

THE DEVIL'S TRIANGLE

Civil liberties and the relationship between the law, the media and the parliament

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This Lecture commemorates the great figure in Australian legal history Justice Sir Frank Kitto, who served on The High Court of Australia from 1950 to 1970 and was thereupon elected Chancellor of this University.

As long ago as 1998 Justice Michael Kirby used this lecture to describe not only Sir Frank's contribution to the law but his high integrity, demonstrated for instance, in the unequivocal judgment in which he joined the majority in the seminal decision to strike down the Menzies Government's *Communist Party Dissolution Act* 1950. It was the beginning of the Cold War but Kitto was immune to the politics of the situation:

"...it may have been thought (although never said in those more graceful days) that Justice Kitto was a 'capital C conservative'. His skills were in the black letter law... He had just succeeded in a substantial brief for the banks in striking down the nationalisation scheme of the former Labor Government. Yet in less than a year, he performed his function as a judge of our highest court, in accordance with his understanding of the law and the Constitution precisely and only as his learning and conscience dictated."¹

In the period 1976 to 1982 he was inaugural Chairman of The Australian Press Council. I venture to believe that he may have grudgingly approved the national defamation law finally achieved by the Commonwealth and State Attorneys General in 2005 after years of difficult negotiation.

That kind of law reform, as I have found, can require strenuous negotiation with persistent interest groups around issues of substantial policy and technical difficulty. It was a rare opportunity for me to have a broad commonality of view and sympathy with the legal representatives of the major news organisations and their clients who took the view, I think rightly, that speculative defamation litigation was a blight upon press freedom.

That kind of law reform is necessary because it can bring substantial improvement to the administration of the law, the efficiency of the economy and the welfare of the community. It does not normally raise difficult issues of morality or justice. If that kind of law reform is able to resolve conflicts of opinion and interest, without creating a serious sense of grievance among some of the parties, it is likely to achieve a level of uncontroversial permanence.

However, when Professor Paul Martin invited me on behalf of your Faculty to present this lecture he was thinking about another kind of role that I believe is essential to the role of an Attorney General in our Westminster system of

government: the protection of the fundamental norms and principles of the Australian legal system.

Almost all of those who have previously given this lecture have been legal philosophers or judges but today I want to talk about how those values played out among the contingencies of real life in the realm of government during a quite turbulent period in the recent history of our society and therefore in the administration of the law itself in New South Wales.

Let me set the scene. I was New South Wales Minister for Emergency Services for seven years from 1995. During that time we suffered the worst floods in thirty years, the worst bushfires in fifty years; and the hailstorm in the eastern suburbs of Sydney was at the time the most expensive natural disaster in Australian history. When I ceased to hold the portfolio the weather seemed to become quiet.

In the same period, I was Corrections Minister. The new government had come to power after an election campaign marked by strident cries for the imposition of preventative detention. The notorious cases of wife killer Gregory Kable and child murderer John Lewthwaite were prominent. Soon after the election, the High Court brought down its somewhat delphic judgement in Kable; not long after that, it was my task to defend the decision of the Parole Board to free John Lewthwaite and to stand against tabloid calls for new preventative detention legislation, while a howling mob surrounded the inner city terrace in which the freed murderer had been accommodated. The inner city terrace, I might add, in which the Parole Service had astutely chosen to place this notorious offender was opposite a convent school full of tiny children. My subsequent conversation with the rather saintly nun in charge of the school was, all things considered, less unpleasant than it might have been.

I was Attorney General from seven years from 2000 and astute listeners among you will be beginning to discern something of a pattern. Charges were laid in 2000 against Bilal Skaf and his associates for a series of pack rapes, which, as their circumstances became known, agonised the State; the fraught trials, retrials and appeals went on for several years raising hard questions in the general media about sentencing policy, the treatment in courts of complainants in sexual assault hearings and the rules for the conduct of jury trials.

In 2003 a violent offender on bail murdered his wife in Newcastle, reviving memories of the unspeakable Bega Schoolgirl murders of half a dozen years before, raising questions about the efficiency of administration of the justice system and encouraging complaint about the established presumptions for granting bail. The violence and racism of the Cronulla Riots appalled us in 2005.

These events were collectively to encourage some of the most vituperative tabloid media campaigns against the courts ever seen.

Outside New South Wales the "Tampa" incident, followed instantly by Commonwealth Legislation to introduce the so-called "Pacific Solution" for asylum-seekers, occurred in August 2001. Three months later the terrorist attack on the Twin Towers in New York traumatised the world, and caused an extreme legislative response in Australia. The Bali Bombing shocked us in 2002. A second Bali Bombing and the 7/7 Bombing in London followed the Djakarta Embassy Bombing in 2004. They all involved Australian victims. The London bombing raised new fears about so called home grown terrorists and caused another extreme legislative response.

Constellations of violent criminal offences and acts of terrorism preoccupied public attention but they were not the only matters of concern. For instance, the High Court decision in Brodie² abolished the rule distinguishing misfeasance and nonfeasance in negligence, thereby extending the tortious liability of local government and contributing to an acute crisis in public liability insurance. The dramatic events concerning the compensation by the Hardies Company of victims of asbestos poisoning played out in the media and the government.

