The SEPARATION of POWERS

The fundamentals of good government

By Robert McClelland MP

Labor's recent election victory presents an opportunity to reaffirm the importance of the principles that underpin our democracy. The bedrock of our system of government is the separation of powers. That is, the sharing of power, responsibility and accountability between the parliament, the executive and the judiciary.

Throughout its 11 years in power, the Coalition took a worrying approach to the separation of powers. In particular, we saw several instances of politically motivated attacks on the judiciary, significant intrusions into the independence of the public service, and the failure of ministers to accept responsibility for gross mismanagement that occurred within their offices and agencies. This period was marked by a significant departure from the traditional standards that were previously observed by governments of all political persuasions. It is now critical to chart a future that favours accountability and a renewed commitment to the Westminster system.

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INDEPENDENCE OF THE JUDICIARY

A critical priority for the new Labor Government is to re-invigorate the separation of powers by reinforcing judicial independence. An independent judiciary that acts and is seen to act without fear or favour is crucial to the effective functioning of our democracy. It ensures adherence to the rule of law and provides a mechanism for challenging the lawfulness of government action.

For example, the independence of the judiciary ensures that government officials do not have the last word on whether they have acted illegally. The public must be in no doubt that our courts will adjudicate free of external political pressure. This is why, in our Constitution, we have adopted protections such as security of tenure for judges and specifying the grounds on which they can be removed. It is also why we have developed a robust appellate structure to enable errors in judicial decisions to be corrected.[1]

The Hon Sir Gerard Brennan AC KBE, former Chief Justice of the High Court, has rightfully acknowledged that there is a legitimate place for scrutiny of the Court's decisions. However, there is a significant difference between criticising legal reasoning and impugning the motives or character of members of the Court.[2] Criticism oversteps the bounds of propriety when it focuses on a judge personally, or is conducted in a way that seeks to play on a lack of public knowledge about the judicial process for political gain.[3] Several attacks of this kind occurred during the period of the last government.

The first serious case was the attack of former Deputy Prime Minister Tim Fischer on the High Court of Australia, following its 1996 *Wik* decision. In response to the judgment, Mr Fischer called for retiring judges to be replaced with 'Capital-C Conservatives'. This attack earned a sharp rebuke from Chief Justice Brennan.[4]

The Hon Phillip Ruddock MP, as Minister for Immigration and Multicultural Affairs, also attacked the Court for its position on reviewing the claims of asylum-seekers, when he described judges as embarking on 'a legal frolic'. As off-hand as the remark may have appeared, it had particular resonance in the context of the emerging threat of terrorism. A greater sense of insecurity naturally tends to increase public pressure for greater scrutiny of those seeking entry into Australia. The suggestion that the judiciary – rather than flawed administrative practices – were letting the public down had the potential to significantly erode public confidence in our legal system.

Our legal system is robust enough to withstand the occasional skirmish with politicians. But we must ensure that we do not develop a culture where our political leaders can regularly divert criticism for failed administrative action on to those whose job it is to ensure the legality of those actions.

In that context, the attorney-general, as first law officer, has a particular responsibility to defend judicial independence[5] and ensure that members of the judiciary are not subject to politically motivated personal attacks. It should >>

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be remembered that politicians can launch such attacks under cover of parliamentary privilege without fear of an action for defamation.

In 2002, Senator Heffernan abused that privilege when he launched a scandalous personal attack on Justice Kirby. While the attack was proven to be baseless, the attorney-general was 'missing in action'. Even when provided with the opportunity to answer a specific question in parliament, the attorney-general refused to say a word in Justice Kirby's defence, or criticise Senator Heffernan for abusing parliamentary privilege.

This failure flew in the face of tradition, convention and the predominant view of the legal community regarding the role of the attorney-general. In March 2002, the Judicial Conference of Australia published a statement roundly condemning the then federal attorney-general, Daryl Williams. Its last paragraph read:

> 'A responsibility of the attorney-general and one of the first importance is to uphold the rule of law. The rule of law depends upon an independent judiciary. In addition to the personal trauma it inflicted on Justice Kirby and his family, Senator Heffernan's speech damaged the reputation of the High Court and of the Parliament...
>
> If the attorney-general had been strong in his advice to the prime minister and defence of the High Court, both the High Court and the Parliament might have been spared... The attorney-general must reconsider his role in upholding the rule of law and the independence of the judges.'[6]

Mr Williams had a very different conception of his role. In his own words:

> 'It is more compatible with the independence of the judiciary from the executive government and more compatible with being so seen that the judiciary not rely on the attorney-general to represent or defend it in public debate in the media.'

