

'... in pursuit of the truth'

# The Rule of Law – reality or humbug

Alyssa Betts

AUSTRALIA'S senior judges have repeatedly stressed the fundamental importance of the rule of law, and observing it, to our society.

The essence of the rule of law, according to High Court Chief Justice Murray Gleeson in his Rule of Law series of addresses for the University of Melbourne, requires that all authority be "subject to, and constrained by, law". Justice Gleeson said one of the features of the rule of law was that it applied to "the governors" as well as "the governed".

He said: "... The first two of the three aspects of the rule of law ... regularity as opposed to arbitrariness or unconfined discretion, and equal subjection of all, the governors as well as the governed, to law, also reflect a view of the nature of law.

"Judgments in the High Court of Australia contain numerous assertions of practical conclusions said to be required by the principle of the rule of law," Judge Gleeson said.

"They include the following: ... that citizens are equal before the law; and that the criminal law should operate uniformly in circumstances which are not materially different."

Former High Court Chief Justice Sir Gerard Brennan, addressing a Central Queensland Law Association function, stated that without judges to protect the rule of law "future generations would have to begin again the upward path from savagery".

High Court Judge Michael McHugh, speaking at an Australian Bar Association occasion, said the judiciary must "speak out publicly against any attempt



Former pastor Douglas Ensbey



McHugh



Gleeson



Brennan

by the Legislature or the Executive to undermine the rule of law".

"If the rule of law is to remain the basis of our democracy, the courts cannot be moved by the political consequences of their decisions," he said.

High Court Justice John Heydon, in an article published in *Quadrant*, wrote "the rule of law prevents citizens being exposed to the uncontrolled decisions of others in conflict with them".

"The rule of law operates as a

**"... citizens are equal before the law; and ... the criminal law should operate uniformly in circumstances which are not materially different"**

bar to untrammelled discretionary power," he wrote.

"It does so by introducing a third factor to temper the exposure of particular citizens to the unrestrained sense of self-interest or partisan duty of other citizens or institutions -- an independent arbiter not affected by self-interest or partisan duty, applying a set of principles ... and possessing a measure of independence from the wrath of disgruntled governments or groups.

Former High Court Justice Sir Ninian Stephen, in an article published in *Dialogue*, wrote that the difference between "democracy and the totalitarian state" was the existence of the rule of law, a reliance upon a requirement "that governments operate under and act within the established law, exercising their powers solely for lawful purposes and also that there be equality of treatment of all citizens".

Former High Court Justice Mary Gaudron, speaking at the University

of Melbourne Comparative Constitutional Studies 'Rule of Law Lecture Series', said the rule of law was the foundation of democracy.

"It is critically necessary in a federation in which sovereignty is shared between the States and the Commonwealth; it is the touchstone of good government; and ... without it, there is neither liberty, equality nor fraternity," Judge Gaudron said.

Earlier this year *The Independent Monthly* sought a response to some matters related to the rule of law from the Chief Justice of the the Queensland Supreme Court, Justice de Jersey.

A reply was received from the Court's principal registrar writing on behalf of the Chief Justice.

"It would not be appropriate for [Justice de Jersey] to express any view on other cases without knowing their particular facts," the reply said.

"... the Chief Justice is disinclined to accept your kind invitation, for it is important to the integrity of his office that he not trespass unnecessarily into areas of political controversy."

Justice de Jersey has spoken previously about the vital importance of the judiciary where the rule of law is concerned, writing in a newspaper article that "judges comprise the courts which maintain the rule of law so fundamental to our free and democratic society".



de Jersey

## Former Premier declines to comment

Gemma Stenner

FORMER Premier Rob Borbidge has declined to comment on the contents of a letter Crime and Misconduct Commission chair Rob Needham sent to Opposition Leader Lawrence Springborg.

The letter cited a 1997 press statement made by Mr Borbidge to justify why no further investigation should be made into prosecuting former Queensland Cabinet members involved in the 1990 shredding

of the Heiner documents.

In 1996, Premier Rob Borbidge commissioned barristers Tony Morris and Edward Howard to examine the paper-trail connected with the 1990 shreddings.

The Morris and Howard report concluded there was evidence public officials had breached sections 129, 132 and 140 of the Criminal Code, as well as a number of other Acts.

Premier Borbidge referred the report to the DPP, Royce Miller.