This list of often unpredictable events could be made longer. It was not a comfortable time to be administering the legal system or seeking to protect its fundamental values. Indeed, some of those values as I had understood them were open to considerable challenge in the media and the parliament and in the electorate at large, as they often have been in history when society is subject to feelings of fear and threat.

I should acknowledge that there exists some degree of ambivalence about the role of the contemporary Attorney General as First Law Officer, in Australia anyway. The establishment of the Office of The Director of Public Prosecutions was the most important of the systematic changes that have seen public law officials take over many of the historic functions of Attorneys General. In Australia the Attorney General is not the government's legal representative but a regular cabinet minister in charge of a department: a department that nevertheless holds responsibility for the administration of the legal system and for the criminal law and other legislation dealing with legal rights.

A minister who served in the late nineteen seventies has told me that if the Attorney General in those years told the New South Wales Cabinet that a particular proposal would not be legally acceptable that was an end to the matter. I can attest that such is no longer the situation.

Nevertheless, with a few blatant exceptions ministers and members still acknowledge that the Attorney General has a particular responsibility for advising the government on legal matters, for the appointment of judicial officers and for the comity of the relationship between the executive, parliament and the other arm of government existing under the doctrine of the separation of powers, the courts.

The State Attorney General also has an especially intense relationship with the legal profession. I acknowledge that the Minister for Agriculture has an important relationship with the Farmers' Association and the Minister for Local Government has a special relationship with local government defined by legislation. However, the Attorney General and the Attorney Generals Department are permanently engaged in a dialogue with the profession through the Law Society and The Bar Association, with the Law Reform Commission, the Judicial Commission and the Public Law Officers, as well as with the Court jurisdictions, concerning the effective, principled conduct of the legal system and the protection of its values.

Of course the legal profession is hardly free of self-interest, tax evasion, overcharging or neglect: of course not. Indeed, while I was New South Wales Attorney General, the huge scandal erupted over a small number of extremely senior barristers who were systematically cheating the Taxation Office and exploiting bankruptcy provisions in a manner both flagrant and baroque. However, I wish precisely to say that in my experience professional, ethical ideals remain important for the great majority of lawyers. The professional associations, along with the Legal Services Commissioner, support and nurture this culture, and indeed in the case of the "Bankrupt Barristers" scandal the office holders and executive of the Bar Association showed quite extraordinary courage and vigour.

It is not just the existence of the principles that matters. In the day-to-day life of the nation basic values of the law critical to our democracy are more carefully nurtured and understood and more often vigorously defended by the culture of the wider legal profession than they are by our parliaments or the media.

Within the Australian Westminster tradition, one of the oldest continuously existing democratic systems in the world, the Attorney General is also a part of the legal professional culture, unless he or she deliberately chooses otherwise. The old roles of prosecutor and government advocate are gone but the critical responsibility for protecting fundamental values and ensuring continuing public confidence in the administration of justice remain. They are inseparable, it seems to me, from the Attorney's continuing responsibility for the appointment of judicial officers and the administration of the criminal law and of the court system itself.

In a paper given to the National Judicial College³ former Chief Justice Gleeson provided a characteristically precise account of public confidence in the courts:

"...in the determination of civil rights and obligations, and criminal responsibility, all people are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Competence, independence and impartiality are basic qualities required of judges as individuals, and of courts as institutions. Fair and public hearings are the required standard of judicial process. Confidence in the courts is a state of reasonable assurance that these qualities and standards are met."

The Chief Justice went on to point out that:

“... courts also have the benefit of cultural reinforcement of their authority, and of faith in their integrity. This is a society which accepts the rule of law as the natural order of things. The decisions of courts are obeyed, even when they are unpopular, or offend powerful interests...”

This cultural habit of acceptance cannot however be taken entirely for granted. From time to time it can partially break down, a matter to which I will return.

It is of practical relevance that the judicial officers who deal with the great volume of matters involving the citizens of NSW are actually not judges at all: they are magistrates and they conduct ninety per cent of criminal and civil hearings in our jurisdiction. Public confidence in the courts can be undermined if the local courts are seen by local people to be conducted incompetently. For that reason, I worked closely while in office with the Chief Magistrate to improve procedures, to introduce substantial diversionary and rehabilitation programs for offenders, to appoint competent practitioners from a variety of backgrounds and to enhance the public reputation of magistrates.

In that last respect and with the assistance of Chief Justice Spigelman I arranged to change the form of address for magistrates from the obsolete and faintly ridiculous honorific “your worship” to the form “your honour,” which is used for any other judicial officer. I know that my initiatives were successful. It was a startling experience to have a chorus of magistrates actually sing me a song of appreciation at their annual dinner to the tune of the song “A Policeman’s Life is not a Happy One” from The Pirates of Penzance. Regrettably the higher courts never exhibited the same creative flair.

