RULE OF LAW
INSTITUTE OF AUSTRALIA

The Rule of Law: its State of Health in Australia

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Introduction

It is universally agreed that the rule of law is a worthy ideal that must be treasured and preserved – at least until it becomes inconvenient! Yet, there is not universal agreement as to what "the rule of law" means.

The expression signifies not a legal rule, but more generally rule by "law" as distinct from rule by power, free of legal constraint, whether by a democratically elected government, a tyrant or otherwise. So, the ideal signifies that the institutions of the state, and in particular, the individuals and bodies that are invested with power by the state, should be subject to the law rather than above it.

There are narrow and broad meanings of the rule of law. According to the narrow meaning, the rule of law is not concerned with whether a law is good or bad, but only with whether the law is applied equally to all. According to the broader meaning, the ideal embraces human rights standards. On any reckoning, both the rule of law and human rights standards should be respected, observed and protected. The only question is the semantic one of whether we properly treat the former concept as encompassing the latter.

Even if we treat them as distinct, a violation of human rights will often involve a failure to observe the rule of law – and vice versa. It is difficult to keep them separate. If for no reasons other than time and space, I have, by and large, adopted the narrow meaning in this paper, but inevitably I have at times discussed human rights as well.

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* In writing this paper I have drawn heavily on papers presented at conferences sponsored by the Rule of Law Institute. They and other key documents relating to the Rule of Law can be obtained from the treasure trove which is the "Principles" section of the Institute's website : www.ruleoflawaustralia.com.au. I gratefully acknowledge the research assistance of Laura Hicks, the Institute's Research Officer and Yvette Theodorou. I also thank Ron Webb SC of the Sydney Bar for his comments. It should go without saying that the ideas expressed are my own as are any errors.

Dicey's concept of the rule of law

It was in 1885 that Professor Albert Venn Dicey published his *Introduction to the Study of the Law of the Constitution*[1]. Professor Dicey was Vinerian Professor of English Law in the University of Oxford. He wrote about the English Constitution, and therefore about a unitary system of government rather than a federal one, such as those of Australia, Canada and the United Stated of America. In a federal system, the sovereignty of parliament is qualified by the bifurcation of power between the federal parliament and the state or provincial parliaments. But, within their respective fields under the federal compact, the rule of law is relevant to both polities.

Apparently it was Professor Dicey who coined the expression "the rule of law". Part II of his treatise was headed "The Rule of Law". Chapter IV, the first chapter within that Part, was headed "The Rule of Law: its Nature and General Applications". Although Dicey's work appears chauvinistic, dated and sexist, it repays study.

Dicey thought that "the supremacy of the rule of law" contained three distinct though related concepts. The first was this:

> "no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint."[2]

This first meaning of the rule of law had been expressed more succinctly by Thomas Fuller in 1733: "Be you ever so high, the law is above you".[3] Professor Dicey contrasted the privileged position enjoyed by the French monarch and aristocrats and, in particular, the oppressive treatment of French thinkers and writers of the seventeenth century such as Voltaire and Diderot, with the rule of law which he saw as native to England.

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1 Through Macmillan and Co. In this paper I have drawn on the fourth edition which was published in 1893 and has been reprinted in facsimile as part of the Nabu Public Domain Reprints. See HW Arndt, "The Origins of Dicey's Concept of the "Rule of Law"" (1957) 31 *ALJ* 117.

2 4th ed, 1893, pp 177-178.

3 Quoted by Lord Denning MR in *Gouriet v Union of Post Office Workers* [1977] QB 729 at 762.

The second meaning of the rule of law as propounded by Dicey was:

> "not only that with us [the English] no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals".[4]

The emphasis here is on the word "ordinary" – the ordinary law and the ordinary courts. In short, there is not a special body of rules that relate to an exceeding of authority by officials, and there are no special administrative courts that deal with such alleged excesses. Rather, the ordinary law governing wrongs done between private individuals applies, and the remedy for those wrongs is to be had in the ordinary courts. Professor Dicey explained it thus:

> "With us [the English] every official, from the Prime Minister down to a constable or a collector of taxes is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the Courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority."[5]

So, if a police constable, in excess of his or her legislative authority and without legislative protection, arrests an individual, it is no excuse that the police constable did so in good faith in the course of an official duty or under the instructions of a superior. The constable, like any private citizen, will be liable to pay the individual damages for the ordinary tort of assault, and the award of damages will be made in the ordinary courts. Plainly, Professor Dicey thought it a good thing that the state's officers should be amenable to the ordinary law enforced in the ordinary courts. Note that we must say "in excess of his or her legislative authority" and "without legislative protection" because of the sovereignty of parliament (which was also expounded by Dicey).

The third of Dicey's features of the rule of law was described by him thus:

> "… the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us [the English] the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts; whereas under many foreign

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4 4th ed, 1893, p 183.

5 4th ed, 1893, p 183.

> constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principle of the constitution."[6]

Professor Dicey's third meaning of the rule of law contrasts the English legal system and those of other countries favourably to the English (note his dismissive "such as it is" in the passage quoted). It is that the principles of the constitution, including the rule of law, are embedded in the decisions of the English courts, rather than in self-conscious attempts at a particular moment in time to formulate and crystallise a country's constitutional rules, including the rights of its citizens.

Professor Dicey implies that the rule of law is only or preferably safeguarded by the common law as distinct from statute or constitution. This, however, is not self-evident and today Professor Dicey would have to re-write his discussion of the third feature. He was contrasting with the unwritten British constitution, the legal systems of other countries in which the protection of individual rights is safeguarded by constitutional or legislative provisions directed expressly to that end, such as the American Bill of Rights.

But today the picture is not so clear. The United Kingdom itself has its *Human Rights Act 1998* (UK), and countries like Australia that have a written constitution that lacks any formal declaration of human rights. Incidentally, it seems that Dicey would see as inferior protections of human rights, not only the United Kingdom Act, but also Victoria's *Charter of Human Rights and Responsibilities Act 2006* and the Australian Capital Territory's *Human Rights Act 2004*. And what would he have made of the international treaties that deal with various aspects of human rights?

The canonical instruments

These are famous documents that stand as bulwarks of the rule of law.

1. Magna Carta 1215

At Runnymede on 15 June 1215 King John reluctantly signed the *Magna Carta*. It was imposed on him by the barons. He had no intention of observing it and did not do so. It was the price of a respite from the superior baronial forces. Pope Innocent III purportedly

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6 4th ed, 1893, p 185.

annulled the Great Charter within a few months on the ground that it had had been exacted from the King by duress (and this was indeed probably a fair description). Yet its importance in the constitutional history of England and of the British Empire cannot be doubted.

Magna Carta contained 63 clauses of which five may be noted. These are the 12th and 14th dealing with taxation, and the 39th, 40th and 45th dealing more directly with the rule of law.

Clause 12 provided that no scutage or aid, except only the three regular feudal aids, were to be imposed, save by the common consent of the realm. Clause 14 provided that that "consent of the realm" was to be given by a council to which archbishops, bishops, earls, greater barons and tenants-in-chief were to be summoned. The "three regular feudal aids" were a tax on the occasion of a knighting of the king's son, the marriage of the king's daughter, and the ransom of the king's person.

Clauses 12 and 14 then were the germ of the aphorism, "no taxation without representation", but "the common consent of the realm" meant only the consent of a highly positioned élite.

Clauses 39 and 40 were as follows:

> "No free man shall be taken, or imprisoned, or dispossessed, or outlawed, or exiled, or in any way destroyed; nor will we go upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land."

and

> "To none we will sell, or to none will we deny or delay, right or justice."

The connection between these provisions and Dicey's first meaning of the rule of law is obvious.

Clause 45 provided that only those who knew the law well and were able to maintain it were to be appointed to the judiciary. This was a pointer to the legally qualified, impartial and independent judiciary of the future – an essential prerequisite of the maintenance of the rule of law against the politically powerful.

King John died in 1216 and was succeeded by his son, Henry III. He was nine years old at the time and therefore a Regency operated. The Regency reissued the Charter but omitted clauses 12 and 14-- the "no taxation without representation" provision.

Upon attaining his majority in 1225, Henry III reaffirmed the *Magna Carta*. Finally, an edited version was entered in the statute book by Edward I in 1297 called the "Great Charter of the Liberties of England and the Liberties of the Forest" – also called the *Confirmation of the Charters*.

Interestingly, when he was in dire financial straits, Edward I had seized the wool from merchants in the ports as security for a tax on the wool. This tax was not a "scutage" or "aid", so Edward was within the letter of the Charter. However, the barons, in effect sought an amendment to the Charter to catch what the King had done and Edward yielded to their demand.