I do not share Mr Williams' view – the overwhelming opinion of the Australian legal community is correct. An attorney-general has a role in ensuring the effective operation of our system of justice, and that includes defending the court against unjustified politically motivated attacks. This does not amount to a defence of the court's reasoning or conclusions. These will always be matters for legitimate public debate.

The recent public outrage that those who raped a 10-year-old aboriginal girl on Cape York did not receive a custodial sentence shows how intense this issue can become. In that case, the Queensland attorney-general has acted entirely appropriately in reassuring the public about the appellate process and examining how the decision came about. In particular, examining prosecution submissions and conduct is entirely appropriate. At no stage has the Queensland attorney-general engaged in a personal attack on the court. Instead, he has acted appropriately by seeking to examine the broader judicial process that led to the decision, and also to explain how it will be reviewed. In short, he appropriately criticised the process and reasoning of the decision, but nonetheless acted to ensure ongoing public confidence in the administration of justice.

INDEPENDENCE OF THE PUBLIC SERVICE

The need for independence from political interference applies equally to the Australian public service (APS). Our public servants have an impressive record of service under successive governments. They are engaged to serve the public, not to act as agents of a political party. Their willingness and ability to provide frank and fearless advice to ministers has long been a hallmark of the APS, and this is vital to good governance. The Australian Public Service Commission sets out a comprehensive guide to the values of the APS, which include:

> 'Direction 2.2 (2) – ... an APS employee must... ensure that ... management and staffing decisions in the Agency are made on a basis that is independent from the political party system, political bias and political influence.
>
> Direction 2.6 - ... Ministers are accountable to Parliament for the effectiveness of their portfolios... APS staff are accountable for the way in which they administer government policies. Ministers must therefore be able to have confidence in the performance of the APS and must also be able to account to Parliament, and through it the public, for actions undertaken by the APS on the government's behalf.'[7]

These two directions were significantly eroded under the Howard government.

Richard Mulgan, Director of the Policy and Governance Program at the ANU's Asia Pacific School of Economics and Government, has identified a number of practices where the government pressured public servants into overstepping the line between being responsive to an elected government and becoming unduly involved in its electoral fortunes.

The first occurred by creating an environment in which public servants suppress truth in order to create a false impression, ensuring that the relevant minister had 'plausible deniability' of uncomfortable facts. Numerous examples exist where the chain of honest and independent advice was filtered – and even blocked – by a cordon of political operatives that were put in place expressly to shield ministers from inconvenient truths. Ministers adopted the philosophy that being retrospectively able to claim ignorance of readily ascertainable facts inoculated them from potentially career-destroying ministerial responsibility.

This occurred during the now-infamous 'children overboard' scandal, with the claim that refugees were throwing their children off boats to be rescued by Royal Australian Navy personnel. Public servants with information debunking this claim refrained from formally conveying it to the prime minister. This allowed him to continue his incorrect assertions during the final, decisive days of the 2001 election.[8]

The same practice was employed during the scandal of abuse at Abu Ghraib prison in Iraq. The prime minister and minister for defence were forced to apologise for misleading the Australian people, after it became evident that the department of defence was aware of reports detailing abuse months before the government claimed to possess the knowledge. Eight ADF legal officers had visited Iraqi detention facilities on 35 occasions and reported their observations. Yet, once again, the information that they were duty-bound to record and report was not communicated to the responsible ministers until the issue became a matter of public controversy.[9]

Dr John Gee, a highly respected chemical weapons expert, also claimed that the minister directly suppressed his 2004 report that there were no weapons of mass destruction in Iraq. This preceded the official report of the Iraq Survey Group, to which Dr Gee was attached.[10] The convenient dismissal of Dr Gee's advice deferred the time of reckoning. The political imperative to avoid pre-election accountability overrode the public interest in finding out that young Australians had been sent to war on false pretences.

Perhaps the most disturbing example of misleading the Australian public through omission came with the AWB wheat-for-weapons scandal. The previous administration had received 34 separate warnings about the facts surrounding the payment of bribes to the regime of Saddam Hussein, stretching back to 1998. Reports of the allegedly dubious >>

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activities of the AWB increased, and included reports by intelligence agencies and departments, as well as cables sent directly to ministerial offices. Yet when the events finally came to public attention, all the relevant ministers – including the prime minister – pleaded ignorance.[11]

In the case of AWB, the foreign minister was truly out on a limb when protesting his lack of knowledge. Regulation 13CA of the *Customs (Prohibited Exports) Regulations* empowered him to request any oral or documentary information on AWB's sanctions-related activities before granting or revoking its export licence.[12] Any competent decision-maker is required to make a decision based on 'findings or inferences of fact which are supported by some probative material or logical grounds'. The broken lines of communication in a politicised department meant that the probative material was never given to, nor sought by, the minister.