Threats to confidence in the courts are not always pragmatic. Ideological conflict over the proper role of the courts has flared often in the last twenty years. In 2004 a particularly intense episode in intellectual debate about what was called “judicial activism” and the rule of law was under way. It was conducted as a high profile political campaign in the pages of The Australian newspaper and elsewhere. The politically conservative commentators, politicians and establishment figures who drove the debate were angry about decisions of the High Court of the nineteen nineties; for instance, its implication of a right to freedom of political communication in Political Advertising⁴ and subsequent cases but especially its decision to overturn the brutal historical injustice of the doctrine of *terra nullius* in Mabo.⁵

The critics suggested that the work of judges was not to make law but to find the existing law and to apply it to the situation before them, not to pay attention to the context of the matters before them or to contemporary values or ideas of justice. They overtly attacked those judges, not least High

Court judges who, they said, were undermining the role of the parliament by “legislating from the bench”.

I concede that this position is not a long way from the formal view argued by Sir Frank Kitto. However, if you were in a parliament, as I was, and understood the nature of judicial reasoning as I had been taught it, you drew the conclusion that the commentators were doing precisely *the opposite* to that which they claimed. They were attempting, often in exceptionally aggressive language, actually to reduce the *established* role of the judiciary in law making. They had a broad, radical conservative political agenda and they did not seem to mind if they undermined public confidence in the courts along the way.

When I was at the Law School of The University of Sydney more than forty years ago we were taught jurisprudence by the formidable Professor Julius Stone but more often by his protégé, the brilliant young lecturer Tony Blackshield. It was a homecoming for me therefore to walk into a conference on constitutional law in February 2004 at The Art Gallery of New South Wales to find the now venerable Professor Blackshield in full flight, restating the familiar robust teaching of Julius Stone:

“...when politicians and newspaper columnists inveigh against ‘activism’, what they usually postulate as its antithesis is the old idea that judges cannot *make* the law, but can only *apply* the law – and behind that, the old fiction that “the law” exists in advance in some objectively knowable, unambiguous, predetermined form, so that all the judge has to do is to apply it in the correct mechanical manner...”

However:

“We all *know* that judges make the law, and that even in the simplest case they always have to restate, develop, rationalise and reinterpret the law in order to apply it to the case before them – so that the judicial process is always and inevitably a creative process. And once we’ve agreed on that, we can also agree that what is meant by “activism” must be not that judicial creativity is bad in itself, but only that it might sometimes go too far, be exercised too sweepingly...”⁶

Professor Blackshield went on to discuss the manifest constraints on the exercise of judicial “creativity,” beginning with the fact the judges must decide the particular matter or dispute before them “on the basis of existing legal materials”:

“...justifying the decision by a process of reasoning persuasively constructed through an interpretation of those materials and either consistent with those materials or confronting any inconsistencies and plausibly explaining them away.”

Nevertheless, the clear antithesis to judicial activism, Professor Blackshield concluded, was not timid restraint but abnegation of judicial responsibility.

I recall that it was also in February 2004 that Justice Keith Mason, then President of The New South Wales Court of Appeal, presented the Sir Maurice Byers Lecture to the Bar Association⁷. Justice Mason mentioned the appearance of Byers QC before the High Court in three famous cases: the

Political Advertising case, which I have mentioned; The Wik Peoples v Queensland⁸, which found that native title rights could co-exist with rights under a pastoral lease, depending upon the precise terms of the lease; and the case of Kable v Director of Public Prosecutions (NSW)⁹, to which I have already in part alluded and which held that legislation in New South Wales allowing the Supreme Court to detain a single individual was not compatible with the exercise of the judicial power of the Commonwealth vested in the Supreme Court under the Constitution.

These were decisions that stood as “remarkable tributes” to the advocacy of Byers QC but they were also all demonstrations of the legitimate judicial creativity that appears from time to time “in every age” whether it is admitted or not.

Justice Mason went on to point to the dramatic changes that had actually been occurring in the law of negligence at the time. Unlike the case of Brodie, the slightly later case of Tame¹⁰ had constrained a field of tortious liability, this time in nervous shock. He showed that the case depended on much more than reading earlier precedents. It also depended on new understanding in the field of psychology, recognition that old distinctions were incoherent, an acceptance of the public mood of impatience with ambulance chasing and concern about the cost of insurance. That was the reality.

My last example is from earlier this year when Professor Hal Wootten, Supreme Court Judge, Royal Commissioner into Aboriginal Deaths in Custody, founding Dean of the Law School at the University of New South Wales paid tribute to Sir Gerard Brennan who, of course, wrote the leading judgment in Mabo. Recognising that there is always a tension “between the claims of continuity and consistency, which give certainty and predictability to the law, and claims of justice according to contemporary values, which give respect and acceptance,” Professor Wootten described the momentous historical events, the profound social change and the advances in understanding of Aboriginal culture that had occurred in the two centuries since the legal doctrines of *terra nullius* were established. For Sir Gerard:

“ a legal doctrine denying indigenous people rights because it deemed them ‘barbarous’ or ‘so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society’ seriously offended ‘the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system.’”¹¹

I share Hal Wootten’s pride that our independent court system could discard *terra nullius* as the foundational doctrine of Australian law:

“I wonder what... critics would say of their extravagant language today, when everyone can see Mabo’s modest effect on land titles and its beneficent effect on our race relations and, whether black or white, on our self respect and feelings of legitimacy in our land.”