Magna Carta was a part of the English law that was received into New South Wales upon settlement in 1788. The High Court of Australia has referred to it in 40 cases, the Federal Court of Australia in 38 cases (the Federal Court was established only in 1976), and the Supreme Court of New South Wales in 32 cases. Let me immediately acknowledge that in not one of these cases was the Great Charter relied on as the basis for the decision, and in nearly all of them it was referred to only in passing. Nonetheless, the frequency of its citation marks the frequent reference by the courts to the rule of law which it has come to symbolise.

2. Habeas corpus (more fully, *habeas corpus ad subjiciendum*)

The *Writ of Habeas Corpus* is designed to give a person who complains that he or she is being unlawfully detained, access to the courts to have the lawfulness of the detention determined. Literally, it commands the custodian of the person to "have the person's body" before the court at a named time and place. The writ is frequently addressed to the Governor of a prison. It could, however, be directed to the superintendent of a mental hospital or of an immigration detention centre, for example. Once the individual is before the court, the custodian must confirm that the individual is in custody, state when he or she was detained and show good legal cause for the detention. *Habeas corpus* is the procedure by which the representatives of the state are brought to account for their detention of the individual

3. The Petition of Right 1628

In 1628 five knights were imprisoned for failing to pay a forced loan imposed on them by Charles I to support his military aims. Each of the five sought a *Writ of Habeas Corpus* to secure his release. One gave up the fight but the other four persisted.

The outcome of the court proceeding was problematical. The court remanded the knights back to prison, but without delivering a final judgment. In substance this outcome was simply a provisional refusal of bail, but in fact it led the four to make the loans to King Charles after all and only after they did so, their release from prison.

Be this as it may, the *Five Knights' Case* led to the "Petition of Right" as it is called, which Charles I reluctantly granted. Parliament treated it as an Act of Parliament and printed it as such. The Petition of Right recited *Magna Carta* (a revised version enacted in 1354).

Clause VIII of the Petition of Right provided:

> "They do therefore humbly pray your most excellent majesty that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax or such like charge without common consent by act of parliament, and that none be called to make answer or take such oath or to give attendance or be confined or otherwise molested or disquieted concerning the same or for refusal thereof. And that no freeman in any such manner as is before mentioned be imprisoned or detained. And that your Majesty would be pleased to remove the said soldiers and mariners, and that your people may not be so burdened in time to come. And that the aforesaid commissions for proceeding by martial law may be revoked and annulled. And that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by colour of them any of your Majesty's subject be destroyed or put to death contrary to the laws and franchises of the land."

There is a clear connection between the first (long) sentence and clauses 12 and 14 of *Magna Carta* noted earlier. But the rest of clause VIII is a broader protection of the King's subjects.

4. The Habeas Corpus Amendment Act 1679

Following the restoration of the monarchy in 1660 after the Civil War, Charles II's Chief Minister, Edward Hyde, the First Earl of Clarendon, in the exercise of executive powers, made a practice of dispatching prisoners to outlying parts of the United Kingdom so that the

Writ of Habeas Corpus was not available to them. This was because at the time it was a remedy local to England and Wales.

In 1667, when he fell from power, Clarendon was impeached. One of the charges against him was that he had sent persons to "remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law"[7]. Clarendon fled and later died in exile. It was not until 1679 that the House of Lords, by a majority of only 57 to 55, passed the *Habeas Corpus Amendment Act 1679* , section 11 of which remedied the position. Since that time, devices to circumvent *habeas corpus* have been unlawful in The United Kingdom.

In more recent times, the motive of the United States Government in detaining terrorist suspects at Guantanamo Bay was the same as that of Clarendon. One motive of both Government and Opposition parties in the Australian Parliament in supporting offshore processing of applicants for refugee status is at least partly the same – access to lawyers and to the courts can be an inconvenience. This is a subject to which I will return below.

5. The Bill of Rights 1689 and the Act of Settlement 1701

The "Glorious Revolution" of 1688-9 saw the expulsion of James II and his replacement by William III and Mary II. Mary was the daughter of the expelled King. Her husband was the Prince of Orange and was imported from the Netherlands.

Parliament was in a strong position when negotiating with them. After James II fled the country in 1685, 35 members of the House of Commons struck a deal with representatives of William and Mary which enabled a Parliament to be called, and the Bill of Rights, as agreed to by William and Mary with minor amendments, to be enacted into law.

William of Orange had been offered the throne on condition that he agreed to Parliament's terms. By contrast, *Magna Carta* and the *Petition of Right* had been granted by monarchs who were already on the throne. King John had repudiated *Magna Carta* as soon as his immediate financial crisis had passed, and Charles I had ruled as an autocrat and without

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7 *Clarendon* (1668) 6 State Trials 291, 330, 396.

recourse to Parliament for eleven years from 1629 until his execution in January 1640, notwithstanding his having granted the *Petition of Right*.

Although called the "Bill of Rights", the Act of 1689 was directed more to limitations on the Crown than to the protection of individual rights. For example, no monarch could again rely on divine authority to override the law; the Crown's power to suspend laws without the consent of Parliament was made illegal, and so was the power of dispensing with laws or with the execution of laws. There were prohibitions against excessive fines, excessive bail and the infliction of "cruel and unusual punishments". Jury trial was also protected.

There was a problem, however, over entrenching judges. The drafting committee had included a safeguard of the tenure of judges and the protection of their salaries, but William of Orange insisted that the Bill should confirm old rights and not create new ones, and he prevailed.

In 1701, however, the *Act of Settlement* (12 & 13 Wm III c2) was passed. It provided for the Protestant succession to Queen Anne, but also reinstated the provisions for security of judicial tenure. It passed through both Houses without a division. The Act of Settlement of 1701 also rendered the higher judiciary immune from civil suit or criminal prosecution for acts done in a judicial capacity.[8]

For another sixty years, the rule survived that judges need not be reappointed on the accession of a new monarch. This meant that they held office indefinitely. Dr Samuel Johnson favoured reappointment on the accession of a new monarch, pointing out that a judge may become corrupt, irascible or otherwise unfit for office. Johnson considered it desirable that there should be a possibility of relief from such a Judge by a new King or Queen.

Modern instances of countries where there is not an independent judiciary illustrate the importance of its independence to the maintenance of the rule of law.

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8 Holdsworth, *History of English Law*, vol 6, pp 234-40

6. The American Bill of Rights

The first ten amendments of the US Constitution are called the Bill of Rights. They were introduced into the First US Congress by their author, James Madison, who was to become the Fourth President of the United States. They became constitutional amendments by a process extending from 1789 to 1791. The Bill of Rights protects fundamental rights of the individual.

Parts of the American Bill of Rights reflect the British Bill of Rights of 1689 but other parts go beyond it (it was also influenced by the Virginia Bill of Rights). I have paraphrased and quoted from the American provisions in **Attachment 1** to this paper. Articles V and VI are particularly important for rule of law purposes.

7. The French Declaration of the Rights of Man and the Citizen 1789

The Marquis de Lafayette returned from America impressed by the principles enshrined in the American Declaration of Independence. He drafted and advanced the French *Declaration of the Rights of Man and the Citizen*. This Declaration was made by the French Revolution's short lived (1789-1791) Constituent Assembly and was to provide the basis of the United Nations Universal Declaration of Human Rights, which was also to be adopted in Paris, but not until 10 December 1948.

I have set out an English translation of the French Declaration in **Attachment 2** to this paper.

8 International instruments

This listing of the canonical instruments would be obviously incomplete if I did not mention the adoption in Paris on 10 December 1948 of *The Universal Declaration of Human Rights,* followed in 1966 by the *International Covenant on Social and Cultural Rights* and the *International Covenant on Civil and political Rights*---the three together being sometimes referred to as the "International Bill of Rights".

Potential threats to the rule of law, with particular reference to Australia

In this part of the lecture I will address potential threats to the rule of law, with particular reference to Australia. By and large the ideal is respected and observed, but there is always

room for improvement, and in any event a need to remind ourselves of potential threats to guard against.

1. Independence of the judiciary

Under s 72 in Chapter III of the Australian Constitution the period of tenure of all federal judges is until the attainment of the age of 70 years (there is a qualification not presently relevant which still ensures security of tenure until attainment of the retirement age for the court). During that tenure federal judges cannot be removed except by the Governor-General in Council upon an address from both Houses of Parliament "on the ground of proved misbehaviour or incapacity". Finally, the remuneration of a justice of a court created by the Parliament may not be diminished while he or she holds office.

There are generally similar provisions in the State and Territories, although the age may be different.

These constitutional safeguards are a bulwark for federal judges to "do right to all manner of people according to law, without fear or favour, affection or ill-will" as the Judicial Oath has it (*Federal Court of Australia Act 1976* (Cth), s 18Y). The State and Territory versions of the Judicial Oath are very similar.

The inability of the politically powerful to remove a judge from office or to lower the judicial salary supports the maintenance of the rule of law by the courts.

