion of the sentencing court not be unduly fettered. The just rule of law operates here, I would suggest, by requiring that the penalties available and imposed be in accord with what the community generally would regard as just.

Prescribing unnecessarily harsh penalties, or setting mandatory penalties for all but the most minor of regulatory offences, removes the ability of the court to impose just penalties. It is arguable, too, that restricting the discretion of the court by such schemes as tables of standard non-parole periods unduly interferes with the court's ability to do justice. If justice is not seen to be done, the criminal justice process loses general public confidence and acceptance, with potentially serious consequences – even vigilantism.

INDEPENDENCE AND ACCOUNTABILITY OF THE PROSECUTION

In the Canadian Supreme Court case of **Boucher v The Queen** (1954) 110 CCC 263 at p 270 Rand J said of the role of the prosecution:

> *"It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."*

That quotation may be found in my Prosecution Guideline 2. It imports requirements to exercise judgment at various stages of a prosecution – in the making of decisions, the selection of evidence, the framing of arguments, communications with others involved in the process and so on. The making of judgments is necessarily imprecise – it is not a scientifically exact process, a process for which there is only one right outcome measurable against established and invariable benchmarks. It requires the balancing of competing considerations, using one's knowledge, experience and often values and commonsense.

It is especially in respect of the exercise of functions of that kind, the making of judgment calls, that independence of decision making from inappropriate influences and considerations becomes vital. It is also in respect of those decisions that demands may be made for accountability, the flipside of independence – for officers to be held to account, to be held responsible, for such decisions and conduct. Those making the demands need to know how to measure what is done in order to be able to assess it – and those carrying out the functions must be able to demonstrate that they have been performed independently, in accordance with the rules and standards required.

Also from Canada but much later, in an address during the XXth Annual Conference of the Canadian Federal Prosecution Service in June 2000, then Deputy Minister of Justice and Deputy Attorney General of Canada, Morris Rosenberg, said:

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

He also referred to the prosecutor's heavy obligation to conduct himself (or herself) with dignity and fairness; and to take into account what the public interest demands. All of that imports more by way of judgment and balance, working within the parameters that have been established over time and as a result of trial and error. All of that underlines the importance of independence and the need for accountability.

It is said that the prosecutor acts in the general public interest and so it must be. That is where the prosecutor's ultimate loyalty and responsibility lie. Defining what is meant by that deceptively short phrase is not always easy in practice. What is "in the public interest" is different, of course, from what is "of interest to the public". The general public interest requires consideration of the present requirements for action, an appreciation of how such matters have been addressed in the past and a prediction of the likely impact of a particular course in the future. There is an historical continuum to be considered and that sometimes makes a controversial matter difficult to resolve in a way that is both in the general public interest and immediately acceptable to most, if not all, interested persons or even members of the general public. Indeed, in many situations there may be ongoing controversy and in that situation the prosecutor must maintain proper independence and be able to account for his or her conduct.

The prosecutor must strive to act by these principles in all situations. It is not part of the prosecutor's brief to be popular. (Indeed, we go to work every day knowing that most of the decisions we make will displease somebody.) It is no part of the prosecution function to set out to please a party to proceedings, a victim of crime, a government, the media or any individual or section of society or improperly to do their bidding (whether the views of the person or persons concerned are communicated directly, indirectly or even by implication).

Independence in prosecution decision making is of crucial importance in our legal systems in order to preserve the separation of powers, the just rule of law and, ultimately, our form of democracy. It is the reason why Directors of Public Prosecutions have been created (or are being created) in many jurisdictions – independent officers by law. It is the primary means by which general community acceptance of and support for our work may be guaranteed, whether we practise as DPPs or elsewhere as officers of Attorneys General or otherwise of government. General community acceptance and support are vital to the effective functioning of the criminal justice system and we play an important role in maintaining that.

Independence is made manifest in many practical ways.

