

National Security: Proportionality, Restraint & Commonsense

by Michael Kirby

Terrorism is not new. Michael Kirby calls for proportion in our response to it, and argues that national security rests on respect for the institutions of democracy—including the rule of law, due process of law, and equal justice under law for all.

Maintaining Our Perspective

I start on a somewhat discordant note. It is easy to gather a group of experts, some of whom may have a view of the importance of their topic, and perhaps a professional and institutional commitment to its themes, and to run the risk of losing a sense of proportion and perspective. However, there is a strong commonsense streak in the Australian character. Normally, it tends to rescue us from overreaction. I have reason to know that fact. I learned of it when I was twelve years of age. It left an indelible imprint on my memory, as I shall show.

Terrorism, the main cause for contemporary concerns about national security law, is not new. The pirates (most of them English) who harassed the Iberian trade ships to the Americas, were international terrorists of a sort. The British certainly regarded George Washington and his confederates as terrorists who had risen in rebellion against the Crown. The twentieth century was filled with acts of terrorism. One at Sarajevo triggered the First World War. Another, shortly after in Dublin, renewed 'the troubles'. Acts of terrorism helped dismantle the great European empires until, by century's end, those empires were gone. And the communists were often regarded as terrorists. Their dedication to the destruction of capitalist society as it was organised led to legal responses that were sometimes unnecessary, excessive and unwise.

I knew about the communists because my grandmother remarried in 1944. Her new husband was a communist. He was a fine man and an idealist. But he was involved in a cause that was deeply distrusted. He was treasurer of the Australian Communist Party. That party had links to a country that possessed weapons of mass destruction. They had undoubted stockpiles of nuclear armaments and chemical weapons. Fear of the communists led to legal responses in Australia and elsewhere that we can

now see as completely disproportionate. We were saved from these legislative excesses in 1951 by the decision of the High Court of Australia in *Australian Communist Party v The Commonwealth*. That case held that the *Communist Party Dissolution Act 1950* (Cth) was beyond the powers of the Federal Parliament and constitutionally invalid. That decision, made by judges who had no resort to a Bill of Rights expressing guarantees of freedom of speech and freedom of assembly, offered a stark contrast to the decision of the United States Supreme Court a few weeks earlier in *Dennis v United States*. That decision upheld similar legislation to outlaw communists in the United States under the Smith Act.



In retrospect most Australians, and not a few Americans, would regard our country's judicial resolution of that legal controversy as wise and the American resolution as unwise and excessive. The decision of the High Court majority was endorsed, later in

1951, by the rejection by the electors of Australia of a proposal to amend the Constitution to grant the Parliament the lawmaking powers denied by the High Court. The legislature and the executive government of the Commonwealth on that occasion went too far. The Court hauled them back to the rule of law and Australia's constitutional fundamentals.

These events tend to show that in such matters, in the past, the Australian people and their highest court have

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The pirates...who harassed the Iberian trade ships to the Americas, were international terrorists of a sort.

been more temperate and prudent than others in evaluating the real risks to national security and judging the needs for draconian laws to respond to those risks. The United States of America, great a nation as it is, sometimes gets swept up in tides of nationalistic passion that Australians tend to avoid or keep firmly under control. We should keep this story of our country before us as we embark upon responses to contemporary problems of terrorism and risks to our national security.

The times now are different. The risks have changed. The technology is new. The weapons are in some ways more perilous. Control over them is more disparate. But the need for prudence and care against over-reacting is as strong today as it was in 1951. If a world-wide danger supported by a mass movement of convinced ideologues, sustained by one of the world's super powers, armed with nuclear and other weapons, could not destroy our security in the twentieth century, we must keep in perspective the powers of those presently ranged against the Western democracies. This is not a reason for complacency over national security or indifference to violence and risks of violence. But it is a reason for keeping our feet firmly planted on the Australian ground. We should never forget that, to the extent that we exaggerate the risks to national security we fall into the hands of those who threaten our constitutionalism. To the extent that their threats propel us into demolishing the fundamentals of our liberal democracy, we reward the enemies of our form of government with success. To the extent that we over-react, we proffer the terrorists the greatest tribute.

Moreover, in terms of proportionality, terrorism and its dangers do not constitute the greatest peril for the world today. Every day on this planet more people die of AIDS than died on 11 September 2001. But most of them die anonymously, in poverty and in far-away developing countries. Their deaths are hidden in shame and suffering. They are not subject to vivid television images to frighten a proud and powerful nation. Lack of access to water, homelessness, poverty, malaria, ethnic violence. These are more potent dangers for more members of humanity than the terrorism of Al Qaeda. If a small proportion of the energy and capital that has been devoted to the dangers following 11 September 2001 had been lavished on the problem of AIDS, I feel sure that the world would be a better and probably a safer, certainly a kinder place. Not once have I been invited to speak at a high level Australian conference, such

as this, of judges and senior officials focussed on the issues of HIV/AIDS and the way the law can contribute to reducing its dangers.

So my first message is one of proportion. We should found our policies and laws on national security upon sound data alone. We should maintain our prudence, as we have in the past. We should address the causes, and not simply the manifestations, of terrorism as a danger to Australia's national security. We should avoid the closed drawbridge mentality which, in any case, affords no ultimate security against fanatical individuals. We should not over-react. We should remember the events of 1951 concerning the communists. We should not necessarily follow American leadership in all of its responses in the current age for, as in the past, its responses may sometimes be misguided and prone to excess.