(a) Papua New Guinea

I would like to refer, I hope at not too great a length, to the recent very real threat to the independence of the judiciary in Papua New Guinea. In March 2012 the Parliament there passed an Act providing for Judges to be removed for "bias". The Act is the *Judicial Conduct Act 2012*. The Constitution of the Independent State of Papua New Guinea already provided a mechanism for the removal of Judges for proved misbehaviour or incapacity in terms not altogether dissimilar to those in the Australian Constitution. Obviously, there must therefore be a question whether it was constitutionally open to the Parliament to enact a different mechanism.

The background to this recent event can be summarised as follows. By mid 2011 the Prime Minister, Sir Michael Somare, had spent some months in a hospital in Singapore. The majority of the members of the National Parliament decided to withdraw their support for him and to elect his political opponent Peter O'Neill. In accordance with the decision of the Parliament, the Governor-General of Papua New Guinea, Sir Michael Ogio, then appointed O'Neill as Prime Minister.

A challenge was mounted in the Supreme Court to the removal of Somare from office. After the hearing of the challenge and while the Court's decision was reserved, and against the prospect that it would be adverse, the Parliament enacted legislation and passed a number of resolutions on 9 and 12 December 2011. The resolutions included the election of O'Neill as Prime Minister again.

The decision of the Court was given on 12 December. By a 3:2 majority the Court found that Somare's removal had been unlawful and ordered his reinstatement.

Finally, in recognition of the Court's order, Governor-General Ogio refused to appoint O'Neill, whereupon, on 14 December 2011, the Parliament suspended him and declared that in view of the consequential vacancy in the office of Governor-General, the Speaker of the Parliament had automatically under the Constitution become Acting Governor-General. Acting in that capacity, the Speaker reappointed O'Neill. There is no evidence that the Queen revoked Sir Michael Ogio's commission as her Viceroy. On 19 December 2011 Governor-General Ogio and the Parliament again recognised O'Neill as Prime Minister.

There have been subsequent related events—two Police Commissioners were appointed by the rival factions and in January there was an attempted mutiny by about 30 soldiers who placed the head of the PNG Defence Force under house arrest.

This brings me back to the recent Act.

The Act provides in clause 5 (1) that a Judge must disqualify himself in, and must not influence, a proceeding "in which the Judge's impartiality might reasonably be questioned" – an objective standard.

Where it appears to the Parliament that a Judge has contravened this provision, the Parliament may by motion refer the Judge to the Head of State to appoint a tribunal to investigate the contravention and report to Parliament, or may refer the matter " to another authority for an appropriate course of action": s 5(2). Upon receipt of a referral the Head of State must appoint a tribunal of three judges or former judges which shall make due inquiry "without regard to legal formalities or the rules of evidence and inform itself in such manner as it thinks proper, subject to compliance with the rules of natural justice": s 5(3), (4). If the tribunal reports a contravention, Parliament is to take "whatever action necessary", including a referral to the National Executive Council (cabinet) or the Judicial and Legal Services Commission for their consideration of the commencement of a process to remove the Judge in accordance with ss 179, 180 and 182 of the Constitution: s 5(5).

Where the Judge in question is a Chief Justice, if the National Executive Council has advised the Head of State to set up a tribunal to investigate his or her removal from office, that "reference by Parliament may be added to those proceedings or be kept separate": s 5 (6). Finally, once Parliament has referred a Judge to the Head of State, he or she must not exercise judicial office pending the provision of the report by the tribunal to Parliament, and if it is the Chief Justice who is referred, the Deputy Chief Justice is to act as Chief Justice: s 5(7) and any order or judgment in that proceeding made by that Judge is stayed pending the provision of the report by the tribunal to Parliament (s 5(8)).

There have been many remarkable features touching the procedure by which this Act was passed. One of the most egregious features is its retrospectivity. The Act states that it came into operation on 1 November 2011---well before the Supreme Court's decision for Somare and against O'Neill on 12 December 2011

The Act drew protests by students and criticism by veteran politicians that it damaged the independence of the judiciary and therefore the rule of law in Papua New Guinea.

It has been reported that on Wednesday 4 April 2012 the Parliament voted to suspend the Chief Justice Sir Salamo Injia and Justice Kirrwom and that on Tuesday 10 April 2012, in response to further protests, O'Neill publicly announced that if they would stand down voluntarily, Parliament would repeal the Act.

Some other matters may be noted. Like the entire sorry saga of the repudiation of the rule of law by O'Neill and his supporters, these matters can be understood only against the background of their wanting to be rid of Somare, to overcome the adverse decision of the Supreme Court and to legitimise their grip on power.

In February 2012 the National Executive Council decided to appoint a tribunal under s 179 of the Constitution to investigate the Chief Justice for misconduct and to suspend him under s 182. However, the Supreme Court (the bench did not include the Chief Justice) stayed that decision on 2 February.

That manoeuvre occurred just before the Attorney-General and the Speaker, acting on behalf of the Parliament, commenced a new proceeding (on 8 February) seeking to legitimise the events of December and it seems may have been intended to intimidate the bench before the new proceeding came on for hearing.

Section 5(6) of the Act seems intended to salvage the February decision of the National Executive Council by allowing it to be dealt with by the same tribunal as that to be established as a result of the Parliament's subsequent suspension of the two Judges on 4 April.

It remains unclear what procedure was followed by the Parliament to suspend the two Judges on 4 April.

Peter O'Neill clearly has the support of a substantial majority of members of the Parliament. But a country that respects the rule of law and the separation of powers accepts that there is more at stake here than democratic political power. It accepts that the rule of law must be allowed to trump the political numbers game.

(b) Fortification of the rule of law in the Australian states on the basis of Chapter III of the Constitution

In recent years, the High Court has fortified the independence of the judiciary in Australia by holding that the Constitution presupposes the existence of State Supreme Courts whose judicial function may not be taken away or diminished by State Parliaments. There are four notable cases: *Kable v Director of Public Prosecutions (New South Wales)* (1996) 189 CLR 51 (detaining prisoner after expiry of period of imprisonment); *South Australia v Totani* (2010) 242 CLR 1 and *Wainohu –v- New South Wales* (criminal organisation cases); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 (statutory power to appoint Acting Judges for up to 12 months held valid, but cautionary note sounded that Supreme Courts must be principally comprised of permanent Judges having tenure of the kind for which the *Act of Settlement* provided); *Kirk v Industrial Court of New South Wales* (2009) 239 CLR 531 (privative clause depriving a Supreme Court of its traditional jurisdiction to ensure that public decision-makers, including other courts, do not exceed their powers or otherwise transgress the law).

(c) More subtle influences on the judiciary?

We can take comfort from all the matters I have mentioned, but are there subtle influences on the judiciary?

Might a judge be inclined to decide cases in favour of the Government or engage in extracurricular activities in the hope that this will lead to his or her being appointed by that Government to a higher court in the future? It would be possible to legislate to exclude the possibility of an incumbent Judge being appointed to a higher court, but consider the judicial talent on the High Court of which Australia would have been deprived if we had had such a law!

A more real threat lies in the requirement of managerial accountability that is imposed on courts by government departments. Of course, the word "accountability", like "motherhood", suggests an idea of which no criticism can be tolerated. Yet, if the performance of courts is to be measured by statistical criteria such as the number of judgments produced, the number of days spent by judges in the court-room, the number of cases finalised, the number of pages of transcript of proceedings recorded, and so on, courts, and in particular their Chief Justices,

can be tempted to tailor the way in which they operate in order to maintain or raise the level of their funding. It was rumoured that one court recorded as a proceeding completed, indeed completed very soon after commencement, every admission of an individual as a barrister or solicitor of the court. Strictly, that was indeed a "proceeding" in the court which was completed upon the admission of the individual as a legal practitioner and the practice presented no threat to the rule of law. A less innocuous example would be a failure by a judge to give painstaking and therefore time consuming consideration to his or her cases in the interests of favourable statistics.

Another potential threat comes from the media. In my experience ill informed criticism of court decisions is simply ignored by Judges, but again one must hope that the theoretical possibility of influence will ever remain just that – theoretical.

Then there is the issue of Acting Judges. While constitutionally lawful (see *Forge –v- Australian Securities and* Investments *Commission* referred to earlier), the danger of these short-term appointees seeking to please the Government in order to secure reappointment has been remarked upon and I understand that the practice has largely fallen away.[9] Acting Judges cannot serve in the federal courts because of the Constitution.

There is the necessity of ensuring that appointments be on merit and the jurisdictional needs of the particular court alone. The innovation of the former Attorney-General, the Hon Robert McClelland MP, of appointing an advisory panel was a welcome development in my view, although there have been practical difficulties, principally of governmental delay in the implementation in the individual cases.