- There should be legislative prescription of the functions and accountabilities of the prosecutor.
- There should be tenure in office of the senior prosecutor, preferably on similar terms to those properly provided for judges, and security of employment for more junior prosecutors. Protection against arbitrary dismissal is a minimum requirement.
- Appropriate resources must be provided to the prosecutor to enable that function to be carried out effectively and efficiently.
- Proper leadership, training and support must be provided to prosecutors to enable them to attain and maintain appropriately high professional standards.
- Publicly available policies and/or guidelines should be promulgated to serve as benchmarks against which the performance of prosecutors may be assessed.
- Politicians and public commentators must learn and respect the rules that surround the execution of the prosecution function and refrain from inappropriate attack, directly or indirectly (just as the judiciary should be spared such attack). They should also refrain from improperly seeking to influence the outcome of proceedings.

Threats to the independence of prosecutors exist wherever these requirements are not met or are not properly satisfied. I am pleased to note, however, that in my 16 years as DPP I have never been the subject of any improper attempt to influence my decisions or to impinge upon my independence in the prosecution function (other than the parliamentary attempt that I shall come to).

The other side of the independence coin is accountability – the prosecutor must not have a completely free rein to do as he or she feels like doing. Just as in almost all that a prosecutor does, there is a balance between these considerations. Unless the function

is properly accountable to the people, then the people will not know what is being done in their name and how it is being done and they will then not be able to assess it, to respect it and to support its execution. Disorder and vigilantism may gain a hold.

Accountability is traditionally achieved by a variety of mechanisms.

- The chief prosecutor is made accountable, through the appropriate Minister, to the Parliament.
- The Minister is able to inquire and entitled to be informed about any matter of concern in the conduct of the prosecutor's official functions.
- The prosecutor is required to report on a regular basis (typically by way of an Annual Report to Parliament). There will be regular reporting on the expenditure of public funds which must be appropriately overseen by the relevant Treasury and auditing officials.
- Prosecution Policy and/or Guidelines are promulgated. They inform the community and all agencies coming in contact with the prosecution of the standards that will be met and the guideposts that will be followed in the course of the prosecution function. That enables action to be assessed against those standards and guideposts to ensure that it is accountable in that way.
- Reasons for decisions are given to those with a legitimate interest in having them. (Of course, there are limitations on that.)
- In the course of the prosecution process, prosecutors are required to consult with police, victims and some witnesses about important decisions to be taken (eg changing charges, discontinuing matters, appealing or not appealing) before the decisions are made. The purpose is to ensure that the others are informed about what is happening and also have the opportunity to make their views known, even if they may not ultimately prevail.
- The prosecutor's principal core function – the prosecution of matters in court – takes place under public observation: in open courts where the public, the media, police and so on may come and watch and listen. Defence representatives are also keen observers and reporters of the conduct of prosecutors.
- The media report on prosecution proceedings and conduct – another effective means of ensuring accountability.
- Court decisions are usually publicly available and are usually subject to appeal procedures in which the conduct of the prosecutor may be further examined if necessary.

One unacceptable means of attempting to ensure accountability of the prosecutor is to establish any sort of parliamentary oversight committee over the agency – a move discussed in NSW in the past. In my time as DPP, a private Member's Bill was introduced by the Opposition in late 1995 that would have established a Parliamentary Joint Committee on the Office of the Director of Public Prosecutions. The Committee would have had the power, *inter alia*, *"to monitor and to review the exercise by the Director of the functions of the Director under this* [the Director of Public Prosecutions Act, as amended] *or any other Act"*. In the absence of Government support it did not succeed.

The Bill was resurrected in 1997 but the motion to have it read a second time was defeated. It surfaced again in 2000, 2001, 2002, 2003 and by reference in 2005. In 2007 it was Opposition policy during the election campaign but we have not sighted it since. Hopefully it has died – because any such breach of the separation of powers and any such interference of the legislature with the prosecution would be contrary to rule of law principles in this State. I have not heard the Bill mentioned again by the present State Opposition.

