Extract from MAY 2021 ALJ CURRENT ISSUES

The rule of law

Australians have come to know of a personal tragedy that has become a public tragedy. This has happened in a profound cultural moment as the scourge of violence against women, including in the highest institutions of government – the Parliament and the courts – has been raised to the forefront of the national discourse.

In 2020 a woman took her own life. Her name has not been made public. By all accounts, she was a highly intelligent and remarkable person whose loyal friends have sought to ensure her voice continues to be heard notwithstanding her tragic death. What she wished to be heard about was her allegation that more than thirty years ago she was sexually assaulted when she was a brilliant, 16 year old high school debater by another, brilliant student debater: the current Commonwealth Attorney-General, the Hon Christian Porter MP. Mr Porter has passionately and very publicly denied the allegation.

The Journal makes no comment about any aspect of those allegations or the personal legal position of Mr Porter. However, in the course of the public controversy that has ensued (largely because, while he took mental health leave, Mr Porter did not resign and was not stood down by the Prime Minister), much has been said about the rule of law, not least because Mr Porter is the first law officer of the Commonwealth. This note is confined to some of the legal issues that have been raised about the rule of law and advances three propositions:

- The rule of law is not limited to the criminal law, and is not exhausted because a criminal prosecution based upon the woman's allegations will not proceed.
- An independent inquiry commissioned by the Prime Minister, at whose pleasure Mr Porter serves as Attorney-General, to advise the Prime

Minister as to whether Mr Porter is a fit and proper person to hold that high office would advance, and not be contrary to, both the rule of law and public trust and confidence in the proper administration of government. This involves a completely different question to the determination of criminal guilt and the imposition of a criminal penalty.

- The rule of law will be threatened if lawyers are reluctant to assist people who are accused of serious misconduct to exercise their legal rights in an emotionally charged time in our national life.

What is meant by the rule of law? There is no single, authoritative list of the necessary constituents of the rule of law, but the various attempts to identify them come out with the same basic ideas. There is a general thematic unity even if the precise expression differs. Some aspects of the rule of law are really corollaries or consequences of more fundamental points, and what follows are only the most immediately salient.[1]

First and foremost, all authority is subject to, and constrained by, law. This is sometimes expressed as "no one is above the law" or "everyone is equal before the law". In *Gouriet v Union of Post Office Workers* Lord Denning MR famously quoted "be you ever so high, the law is above you".[2] An important consequence of this is that the government and its ministers are themselves both subject to and have the benefit of law.

Second, there must be separation between the executive and judicial functions. Our system of government depends upon the separation of the powers of the legislative, executive and judicial branches of government. The Westminster system, whereby members of the executive must sit in Parliament, sometimes

[1] See, for example, The Hon A M Gleeson AC QC, "Courts and the Rule of Law" in C Saunders and K Le Roy eds, *The Rule of Law*, The Federation Press, Leichhardt, 2003, pp 178 & ff; The Rule of Law Institute of Australia's Statement of Principles http://www.ruleoflaw.org.au/principles/ and the excellent foundational discussion in T Bingham, *The Rule of Law,* Allen Lane, London, 2010.
[2] [1977] QB 729 at 762.

obscures the separation of the legislature and the executive, but the judicial branch must be, and be seen to be, independent of both.

Third, every person has a right to a fair trial irrespective of their station or circumstances in life. This includes having the benefit of the presumption of innocence and a right against self-incrimination, to be informed of any charges laid, to be tried without delay and to be free on bail unless it can be shown they might escape the country or are a risk to the community.

Fourth, in any inquiry about someone's conduct that may result in some kind of action against them, the rule of law requires that they are given procedural fairness. The person concerned has a right to be heard to answer the case being made against them and is not required to prove their innocence. Any finding on the civil standard of the balance of probabilities must be made having regard to the seriousness of the allegations made.

Because the events in question allegedly occurred in Sydney, any criminal investigation fell under the jurisdiction of the NSW Police. They have announced that, with the woman's death and in the absence of a formal, signed witness statement from her (as opposed to the dossier which she prepared), they would not be taking any further action. Criminal law and justice are administered by the courts, so in the absence of a prosecution it is not open to the executive to conduct an administrative inquiry to establish whether Mr Porter committed a criminal offence and should be found guilty. But that is not the end of the matter.