I would refer to another threat which, so far as I am aware, is a theoretical one: a threat arising from competition between courts. Not uncommonly, litigants have a choice of the court in which to commence a proceeding. The choice may be between the various Supreme Courts or between them and the Federal Court. If the proceeding is viewed as important and interesting, it would, generally speaking, be in the interests of a court to be chosen. An interesting and stimulating diet of work is important for the presently incumbent judges and

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[9] The Institute's Research Officer contacted several Supreme Courts and informs me that as at 5 April 2012 the Supreme Court of New South Wales had six Acting Judges, the Supreme Court of Queensland had two Acting Judges and the Supreme Court of the Australian Capital Territory is in a special position in that the Acting Judges are all full-time serving Judges of the Federal Court of Australia.

in the interests of attracting good appointees in the future. Moreover, the more work of any kind the more substantial the basis for staffing and funding of the court.

In so far as so called "competition" between courts means only ensuring that efficiency, speed and cost minimisation are striven for, there can hardly be any objection. It is important, however, to avoid any temptation to be the court of choice for regular plaintiffs/applicants in interesting proceedings.

Similarly, courts should avoid being "used" to attract particular classes of work to Australia, such as international commercial arbitration, except, of course, by their speed, efficiency, understanding of the arbitral process, comparatively low cost and impartial decision-making in accordance with the rule of law.

Finally, it is important that courts be administratively independent of the other arms of government. Of course, the relevant Treasury or the Attorney-General's Department will determine the level of funding courts generally and of any particular court. Ideally, the employment of the funds allocated should be left to the court. It is a threat to the rule of law if the Executive descends into the detail of how much the court must spend on its library, how much on transcript, and so on.

2. Placing people beyond the reach of the domestic jurisdiction

I referred earlier to the Earl of Clarendon's practice in the 1660s of having people incarcerated elsewhere than in England or Wales so that they would not be able to challenge the lawfulness of their detention through *Habeas Corpus*.

(a) Guantanamo Bay

Following the Al-Qaeda terrorist attacks on 11 September 2011, President Bush, on 13 November 2001, issued an order providing for trial by military commissions of persons accused of violations of the rules of war. Beginning in January 2002 hundreds of prisoners have been transferred to Camp X-Ray and then to Camp Delta, both military installations at Guantanamo Bay.

Guantanamo Bay is territory over which Cuba has ultimate sovereignty and which the United States occupies under a 1903 lease and treaty, and over which it exercises plenary and

exclusive jurisdiction. It has been reported that virtually all the prisoners there have been foot soldiers of the Taliban. By Presidential decree these "enemy combatants" as they have been labelled were denied prisoner of war status, which would have attracted the protections of the Third Geneva Convention. The purpose was to put them beyond the rule of law and the protection of the United States courts.

There have been several legal challenges. It would take too long to give a detailed account of them. The story demonstrates, however, the importance of the United States Constitution and Supreme Court for the rule of law.

At first, the Administration had success at the Circuit Court of Appeal level; see *Hamdi v Rumsfeld* 316 F.3d 450 (2003) and *Rasal v Bush* 321 F. 3d 1134 (2003). In *Rasal v Bush* the Court of Appeals for the District of Columbia rejected an attempt by nationals of Kuwait, Australia and Britain to challenge in the American court system the lawfulness of their detention. The District Court had treated the proceedings as petitions for writs of *habeas corpus.* The Court of Appeals held that jurisdiction was lacking because the plaintiffs were aliens, had been captured during United States military operations outside the territory of the United States and had never once set foot in that country.

In the Supreme Court, however, in two cases heard together, *Rasal v Bush* and *Al Odah v United States* 542 US 1 (2004), the Supreme Court ruled 6:3 that detainees were entitled to challenge the lawfulness of their detention in federal courts.

In *Hamdi v Rumsfeld* 542 US 507 (2004), decided the same day, the Supreme Court ruled that United States citizens who were detained because they were classified as "enemy combatants" must have an opportunity to challenge that classification before an independent decision-maker.

Within two weeks of these opinions being delivered, the Administration established a system of Combatant Status Review Tribunals (CSRTs) "to provide detainees at the Guantanamo Bay Naval Base with notice of the basis for their detention and an opportunity for them to contest their detention as enemy combatants".

On 30 December 2005 the *Detainee Treatment Act 2005* purported to overcome *Rasal/Al Odah* and to eliminate detainees' right to file *habeas corpus* petitions. But in *Hamdan –v- Rumsfeld* at first instance a District Court Judge granted *habeas corpus* relief, holding that until Hamdan was adjudged by a competent tribunal not to be a prisoner of war, the Third Geneva Convention applied to him and he could not be tried before a Military Commission. The Court of Appeals for the District of Columbia Circuit reversed (415 F. 3d 33).

Ultimately in *Hamdan v Rumsfeld* 548 US 1 (2006) the Supreme Court ruled that the CSRTs violated both United States law (the *Uniform Code of Military Justice,* 10 USC s 801 *et seq*) and the four Geneva Conventions of 1949.

In response, the Administration had Congress pass the *Military Commissions Act 2006* which attempted to erode *habeas corpus* further.

On 20 February 2007 the Court of Appeals of the District of Columbia Circuit ruled that detainees had no **constitutional right** to *habeas corpus* review of the lawfulness of their detention (476 F. 3d 981), but on 12 June 2008, in two cases heard together, *Boumediere –v- Bush* and *Al Odah –v- United States,* the Supreme Court ruled that they did: 553 US 723 (2008).

I will offer a comment on these cases after discussing the offshore processing of asylum seekers.

(b) Offshore processing of asylum seekers

Two cases are to be noted here. They are *Plaintiff M 61/2010E v Commonwealth* ; *Plaintiff M 69 of 2010 v Commonwealth* (2010) 243 CLR 319; 272 ALR 14; 85 ALJR 133; [2010] HCA 41 and *Plaintiff M 70/2011 v Minister for Immigration and Citizenship; Plaintiff M 106 of 2011 –v- Minister for Immigration and Citizenship* (2011) 280 ALR 18; 85 ALJR 891; [2011] HCA 32.

In *Plaintiff M 61* two Sri Lankan citizens arrived at Christmas Island without a visa. They claimed that Australia owed them protection obligations under the Refugees Convention and the Refugees Protocol. They were taken into detention on Christmas Island under s 189 of the *Migration Act 1958* (Cth).

Although the Territory of Christmas Island was part of Australia, it was what the Act called an "excised offshore place". Section 46A of the Act classified the plaintiffs as "unlawful non-citizens" and provided that because they were in an excised offshore place they could not apply for a protection visa. This was so even though Australia might owe them protection obligations under the Convention.

Briefly Australia's argument was that it did not owe them any duty of procedural fairness. Again, briefly, the High Court disagreed.

All seven members of the Court sat on the case and in a unanimous judgment they rejected the contentions of the Commonwealth and the Minister that the plaintiffs were owed no duties because, in effect, the Commonwealth had created a legal no-man's land where people in their position were outlawed. Although they wanted to apply for a privilege (a visa) and did not assert a right, the Court held that their interests were liable to be affected by any decision taken by the Minister who therefore owed them an obligation of procedural fairness in dealing with their applications.

Plaintiff M 70 was the "Malaysian solution" case, the case in which the High Court decided by a 6:1 majority that the so called Malaysian solution was constitutionally invalid. The case raised a question as to the kind of access to and furnishing of protection that a foreign country would have to provide before it was a country to which Australia might remove individuals for processing of their claims for refugee protection. The majority held that it was not enough to examine what had happened, was happening and might be expected to happen in the foreign country: the asylum seeker had to be afforded protection in the foreign country **as a matter of legal obligation**. Malaysia, which was not a party to the Refugees Convention, did not satisfy that test.

In the result the Court declared invalid the Minister's declaration of Malaysia as a "declared country" under s 198A (3) of the *Migration Act 1958* (Cth) and granted an injunction restraining the Minister from removing the plaintiffs to that country.

Both the Guantanamo Bay and the offshore processing cases show two things: first, the tension, indeed the tussle, that can exist between the Executive and the Judicature and therefore the separation of powers in our politico-legal systems; and, second, that the highest

courts of both of our countries, faithful to their institutional functions and the judicial oaths of their members, apply the law to protect individuals in accordance with the rule of law, from the otherwise overwhelming power of the Executive.

3. Independence of the legal profession

It is essential to the maintenance of the rule of law that lawyers be able to represent unpopular clients and those associated with unpopular causes, fearlessly in the interests of upholding legal rights.

The report *Attacks on Justice: the harassment and persecution of judges and lawyers (2002)* released by the International Commission of Jurists recorded reprisals against 315 lawyers and judges, including 38 murders and five disappearances, in the period covered by the report.

Human Rights activist lawyers have suffered at the hands of repressive régimes. On 1 February 2005, His Majesty King Gyamendra dismissed the Nepalese Government and assumed direct rule, declaring a state of national emergency. Since that time, Human Rights lawyers in Nepal have been detained or placed under house arrest. The former President of the Nepal Bar Association, Sindhu Nath Pyakurel, was one of them. He was released just two hours before the Supreme Court of Nepal was due to consider his *habeas corpus* petition.