Another unacceptable way of making the prosecutor accountable and of measuring "success" is by reference to results. This issue often arises in the context of demands made by the bean counters in government for the operations of the prosecutor to be made more "efficient" – by which they mean cheaper – and of continual budget cuts misdescribed as the production of "efficiency dividends" or "efficiency savings". Financial power over a prosecution agency can affect independence, but that position has not been reached in NSW for the last 23 years at least (since the ODPP began). We still do what we do independently, even if less professionally and effectively at times because of diminished resources – it is just that very soon there will be some things that we simply will not be able to afford to do at all.

The conviction rates achieved by my Office are broadly in line with results achieved by DPP Offices in similar jurisdictions worldwide. We all measure success, not by results but by the professional quality, timeliness and effectiveness of what we do. The results we achieve are not dependent only upon our conduct – they are the product of a process in which many actors take part.

I could possibly give the State a conviction rate like the Japanese prosecutors of 99.99% - but I would be discontinuing a lot of prosecutions that come to us and declining to advise that others commence. I think a measured application of principle and professionalism is preferable. We have a criminal justice process that is predicated on the fact that sometimes accused persons will be acquitted and we should not be dismayed when that occurs after a properly conducted trial.

Prosecutors are not perfect, of course and we should be factual, clear and direct in responding to criticism. If we are wrong, then we should admit it, apologise and do everything reasonable to avoid error in the future. Practices vary from place to place, but in NSW anyone with an interest in a matter may make representations to the DPP about the conduct of prosecutions, during or after the proceedings. All such correspondence is taken seriously and provided with a response (if a return address is supplied).

It is important to have accurate and complete records of action taken in order to be able to make such responses.

SOME SHARED EXPERIENCES

Kable

The importance of the doctrine of the separation of powers in our system, described well before the English settlement of Australia, is now beyond argument. 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 thought to pose a risk of violent behaviour. The Act made the DPP the moving party. (I had been appointed to the position less than two months earlier.)

Various applications and orders were made under the Act until the High Court was invited on appeal to consider its constitutionality. It held, by majority, that the legislation 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.

Mr Kable was eventually released, has not re-offended (so far as I am aware) and sued the State very successfully for compensation. (One day, I hope, my correspondence with the Attorney General about this matter may be released.)

Serious Sex Offenders

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 legislation (unlike the Kable legislation) contained many safeguards of a conventional criminal trial and the application of a full judicial process before an order could be made.

NSW then addressed this vexed area of unreformed serious sexual offenders and modelled the *Crimes (Serious Sex Offenders) Act* 2006 on the valid Queensland legislation. It enables continuing detention or extended supervision beyond the expiration of a sentence, subject to the judicial processes prescribed. The Attorney General (and, fortunately, not the DPP as in some other places) is the moving party. Many 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 mandated by the rule of law and reflected in international instruments – principles that have traditionally required an allegation of criminal conduct, procedural fairness, proof beyond reasonable doubt and a finite sentence (for that offence only). Nevertheless, it has been held to be lawful and not a breach of the doctrine of the separation of powers, for the legislature to provide generally 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 risk of danger to the community. Such a finding must necessarily be based on someone's acceptance of someone else's prediction of future dangerousness.

On 18 March 2010 the United Nations Human Rights Committee (in a case brought by Kenneth Davidson Tillman) ruled that the NSW legislation violates Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR) because it amounts to the imposition of a further penalty for the same offence (constituting double punishment) and operates retroactively. The Federal government was given 180 days to respond to the ruling. This is a significant development, for another feature of the rule of law is compliance with the requirements of international law.

In the meantime, the NSW government briefly and loudly gave notice that it wished to extend such provisions to prisoners who have committed offences of serious violence and who have not engaged satisfactorily in rehabilitation programs while incarcerated. That extension, however, seems to have been much more quietly abandoned.