Our courts are the final guardians of the liberties of Australians. Their duty is to give effect to valid laws enacted by Parliament. But if those courts look around the world at this present time, they will find much food for thought on the subject of national security laws. This is the other point I wish to make. The decisions of final courts in many lands have lately spoken with considerable wisdom in recent cases involving terrorism and national security. In the balance of this paper, I want to call attention to a few illustrations.

Learning From The Courts

South Africa

An early instance of the unwillingness of national courts to bend basic principles in the face of allegations of terrorism was the decision of the Constitutional Court of South Africa in *Mohamed v President of the Republic of South Africa* (2001).

The case concerned Khalfan Mohamed who was wanted by the United States on a number of capital charges relating to the terrorist bombing of the United States Embassy in Dar es Salaam, Tanzania, in August 1998.

The appellant had been indicted in the United States. A warrant for his arrest was issued by a federal District Court. He had entered South Africa unlawfully as an alien. He was detained there by the authorities, acting in cooperation with United States officials. In his interrogation, the detainee was not given the rights provided by South African law for such a case. The South African authorities offered him a choice of deportation to

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The Honourable
Justice Michael Kirby
AC CMG, of the
High Court of
Australia, was
Foundation Chairman
of the Australian Law
Reform Commission
(1975-1984).

Tanzania or the United States. He preferred the latter; but applied to the courts for an order that the Government of the United States be obliged to undertake that the death penalty would not be sought, imposed or carried out on him. That order was refused at first instance. The appellant was promptly deported. This notwithstanding, an application to the Constitutional Court was pursued on his behalf on the footing that the appellant had been denied the protection of South African constitutional law under which it has been held that capital punishment is contrary to fundamental constitutional guarantees.

The South African court did what it could...to uphold the accused's fundamental legal rights, notwithstanding the charge of terrorist offences.

The Constitutional Court of South Africa held that Mr Mohamed's deportation was unlawful and that *extradition*, not deportation, was the applicable law. Under South African law, that procedure was required to be negotiated with the requesting state under conditions obliging an assurance that the death penalty would not be imposed following a conviction.

In this respect, the court below, and the Government of South Africa, had failed to uphold a commitment implicit in the Constitution of South Africa. It was held that there had been no waiver by the accused in consenting to deportation or extradition.

Because, by the time of the Constitutional Court's orders, Mr Mohamed was under trial in the United States, he was outside the effective power of the Constitutional Court, by its orders, to afford him physical protection. Nevertheless, the decision of the primary judge was set aside. A declaration was made that the constitutional rights of the appellant in South Africa had been infringed. The Constitutional Court directed its chief officer, as a matter of urgency, to forward the text of its decision to the relevant United States Federal Court. Following his trial in the United States, the appellant was convicted. However, he was not sentenced to death. Whether this was due in any way to the South African intervention is unknown. The South African court did what it could in the circumstances to uphold the accused's fundamental legal rights, notwithstanding the charge of terrorist offences. The government officials in South Africa had been less respectful of those rights.

In the course of argument, the court was reminded of the famous words of Justice Brandeis in *Olmstead v United States* (1928), later cited in *Mohamed* (2000):

In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously...Government is the potent, omnipresent teacher. For good or ill, it teaches the whole

people by its example...If the government becomes a law-breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.

These last words have a special resonance in South Africa as the Constitutional Court explained:

...[W]e saw in the past what happens when the State bends the law to its own ends and now, in the new era of constitutionality, we may be tempted to use questionable measures in the war against crime. The lesson becomes particularly important when dealing with those who aim to destroy the system of government through law by means of organised violence. The legitimacy of the constitutional order is undermined rather than reinforced when the State acts unlawfully.

These reasons were written in May 2001, before the events of 11 September of that year. But they remain true today and not only in South Africa.

The United States

Probably the best known decision in this class of case is that of the Supreme Court of the United States in *Rasul v Bush* concerning the availability of judicial scrutiny of the cases of non-citizens detained as terrorist suspects in Guantanamo Bay. That decision was delivered in June 2004. The Supreme Court was divided 6:3. The opinion of the Court was written by Justice Stevens. Justice Scalia wrote the opinion of the dissenting judges (Chief Justice Rehnquist, Justice Thomas and himself).

In the Court opinion, Justice Stevens cited the law authorising President George W Bush, after 11 September 2001, to use 'all necessary and appropriate force against those nations, organisations or persons he determines planned, authorised, committed or aided the terrorist attacks ... or harbored such organisations or persons'. In reliance upon this law, President Bush established the detention facility at the Naval Base at Guantanamo Bay, on land in Cuba leased by the United States from the Republic of Cuba. Two Australians (Mamdouh Habib and David Hicks), who were detained in the facility, together with others, filed petitions in United States federal courts for writs of *habeas corpus*. They sought release from custody, access to counsel, freedom from interrogation and other relief.

The United States District Court dismissed these petitions for want of jurisdiction. It relied on the 1950 decision of the United States Supreme Court in *Johnson v Eisentrager*. That decision had held that '[a]liens detained outside the sovereign territory of the United States [may not] invoke a petition for a writ of habeas corpus'. However, the Supreme Court reversed the federal court decision, granted certiorari and remitted the case to the federal courts. In effect, Justice Stevens

followed what he had earlier written in the *Padilla* case where he said:

At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unrestrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber...for if this nation is to remain true to its ideals symbolised by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.

The decision of the majority of the Supreme Court in *Rasul v Bush* reflects these notions. It traces the restraint on Executive power in the United States to legal and constitutional 'fundamentals'. It does so through the history of the legal system which the United States shares with other common law countries:

As Lord Mansfield wrote in 1759, even if a territory was 'no part of the realm', there was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown'.

Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown'.

In *Rasul v Bush* the rule of law was upheld by the American judges. Even in the face of Executive demands for exemption from court scrutiny because of the suggested exigencies of acts of terrorism, the Supreme Court upheld the availability of judicial supervision and the duty of judges to perform their functions, including on the application of non-citizens. To say the least, the case is an extremely important one.

The United Kingdom

On 18 March 2004, the English Court of Appeal delivered its decision in *Secretary of State for the Home Department v M*. The judgment of the English Court was delivered by Lord Chief Justice Woolf. The case involved an application by the Home Secretary for leave to appeal against a decision of the Special Immigration Appeals Commission. That body had been established by the United Kingdom Parliament in partial response to an earlier decision of the European Court of Human Rights in *Chahal v United Kingdom* (1996). The latter had criticised the procedures that existed in Britain under the legislation then in force to respond to terrorism in Northern Ireland.

The Special Commission is, by law, a superior court of record. Its members are appointed by the Lord

The Commission insisted that the suspicion of the Minister had to be a reasonable suspicion.

Chancellor. One must be a judge who holds, or has held, high judicial office. This provision was in place when the events of 11 September 2001 occurred. Under the *Anti-Terrorism, Crime and Security Act 2001* (UK), the British Home-Secretary enjoys the power to issue a certificate in respect of a person whose presence in the United Kingdom is deemed a 'risk to national security' or who is suspected to be a 'terrorist'. The then Home-Secretary (Mr David Blunkett) granted such a certificate in the case of M, a Libyan national, present in the United Kingdom. M was thereupon taken into custody.

In 2004, the Commission, presided over by Justice Collins, allowed M's appeal against the Home Secretary's certificate. The Home-Secretary challenged this action which he saw as unwarranted judicial interference in an essentially political and ministerial judgment. He sought leave to appeal to the Court of Appeal. He complained that the Commission had reversed a decision for which he was accountable in Parliament and through the democratic process, to the British electorate.

The Court of Appeal rejected the Home-Secretary's application. That Court, like the Commission, conducted part of its hearing in closed session. Only a portion of the Court's reasons were given on the record. The Commission insisted that the suspicion of the Minister had to be a *reasonable* suspicion. It stated that the Minister had failed to demonstrate error on the part of the Commission. In his concluding observations, Lord Chief Justice Woolf, for the Court of Appeal, said:

Having read the transcripts we are impressed by the openness and fairness with which the issues in closed session were dealt with...We feel the case has additional importance because it does clearly demonstrate that, while the procedures which [the Commission] have to adopt are not ideal, it is possible by using special advocates to ensure that those detained can achieve justice and it is wrong therefore to under-value the SIAC appeal process...While the need for society to protect itself against acts of terrorism today is self-evident, it remains of the greatest importance that, in a society which upholds the rule of law, if a person is detained as 'M' was detained, that individual should have access to an independent tribunal or court which can adjudicate upon the whether of whether the detention is lawful or not. If it is not lawful, then he has to be released.

Israel

At about the same time as the decision of the United States Supreme Court in *Rasul v Bush* was handed down, the Supreme Court of Israel, on 2 May 2004, delivered its decision upon a challenge brought on behalf of Palestinian complainants concerning the ‘separation fence’ or ‘security fence’ being constructed through Palestinian land. This ‘fence’ has been justified by the Government of Israel and the Israeli Defence Force as essential to repel the terrorist (specifically suicide) attacks against Israeli civilians and military personnel, carried out from adjoining Palestinian lands. The court was told that the issues raised by the challenge were non-justiciable.

However, from bitter experience, the Jewish people had learned about the great dangers of legal black holes. Applying what common law judges would describe as principles of administrative law or of constitutional

proportionality, it upheld the complaints of the excessive way in which the wall had been created in several areas. Justice Aharon Barak, President of the Court, said:

Our task is difficult. We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which

*is not infrequently hit by ruthless terror. We are aware of the killing and destruction wrought by the terror against the state and its citizens. As any other Israelis, we too recognize the need to defend the country and its citizens against the wounds inflicted by terror. We are aware that in the short term, this judgment will not make the state’s struggle against those rising up against it easier. But we are judges. When we sit in judgment, we are subject to judgment. We act according to our best conscience and understanding. Regarding the state’s struggle against the terror that rises up against it, we are convinced that at the end of the day, a struggle according to the law will strengthen her power and her spirit. There is no security without law. Satisfying the provisions of the law is an aspect of national security. In *The Public Committee against Torture in Israel v The Government of Israel*, at 845 [I said]:*

We are aware that this decision does not make it easier to deal with that reality. This is the destiny of a democracy—she does not see all means as acceptable, and the ways of her enemies are not always open before her. A democracy must sometimes fight with one arm tied behind her back. Even so, a democracy has the

upper hand. The rule of law and individual liberties constitute an important aspect of her security stance. At the end of the day, they strengthen her spirit and this strength allows her to overcome her difficulties.

*That goes for this case as well. Only a separation fence built on a base of law will grant security to the state and its citizens. Only a separation route based on the path of law, will lead the state to the security so yearned for. (*Beit Sourik Village Council v The Government of Israel*)*

The Supreme Court accepted the petitions in a number of cases, holding that the injury to the petitioners was disproportionate to the security needs. It ordered relief and costs in favour of those petitioners.

Indonesia

On 24 July 2004, the Constitutional Court of Indonesia set aside the conviction imposed on Masykur Abdul Kadir, sentenced to fifteen years imprisonment for helping Imam Samudra in connection with the bombings in Bali on 13 October 2002. Those bombings killed 202 people, including 88 Australians.