In Zimbabwe, the organisation Lawyers for Human Rights has complained of intimidation of justice administration officials by security agents of the State. In that country there have been refusals of the Government to abide by judicial rulings perceived to be against its interests, and the intimidation of lawyers and judges by arrests and prosecutions.

In Australia, there can be unpopular causes too. One thinks of the lawyers who represented, pro bono, the asylum seekers rescued by the "*MV Tampa*", those who represented Australian detainees at Guantanamo Bay, and many lawyers who have represented, I think generally speaking free of charge, those seeking asylum under the Refugees Convention and the *Migration Act 1958* (Cth) which gives that Convention effect in this country.

4. The prosecutorial discretion and the independence of the prosecutor

The independence of the prosecutor is essential to the just rule of law. This is why the office of Director of Public Prosecutions has been created –its holder is an independent legal officer.

Nicholas Cowdery AM, QC, in a paper entitled "The Rule of Law and a Director of Public Prosecutions" presented at the Rule of Law Institute of Australia Conference held on 6 November 2010, listed the following as ways in which the independence of the prosecutor should be made manifest (at 7):

- 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 should be provided to prosecutors to enable their function to be carried out effectively and efficiently.

- Proper leadership, training and support should be provided to prosecutors to enable them to obtain 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 performance of the prosecutorial function and refrain from inappropriate attack. They should also refrain from improperly seeking to influence the outcome of proceedings.

Mr Cowdery went on to acknowledge that the other side of the "independence coin" was accountability and he identified mechanisms by which the prosecutor should be accountable.

He rejected, however, any kind of parliamentary oversight committee which would monitor and review the DPP's exercise of his or her functions.

5. Governmental use of the courts to prevent crime

State governments have sought to invoke the aid of the courts in their attempts to prevent crime. But they have come up against a problem---the essential nature of a court in the Australian federation. This can be seen as a demonstration of the rule of law being observed, albeit to the discomfort of some politicians and commentators.

What has happened, and it has been a remarkable development, is that the High Court has found that the Australian Constitution not only safeguards the position of federal courts, that is to say, courts established by the Parliament and therefore exercising judicial power under Chapter III of the Constitution, but the position of State courts as well. The reason, or one reason, is that the Commonwealth Parliament has invested not only the courts it has created, but also the State courts, with federal jurisdiction.

(a) Preventive detention

First, I will deal with preventive detention.

I referred to *Kable* earlier. Gregory Wayne Kable killed his wife. He was charged with murder but pleaded guilty to manslaughter and was sentenced to a term of imprisonment. Being unhappy about arrangements made for his two young children, he wrote threatening letters, mainly to relatives of his deceased wife. The authorities became alarmed and feared what he might do upon his release.

On 2 December 1994 the New South Wales Parliament passed the *Community Protection Act 1994*. Its aim was to keep Kable in custody beyond the expiration of his sentence, because of the risk he was seen to pose – an example of preventive detention.

According to the sovereignty of Parliament, such a law could be made. However, the Act went further. It established a procedure which involved enlisting the aid of the Supreme Court of New South Wales. An order of that Court for Kable's detention was required and the DPP was made the moving party.

The DPP had to satisfy the Court on reasonable grounds, but only on the balance of probabilities, that the person was more likely than not to commit a serious act of violence,

and that it was appropriate for the protection of a particular person or the community generally that he be held in custody beyond the expiry of his term of imprisonment. The maximum period of detention that could be ordered was 6 months, but successive applications could be made in relation to the same person.

In *Kable* the High Court held, by majority, that the Act was unconstitutional. The reasoning of Gaudron, McHugh and Gummow JJ was that the Supreme Court of New South Wales was a court in which federal jurisdiction had been invested under Chapter III of the Constitution, and that the exercise of the jurisdiction conferred by this State Act was incompatible with the integrity, independence and impartiality required of a court invested with federal jurisdiction. The Act purported to give the Supreme Court non-judicial power, namely, the power to order the detention of a person in prison without any judgment of guilt of a (further) criminal offence.

Mr Kable was eventually released and he successfully sued the State of New South Wales for compensation for his unlawful detention---another manifestation of the operation of the rule of law.

The issue of detention of serious sex offenders did not go away. It was the subject of Queensland and New South Wales legislation. In *Fardon v Attorney-General for the State of Queensland* [2004] HCA 46, the High Court upheld as constitutionally valid Queensland's *Dangerous Prisoners (Sexual Offenders) Act 2003*. Under that Act, the Attorney-General could apply to the Supreme Court of Queensland for a continuing detention order or extended supervision order against a person after expiration of a sentence, but only if certain requirements were satisfied. The requirements embodied the safeguards of a conventional criminal trial and the application of a full judicial process. In this respect, the legislation was unlike that in *Kable*.

Taking up the cue, the New South Wales Parliament passed the *Crimes (Serious Sex Offenders) Act 2006* modelled on the Queensland Act. Under each Act the State Attorney-General is the moving party.

On 18 March 2010 the United Nations Human Rights Committee ruled that both Acts violated Article 9 of the *International Covenant on Civil and Political Rights* because they provided for a further penalty for the same offence and because they operated retroactively.

The Australian Government responded to the Human Rights Committee after consultation with the two States. A copy of that response is **Attachment 3** to this paper. In its response the Australian Government contended that the two State Acts and the treatment of Mr Tillman and Mr Fardon under them conformed to the jurisprudence that had been developed by the Human Rights Committee. In particular, the Government observed that both men had refused to attend rehabilitation programs while incarcerated and had breached the terms of non-custodial supervision schemes to which they had been subject.

(b) Criminal organisations and control orders

I turn now to criminal organisations and control orders.

In South Australia and New South Wales, Acts were passed that were popularly seen to target "bikie gangs". The South Australian Act was the *Serious and Organised Crime (Control) Act 2008*. The New South Wales Act was the *Crimes (Criminal Organisations Control) Act 2009*.

In *South Australia v Totani*, referred to earlier, the High Court held (by a 6:1 majority) that s 14(1) of the South Australian Act was invalid. That provision was to the effect that the South Australian Magistrates Court **must** make a control order on the application of the Commissioner of Police if that Court was satisfied of certain things. The reason for the provision's invalidity that commanded most support in the High Court was that the provision authorised the Executive to enlist the Magistrates Court to implement its decisions in a manner incompatible with the discharge of the Magistrates Court's federal judicial responsibilities and with its integrity as a "court".

In *Wainohu v New South Wales* [2011] HCA 24, decided on 23 June 2011, the High Court held that the New South Wales Act was invalid. Section 13(2) of that Act exempted an eligible judge from any duty to give reasons for declaring an organisation to be a "declared organisation" (discussed below). That exemption distinguished the function of declaring

organisations conferred on the eligible judge from that of making control orders conferred by the Act on the Supreme Court itself (also discussed below). French CJ and Kiefel J stated (at [59]):

> "The existence of that difference and the statutory context in which it arises are relevant to the question whether the function conferred on the eligible judge **impairs the institutional integrity of the Supreme Court of New South Wales**." (my emphasis)

Unfortunately (for me) in order to meet the deficiency exposed in *Wainohu* the New South Wales Act of 2009 has very recently been repealed and replaced, and in order to meet the defect exposed in *Totani* the South Australian Act of 2008 is in the course of being amended. The replacement New South Wales Act is the *Crime (Criminal Organisations Control) Act 2012* (NSW) and the South Australian Bill is the *Crime (Control) (Miscellaneous) Bill 2012.* Fortunately (for me), however, the New South Wales Act re-enacts the former Act with one amendment (s13 now **requires** an eligible Judge to give reasons for declaring an organisation---see below).

I will discuss only the New South Wales Act. (The scheme under the South Australian legislation is also one of organisations being declared by an eligible Judge and the making by the Court of control orders against individuals, but there are also differences between the two.)

The New South Wales Act was passed over concerns and protests of the New South Wales Bar Association, the New South Wales Law Society, academics, the Council for Civil Liberties, and others.

The Police Commissioner can apply to have an organisation "declared" under the Act by an "eligible judge". An eligible judge is a Supreme Court judge who has consented in writing to do this work and who has been declared by the Attorney-General to be an eligible judge.

Notice of the application must be advertised in the Gazette and in the newspaper. Any member of the organisation is entitled to be present at the hearing and to make submissions,

subject to the Commissioner's right to object to the presence of a member where "information classified by the Commissioner as criminal intelligence is disclosed": s 8(3).

In order to declare an organisation, the eligible judge must be satisfied that members of the organisation associate for a purpose connected with serious criminal activity, and that the organisation represents a risk to public order and safety.