Though such opportunities will always be rare, they would be a little more frequent if our parliaments legislated to establish charters of rights, a matter to which I will return.

In any event powerful explanations of the true role of the courts and realistic explanations of judicial reasoning such as those I have mentioned have helped to subdue the political campaign against so-called "activist" judges. It is true also that the nature of the High Court and its approach to constitutional questions has altered in recent years: different times, different personalities.

I like to think, on the other hand, that conservative commentators are embarrassed into silence at least to some degree by the unrestrained, flagrantly partisan decisions by Republican appointees to the Supreme Court of the United States of America in cases like Bush v Gore¹² or Citizens United v FEC¹³. The latter decision has given corporations all the free speech rights of real people and thus an unlimited right to spend corporate funds on political agitation. In consequence American politics threatens to drown in money influence: although it was pleasant to see so much of the money wasted in the recent presidential election.

Restraint is something that does not come to mind either when one turns ones attention to the approach of the media to the courts during my time in office. I refer particularly to tabloid newspapers and talk back radio, forms of communication it must be said that are quite unfamiliar to most judges, perhaps most lawyers.

It is easy to underestimate the ferocity of the environment that can be created by a sustained talk back campaign –supplemented these days by social media - especially if it is coordinated with other elements of tabloid media: the effect reaches far beyond the direct audience. A well-orchestrated campaign against a sentence that is perceived to be lenient or a bail decision that is contentious has the potential to taint public confidence in the justice system. The cycle, in the agitated atmosphere surrounding discussion of crime and sentencing a decade ago, was fairly predictable. Let us consider an only mildly fictionalised example.

Leaked security footage appears of an adolescent boy on a train station cruelly casting a small kitten under the wheels of a train. The boy is arrested, charged and bailed. Talkback radio begins a crazed campaign denouncing the magistrate, wanting the bail revoked, wanting the bail laws changed, wanting animal cruelty laws changed. In a week thousands of letters and faxes -this is in a time just before the advent of social media campaigns - arrive in the office of the Attorney General. Staff in his electorate office are deluged and abused on the phone. Parliamentary colleagues, likewise deluged, approach the Attorney General in corridors demanding action. The police union puts out statements indicating that such cases are all too common; that hardworking police are too often undermined by lenient magistrates and inadequate laws; that police need new powers; that more police are needed. Tabloid newspapers run photos of

the presiding magistrate and lists of previous decisions generally misunderstood but deemed contentious. Tabloid radio invites police and public to phone in with other examples of alleged judicial incompetence. Members of the staff of the Premier's office ring the staff of the Attorney General at all hours of the day and night screaming for action.

Sometimes of course there is a kernel of legitimate cause for concern in among all the tabloid hysteria. Sometimes long held conventions understandable to those within the legal profession serve to make the criminal justice system opaque and unresponsive to ordinary people. The Victims Rights Act (1996) responds to what was in my view the entirely justified movement of protest by the relatives of victims of homicide who had previously been refused information about trials on the basis that they were not parties to proceedings, given no opportunity to express their feelings other than in emotional press conferences on courthouse steps and overwhelmed by the feeling that only the rights of the defendant were protected. For similar reasons, in 2004 I introduced legislation, somewhat controversial within the legal profession, to better protect complainants giving evidence in sexual assault trials from harassment by defendants and their representatives.

In any event, terrible criminal acts have always resonated with the general public: modern media, including social media magnify the effect. In a normal time the fictionalised situation I have described could probably be dealt with effectively at a political level by the calling of a press conference in which the Attorney General explains the principles behind the bail laws, releases some accurate information on bail and sentencing in the company of the highly persuasive Director of The Bureau of Crime Statistics and Research (BOCSAR) and promises to ask the Director of Public Prosecutions to review the case. It is after all necessary in a democracy to take the fears and concerns of citizens of the state seriously and to address them if possible.

In 2002 however that kind of stately approach, which I attempted with some frequency, simply would not answer. Extraordinary crimes, dramatic trials and the unrelenting criticism of the entire justice system by tabloid media had reinforced strong perceptions in the public mind that criminal sentencing was inadequate. Private opinion research confirmed that concern about sentencing was at the time a major issue, perhaps the major issue, in the public mind. It became obvious that the parliamentary Opposition had access to similar research. The Government found itself vulnerable to attack of quite uncommon intensity and persistence. It was into this charged and opinionated environment that the Opposition introduced its main political strategy for the general election of March 2003: a policy of "compulsory sentences".

At that time mandatory sentencing was applied to minor property offences in the Northern Territory and Western Australia, where it acted like a super-trawler sucking indigenous kids and young adults into the prison system. In the Parliament and in the media members of the New South Wales

government including myself spent some months arguing the injustice of mandatory sentencing. It was, we said, inherently unjust to treat all cases as if they were the same; it was fundamental to our system of criminal justice that judges should exercise discretion in each individual sentencing decision; in practise crime rates never really fell where mandatory sentencing was applied.