The decision of the Indonesian Court was reached by a majority, five Justices to four. The problem arose out of the decision of the prosecutor to proceed against the accused not on conventional charges of homicide or crimes equivalent to arson, conspiracy, use of explosives etc. Instead, the accused were charged only under a special terrorism law introduced as a regulation six days after the bombings in Bali.

The amended Indonesian Constitution contains basic principles protecting human rights and fundamental freedoms. One of these principles, reflected in many statements of human rights, is the prohibition on criminal legislation having retroactive effect. Under international law an exception is sometimes allowed to permit trial or punishment ‘for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised countries’. This expression is drawn directly from the statute of the International Court of Justice.

The rule of law is itself one of the fundamental principles which democrats, the world over, defend against terrorists. As Chief Justice Latham once said, it is easy for judges to accord basic rights to popular majorities. The real test comes when they are asked to accord the same rights to unpopular minorities and individuals. The Indonesian case of Masykur Abdul Kadir was such a test.

In a comment on the Indonesian court’s decision, an Australian editorialist said:

The Constitutional Court’s decision should be seen for what it is—part of a proper legal process in

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which every person has the right to exhaust all avenues on appeal. This is a positive development for Indonesia. The ensuing legal uncertainty and the inevitable stress it will cause...could and should have been avoided. (*Sydney Morning Herald*, 27 July 2004)

I agree with that comment.

The House of Lords

Finally, I would mention two recent developments in the British House of Lords—one judicial and the other political.

In December 2004, the Law Lords handed down their decision in *A (FC) v Secretary of State for the Home Department*. The case arose out of the arrest of nine persons under the United Kingdom Terrorism legislation, including the *Anti-Terrorism (Crime and Security) Act 2001* (UK). The detainees had been taken into custody in December 2001. They were all non-citizens. None had been charged with offences or brought to trial, still less convicted. They sought release. Their case came before the Special Commission previously mentioned. That Commission upheld their objection to the lawfulness of their detention. However, the Commission's order was set aside by the English Court of Appeal. That Court emphasised the importance of deference in such matters to the Minister.

By a decision of 8 to 1, the Law Lords reversed the Court of Appeal and restored the decision, obliging release of the detainees.

Lord Bingham, the Senior Law Lord, in his reasons, responded to the suggestion that interference by the courts in such matters would amount to 'judicial activism'. This has been an accusation leveled at the courts in the United States by the former Attorney-General John Ashcroft. Citing the reasons of Simon Brown LJ in *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] Lord Bingham said:

The Court's role under the [Human Rights Act] is as the guardian of human rights. It cannot abdicate this responsibility...[J]udges nowadays have no alternative but to apply the Human Rights Act... Constitutional dangers exist no less in too little judicial activism as in too much. There are limits to the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts.

Lord Nicholls opened his reasons with the following remarks:

Indefinite imprisonment without charge or trial as an anathema in any country which observes the rule of law. It deprives the detained person of the protection

a criminal trial is intended to afford. Wholly exceptional circumstances must exist before this extreme step can be justified. The government contends that these post-9/11 days are wholly exceptional...The principal weakness in the government's case lies in the different treatment accorded to nationals and non-nationals.

Lord Hoffmann, in his reasons, said:

This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not under-estimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. ...Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.

Baroness Hale, the only woman member of the House of Lords judicial board, observed:

No one has the right to be an international terrorist. But substitute 'black', 'disabled', 'female', 'gay' or any other similar adjective for 'foreign' before 'suspected international terrorist' and ask whether it would be justifiable to take power to lock up that group but not the 'white', 'able-bodied', 'male' or 'straight' suspected international terrorists. The answer is clear.

Lord Walker dissented from the majority. However, the Law Lords' voice was clear. Unlimited detention of non-nationals was inconsistent with their view of the British Constitution, legal history and the provisions of the *Human Rights Act*.

This decision led to a flurry of political measures aimed at increasing ministerial powers. However, the *Prevention of Terrorism Bill* was held up, in late night sittings in March 2005, by the repeated insistence of the House of Lords upon amendments. In the end, on 11 March 2005, the British Government backed down. It continued to insist that decisions, permitting the Home Secretary the power to impose 'control orders' should be made on the civil and not the criminal onus. But it agreed to insert an effective sunset clause of one year when the legislation must be reviewed. Most importantly, it agreed that the Ministerial power to impose 'control

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orders' on terrorist suspects, restricting their liberties, could only be made with the approval of a judge.

The insistence of United States, British and other courts upon effective supervision of legislative and executive detention of persons, outside cases

where punishment orders have been imposed by judges under pre-existing valid laws, must be compared and contrasted with recent decisions of the courts in Australia. Of course, the Constitution must be obeyed. Valid laws must be given effect. However, in reading our Constitution we should always remember the lessons of the wise decision of the High Court in the Communist Party Case, vindicated by the people and by history. And we should familiarise ourselves with the wisdom of other final courts approaching the new legal questions.

The Ultimate Foundation For National Security

If we hold in our minds the principle of proportionality, the dictates of Australian commonsense and the wise

approach of courts in other lands with raised legal systems to which I have referred, it is likely that we in Australia will face our own tests, if and when they come, with restraint and a determination to uphold respect for fundamental human rights.

National security in a country like Australia ultimately rests not on fear or restrictive laws. It lies in the loyalty of the people, their love of the country and their respect for its institutions, including those that safeguard the rule of law, due process of law and equal justice under law for all.