The rules of evidence do not apply, and this aspect provoked adverse submissions from the bodies mentioned earlier. However, the eligible judge must now provide reasons for making or revoking a declaration : s 13(2). As already noted, this requirement was inserted to remove a ground on which, it will be recalled, the previous Act had been held invalid.

The Commissioner must publish notice of the making of a declaration in the Gazette and in the newspaper: s 10. Unless revoked or renewed, the life of a declaration is three years: s 11.

Once the declaration is made, the Supreme Court can, on application by the Police Commissioner, make, first, an interim control order, and second, a final control order, against an individual if the Court is satisfied that he or she is a member (or former member with an ongoing involvement) of a particular declared organisation and that "sufficient grounds" exist for making the order: ss 14, 19. The application for the interim control order is heard ex parte but if the interim order is made, the person must be served with it and is entitled to appear and to make submissions on the hearing of the application for the final order: ss 14(4), 20. The Act gives no further guidance as to the meaning of "sufficient grounds".

Sections 16 and 21 require the Court to state the grounds on which interim and final control orders are made.

There is a right of appeal against the making of a final control order: s 24.

It is made an offence for a controlled member of a declared organisation to associate with another controlled member (under the South Australian Act, any other member) of the same organisation, the purpose of their association being irrelevant. The penalties in terms of imprisonment are severe.

I have discussed the battles over the preventive detention and criminal organisation legislation at some length because it illustrates the operation of the rule of law and the effects of that operation. All, including State governments and parliaments are subject to the Constitution, and the Constitution safeguards the integrity of the Australian courts, not only federal but State as well – an integrity which, in turn, is vital to the maintenance of the rule of law. Whatever one's view of the final result, the two examples also show how the content of legislation can be improved in response to the courts' decisions.

6. Administrative justice

Administrative law came of age in Australia in the 1970s with the enactment of three Acts: *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act), the *Ombudsman Act 1976* (Cth) and the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (AD(JR) Act). These Acts followed three reports by the Kerr Committee in 1971, followed by the Bland and Ellicott Reports.[10] The assumption of the Kerr Committee was expressed by Professors Creyke and McMillan as follows:

> "… administrative justice and accountability – correcting defective decisions and assuring the public that the rule of law was safeguarded – were the central objectives of administrative law."[11]

The Kerr Committee recognised, however, that judicial review alone did not provide adequate review of administrative decisions: merits review was also essential.

The AD(JR) Act provides for judicial review by the Federal Court of administrative decisions under Commonwealth enactments on the legal grounds set out in the Act. The AAT Act provides for review of Commonwealth administrative decisions on merits grounds with a right of "appeal" to the Federal Court of Australia on question of law.

Attempts by government to exclude judicial review through the use of "privative clauses" have failed in the High Court, whether those attempts were made at the Federal[12] or State[13] level.

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10 All three reports are reproduced in *The Making of Commonwealth Administrative Law: the Kerr, Bland and Ellicott Committee Reports*, compiled by R Creyke and J McMillan (CIPL 1996).

11 R Creyke and J McMillan, "Administrative Law Assumptions … Then and Now", *The Kerr Vision* at 18.

12 *S157/2002 v Commonwealth* (2003) 211 CLR 476.

7. Military law[14]

The Director of Military Prosecutions (DMP), Brigadier Lyn McDade, announced on 27 September 2010 that she had decided to prosecute three soldiers arising out of a civilian casualty incident in Uruzgan Province, Afghanistan on 12 February 2009. They were fired upon by a man in a compound. The soldiers returned fire and threw grenades into the room from which the fire was coming, killing six civilians – five children and an adult.

The DMP's decision to prosecute provoked intense, emotional and often ill-informed comment, both in military and non-military circles. Many who would have none of the knowledge available to the DMP, had no hesitation in stating that the charges should not have been brought. Many vilified the DMP, attacking her competence.

The Office of DMP is created by the *Defence Force Discipline Act 1982* (Cth), s 188G. The DMP is given functions by s 188GA, the main one of which is prosecuting for service offences before a court martial or Defence Force magistrate. Prosecutions begin with a charge under s 87(1) which provides that where an authorised officer, including the DMP, believes on reasonable grounds that a person has committed a "service offence" the DMP may charge the person. The major considerations are whether there is evidence which, if accepted, can prove the offence, whether there are reasonable prospects of a conviction, and a range of discretionary factors. This is generally in line with the considerations which reflect the prosecution policies of civilian DPPs.

The DMP is independent of the chain of command: although a military officer, she answers to no one for her decision.

In the non-military justice system, it is a contempt of court to engage in conduct that might improperly influence the outcome of pending prosecutions, such as by making a public statement that is calculated to influence a party. An example would be to inhibit a person from commencing, continuing or defending a proceeding.[15]

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13 *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531.

14 In writing this section, I have drawn on a paper presented by The Hon Justice PLG Brereton of the Supreme Court of NSW "The Director of Military Prosecutions, the Afghanistan Charges and the Rule of Law" at the Rule of Law Conference held in 2010.

15 See, for example, *Smith v Lakeman* (1856) 26 LJ Ch 305; *Registrar v Unnamed Respondent* (ACT Sup Ct, Miles CJ, 16 March 1994, BC 940 5547); *Resolute v Warnes* [2000] WASCA 359; *North Australian*

In the case of civilian DPPs, public criticism has, if anything, been of perceived insufficient zeal in the pursuit of criminals, rather than an excess of it. It must be regarded as very doubtful that a non-military DPP would have been subjected to the same attacks as those which were made on Brigadier McDade It must also be suggested that a contempt of s 53 of the Defence Force Discipline Act makes it a service offence for a Defence member to engage in conduct in respect of a service tribunal that would be a contempt if engaged in respect of the court. Section 89 of the *Defence Act 1903* (Cth) creates a similar offence extending beyond service personnel.

Another misconception that attached to the public comment made at the time was that the DMP should have conducted some kind of preliminary hearing or given reasons for her decision to prosecute. Plainly, those steps are not recognised features of prosecutorial decision-making.[16]

Probably a prosecution would turn on the question whether the rules of engagement were adhered to, and, perhaps, whether the soldiers' acts were a reasonable and proportionate response. Those questions are complex. What is significant is that the rule of law applies. If a soldier steps outside the rules of engagement, that soldier is acting without lawful authority.

Following the Second World War hundreds of Japanese were tried by Australian courts martial for war crimes and many were executed. That is to say, they were held to account for having gone outside the rules of war. It is a mark of a society of which the rule of law is a feature that we call to account, not only those who threaten us, but also our own soldiers.

This never meant that the soldiers would be convicted. The charges would have been heard by courts martial and if there were any reasonable doubt as to their guilt they would have been acquitted.

Aboriginal Legal Aid Service Inc v Bradley (2001) 188 ALR 312 at 335 per Wilcox J; *Bhagat v Global Custodians Ltd* [2002] NSWCA 160; *Clarkson v Mandarin Club Ltd* (1998) 90 FCR 354; *Harkianakis v Skalkos* (1997) 42 NSWLR 22; *Attorney-General v Times Newspapers Ltd* (*Sunday Times Case*) [1974] AC 273; *Commercial Bank of Australia Ltd v Preston* [1981] 2 NSWLR 554.

[16] *Commissioner for Police v Reid* (1989) 16 NSWLR 453 at 461; *Oates v Attorney-General (Cth)* (1998) 84 FCR 348 at 354-5.

In fact, in May 2011 a military Judge threw out manslaughter charges against two of the soldiers and although she was entitled to lay different charges, the DMP did not do so.

That left the lieutenant colonel who had been in charge of the raid. In august 2011 the DMP dropped the charges against him.

8. Human rights legislation

Father Brennan's Committee[17] recommended the enactment of a *Human Rights Act*. It has been suggested that while the Act would not have a direct relevance to the rule of law, it would so affect the relationship between the courts and the other branches of government, as to undermine public confidence in the courts – something which is essential to the rule of law.

In a paper "Implications of Proposed *Human Rights Act* for the Rule of Law as manifested in Australian Courts", presented to the conference "Is the Rule of Law under challenge in Australia?" held by the Rule of Law Institute of Australia and the New South Wales Bar Association on 20 November 2009, Richard McHugh SC suggested that the proposed general interpretative provision and the proposal to give the High Court power to make "declarations of incompatibility" would diminish the respect in which the courts are held in the public mind.

The interpretative provision, which would relate to Commonwealth laws but not State or Territory laws, would be to the effect that Federal legislation must be interpreted in a way that is compatible with the human rights expressed in the proposed Act and consistent with Parliament's purpose in enacting the legislation. The expression "consistent with Parliament's purpose in enacting the legislation" seems to allow the courts hardly any scope for movement, and one would find this a good or bad thing depending on whether one places greater value on parliamentary sovereignty or judicial discretion.