Influence of Counter-Terrorism

However, extensions of law enforcement provisions and distortions of accepted rule of law principles continue to occur.

In recent years we have been exposed (again) to the threat of terrorism. Australia has been fortunate that, while preparations have been made here, no terrorist act has been carried out on our soil for decades – and certainly not since 11 September 2001. We will soon hear from Lord Goldsmith; but in an interview he gave to the Australian Financial Review earlier this month he referred to the need, while government goes about its business of protecting the lives and property of citizens, for such legal measures to allow the protection of the values on which the society is built. It requires balance – between the level of threat and the measure employed. He said that the wrong question for government to ask is: "Could I do something more that might make a difference?" The right question to ask is: "Is there something else I ought to do that is necessary to do because of the threat and which is proportionate to that threat?"

In this country we have had some exceptional provisions introduced to prepare us to combat terrorism. There is argument whether they meet the test of proportionality.

However, the vice that I wish to address is that it seems that governments have taken heart from the introduction of those extraordinary, special measures and seek to apply them to what I call "ordinary crime" – crime that will always be with us.

In recent times in NSW we have seen legislation passed providing for the issue by "eligible judges" of covert search warrants and the approval of other intrusive methods of investigation and for judicial orders to be made, again by "eligible judges", against members of organisations that may have penal consequences. The latter bodies of legislation, from South Australia and from NSW, are before the High Court. In NSW, at least, one questions the need for any such legislation. Motorcycle club members are regularly prosecuted, convicted and sentenced under previously existing laws.

(I have posted a critique of the misnamed "bikie" legislation under Speeches & Papers on the ODPP website: www.odpp.nsw.gov.au .)

Such are the difficulties rightly encountered by governments that seek to depart from well established principles of governance and the application of the rule of law. It matters not that the motives of the urgers or policy makers may be honourable. It is worth remembering the words of Justice Brandeis who in 1928 warned in his dissent (with Holmes J) in **Olmstead v United States** (277 US 438,479), a case involving the use by law enforcement officers of unlawful telephone interceptions in the fight against the importation, possession and distribution of bootleg liquor:

> *"... it is also immaterial that the intrusion was in aid of law enforcement. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."*

Punitiveness

On 2 June 2010 Chief Judge Blanch of the District Court of NSW spoke at a conference of Legal Aid Commission lawyers. He drew comparisons between NSW and Victoria. In 2009 (on average each day) there were 150 people in custody per 100,000 in NSW and half that in Victoria. In NSW for the 2008-09 financial year just over a billion dollars were spent on Corrective Services. If we did whatever is being done in Victoria, he said, we could spend half that amount. It presently costs an average of $205.94 per day to house an inmate full time.

It might also be remarked that if imprisonment reduces criminal offending, then NSW's crime rates should be significantly lower than those in Victoria – but they are not. While crime rates are stable or falling throughout Australia, rates of personal assault, murder, robbery, break-ins, burglary and car theft are all lower in Victoria than in NSW.

Furthermore, in NSW 25% of the prison population is unsentenced – on remand. In Victoria the figure is 18% (where the delays in coming to trial, however, are significantly greater than in NSW).

Bail

The *Bail Act* 1978 (NSW) was passed substantially to address a burgeoning number of prisoners on remand. Presumptions in favour of bail were enacted in some cases and offences and situations stipulated where no presumption applied or there was a presumption against bail. We seem to have come full circle with the progressively legislated removal of presumptions in favour of bail and the enactment of presumptions against with a corresponding rise in the remand population. These piecemeal amendments have often been in response to individual and atypical cases that have received tabloid publicity. As the NSW Bureau of Crime Statistics and Research (BOCSAR) has reported, many people refused bail have their charges withdrawn or are ultimately acquitted and many receive non-custodial dispositions of their cases. There is no recourse to compensation in such circumstances (as there is in some other countries, especially in Scandinavia).