Of course these arguments were true and entirely supported within the legal profession but they had no discernible effect at all upon public opinion. It was rationally believed within the Government and, it seemed the Opposition, that sentencing policy would be of strategic significance at the coming election. The choice was mandatory sentencing, an idea abhorrent to established values of our system of criminal justice, or something else.

It was against that background, and assisted by a small band of particularly accomplished criminal lawyers, that I introduced amendments to the Crimes (Sentencing Procedure) Act in November 2002 to "establish a scheme of standard minimum sentencing for a number of serious indictable offences and to establish a Sentencing Council to advise the Attorney General in connection with sentencing matters." Its purpose was to encourage adequacy, consistency and transparency in sentencing while avoiding the dangers involved in grid or mandatory sentencing.

In the second reading speech I was out to make a point.

"At the outset I wish to make it perfectly clear: the scheme being introduced by the government today is not mandatory sentencing... the scheme provides further guidance and structure to judicial discretion. It does not replace judicial discretion. These reforms are primarily aimed at promoting consistency and transparency in sentencing and also promoting public understanding of the sentencing process.

By preserving judicial discretion we ensure that a just, fair and humane criminal justice system is able to do justice in the individual case. This is the mark of a criminal justice system in a civilised society."

I concede that other members of the Government were not always so fastidious on the point.

I will attempt only a short explanation of the legislation here. The first important point of reference to be considered in a conventional sentencing exercise by a judge is the maximum penalty. The new scheme introduced a further reference point, being a point in the middle of the range of objective seriousness for the particular offence. Standard non-parole periods, set out in a Table, were in some cases set substantially higher than the median non parole periods for the offences involved indicated by statistics collected by the Judicial Commission over the previous seven years. The court was to set a standard non -parole period as the non- parole period for the offence unless it determined that there were reasons for setting a non- parole period that was longer or shorter than the standard non- parole period. Nevertheless the legislation maintained the court-defined "instinctive synthesis" approach to sentencing already established in New South Wales It

contained an expanded and comprehensive list of clearly identified “aggravating” and “mitigating” factors already existing in the common law that the sentencing judge could take into account in each particular case: for instance, the offender has a record of criminal activity, the offence involved gratuitous cruelty; or on the other hand, the offender has no criminal record, the offender was provoked by the victim.

The New South Wales Sentencing Council has reported that there has been some increase in the non-parole periods for standard non-parole Table offences and that there has been greater consistency in sentences imposed for Table offences. That is to say, at least to a significant extent the legislation has worked as intended. I remain aware nevertheless that application of the legislation has taken enormous effort by members of the judiciary and defence lawyers in particular.

An exceptionally strong Court of Criminal Appeal in the leading case of R v Way¹⁴ interpreted the statute to imply that a judge was obliged to adopt a two-stage process in the sentencing of an offender for a standard non-parole offence. First they should ask whether an offence fell into the mid range of objective seriousness by comparison with an hypothesised offence answering that description and, in the event that it did, by inquiring if there are matters justifying a longer or shorter non-parole period. However, the fairly recent High Court decision of Muldrock¹⁵ overturned the mandatory two-stage sentencing process established in Way and instead treated the standard non-parole period as an overall guide to sentencing of equivalent importance to the maximum sentence. The High Court described the maximum penalty and the standard non-parole period as “legislative guide posts.”

It is to be expected in consequence, that the increase in sentences that had been occurring in some standard non-parole offences will taper off. If I were of a more conservative caste of mind I should describe the creative statutory interpretation of the High Court in this instance as “activism”. The effect is that the influence of standard non-parole period scheme will be subdued and I am content.

The *political* effect of the standard non-parole period scheme however, was astounding. Admittedly influenced by tendentious headlines like one in the Sydney Morning Herald that referred to “Carr’s Killer Sentences,” the community responded positively to the proposals. There was a widespread acceptance that the government had made a reasonable settlement of a problem. This in turn left the electorate open to an implicit acceptance of the lawyers’ argument that not every case deserved the harshest penalty.

The Opposition attempted nevertheless to exploit the fact that judicial discretion had been maintained. Political discourse fell to a very low ebb. Advertisements and direct mail letters listed the common law mitigating circumstances recited in the legislation and sought to persuade voters in marginal electorates that random killers would walk free because of the actions of soft judges: “Bob Carr ...will give criminals thirteen excuses to get

out of gaol early". Judges will be able to "look for mitigating circumstances to let rapists, murderers, drug lords and violent criminals under the bar".

However, this rhetoric was unpersuasive. A victory had been won. The wheels had fallen off mandatory sentencing and public confidence in the courts had been restored; or at least widespread concern had been ameliorated.

Today, crime rates for most offences in New South Wales, in decline for ten years, are at their lowest level in more than twenty years. Fear of crime in the streets has therefore declined, tabloid media has perforce turned to other issues and in consequence the contingent politics of law and order, so consuming in the hothouse of politics and media a decade ago, has virtually disappeared.