As well as producing bad governance, the excuse of ministerial ignorance is legally questionable. The fact that Commissioner Cole referred to the concept of constructive knowledge in his report is relevant to this point. In the 1992 case of *Baden v Société Générale pour Favoriser le Developpement de Commerce et de L'Industrie en France SA*, it was determined:

> 'Constructive knowledge may be imputed where a person wilfully shuts his or her eyes to the obvious, wilfully and recklessly fails to make such inquiries as an honest and reasonable person would make, has knowledge of circumstances that would indicate the facts to an honest and reasonable person, or has knowledge of the circumstances which would put an honest and reasonable person on inquiry.'[13]

If a minister wilfully creates an environment where the public service routinely fails to pass on vital information, and fails to make the inquiries that s/he is statutorily empowered to make, it could well be argued that the minister's conduct fits this description. As Direction 2.6 of the Public Service Values Statement indicates, a minister must take responsibility for his department as the elected official. It is a grave dereliction of duty to continually deflect blame on to departmental officials.

The creators of Sergeant Schultz in the famous *Hogan's Heroes* TV comedy would be amazed that the character's key line of "I know nothink" was adopted as a strategy by Howard government ministers. Failure to accept responsibility on vital matters of national security is, however, no laughing matter.

As Mulgan writes, public servants will tailor their evidence if they believe that they will be penalised by their political masters for telling the unvarnished (and unpalatable) truth.[14] But the Australian public is entitled to no less on these important matters.

MINISTERIAL RESPONSIBILITY: THE KEY TO SOUND GOVERNMENT

All of these failings come back to a central responsibility – while ministers of the Crown are politicians, they are also custodians of our democracy. History has shown that that which we take for granted can be extremely fragile.

As members of the federal executive, all ministers should understand their role within the constitutional framework of separation of powers. Political point-scoring through personal attacks on the judiciary is unacceptable because it potentially undermines the public's faith in our legal system. Ministers must also understand the value of an apolitical, independent public service that has no hesitation in providing the very best advice, rather than that which ministers want to hear.

Re-establishing good governance and parliamentary standards are significant challenges for the new Government. In my role as attorney-general, they will be at the forefront of my approach to a portfolio that is vital to maintaining Australian democratic values and structures. ■

Notes: **1** Denise Meyerson, 'The Rule of Law and the Separation of Powers' (2004) 4 *Macquarie Law Journal*, p1. **2** Hon Justice Gerard Brennan, 'The State of the Judicature – Opening of the 30th Australian Legal Convention, 19 September 1997' (http://www.hcourt.gov.au/speeches/brennanj/brennanj_judicat.htm) at paras 45-6, 55. **3** *Ibid.* **4** Hon Justice Michael Kirby, 'Judicial Activism: Authority, Principle and Policy in the Judicial Method' (http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_24nov.html) at para 5. **5** Hon Justice Gerard Brennan, Interview on ABC *AM*, 6 October 2007. (http://www.abc.net.au/am/content/2003/s960534.htm). **6** Judicial Conference of Australia, 21 March 2007. (http://www.bocsar.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_sheller_030502) at para 46. **7** Australian Public Service Commission, 'Values in the Australian Public Service' (http://www.apsc.gov.au/publications02/values.pdf) at pp1, 6. **8** Richard Mulgan, *Truth in Government and the Politicisation of Public Service Advice*, Asia Pacific School of Economics and Government – Policy and Governance Discussion Paper 06-02, at p7. **9** Ben Ruse, 'ADF Officers Visited Iraqi Jails 35 Times' in *The West Australian*, 17 June 2004, p11. **10** Ross Peake, 'Report on Iraq WMD "Suppressed by Downer"', *The Canberra Times*, 1 September 2006, p5. **11** See Robert McClelland, Second Reading Speech on Wheat Marketing Amendment Bill, House of Representatives, 19 June 2007. **12** Commissioner Terence Cole, 'Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme, Volume 1, November 2006, p62. **13** *Baden v Société Générale pour Favoriser le Developpement de Commerce et de L'Industrie en France SA* [1992] 4 All ER 161. **14** Mulgan, *Op. Cit.*, p14.

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