No one has a right to serve as a Minister of State. Ministers are not elected as such. They are appointed by the Governor-General under s 64 of the Constitution on the recommendation of the Prime Minister from among elected Members of Parliament. The integrity of the office of a Minister of State is more important than the personal aspirations of the individual who occupies it. It is a position of public trust which, while given effect by a commission under the Constitution, is in practical reality an office conferred by, and held at the pleasure of, the Prime Minister. Section 44 of the Constitution sets out various grounds for disqualification of a Member of Parliament. They include if the person "is

attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer".

However, it is not seriously arguable that s 44 exhausts the criteria which determine whether or not someone should be a Minister of State. For the public to have trust and confidence in the proper exercise of power by the government that acts in their name requires that those who exercise ministerial responsibility – and all the more so the minister who is responsible for the entire system of justice – must be fit and proper persons to hold such an office.

If that is so, then when an allegation is made that can reasonably be described as sufficiently serious and credible to undermine public confidence and cast doubt on whether a minister is a fit and proper person to hold that office (and the Journal makes no suggestion that the allegations made against Mr Porter necessarily reach that threshold), it must be open to the Prime Minister of the day to order an independent inquiry to advise him or her on that question. It is also important to note that no one has suggested that the Prime Minister is legally bound to commission such an inquiry. He or she may act without an inquiry and leave that action to the judgement of the electorate at the ballot box.

Concepts such as "fit and proper" or "good fame and character" are well known to the law. They are applied for admission to the legal profession and other occupations, and for the grant of licences and permits to engage in various kinds of activities. Quite apart from inquiries by the executive, other private and public organisations regularly hold such inquiries for their own purposes – generally in private – when complaints are made against officers, employees or members.

In the current debate, the private inquiry commissioned by the High Court of Australia into allegations of sexual harassment against a former member of that Court, the Hon Dyson Heydon AC QC, is often cited as an example of the type of inquiry that might be held. That inquiry was conducted by a retired senior public servant. Mr Heydon denies the allegations and declined to take part in the inquiry.

A better example, because it concerned the current occupant of a prominent position, may be the inquiry conducted in 2002 by the Hon A J Southwell QC, a retired Victorian judge, into allegations by a man that he had been sexually molested in 1961 by the then seminarian George Pell, who by 2002 had become Archbishop of Sydney. The complainant refused to go to the police. Archbishop Pell stood aside and a private inquiry was conducted into whether the complaint had been established. Both men were legally represented and gave evidence.

Mr Southwell QC's conclusions were made public. Recognising the seriousness of the allegation, he reminded himself that the standard of proof was a high one and said: "I accept as correct the submissions of Mr Tovey [for the complainant] that the complainant, when giving evidence of molesting, gave the impression that he was speaking honestly from an actual recollection. However, the respondent, also, gave me the impression that he was speaking the truth. ... In the end, and notwithstanding that impression of the complainant, bearing in mind the forensic difficulties of the defence occasioned by the very long delay, some valid criticism of the complainant's credibility, the lack of corroborative evidence and the sworn denial of the respondent, I find I am not 'satisfied that the complaint has been established', to quote the words of the principal term of reference."

It must be immediately acknowledged that the current situation and the example just given differ in at least two important respects. First, the complainant against Archbishop Pell was alive, the complainant against Mr Porter is not. Second, the question before Mr Southwell QC was whether the complaint had been established and not whether Archbishop Pell was a fit and proper person to hold his office. Nevertheless, the Southwell inquiry demonstrates that an inquiry other than a criminal proceeding can be conducted in accordance with the rule of law into a very serious allegation against a public figure by being held in private, affording procedural fairness and applying familiar legal principles in the case of historical complaints.