The politics of terrorism is subdued at the present time as well. In 2005 it was in full cry. A few days ago I found an old copy of the front page of the Sydney Morning Herald, October 28, 2005.

" The NSW Attorney General Bob Debus has publicly questioned the adequacy of the safeguards in the Howard Governments anti-terrorism bill.

In remarks that are at odds with the Premier, Morris Iemma's determined support for the legislation, Mr Debus told the *Herald* yesterday: "I think I share the concern about this legislation with plenty of other people. I don't query that we need to have very tough responses to the threat of terrorism and I don't query that the Premiers have signed off on a framework last month.

But that was a framework that said judicial review of preventative detention and control orders would be meaningful and I'm concerned that in the drafted provisions that presently exist there are many aspects of normal judicial review that have been left out...

I'm also concerned that debate so far has been so secret. I do think we are talking here about some of the most profound changes to the criminal law that we have known in a generation and, necessary as they may be in general, it is obviously extremely important for democracy that they should be debated in a rational manner, both before they get into parliament and when they get there...."

That was a pretty good account of my state of troubled state of mind at the time.

The many schemes and amendments to counter terrorism laws passed by the Commonwealth after the ninth of November 2001, over fifty of them, have been conducted often in the rhetorical context of a "War in Terror". At a political level the spectre of a war has been used to justify the swift implementation of legislation, generally with little time for reflection. A sense of emergency has been used to justify the suspension of established rights or safeguards, to dismiss reasonable misgivings. Not a few political leaders took unabashed pride in claiming that "we have the strongest counter terrorism laws in the world." They were probably correct.

Absurd levels of secrecy were justified by the alleged requirements of national security. When officials from my department visited Canberra in 2005 to discuss the terms of counter terrorism legislation to be presented to parliament they were startled to discover they were scanned and taken into a secure room without mobile phones for their meeting.

There was no better demonstration of the unbalanced approach to law making at the time than the Commonwealth's decision to reintroduce a version of the defunct and essentially medieval law of sedition into the Crimes Act: a law that would mean in reality that you could be prosecuted if the government didn't like what you said. Those amendments were passed but under protest from MPs on both side of the House. The Commonwealth Attorney General agreed to refer the sedition provisions for the consideration of the Australian Law Reform Commission and the Labor Government carried out its recommendations for the repeal and replacement of the offending sections in 2010.

The Commonwealth had used the 7 July 2005 London Underground Bombing as the trigger for a further round of counter terrorism legislation. It was able to legislate a scheme for control orders under its own constitutional head of power, and did so. However, it had received legal advice casting doubt on its power to detain a suspect without charge for longer than 48 hours. Thus it was that the Commonwealth needed the assistance of the States, who were not so hampered, to introduce supplementary legislation for a scheme of preventative detention that would allow authorities to hold a terrorism suspect without charge for up to 14 days.

The Terrorism (Police Powers) Amendment (Preventative Detention) Bill essentially imported British legislation developed in the 1980s to hold members of the IRA without trial. Controversy had followed the British laws as the period of detention was steadily increased from 48 hours to 7 days to 14 days to 28 days; a 2008 bill to increase the detention time to 42 days was defeated in the House of Lords. Now, it seemed to many of my colleagues and I, the Commonwealth legislation sought to remove protections for no better purpose than to superfluously demonstrate that the Government was tough on terrorism.

Assisted again by criminal law officers of the highest calibre and strongly supported by many parliamentary colleagues I introduced a scheme, which replicated the Commonwealth preventative detention provisions but differed in some important respects. The Commonwealth scheme was administrative. Initial orders were made by a senior police officer and later confirmed by judicial officers acting in a personal capacity. The New South Wales scheme was judicial: both initial and final orders made by a judge.

The Commonwealth scheme at no time allowed a hearing on the merits between the parties before the expiry of the detention. The New South Wales scheme allowed an initial order to be made in the absence of the subject person but at subsequent confirmation or revocation hearings the detained

person was permitted to be present and contest the matter. The Commonwealth scheme contained disclosure offences designed to keep the existence of the preventative detention order secret. The New South Wales scheme included no such disclosure offences but allowed the Supreme Court to make the kind of non-disclosure order that might be applied to any criminal matter. I quote from my second reading speech:

“A 14 day scheme where a person was arrested secretly and held incommunicado without access to the courts would offend not only fundamental principles, such as habeas corpus, but also basic common sense. In the end the disclosure offences were not included in the New South Wales scheme as they are not effective in keeping a preventative detention order secret over a 14 day period. But their inclusion would have added greatly to the complexities of the bill. The bill implements a fairer scheme of preventative detention. This balance, sadly lacking in the Commonwealth bill, will mean the legislation can still operate effectively in preventing a terrorist attack and in preserving evidence of an attack, but eliminates some of the more rigid and unreasonable aspects of the Commonwealth bill...”