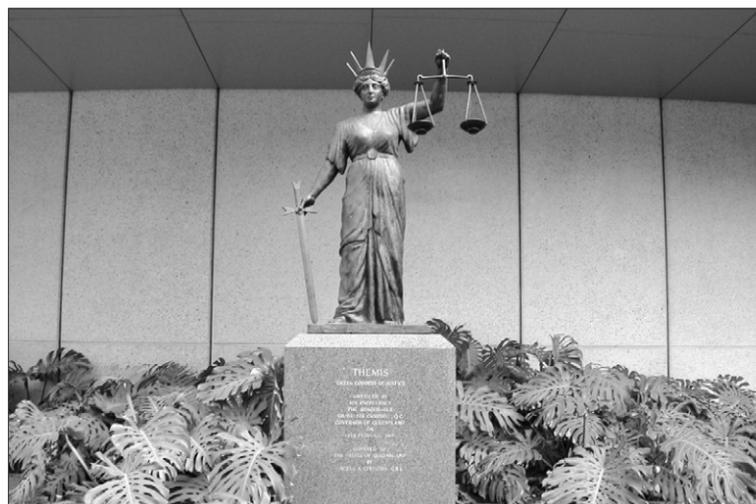
Seven months later, on June

11, 1997, Mr Borbidge, while in Indonesia, issued a press release.

In it he said there would be no further investigation into the shredding and there would be no prosecutions.

The press release claimed the DPP had wondered whether the public interest could be served by further pursuing the matter.

Mr Borbidge told *The Independent Monthly* he was no longer in politics and did not wish to comment on the advice he had received.



Justice ... it all depends

## Destroying evidence: what the law says was never in doubt

Alyssa Betts

A FORMER Queensland Appeal Court Judge is just one of a number of prominent legal authorities who for years have rejected the claim made by the Criminal Justice Commission in 1994 (and until now subsequently maintained by successors) that evidence could be destroyed if no legal action related to that evidence was actually underway.

In 2003 retired Supreme and Appeal Court Judge James Thomas QC said s129 of the Criminal Code was never open to such an interpretation.

"I can't see how it is even arguable that a legal proceeding be on foot," Mr Thomas said.

"The section itself contemplates that legal proceedings might not be on foot," he said.

Mr Thomas said whilst there were some things in law open to different interpretations, the wording of s 129 meant that this "clearly isn't one [of them]".

He went on to warn that those who authorised the shredding of the Heiner Affair documents could still be charged with criminal offences.

In 1995, barrister Ian Callinan QC, now Justice Callinan of the High Court, criticised the CJC's interpretation of s 129 as being too significant to ignore.

"The real point about the matter is that it does not matter when, in technical terms, the course of justice begins to run," Mr Callinan said at the time.

"What is critical is that a party in possession of documents knows that those documents might be required for the purposes of litigation and consciously takes a decision to destroy them.

"That is unthinkable ... and much more serious, might I suggest, if done by a government," he said.

In 1996, Anthony Morris QC – currently Commissioner of the Bundaberg Hospital Inquiry – was appointed by the Borbidge government to investigate the Heiner Affair paper trail with barrister Edward Howard.

Even though unable to gain access to crucial Cabinet documents, in their report Morris and Howard said on the basis of prima facie evidence, it was open to conclude that a number of criminal charges could

be bought against those involved in the shredding of the youth detention centre documents.

The Morris/Howard report criticised the CJC's previous efforts to investigate the matter, stating that "there must now be serious doubts as to the adequacy or competence of the [CJC's] investigations into the same issues."

It concluded by stating that it was "in the public interest of the state of Queensland" that a public inquiry be established by the government to investigate the matter more thoroughly.

However, after seeking advice from the then DPP Mr Miller, the Borbidge government decided not to pursue the matter any further [see accompanying story].

The House of Representatives Inquiry into Crime in the Community investigated the Heiner Affair in 2003-2004.

While the report the inquiry produced noted that aspects of the Heiner Affair had been scrutinised on other occasions, it stated that the shredding had "never exhaustively" been investigated.

In addition, the Crime in the Community report noted that the Morris/Howard report was the only independent investigation that had been conducted.

"The remainder were investigations (albeit partial or limited ones) by government bodies," the report said.

"Of grave concern to the Committee in the Heiner Affair ... are the inadequacies of the investigations carried out by the then Criminal Justice Commission (CJC) in particular."

The report recommended that the entire Goss Cabinet be charged over its authorisation of the shredding.

Queensland University of Technology's Senior Lecturer in Law Alastair MacAdam, in giving evidence to the House of Representative's Inquiry, said one of the most serious concerns of the shredding was that "in this particular matter ... all of the bodies that are established to protect us against the excesses of executive government have failed".

"Rather than carry out their duty in an independent manner ... they have collapsed around the executive government and said that the executive government can do no wrong," Mr MacAdam said.