



ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

**NSW Bar Association “Is the Rule of Law Under
Challenge in Australia?” Conference**

Level 4, Hilton Sydney, 488 George Street, Sydney

Friday 20 November 2009 at 9.00 am

[Acknowledgements]

- **First, may I acknowledge the traditional owners of the land we meet on – and pay my respects to their elders, both past and present.**

[Other Acknowledgements]

- **The Hon J J Spigelman, Chief Justice of NSW**
- **The Hon Justice Margaret Stone, Federal Court of Australia**
- **The Hon Justice D Hammerschlag, Supreme Court of NSW**

- **His Honour Judge M Bozic, District Court of NSW**
- **Senator the Hon George Brandis, Shadow Attorney-General**
- **Robin Speed, President, Rule of Law Association**
- **Professor David Weisbrot, President, ALRC**

[Introduction]

- 1. The rule of law is a central feature of a modern democracy.**
- 2. It is the fundamental protection that gives people and organisations confidence that society's rules will be respected and upheld. This in turn underpins economic and social cooperation.**
- 3. A strong rule of law means that a country has less or no corruption, and that it will have enforceable legal rights, due process, good governance and accountable government. Not surprisingly, the World Bank ranks Australia high on the quality of our rule of law.**
- 4. However, we cannot afford to take the quality of our system of law and government for granted. Government must continually seek to improve the mechanisms available to resolve disputes lawfully, peacefully and fairly, and to reinforce the fundamental principles that are embodied in laws.**

5. In pursuit of this continuous improvement, and commitment to maintaining a strong rule of law, the Rudd Government has undertaken this year the most extensive consultation on human rights issues in Australian history, together with a review of access to justice in the federal civil justice system.

[Human Rights and the Rule of Law]

6. The primacy of the rule of law is, of course, not a new concept. From the Magna Carta in 1215, to the seminal judgement of the United States Supreme Court in *Marbury v Madison* in 1803 and the most recent cases, its relevance has not waned. In that case, United States Chief Justice Marshall asked rhetorically: *"To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"*

7. However, since then the rule of law has remained responsive to protecting our most fundamental values, including human rights.

8. In promoting the rule of law the courts have, for example:

- **restricted the use of arbitrary Government power¹**
- **ensured that Government decisions are lawful and, if they are not, found them void², and**
- **ensured that the law applies equally to all people, including government officials³**

9. In so doing, our independent judiciary have:

- **construed legislation, in the absence of a clear legislative intention to the contrary, in accordance with human rights⁴, and**

¹ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 193

² *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96 at 109

³ *A v Hayden* (1984) 156 CLR 532

⁴ For example, *Minister for Immigration and Multicultural Affairs v Al Masri* (2003) ALR 241 relying on *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1989) 167 CLR 637 at 276

- preserved the substantive common law right to procedural fairness unless there is the clearest legislative intention to curtail it.

10. This has resulted in the protection of individual rights, in particular, freedom from arbitrary detention⁵; the protection of privacy and freedom of speech, and limitations on the actions of the executive⁶ where those actions have threatened fundamental human rights.

[Human Rights]

11. While Australia has been well served by its democratic foundations, the Government has asked whether we can do better in this area.

12. On 30 September this year, the National Human Rights Consultation Committee provided the Attorney-General its report on human rights protections. The report follows a comprehensive

⁵ *Chu Kheng Lim v Minister for Immigration* (1992) 179 CLR 1 at 27; *Minister for Immigration and Multicultural Affairs v Al Masri* (2003) 197 ALR 241 at 243

⁶ *The Queen v Joseph Terrence Thomas* (no 4) [2008] VSCA 107

and inclusive nationwide community consultation.

13. The Committee reports that for many people human rights are not an abstract concept but are relevant to actual, everyday experience. People spoke of their need to access services, their interactions with law enforcement agencies, and the invisibility of the elderly to name a few.

14. In talking about the Committee's report at the Press Club last month, the Chair of the Committee, Father Brennan said 'the clearest finding from [the Committee's] work is that Australian's know little about their human rights – what they are, where they come from and how they are protected.

15. The Committee's recommendations fall into three key areas:

- **improved education about human rights and responsibilities in schools, universities,**

within the public sector and general community

- **measures to increase consideration of human rights by Parliament, Government and bureaucrats, and**
- **introduction of a statutory human rights act.**

16. The Government is currently considering the report. When releasing the report last month the Attorney-General said that the Government will respond to the report in the coming months.

17. The Government is on the record as stating that respect for human rights underpins Australia's future as a safe and inclusive democracy. It has also made it very clear that any change to enhance the protection and promotion of human rights and responsibilities must preserve the sovereignty of Parliament.

[Access to Justice]

- 18. One of the Human Rights Committee's findings was that access to justice has a significant influence on human rights. The Committee noted that over 1000 submissions expressed support for measures that improve access to justice.**
- 19. While the Committee's report reflects this concern, they also noted that much work is already being done.**
- 20. The Government's Strategic Framework for Access to Justice was launched in September 2009. The Strategic Framework is intended to guide policy decision on access to justice into the future.**
- 21. The Framework is based on the principles of accessibility, appropriateness, equity, efficiency and effectiveness. Reliance on the Framework will ensure that decisions about reforming the justice system are made in a coordinated manner.**

- 22. The Framework will contribute to improving access to effective resolution opportunities, irrespective of how individuals make contact with the legal system.**
- 23. This is essential in maintaining the rule of law in a practical manner.**
- 24. The Attorney-General took the Strategic Framework to SCAG earlier this month where all state and territory Attorneys-General agreed to the principles of the Framework.**
- 25. The Taskforce report set out 58 recommendations covering information about the law, alternative dispute resolution, the courts, administrative law, legal assistance and building resilience.**
- 26. Recommendations range from proposals for less complex and more accessible dispute resolution through the use of industry ombudsmen and external dispute resolution for consumer disputes to the adoption of a ‘no wrong number, no wrong**

door' approach to assisting people deal with Government.

[Conclusion]

- 27. These initiatives, as well as others such as civil litigation and Federal Court Reforms, demonstrate the Government's recognition of the importance of the rule of law in Australia and its commitment to continuous improvement.**
- 28. I look forward to hearing the views of other speakers on this topic today.**