This is the text of His Honour's keynote speech at the Australian Law Reform Commission National Security Law Conference, Sydney, 12 March 2005. The paper draws on an earlier essay which is forthcoming in the Indiana Journal of Global Legal Studies, Vol. 12, Issue 1 (2005).

Davis McCaughey died on 25 March, 2005, at the age of 90, at his North Melbourne home, with his wife Jean and family by his side.

Dr McCaughey was a theologian, and a key architect in bringing together the Presbyterian, Methodist and Congregational churches to form the Uniting Church in Australia.

He was Master of Ormond College at the University of Melbourne between 1957 and 1979, and was deeply involved in the foundation of La Trobe University in the mid-1960s.

He served as Deputy Chancellor of the University of Melbourne in 1978-79.

He was appointed Governor of Victoria from 1986 to 1992.

In addition to his outstanding record of service to the community, Davis was a member of the Advisory Board of the Centre for Philosophy and Public Issues (one of the two precursors of CAPPE) since its beginning in 1990.

He was a source of great support and guidance to the Centre and a friend to all involved in CPPI.

He will be deeply missed.

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International Lawyers and the War in Iraq

by Hilary Charlesworth

The status of international law has often been contested, but for many commentators the US invasion of Iraq signaled the ‘disappearance of the voice of truth/law in the maw of politics’. Hilary Charlesworth revisits the old debates about the status of international law, and argues a better way of understanding law’s relationship to foreign policy may require studying its dark side.

The theme of a recent symposium in honor of Richard Bilder was the relationship between the practice of international law and the conduct of foreign relations. This prompted me to reflect on my confused reaction as an academic to the invasion of Iraq in March 2003. The lead up to the invasion, and the response to it, made international lawyers everywhere feel as though they were at the heart of the action. We were relevant at last because of the unusual public interest in whether or not the invasion was legal. For a time at least, the press, colleagues, students and even my family seemed interested in my views and those of international lawyers generally. I joined a group of Australian international lawyers to write a letter questioning the legal basis for war that was both praised and denounced in the press and in parliament.

This thrill of attention and relevance, of talking law to power, was however tainted by a sense of deepest irrelevance. Whatever the views of most international lawyers that the invasion was illegal, the members of the ‘Coalition of the Willing’ proceeded to invade Iraq on the basis of what seemed to be very weak, perhaps even ironic, legal advice. Never before had I experienced the gap between the practice of international law and the conduct of foreign relations so keenly.

In this paper, I first try to understand my own particular predicament in the context of some of the perennial anxieties of international lawyers about the status of our discipline. I then sketch some of the available accounts of the relationship between international law and foreign policy and consider how these theories apply in the case of the 2003 invasion of Iraq.

Perennial anxieties

A sense of insecurity dogs international lawyers. In the academy we tend to be considered purveyors of a rather suspect form of legal reasoning and incapable of distinguishing between true law on the one hand and politics on the other. The role of international law in the academic curriculum is thus endlessly debated—is it central or peripheral to the core business of a law school?

One aspect of the dilemma is the perceived need to provide law students with ‘practical’—by which is usually

meant commercially oriented—training. This idea that ‘the firing line’ or coalface of legal practice is commercial legal work suffuses many academic defences of international law. The virtues of international law thus require emphasis: it is presented as a civilising influence, with an illustrious history—the modern day equivalent of the Grand Tour to Europe for an eighteenth or nineteenth century gentleman. This type of defence depends on a distinction between hard commercial subjects and the ‘soft’ contours of international law.

Another form of vindication of international law is to assert its place on the ‘hard’ side of a hard/soft dichotomy. There is a nice pictorial representation of this on the cover of Michael Byers’ edited collection of essays, *The Role of Law in International Politics: Essays in International Relations and International Law*. Pictures of lawyers consulting tomes in a library are overlaid with a photo of a military aircraft, as if to suggest that poring over cases has a very active element and can lead directly to the unleashing of the use of force. An alternative reading of the cover montage is that military aircraft will go about their business whatever the law books say.

Outside the academy, in the sphere of organized politics, international lawyers suffer from different types of image

A sense of insecurity dogs international lawyers.



problem. They can be styled as hopelessly idealistic and naïve, championing abstract principles that have no connection with reality, members of what Australian politicians are pleased to call the chardonnay-sipping chattering classes. Another form of political representation of international lawyers is that they have no common core of principle and endlessly debate and disagree. For this reason, one argument can be presented as just as valid as another. Thus Prime Minister John Howard dismissed international lawyers' criticism of the invasion of Iraq by telling Kerry O'Brien on the *7.30 Report*, 'you know what lawyers are like, they do tend on occasions to argue.' He went on to emphasize that the critics of the invasion were 'learned professors' while the Government's legal advice was from a practitioner of international law.

Speaking law to power

The various types of existential insecurity of international lawyers have launched many missions to define a plausible account of their role. The literature typically draws a distinction between the role of government international lawyers and academics. Over forty years ago, Richard Bilder wrote an influential paper on the way the US State Department lawyers influenced the conduct of foreign affairs. He argued that the government's international lawyers exerted a 'major influence' on the views and policies of the US government and that their work was indispensable to the conduct of foreign affairs. Bilder sustained this argument through a detailed examination of the work of the State Department in drafting treaties and in dealing with Congress. Bilder's own experience in the Office of the Legal Adviser convinced him of:

the reality of international law—an acute awareness of the extremely meaningful and generally effective role that international law actually performs in regulating the conduct of nations and making the international community work. The attorney becomes particularly aware both of the vast web of legal obligations which bind nations together and of the fact that these obligations are generally respected and observed. As a consequence, the practice of international law takes on the character of a very serious and vital business with stakes of great consequence.