The editorials in the Sydney Morning Herald and The Age of 20 April 2010 referred to the "Disappearing right of bail" and to the matters raised above. They said: *"As the NSW government steadily piles on new categories of serious crime in response to the latest crime scare…, ramps up mandatory sentences, restricts bail eligibility, and most recently, throws away the key for convicts perceived as unrepentant, we are entitled to ask what returns in safety we are getting from our billion-dollar-a-year jail industry. On a more humane calculation, we should be asking what damage is being done to individuals and society by this pursuit of vengeance… Of course, there will always be a few who go out and commit new crimes while on bail or parole, and set the tabloid dogs barking again at the Attorney General. If jail worked at reform, the lock-'em-up philosophy might have more appeal. Unfortunately, the statistics show NSW also has a much higher recidivism rate than Victoria."*

The Bail Reform Alliance in NSW was set up to address these issues, headed by a former magistrate.

A NSW Parliamentary Briefing Paper[2] examined the bail issue in great detail. It concluded: *"Changes to bail laws since 2002 have followed the dominant trend of making it more difficult for accused persons to obtain bail: both in relation to a range of offences, and where the accused person is regarded as a 'repeat offender'. These changes have been justified on the basis that they provide greater protection for the community against the risk that such persons will commit offences while awaiting trial. However, critics have argued that the changes have largely been ad hoc responses to particular crime incidents, and that a good case has not been made out for reforms that have undermined an accused person's right to the presumption of innocence."*

In its Crime and Justice Statistics Bureau Brief (Issue paper no. 49) of July 2010, BOCSAR reported on the operation of the bail regime and found three main anomalies:

- nearly half of those falling into the "exceptional circumstances" category were on bail at their final court appearance;

[2] "*Bail law: developments, debate and statistics*", Briefing Paper 5/2010, Lenny Roth, NSW Parliamentary Library Research Service, June 2010

- factors such as previous criminal record, number of concurrent offences and delay in finalising a case exert a much stronger influence on the risk of bail refusal than the presumption surrounding bail; and
- the risk of bail refusal was higher for those charged with offences where there was no presumption for or against bail, than for those charged with offences involving a presumption against bail.

There is a new *Bail Bill* out now for speedy public consultation. The Opposition has declared it will be repealed and replaced if enacted by this Government (and there is a change on 26 March 2011).

Juveniles

On 29 October 2010 the President of the Children's Court of NSW, Judge Marien, published an opinion piece in the Sydney Morning Herald commenting on the Ombudsman's remarks on juvenile justice in the State. He focused on the need for rehabilitation for juvenile offenders because most offending results from the immaturity of youth and their developmental needs differ from those of adults. There is a need to focus on the underlying causes of juvenile offending as early as possible. He concluded by agreeing with the Ombudsman's call *"that we be 'smarter' on juvenile justice and that we focus on intervening earlier through effective programs before things get out of hand"* – rather than just locking them up when things have got out of hand.

At that time more than half of the juveniles in custody were on remand, of whom about 17% would be acquitted or have their charges dropped. Only 20% would be sentenced to incarceration. Just over half were Aboriginal youth.

Sentencing

The Chief Judge in his paper in June put forward as another reason for the growth in the gaol population the operation of the Standard Non-Parole Period regime. The stated objective of the scheme was limited to "promoting consistency and transparency in sentencing"[3], but the intention of its proponents must also have been to increase sentences for the offences listed. (It is not known how the offences were selected. It seems that median non-parole periods for the listed offences, extracted from NSW Judicial Commission statistics, were used for the standard non-parole periods, resulting in periods ranging from 17% to 70% or more of the maximum penalties prescribed.) While, following the decision in **R v Way**[4], judges have skilfully overcome the worst of the regime, there is no doubt that it has resulted in more and longer sentences of imprisonment and judges generally feel unreasonably constrained in the exercise of proper sentencing discretion. That feeling is emphasised by trenchant and usually unjustified media criticism of "lenient" judges. It was recently announced that the Queensland government would introduce standard non-parole periods.