I went on:

The government has consistently proven that strong counter terrorism laws can be crafted that include strict safeguards and effective oversight. Whilst being ever vigilant as to the security and safety of the citizens of New South Wales I also want to assure the public that the government will always attend to the liberties and freedoms that are the mark of our democracy.”

Of course an observer may feel that I hadn't really done as well as I said I had done in balancing the needs of security and fundamental protections. My blunt point however is that the Commonwealth demonstrated little concern to do so at all.

A level of conflict over related issues persisted between the Attorneys General of some of the States and the Commonwealth. The detention of the Australian David Hicks in the American prison camp at Guantanamo Bay, Cuba without trial for five years was an issue of increasing concern for civil rights activists.

Awareness had grown about dramatic attacks on the rule of law by the Bush Administration after the Twin Towers attack. Evidence emerged of covert CIA kidnapping of terrorism suspects and their torture at secret prisons in Eastern Europe and the Middle East. The evasive official term was 'rendition'. Officials of the US Justice Department wrote detailed memoranda justifying the use of torture to elicit evidence. The Abu Graib scandal broke. Lawyers from some of the most prestigious firms in the United States sought to provide pro bono representation to detainees at Guantanamo Bay and were treated for practical purposes as enemies of the state.

Against this background the military defence counsel appointed to represent Hicks, the straight talking, charismatic Marine Major Michael Mori visited Australia with the purpose of persuading the Australian government to seek his repatriation. I arranged for Mori to address the Standing Committee of Attorneys' General in Fremantle in November 2006. Following the meeting the State and Territory Attorneys General signed the Fremantle Declaration

affirming our commitment to fundamental principles of justice including the right to a fair trial, the principle of habeas corpus, the prohibition of indefinite detention without trial, the prohibition on torture, access to rights under the Geneva Conventions, the separation of powers and the prohibition of the death penalty.

I wrote to the Commonwealth Attorney General expressing doubt that Hicks could ever receive a fair trial under the relevant US Military Commissions Act. That legislation allowed the Commission that would try Hicks to hear coerced testimony and denied defence counsel access to certain evidence; authorised the exclusion of the defendant from the court room; prohibited any person from invoking the Geneva Conventions as a source of rights or action; permitted the prosecution to admit hearsay evidence and placed the burden on the defence to show why hearsay evidence is not reliable; eliminate the right of non-US inmates to challenge their detention with habeas corpus petitions, and much else besides. Some US officials apparently referred approvingly to this manifest misuse of the law as "lawfare", by which they meant the deliberate, careful subversion of centuries of Anglo Saxon legal tradition.

It remains shocking to me that the Commonwealth of Australia would acquiesce to the indefinite detention of an Australian citizen without charge in circumstances such as these. In the end of course, David Hicks went through the form of a guilty plea and was released to become, for a while, one of only two people in Australia ever actually subjected to a control order.

Fundamental freedoms and guarantees can be much more fragile than we often assume. Here is Alfred McCoy, the American writer and scholar once resident in Sydney, writing about public acceptance of interrogation by torture that he was observing in the United States in 2006:

"Why has the public response to issues that cut to the core of America's national identity been so muted? The short answer: The administration's increasingly unapologetic advocacy of torture has echoed subtly but effectively with the trauma of 9/11.

With the horrific reality of the Twin Towers attack still resonating and endless nuclear-bomb-in-Times-Square...scenarios ricocheting around the media and pop culture, torture seems to have gained an eerie emotional attraction...

McCoy went on:

With a complex reality reduced to a few terrifyingly simple, fantasy-ridden scenarios, torture in defence of the "homeland" has gained surprisingly wide acceptance, while the torture debate has been reframed as a choice between public safety and the lives of millions or private morality and bleeding-heart qualms over a few slaps on the head. In this way old fashioned morality has been made to seem little short of immoral."¹⁶

The experience of years in the Devils Triangle, as I have called it, has done nothing to change my conventional view that a system of elected parliamentary government, a free press and an independent legal system are the foundation of democracy. It has not changed my view that it is within

democratic political systems that human possibilities are most effectively realised. I have also meant to demonstrate however that long nurtured legal values critical to the strength of our democracy, admirable as it is in plenty of ways, can be hastily broken down or overlooked in the executive and the parliament and the media in times of fear and threat.

Over many years I have therefore supported the enactment of a charter of rights, which has the primary purpose of causing a parliament to hasten more slowly, in such difficult times especially. As the Chief Justice reminded us in last year's Kitto Lecture the common law does protect many rights and freedoms but it cannot withstand plainly inconsistent statute law operating within constitutional limits.

As Australia had been the only comparable country not to recognise indigenous rights to land before Mabo, it is now the *only* comparable country governed without any agreed statement of basic rights. There is no law at all to protect many of our assumed freedoms.

Professor George Williams has been a tireless advocate of a national charter of human rights in the form of a so-called parliamentary rights model. This model allows the judiciary to exercise an important role but not at the cost of parliamentary sovereignty. Unlike the United States Bill of Rights, a charter of this sort does not leave a final decision to the courts. The charter is an ordinary act of parliament that can be changed to meet circumstances over time: no need for a permanent debate about whether or not to try to understand the intentions of the original framers.