Bilder acknowledged that much of the work of the Office of the Legal Adviser crossed over from a purely legal domain into issues of substantive policy, but he observed that the lawyers' views nevertheless had influence. The basis for a lawyer's influence on policy was, first, the result of the lawyer's 'personal prestige and his client's respect for his general judgment and knowledge of the subject matter'; second, the lawyer's 'professional skills of analytic ability and articulateness'; and finally, the depth of a lawyer's knowledge of an area compared to that of the 'frequently rotated policy officers'.

Bilder considered the realist charge that too keen an adherence to international law would be both impractical and dangerous for the US. He responded that respect for international law was more than a moral position and that it was:

indispensable to the general establishment of conditions necessary to the protection of our own citizens abroad, the effective conduct of international relations, and the ultimate achievement of the kind of world in which the people of this country wish to live.

A second response offered by Bilder to the realist scepticism about international law was the 'strongly moral and legal tradition of the American people', 'this country's national predisposition to think and conduct its activities in terms of law' that would restrain the conduct of international relations on a non-legal basis. At the same time, Bilder rejected the claim that adherence to international law would result in a legalistic or utopian foreign policy. International lawyers, he wrote, were pragmatic and well aware of the limits of their discipline. However:

[w]hat a policy of respect for international law does mean is a seriously undertaken national dedication to compliance with existing law even when such a policy entails the risk that national freedom of action may thereby be limited to some degree, and a conscious decision that a continuing effort be made toward broadening wherever practicable the area of international conduct subject to that law.

While such a policy was no substitute for good quality foreign policy decisions and diplomacy, respect for international law, he wrote, can promote 'the gradual development of agreed international techniques for dealing with more and more areas of such problems in ways and through rational procedures which do not threaten the disruption of international society'.

Bilder saw academic international lawyers and government legal advisers as affected by different time pressures—an assumption he may have since learned to regret! Government lawyers, he wrote, had 'little leisure for concentration on many of the deeper issues and long-range problems of international law, or for such necessary tasks as informing and educating the public as to the nature of and need for international law.' This was a natural task for the academy. He seemed to accept, however, that the two types of international lawyers were engaged in a similar enterprise.

Oscar Schachter's much-cited article, 'The Invisible College of International Lawyers' developed further the relationship between government lawyers and the academy. The professional community of international lawyers, for Schachter, 'constitutes a kind of invisible college dedicated to a common intellectual enterprise'.

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The college allowed a *pénétration pacifique* of ideas from the academy (whose concern was objective knowledge) into government (whose concern was advocacy) and vice versa.

The literature thus presents a pervasive image of international lawyers as speaking law to power. The notion of law in this context is often elided with the idea of truth and thus it gains moral force from association with the classic image of Sir Thomas More, speaking the truth of God to King Henry VIII's power.

Since Richard Bilder's landmark article, there has been a flowering of analysis of the role of government legal advisers. This has been encouraged by regular meetings of Legal Advisers in association with meetings of the United Nations' Sixth Committee since 1990. A good example of this genre is the reflections of Hans Corell, a former Austrian Legal Adviser, and later head of the UN's Legal Office. He asserted the centrality of the role of the Legal Adviser to policy decisions by states. Corell counselled Legal Advisers to play an active rather than passive role, alerting their political masters to legal problems with proposed actions in a robust and firm way, but doing so 'with special experience and tact' in order to retain the confidence of their Minister. The image of Legal Advisers that emerges from the autobiographical literature is of an urbane, tactful and accommodating counsellor, but with a core commitment to international legal principle.

The 'war against terror' seems to have generated a different approach to the role of government's international law advisers, with national loyalties taking priority over international standards. John C. Yoo, one of the US Justice Department officials responsible for a controversial memorandum asserting that international prohibitions on torture did not bind the President, argued that his position required giving policymakers 'a view of the entire playing field' of legal argument. On 6 July 2004 Yoo wrote in the *Los Angeles Times* that:

A lawyer must not read the law to be more restrictive than it is just to satisfy his own moral goals... or to advance the cause of international human rights law. However valid those considerations, they simply do not rest within the province of the lawyer who must make sure the government understands what the law permits before it decides what it should do.

A recent meditation on the role of international lawyers by Martti Kiskenniemi, included as an epilogue to a collection of essays by Legal Advisers to Foreign Affairs Ministries, proposes two different professional moods—commitment and cynicism—between which Legal Advisers are doomed to oscillate. Koskenniemi draws on David Kennedy's scrutiny of the close association of international law and a reformist-internationalist political

agenda. Kennedy notes that international lawyers 'see themselves and their work favouring international law and institutions in a way that lawyers working in many other fields do not—to work for a bank is not to be for banking'. For Koskenniemi, '[t]aking up international law as one's professional career simultaneously seems to opt for a politics that favours global governance over national sovereignty, human rights over national jurisdiction, integration over independence.' The missionary endeavour of international lawyers is no doubt encouraged by the cosmopolitan language of the discipline. Koskenniemi contrasts this public faith with the private knowledge of international law as

...a rather marginal professional technique and culture, at best a handmaid to the national political leader ... with little connection to the philosophical tradition from which it claims to emanate or the academic theory that aims to articulate it as a system of general principles.