[3] Explanatory Note to the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill* 2002
[4] [2004] NSWCCA 131

In Monograph 33 (May 2010)[5] the NSW Judicial Commission reported that since the commencement of the standard non-parole period regime:

- the use of full-time imprisonment increased, at least in respect of items 9A and 9B (from 37.3% to 59.3% and from 57.1% to 81.3% respectively);
- lengths of non-parole periods and full terms increased in the 4 items measurable, the largest being of 125% and 60% respectively for offences against section 33 of the *Crimes Act* 1900;
- uniformity and consistency of sentences improved;
- cases in which there had been pleas of guilty (for which the scheme was not designed) also showed increases in sentences (apparently as a result of an upwards shift in sentencing patterns generally).

The Chief Judge said: *"40 years ago murderers received a life sentence but most were released after serving 10 – 15 years and that was generally regarded as the most serious of offences. It was unusual for a prisoner to spend more than 20 years in gaol. It was then generally accepted that prisoners became institutionalised after serving 5 years in gaol and that after 10 years, they would have extreme difficulty coping with living by themselves in the community. I suspect little has changed in that regard. We also should ask if our community is now any safer and less prone to crime because of the increase in sentences."*

The upwards shift in sentencing was also substantially accelerated by the *Sentencing Act* 1989 and the introduction of "truth in sentencing". It also brought in "true life" sentences, of which there are presently about 50 being served (and some lifers have died in custody). The prison population in NSW has risen 47% in the last ten years, now over 10,000.

The Chief Judge asked if we should review a number of practices, including amending or abolishing the Standard Non-Parole Period regime: *"As I have said, gaol sentences must be imposed in many cases and in some the sentence should be substantial but the real question is how much is enough. You would have a good understanding of just how difficult serving time in gaol is. As you know, in the gaol population there is an over representation of people with mental disabilities, people with very low IQs, people with personality disorders and people from severely disadvantaged backgrounds. That is a difficult environment in which to live.*

Sir Winston Churchill said in 1912: 'The mood and temper of the public in relation to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of a country. A calm, dispassionate recognition of the rights of the accused and even of the convicted criminal … (is a) sign and proof of the living virtue in it.'

The question how much is enough assumes real significance in the context of a prison budget of more than a billion dollars a year."

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

[5] "*The impact of the standard non-parole period sentencing scheme on sentencing patterns in New South Wales*"

Hill QC, an immensely experienced English criminal counsel of international repute, said this – and it remains current today:

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

The impact of the media on political action is significant and sometimes difficult to address. In the longer term, a better-informed constituency may have some useful influence on the directions taken by its political representatives. But with a short election cycle and the general attraction of vengeance to the public mind, we seem to be in for many more "law and order auctions" at election time, fuelled by the "shock jocks" of talkback radio and tabloid headlines. The Shadow Attorney General in NSW says that he has turned his back on such practices. We shall see…

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

"WISH LIST"

Some of the matters on my wish list will have become obvious from what I have already said.

If I had that legislative wand I would create a Bail Act quite unlike the draft that is out for consultation – an Act that enabled appropriate and realistic assessments to be taken into account of the likelihood of conviction and custodial sentence, the accused's prospects of appearance in court, the risk of further offending and the risk

of evidence tampering – an Act that specifically required the interests of the accused to be taken into account – an Act that assisted in reducing the number of persons in custody on remand, especially juveniles and Aborigines – an Act that reduced the number of people in custody on remand whose charges are discontinued or who are later acquitted or sentenced to non-custodial penalties.

I would abolish the standard non-parole period regime and support the exercise of judicial discretion in sentencing, enabling justice to be done between the offender and the community.