In Australia only Victoria and the Australian Capital Territory have legislated for a charter. As Professor Williams explains:

"Victorian courts and tribunals are required to interpret all legislation, "so far as it is possible to do so consistently with their purpose" in a way compatible with human rights.

Where the legislation cannot be interpreted in a way that is consistent with the Charter, the Supreme Court may make a Declaration of Inconsistent Interpretation. This refers the law back to the Parliament but does not strike it down. Parliament can decide to amend the law or leave it as it is."¹⁷

The rights protected in Victoria are generally consistent with the International Covenant on Civil and Political Rights and include, for instance, freedom from arbitrary detention and freedom from cruel and degrading treatment.

It is gratifying to see that the federal government has recently announced a review of national counter terrorism laws by the retired and experienced judge, Anthony Whealey QC. It will look at control orders, preventative detention orders and police search powers.

Demonstrating the truth of my earlier remarks about the legal profession Law Council President- elect, Joe Cantanzariti welcomed the review. He said

that a lot of legislation had been rushed through parliament, some was counter to principles of criminal justice and some had never been used.

Subjected to the kind of charter processes available in Victoria or New Zealand a good many of our terrorism and migration laws would almost certainly not have been passed in their present form in the first place. I say this not unaware of significant work anyway done by several federal parliamentary committees to modify some of the counter terrorism legislation of the last decade.

I conclude by acknowledging that public confidence in the courts in contemporary society is very much higher than confidence in the media: that at the very least there is a widespread belief that Australian media are not as accountable as might reasonably be expected in a democracy. The Press Council, a body for the self-regulation of newspapers does not have the authority to ensure the reliable publication of apologies and corrections. The enforcement procedures of the Australian Communications and Media Authority, the statutory body that regulates commercial broadcasting, are slow and cumbersome. Newer forms of media are not covered at all. It is not clear if this situation will be remedied.

In Australia we have been surprised to see the influence of talk back host Alan Jones suddenly undermined by a social media campaign against unacceptable commentary about the Prime Minister. We have seen nothing to quite match the collapse of standards and ethics leading to criminal charges against well connected editors of massively influential tabloid newspapers in the United Kingdom for systematic illegal phone hacking, that is, invasion of privacy and for bribery of public officials. We watch in astonishment as the head of I daresay the most venerable and respected media organisation on the planet, the BBC, is forced to resign after an inadequately researched and vetted media report is put to air with allegations of paedophilia against an unnamed but prominent MP who was subsequently named on numerous Twitter accounts and other social media.

That kind of organisational failure aside, roiling changes to the structure of the media, driven by new technology and changing market conditions, will continue to perturb the environment in which the administration of the law will be conducted.

In an age not merely of rapidly escalating news cycles but of uncontrolled storms of idiocy and hysteria on social media, pressure will increase. Governments and Attorneys General are often enough already denounced if a response to the latest scandal or crisis is not fully formulated between the thump of the newspaper on the front doorstep at dawn and the first radio interview of the day. Shrill demands for new laws, new police powers, for response, action, activity will probably only escalate.

Nevertheless reactive legislation is more often than not ill thought out. We drink the heady brew of the knee jerk response and wake up months or years later hung over and aghast at unintended consequences. As lawyers

we cannot ignore legitimate grievances or cries for reform. It is however our responsibility to urge the value of principle when those principles seem unpopular and to try to bring to legal reform the kind of diligent and conscientious effort to preserve the integrity of the legal system that was exemplified by Sir Frank Kitto.

NOTES

1. Justice Michael Kirby, Sir Frank Kitto Lecture 1998, University of New England, "Kitto and The High Court of Australia – Continuity and Change."
2. *Brodie v Singleton Shire Council* (2001) 206 CLR 512
3. "Public Confidence in The Courts", National Judicial College of Australia, 9 February 2007
4. *Australian Capital Television Pty Ltd and New South Wales v The Commonwealth* (1992) 177 CLR 106
5. *Mabo v Queensland (No2)* (1992) 175 CLR 1
6. Constitutional Law Conference, Gilbert and Tobin Public Law Centre, Faculty of Law, University of New South Wales. 20 February 2004
7. "What is Wrong With Top-Down Reasoning?" 2004 Sir Maurice Byers Lecture, Journal of The New South Wales Bar Association, Winter 2004
8. *The Wik Peoples v Queensland* (1996) 187 CLR 1
9. *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51
10. *Tame v New South Wales* (2002) 211 CLR 317
11. Hal Wootten Lecture 2012, response to lecture delivered by Sir Gerard Brennan (personal communication)
12. *Bush v Gore* 531 US 98 (2000)
13. *Citizens United v FEC* 558 US 310 (2010)
14. *R v Way* (2004) NSWCCA 131
15. *Muldrock v The Queen* (2011) HCA 39
16. [http:// www.tomdispatch.com](http://www.tomdispatch.com) 17 March 2006
17. Senate Occasional Lecture 22 May 2009