International relations scholars, on the other hand, have tended to overlook the diagnosis by some international law scholars of deep personal and professional tensions implicated in the relationship between international law and foreign policy. They have embraced international legal projects as concrete, progressive outcomes. For example, David Held's cosmopolitan democracy includes the creation of a Human Rights Court with compulsory jurisdiction, the establishment of an effective and accountable international military force, the drafting of an international Charter of Rights and Obligations that would go beyond current human rights treaties—addressed mainly to national governments—to cover broader domains of political, social and economic power, a global parliament and the transfer of a large proportion of a state's coercive capacity to regional and global institutions.

The debate on Iraq

How do the various images of the relationship of international lawyers to foreign policy I have sketched fit with the invasion of Iraq in March 2003? The legal justifications for the invasion proffered by members of the Coalition of the Willing at the time generally followed a common line, arguing that it was justified by the text of various existing Security Council resolutions. Politicians often went further, invoking the brutal treatment of Iraqis by Saddam Hussein and the threat posed by his stockpiles of weapons of mass destruction. By contrast, there was unusual unanimity among academic international lawyers about the illegality of the invasion of Iraq even before the collapse of the Coalition of the Willing's

The literature presents a pervasive image of international lawyers as speaking law to power.

claims about the existence of weapons of mass destruction. Public letters setting out the modern international legal framework for the use of force were prepared by Australian, Canadian, UK and US international lawyers. This general consensus stood in sharp contrast to the international legal academy's diverse views on the legality of NATO's intervention in Kosovo in 1999.

The major features of the academic international lawyers' position were, first, that the Coalition of the Willing had not followed the processes for a lawful use of force set out in Chapter VII of the UN Charter. The argument was that an explicit Security Council resolution authorising the use of force was necessary. The second common thread in the various public letters was a rejection of the Coalition's contention that existing Security Council resolutions constituted a 'continuing authorisation' of the use of force against Iraq if it failed to destroy weapons of mass destruction. Some statements also countered the Coalition claim that the invasion could constitute an act of humanitarian intervention and the United States' suggestion that it was an act of 'pre-emptive self-defence'.

Of course, there were some dissenting voices amid the legal opponents of the Iraq invasion. But overall, the dissenters on the issue of legality were few and far between. Later in 2003, some United States power brokers were willing to acknowledge that international law had been violated by the invasion, but they argued that this was not important politically or morally. White House insider, Richard Perle, said simply that 'international law stood in the way of doing the right thing'.

The debates around the invasion of Iraq tattered the image of international lawyers sagely speaking law to power. The tactful, urbane and influential figure of the international legal adviser described by Richard Bilder and Hans Corell is not recognisable in this context and Oscar Schachter's *conscience juridique* seems to have been completely corrupted. The disappearance of the voice of truth/law in the maw of politics over Iraq left many in the discipline feeling stranded. A sense of crisis infuses much of the legal commentary. Proposals to counter the marginalisation of international law in the invasion of Iraq included the creation of more law, better tuned to deal with the age of terrorism, as well as designing a better, more savvy, sales pitch for the discipline. For example, the editors of the *American Journal of International Law* saw the situation in Iraq as holding the

potential for a 'fundamental transformation, or possibly even destruction, of the system of international law with respect to the use of force'. Anne-Marie Slaughter, writing as President of the American Society of International Law, argued in its November/December 2003 Newsletter that:

...we are at a fork in the road regarding the continuation of a basic commitment to try to address global problems through global rules and institutions ... [T]his commitment requires that the politics and the law go hand in hand. Political calculation must provide the support needed not only to create the law but also to value and observe it.

Tom Franck presented perhaps the most despondent view of the state of international law in the wake of the war in Iraq. The US lack of interest in providing even a fig leaf form of legal justification led him to declare the last rites for the UN Charter's prohibition on the use of force. In such bleak times, the role of the international lawyer is simply to 'stand tall for the rule of law', and to draw attention to the long-term costs of flouting legal principle 'even if at risk to personal advancement and safety.' Franck counselled international lawyers to distance themselves from those in power and 'zealously guard their professional integrity for a time when it can again be used in the service of the common weal.'

More optimistic commentary read the invasion of Iraq as preserving the normative function of the Security Council in framing the collective international will, if not its enforcement functions. The apparent violation of the Charter framework regulating the use of force, it was said, could prompt the development of new mechanisms to respond to the use of force.

Recasting international lawyers

International lawyers specialise in crises. Our sense that we are living through a momentous period in history is permanent. We will always feel as though there is something peculiarly challenging and significant about this moment in international law and that the core of our discipline is somehow under threat. The exceptional nature of each new situation provides a stimulating sense of danger. How then can we understand the relationship between international law and foreign policy after the searing experience of the invasion of Iraq? Is it good news or bad news for international law and its practitioners? The options proposed by international lawyers include:

- Vigorous restatement of the basic principles of the UN Charter and retention of the moral high ground, awaiting the day when they will again attract politicians;
- Developing legal principles that are better attuned to political agendas to increase the chance that they will be observed;

There was unusual unanimity among academic lawyers about the illegality of the invasion of Iraq.

- Exploring (and celebrating) the informal amendment of the cumbersome structures of the UN Charter relating to the use of force;
- Accepting and living with the intellectual and emotional pendulum between commitment and cynicism inherent in the practice of international law.

I want to suggest that the long term significance of the dissonance between international legal principle and political action in the case of the invasion of Iraq is its puncturing of the myth of the reasoned effectiveness of international lawyers. The search for a causal link between international law and political action can be seen to be unproductive and the image of speaking law to power a conceit. The invasion of Iraq may lead us to describe a more complex role for international law: it can have a powerful impact, but not in the ways we are taught to expect or acknowledge.