In relation to declarations of incompatibility, Mr McHugh has greater concerns. Briefly, he expresses the concern that declarations of incompatibility could inspire, and in a practical sense even require, political attacks on the High Court. He is probably right in saying that the

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[17] *Report on the Consultation into Human Rights in Australia*, Father Frank Brennan AO (Chair), Mary Kosdakidas, Tammy Williams, Nick Palmer AO, APM (Members), 30 September 2009, Part Four.

Human Rights Act proposed would increase the occasions on which the Court's decisions are the subject of political debate. He concludes (at p 18):

> "Taking the long view, I think the real risk which the proposed *Human Rights Act* presents for the rule of law as we know it is that it could ultimately lead to greater conflict between the judicial and the political branches, and perhaps to more widespread judicial adventurism."

The thesis is that the rule of law and respect for the courts are best served by keeping judicial discretion to a minimum, certainly in cases where political, social and moral values are involved.

9. "Judicial activism"

On 30 October 2002 Justice JD Heydon, then a member of the New South Wales Court of Appeal, delivered an address at a dinner hosted by *Quadrant*, an Australian magazine that provides a forum for public intellectual debate. Justice Heydon's address was entitled "Judicial Activism and the Death of the Rule of Law" and was published in full at (2003) 23 *Australian Bar Review* 110-133.

It is best for you to read that article rather than to rely upon my summary of it. Briefly, Justice Heydon expresses a concern that by failing to adhere to a strict legalism, the courts imperil public confidence in them and therefore imperil the rule of law. There is an obvious connection between this thesis and that of Mr McHugh noted above.

Perhaps no one will disagree with the general proposition that the courts should not be freely altering the law to bring it into line with the idiosyncratic values, ideals and predispositions of incumbent judges. One can readily accept that a free-wheeling independence of judicial mind of that kind, be it called "activist" or not, should be condemned.

The problem that I have is that one person's judicial activism is another person's orthodox adjudication. The most "conservative" and black letter judge will inevitably bring an element of his or her values and predispositions to bear in some cases. Judges are not automatons.

Perhaps the most that can be said is that the Judge, not having been elected to mould policy, should accept in the interests of the rule of law that the judicial role is the more limited one of

striving to faithfully search out and apply the answer or the best answer the law provides to the case he or she is called upon to decide.

10. Access to legislation[18]

If it is impossible or unduly difficult or expensive for the citizen to have access to legislation (I include Acts of Parliament and subordinate legislation), or if legislation confers excessive powers on the Executive, the rule of law is imperilled. There are three aspects of the problem.

First, there is the voluminous, very detailed and technical Acts of Parliament that only a specialist has any hope of understanding. The Acts regulating taxation and corporations are examples of this problem. **Attachment 4** to this paper gives some statistics of Commonwealth Bills for Acts and Regulations over time.

Second, there is the species of legislation that gives the Executive wide power to make subordinate legislation called regulations, by-laws, rules, ordinances and so on. As a matter of analysis, this is a conferral of legislative power.

Third, there are the Acts of Parliament that confer wide discretionary administrative powers on the Executive.

It is no answer to the first or second problem to say that we have immediate access to legislation via the computer. In fact, I sometimes think that worsens the position because we see only a snippet of an Act and cannot easily move around the Act.

Whether it is the Australian Taxation Office (ATO), the Australian Competition and Consumer Commission (ACCC), the Australian Securities and Investments Commission (ASIC) or the Australian Prudential Regulation Authority (APRA), the regulator administers

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[18] For this part of the paper I am indebted to Robin Speed, President of the Rule of Law Institute, whose paper "Is the Rule of Law in Australia under Challenge?" was presented to a Rule of Law Institute conference held on 9 December 2009.

a régime of legislation, principal and subordinate, which creates numerous obligations with penalties for non-compliance.

There is often pressure on the regulator, whether self-imposed or from above, to secure a high conviction rate. This might be unobjectionable if the boundaries of the criminal offences were clear and everyone knew them. But it is otherwise if the boundaries are unclear and they are not known.

In relation to the second and third problems, one should not be too quick to criticise. If we want to deny the Executive any capacity to fill in the gaps, the Act of Parliament itself will tend to be more voluminous, detailed and technical. If we want to avoid that problem, we will be tempted to allow wide power to the Executive.

Conclusion

I have tried to draw attention to some potential threats to the rule of law in Australia. Other people, being conscious of them, established the Rule of Law Institute of Australia in 2009. **Attachment 5** to this paper gives information concerning the Institute.

It is important for lawyers and the wider public to be conscious of the importance of the rule of law and of the need to safeguard it in the interests of our democratic rights and freedoms.

ATTACHMENT 1

Article I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

Article II: "A well regulated Militia, being necessary to the security of a free State, the right of people to keep and bear Arms shall not be infringed".

Article III was directed to the billeting of soldiers in times of peace and war, a live issue following the Revolution.

Article IV: "The right of the people to be secure in their persons, house, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

Article V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without due compensation".

The expression "due process" in Article V is derived from later translations of cl 39 of *Magna Carta*.

Article VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial by an impartial jury of the State and district wherein the crime shall have been committed, … , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the Assistance of Counsel for his defence".

Article VII preserves the right to trial by jury in any civil case where the sum in dispute exceeds $20.

Therefore virtually all civil cases in the United States are heard and determined by juries.

Article VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted".

Compare the provision of the Bill of Rights of l629 noted earlier.

Article IX provides for the retention of existing rights not enumerated in the Constitution, and *Article X* provides for the reservation to the States of powers not vested by the Constitution in the Federal Government.

ATTACHMENT 2

The French Declaration of the Rights of Man and the Citizen in 1789 declared that:

- men were born and remained free and equal in rights;
- that the aim of all political association was to preserve the natural and imprescriptible rights of man;
- that sovereignty rested in the nation; that liberty consisted in freedom to do anything that was not injurious to others;
- that the law could prohibit only such actions as were harmful;
- that law was an expression of the general will;
- that no person should be accused or arrested or imprisoned except in cases and according to forms laid down by law;
- that the law should provide for only such punishments as were strictly and obviously necessary, and should not permit retrospective penalization;
- that persons were to be held innocent until proved guilty;
- that all unnecessary harshness in their initial treatment should be avoided;
- that no person should be harassed on account of his or her opinions or religious beliefs, provided they did not disturb the public order;
- that free communication of ideas was a precious right;
- that protection of the rights of man and the citizen required that there be military forces;
- that a common contribution to the expenses of the State was necessary;
- that there should be a right to vote on taxation;

- that society had the right to require public officials to account for their administrative acts;

- that a society in which the observance of the law was not assured, nor the separation of powers defined, had no constitution at all; and finally,

- that since the holding of property was an inviolable and sacred right, no person was to be deprived of it unless public necessity demanded it and, in such a case, the owner should be compensated.

ATTACHMENT 3

RESPONSE OF THE AUSTRALIAN GOVERNMENT TO THE VIEWS OF THE COMMITTEE IN COMMUNICATION NO. 1635/2007 TILLMAN V AUSTRALIA AND

COMMUNICATION NO. 1629/2007 FARDON V AUSTRALIA

1. The Australian Government presents its compliments to the members of the Human Rights Committee.
2. The Australian Government notes that it has given careful consideration the Committee's Views in Communication No. 1635/2007 Tillman v Australia and Communication No. 1629/2007 Fardon v Australia, dated 10 May 2010, in consultation with the states of New South Wales and Queensland where Mr Tillman and Mr Fardon were detained.

Update on detention of Mr Tillman and Mr Fardon

• Mr Tillman

3. Mr Tillman was released from custody on the expiration of his continuing detention order on 31 October 2008, pursuant to an interim supervision order.[19] Until his release in October 2008, Mr Tillman had spent 17 months and 28 days in custody pursuant to orders made under the Crimes (Serious Sex Offenders) Act 2006 (CSSOA).[20]
4. On 5 December 2008, a five year extended supervision order was imposed on Mr Tillman. An extended supervision order involves the monitoring of the offender in the community and the imposition of conditions determined by the Court, and is imposed by the Court if it is satisfied to a high degree of probability that the offender is likely to commit a further serious sex offence, if he or she is not kept under supervision.[21] The conditions of Mr Tillman's extended supervision order include electronic monitoring and the imposition of a curfew.

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[19] The interim supervision order was imposed pending the outcome of an application by the New South Wales Attorney General for an extended supervision order.

[20] On 11 April 2008, the court extended the continuing detention order on Mr Tillman until 31 October 2008. Mr Tillman consented to this extension, as it provided him with the opportunity to complete the CUBIT rehabilitation program, which is a high intensity treatment program designed for sex offenders assessed as being of moderate to high risk of re-offending, whilst in detention.