I would find more acceptable ways, if possible, of dealing with serious offenders who decline to participate in rehabilitation programs in prison – ways that do not infringe our international human rights obligations. I would expand the range of rehabilitative and therapeutic programs provided in prisons. I would provide more post-release support to prisoners to try to reduce the rate of recidivism in this State (over 40% and on some measures as high as 60%).

I would simplify the legislation governing sentencing generally – it has become horrendously complex and laborious, preventing judges and magistrates from getting the exercise right in most cases.

I would transfer the conduct of all prosecutions, including summary prosecutions, to the DPP. In my view it is inappropriate to have the principal investigators, the police, conducting prosecutions. While the proven instances of inappropriate conduct in the present system have been very few, public acceptance of the prosecution process is enhanced by having an independent prosecutor in all cases, one who is an officer of the court and not subject to the same hierarchical regime as the investigators. My Office came close to taking on this responsibility in 2000 – it is time for the question to be re-addressed.

I would decriminalise drug possession and use and small-scale trafficking. I would treat drugs as the health and social problem that they are and not as the subject of criminal law (except for large-scale commercial enterprises conducted only for profit). I would increase the number of Medically Supervised Injecting Centres and Drug Courts in the State – both of which programs have been found to be hugely successful.

To quote Ken Crispin again: *"Perhaps such a utopian day will dawn in some future age when new technology provides presently unimaginable investigative tools or introduces such wonders that drugs lose their attraction. But in the world we currently inhabit, these claims are false. They can only be attributable to ignorance, blind faith, an obdurate refusal to acknowledge the truth, or political opportunism. The more strident proponents of these claims strive to support them by dramatic announcements about the seizures of large quantities of drugs that were intended for our cities, and occasional shortages of drugs on our streets. This is supposed to prove that the tide of drugs is being driven back. In reality, it is like a modern-day re-enactment of the legend of King Canute attempting to demonstrate his power by ordering the incoming tide to turn back."*[6]

[6] Op cit, page 169

"... people will continue to suffer and die needlessly while we permit our political leaders to engage in impotent posturing instead of making hard and perhaps initially unpopular decisions. As the Portuguese experience demonstrates, decriminalisation coupled with facilities for effective treatment and rehabilitation can have a dramatic effect on the lives of drug users. Anything that is effective in helping people overcome their addictions will also have beneficial effects on the wider community."[7] And, it might be added, on the profits of drug suppliers, manufacturers and growers.

Our present approach to illicit drugs, after decades of trying, is ineffective, wasteful and inconsiderate of the human rights of those concerned.

I would divert more resources into addressing the underlying social and political conditions that give rise to threats of terrorism, rather than into combative means of addressing the symptoms. I would cease waging war on abstract nouns such as "terror" (or even "terrorism") and on chemical and botanical substances. I would rely on existing, traditional laws to deal with terrorist crimes that are committed.

I would enact a national charter of rights.

And at the more mundane level of criminal legal practice in NSW, I would apply more resources to both sides of criminal proceedings and introduce the modest qualifications to the right to silence and the presumption of innocence that have been made in the UK without an obvious collapse of human rights and the rule of law in that country – among them: adverse inferences from silence both in police interview and at trial; requirements for an accused person to disclose the defence case in advance of trial or face penalties or adverse comment; routine admission of previous convictions to establish propensity; joint trial on multiple complainant sexual assault allegations being the norm rather than the exception; wider admission of hearsay evidence.

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 its erosion.) It requires a clear acknowledgement of the separation of the judicial power from both the legislative and the executive and of the role of the judiciary in the constitutional enforcement of the law – including observance of the law by the other two branches of government. The consequences of failure of the rule of law are felt most keenly in criminal justice, where the liberty of the subject is at risk and the consequences of corruption of these principles can be dire. The independence of the prosecutor is essential.

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 the rule of law may be no more than a slogan – to us, it is of essential substance and has very practical consequences.

[7] Op cit, pages 210-211