How such an inquiry could be lawfully conducted in relation to Mr Porter is a matter on which the Prime Minister could obtain the advice of the Solicitor-

General.[3] That advice could also consider how it should be conducted while Mr Porter has defamation proceedings on foot in the Federal Court. Such an inquiry would not only be in accordance with the rule of law but would enhance it. This is because it could expeditiously resolve a doubt which at least some in the Australian community appear to have, namely whether Mr Porter is a suitable person to hold the ministerial office which is responsible for maintaining the rule of law itself. Mr Porter's defamation proceedings may not achieve that result and, given the possibility of appeals, may not be resolved for a considerable period of time.

The events surrounding Mr Porter have given rise to another issue related to the rule of law. As reported in the media, Mr Porter retained a prominent partner of national law firm Minter Ellison to give him defamation advice. That firm's chief executive sent an email to the entire firm which quickly became public: "The acceptance of this matter did not go through the firm's due consultation or approval processes. Had it done so, we would have considered the matter through the lens of our Purpose and Values. The nature of this matter is clearly causing hurt to some of you, and it has certainly triggered hurt for me. I know that for many it may be a tough day, and I want to apologise for the pain you may be experiencing."

No matter how well-intentioned, this email, and the subsequent departure of the chief executive from the firm, created a new and different controversy, much of which is beyond the scope of this note. However, some commentators raised the question of whether the concept of "social licence" could and should now be applied to law firms. This expression, which gained currency in relation to banks and other financial institutions during the Hayne Royal Commission, refers to the social acceptability or legitimacy of a particular activity tested by reference to a perception of society's current attitudes and expectations. Mr Porter's case raised

[3] See, for example, the article in The Guardian by former Commonwealth Solicitor-General Justin Gleeson SC "It is not too late Prime Minister to seek the advice of the Solicitor-General" <https://www.theguardian.com/commentisfree/2021/mar/11/it-is-not-too-late-prime-minister-to-seek-the-advice-of-the-solicitor-general>.

the question of lawyers acting for someone whose cause is unpopular with many people.

Whatever the utility of "social licence" in other fields of endeavour, it has no place in relation to the practice of the law. It may be accepted that solicitors are not subject to a "cab rank" rule like barristers and can decide from whom they will accept instructions at their discretion. In making that decision they may take into account how they think they will be perceived by others, including other clients and their own partners and employees.

But lawyers are members of a profession which already has something more enduring and legally binding than a "social licence", being the obligation represented by the oath or affirmation of office they take upon admission that "you will truly and honestly conduct yourself in the practice of a lawyer of the Supreme Court of … and that you will faithfully serve as such in the administration of the laws and usages of this State according to the best of your knowledge, skill and ability." There are established sanctions for those who breach that solemn commitment.

It is another aspect of the rule of law that everyone, no matter how unpopular their cause, is entitled to legal representation. Notwithstanding the ability of solicitors to choose their clients, the rule of law is hampered if a person in need is unable to obtain competent assistance. In the most extreme situations when no lawyer has been prepared to act, the state has appointed legal representation, sometimes even against that lawyer's express wishes.[4]

It so happened that on the day thousands of women and their allies participated in cities across Australia in the March4Justice to protest against sexual and other violence against women, Mr Porter commenced his defamation proceedings against the ABC and journalist Louise Milligan in connection with their reporting of the allegations against him. As a private citizen, he has every right to invoke

[4] One famous historical example is the Czech lawyer Kamill Resler, who was appointed to defend Karl Hermann Frank, the highest ranking officer in the Nazi Protectorate of Bohemia and Moravia, at his war crimes trial. The story is told in J Drápal, *Defending Nazis in Postwar Czechoslovakia: The Life of K Resler, Defence Counsel ex officio of K H Frank*, Prague, Karolinum Press, 2017.

the law of the land to vindicate his reputation. However, insofar as it is suggested that same law precludes, or would be damaged by, an appropriately conducted inquiry as to whether he is a fit and proper person to hold the high public office of Attorney-General, the Journal expresses its respectful disagreement.

*FK**

* As with all his contributions to the Journal, this note is written by the General Editor in his personal capacity as such and does not necessarily reflect the views of the Supreme Court of NSW or any of its judges.