[21] Please note that on 7 December 2010, New South Wales amended the Crimes (Serious Sex Offenders) Act 2006 in response to recommendations made by the NSW Sentencing Council and following a statutory review of the Act. An extended supervision order is now imposed if the Supreme Court is satisfied to a high degree of probability that the offender poses an 'unacceptable risk' of committing a serious sex offence if he or she is not kept under supervision.

5. Mr Tillman breached his extended supervision order in October 2009 by meeting his grandchildren without approval, which is prohibited under the extended supervision order. Mr Tillman was sentenced to six months imprisonment for this offence. His appeal against this sentence was dismissed on 15 August 2011.
6. Mr Tillman is currently awaiting hearing for breaches of his current extended supervision order allegedly committed in June 2009, which relate to the requirement that Mr Tillman provide a schedule of movements to his supervisors and prior approval for any changes to his proposed movements. Mr Tillman is on bail for these breaches, and the matter has been adjourned until 21 October 2011.
7. Mr Tillman has spent a total of 11 months and 11 days in custody (either in remand or serving a custodial sentence) as a result of breaches of his extended supervision order.

• Mr Fardon

8. Mr Fardon was released from custody on 4 December 2006, following the rescission of his detention order. Mr Fardon was released pursuant to a supervision order, which was set to expire on 8 November 2016.[22] Mr Fardon had 38 conditions attaching to his supervision order.
9. Mr Fardon was imprisoned again from 24 July 2007 to 30 October 2007 for breaching the terms of his supervision order by leaving the locality specified in that order.
10. On 3 April 2008, Mr Fardon was charged with rape against an elderly woman, which led the Attorney-General of Queensland to file an application seeking either the imposition of another continuing detention order on Mr Fardon, or the amendment of the requirements of his supervision order due to the alleged breach of that order. Mr Fardon was ordered to be detained in custody until the final hearing of the contravention proceedings. On 14 May 2010, Mr Fardon was found guilty of one count of rape, and was sentenced to 10 years imprisonment. On 12 November 2010, the Court of Appeal set aside that conviction and ordered that a verdict of acquittal be entered.
11. The contravention matter was finalised within the Supreme Court on 19 May 2011. It was ordered that Mr Fardon be released to the community subject to a supervision order. However, the Attorney-General lodged an appeal against the release. The Attorney-General's appeal was upheld by the Court of Appeal and it was ordered that

[22] A supervision order involves a release from custody with a range of conditions.

Mr Fardon be detained subject to a continuing detention order on 1 July 2011. As a result, the supervision order was rescinded and Mr Fardon remains in custody.

12. The breaches by both Mr Tillman and Mr Fardon of their non-custodial supervision schemes following their release from preventive detention highlights the difficult nature of managing serious sex offenders in the community.

Factual findings in the Committee's Views

13. Australia would like to provide a response to the following factual findings by the Committee in its Views.

Requirement to demonstrate no less restrictive means

14. In line with the Committee's previous jurisprudence, the Australian Government accepts that Australia was required to demonstrate that there were no less restrictive means available to meet the objectives of preventive detention in assessing whether the authors' detention was justified. It maintains that, as a matter of fact, it demonstrated in its submissions to the Committee in these cases that there were no less restrictive means available to achieve the twin purposes of the CSSOA and Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) (DPSOA) of rehabilitation of the offender and protection of the community.
15. In relation to less restrictive means of rehabilitation, the New South Wales Government has advised that, in imposing a continuing detention order on Mr Tillman, the New South Wales Supreme Court was satisfied that at the relevant time, there was no treatment available in the community suitable to address his long standing offending behaviour. The Queensland Government has advised that the intensive counselling and rehabilitation programs Mr Fardon was required to undergo during his preventive detention were not available in psychiatric facilities outside of the prison environment.
16. While rehabilitation of the offenders is integral to the legislative schemes, protection of the community is also of central importance as a purpose of these schemes, and it was assessed by the Supreme Courts of New South Wales and Queensland at the time that continuing detention orders were imposed on Mr Tillman and Mr Fardon as not being able to be achieved through less restrictive means. Under the CSSOA and DPSOA, the New South Wales and Queensland Supreme Courts each have a duty to consider less restrictive means of achieving the purposes of the legislative schemes before imposing continuing detention orders. Under the CSSOA, a continuing

detention order may only be imposed by the New South Wales Supreme Court where it has been determined that adequate supervision of the offender will not be provided by an extended supervision order. Under the DPSOA, the Queensland Supreme Court must decide whether adequate protection of the community can be reasonably and practically managed by a supervision order before imposing a continuing detention order. Therefore, both the New South Wales Supreme Court and the Queensland Supreme Court were actively required to consider less restrictive options when imposing a period of preventive detention on the authors. Therefore, Australia rejects the factual finding of the Committee that Australia did not demonstrate that no less restrictive means were available to meet the objectives of the relevant legislative schemes. Requirement to rehabilitate

17. In relation to rehabilitation, Australia maintains that meaningful measures for reformation and social rehabilitation were in place throughout the incarceration of Mr Tillman and Mr Fardon, but that they failed to avail themselves of these measures by refusing to attend rehabilitation programs while incarcerated.[23] In Dean v New Zealand, the Committee held that where the author chose not to attend certain rehabilitation programs, the delay of the author's release from preventive detention that was caused by his decision not to attend rehabilitation programs did not amount to a violation of article 10(3).[24] In addition, each of the legislative schemes Mr Tillman and Mr Fardon were detained under require an assessment of an offender's risk of recidivism after they have served their term of imprisonment. Therefore, one of the overall purposes of preventive detention in these cases was to facilitate rehabilitation of the offenders.

Summary

18. Australia maintains that, in light of the Committee's previous jurisprudence on this issue, preventive detention must serve a legitimate purpose and have a number of safeguards in place in order for it not to be considered arbitrary under article 9 of the Covenant. The New South Wales and Queensland Governments have emphasised the difficult circumstances of these cases, which deal with two serious sex offenders. Australia stresses that the community has a legitimate expectation to be protected from these offenders, and at the same time, that authorities owe these offenders a duty to try and rehabilitate them. The purpose of these schemes is not to indefinitely detain

[23] Fardon, above n1, [4.2]; Tillman, above n1, [4.4].
[24] Dean, above n24, [7.5].

serious sex offenders, but rather to ensure as far as possible that their release into the community occurs in a way that is safe and respectful of the needs of both the community, and the offenders themselves.

19. In these circumstances, the New South Wales and Queensland Governments do not consider further action is necessary in relation to Mr Tillman and Mr Fardon, or the legislative schemes they were detained under.
20. The Australian Government avails itself of this opportunity to renew to the Human Rights Committee the assurances of its highest consideration.

ATTACHMENT 4

Bills for Acts:

The table below gives the number of bills and pages of bills tabled each year.

Source: All figures are taken from annual reports of the Office of Parliamentary Counsel. Earlier figures are rounded.

1990s

Year	1989/ 1990	1990/ 1991	1991/ 1992	1992/ 1993	1993/ 1994	1994/ 1995	1995/ 1996	1996/ 1997	1997/ 1998	1998/ 1999
Number of Bills	131	201	213	200	228	188	139	205	219	247
Number of Pages	3000	7000	4000	4100	5000	4500	6000	6800	8500	9000

2000s

Year	1999/ 2000	2000/ 2001	2001/ 2002	2002/ 2003	2003/ 2004	2004/ 2005	2005/ 2006	2006/ 2007	2007/ 2008	2008/ 2009
Number of Bills	187	170	202	185	173	217	147	204	164	205
Number of Pages	5400	8700	6600	5300	6700	7245	6489	8225	6054	9439

2010s

Year	2009/10	2001/11
Number of Bills	220	192
Number of Pages	9,273	6,855

Regulations:

The table below gives the number of regulations made each year.

Source: All figures are taken from the yearly Consolidated Legislation Monitors, published by the Senate Standing Committee on Regulations and Ordinances.

Year	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001
Number of Regulations	262	351	365	304	321	330	342	429	347	406	305

ATTACHMENT 5

The Rule of Law Institute of Australia is a not-for-profit body that was established in 2009 to uphold the rule of law in Australia. It is incorporated under the *Associations Incorporation Act 2009* (NSW).

The Institute has held conferences on the theme of the Rule of Law, and posts on its website (www.ruleoflawaustralia.com.au) key documents and conference papers relevant to that theme.

The Institute also makes submissions to governmental and parliamentary bodies in support of observance of the Rule of Law.

In the area of education, the Institute has established a Legal Studies Library of Resources which includes videos for use in Years 11 and 12 HSC Legal Studies syllabus.

The Institute also responds, through public statements in the media, to Rule of Law issues as they arise.

I am honoured to have been appointed as the Foundation holder of the Rule of Law Adjunct Professorship in the Faculty of Law at the University of Sydney for the period 2012 – 2014 for the purpose of delivering in each year four two-hour lectures on the Rule of Law---one in each of four courses---and otherwise encouraging recognition of the rule of law in the Faculty's courses.