One way to better understand the relationship between international law and foreign policy is through the idea of ‘extravascular projects’ proposed by David Kennedy. This requires studying the dark, non-progressive side of international law to challenge the dominant narratives of progress and development in the discipline. Kennedy points to the standard focus of international lawyers on humanitarian objectives—the protection of human rights or the environment, for example. He argues that it may be more useful to ask what international law offers to people who want to violate international law, and to investigate how international law is implicated in the problems we have set out to solve.

Extravascular projects can assist us to see the way that principles of international law may work to obscure injustices. In the case of Iraq, for example, we might ask how international law was deployed to construct Iraq as an appropriate place to invade. How did the international law of sanctions, of no-fly zones, of ‘oil for food’ programs contribute to the creation of ‘Iraq—The Problem’? A Security Council resolution explicitly authorizing the use of force against Iraq would have met the requirements of Chapter VII of the UN Charter and rendered the invasion legal in a formal sense, although the resolution may have been the product of economic coercion of some of the non-permanent members of the Security Council. The sense that action can be legal but illegitimate prompts the question of why international law pays so little attention to economic disparity between states and insists on a fiction of the equality of states as international actors.

A related strategy would be to consider principles of

international law from the perspective of their objects. For example, claims of humanitarian intervention could be studied from the viewpoint of the people on whose behalf the intervention took place. The international interventions in Kosovo, East Timor, Afghanistan and Iraq would take on a more complex hue when examined from inside the ‘rescued’ communities. The pattern of association of humanitarian intervention with economic subjugation of the saved group would become clearer. This type of inquiry would destabilize the stock of images deployed in international law, such as the third world as chaotic and uncivilized and the west as a scion of democracy.

Principles of international law may work to obscure injustices.

International law could be productively studied as myth and ritual in the international community and within nation states: what are its codes and its fetishes? Why is intervention typically understood as having a military form; what other forms

of intervention are possible? Anne Orford draws attention to the fantasy realm that lies behind international law. She proposes moving beyond international law’s juridical model of power and investigating how its narratives affect our imaginations and emotions. What professional and personal performances are involved in the practice of international law? Invocation of international law can often more effectively galvanise civil society than the makers of foreign policy, and understanding the hopes and desires woven into the fabric of international law can help explain this.

The deep sense of disquiet held by many international lawyers about the invasion of Iraq may lead to a new disciplinary self-image, a recognition of the dark sides of humanitarian impulses. Instead of seeing ourselves as wise and sometimes heroic counsellors speaking truth/law to power, hoping that one day we will be heard and that our advice will be taken, we should realise that we will only ever have a minor direct impact on the generation of foreign policy. At the same time, we have considerable power in shaping the way problems are identified, categorized and resolved at the international level. We are active participants in intensely political and negotiable contexts and we must confront this responsibility without sheltering behind the illusion of an impartial, objective, legal order.

An early version of this article was presented on CAPPE’s behalf at the University of Melbourne on 17 November 2004 in the Faculty of Arts Dean’s Public Lecture Series. The current article is a shorter version of a paper to be published in the Wisconsin International Law Journal.

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Hiroshima and the World of Terrorism

by Tony Coady

In Tony Coady's view, the bombing of Hiroshima was an act of terrorism. He considers the bombing in the context of the current war against terrorism, and the campaign against weapons of mass destruction.

It is now 59 years since the *Enola Gay* unleashed the nuclear weapons age in the atomic bombing of Hiroshima. The phrase 'weapons of mass destruction' was not yet current nor was there any widespread public concern about terrorism. Yet the obscenely named 'Little Boy' was a weapon of mass destruction (or WMD as the acronymic military world would have it) and its use against Hiroshima was, I shall argue, an act of terrorism. Hence, it is worth revisiting the atomic bombing of the city and of Nagasaki to place these acts in the context of the current war against terrorism and the current campaign against weapons of mass destruction. Although many Americans would flinch to consider it, there is a parallel between the symbolism of the B 29 Superfortress pictured above the dreadful mushroom cloud rising from Hiroshima and the airliners plunging into the World Trade Centre on September 11, 2001.

I do not call the bombing of Hiroshima 'terrorism' lightly.

Defining Terrorism

I do not call the bombing of Hiroshima 'terrorism' lightly. Throwing around the word 'terrorism' or 'terrorist' is often a morally idle and cynical exercise, when it is not merely a product of muddle and confusion. So I shall begin by attempting to rescue the term from its murky political and propagandist environment and give it a fairly precise definition. Definitions can be too fussy and arid, but they needn't be, and my definition aims to provide both clarification and a key to moral evaluation of terrorism.

For many years now, since I first wrote on terrorism in the 1980s, I have defended a definition of terrorism that views it as a tactic rather than an ideology. It is, according to me, the tactic of pursuing political objectives by attacking (directing violence against) the innocent. This is a simple statement of a complex idea that could—and should—be defended in much greater detail. I have done that elsewhere many times, and will not repeat it all here. But I should say a few words in defence of the tactical definition, as I call it. More fully expressed, my defini-

tion goes as follows: 'terrorism is the organised use of violence to attack the innocent (or their property) for political purposes'.

Perhaps the most important clarification required is the use of the term 'innocent'. By this I mean to link the discussion of the political violence of terrorism to the rich tradition of just war theorising. Some will object immediately to that linkage because they view just war thinking as an exercise in giving a mantle of respectability to the moral outrage that is war. I do not deny that this has been how some have used the just war tradition, but it is not my use nor that of others in the tradition. As I understand it, the idea of a just war is primarily restrictive rather than permissive. It lays down what are potentially very cautionary conditions on when it is legitimate to go to war and what is legitimate in the conduct of war.

True, the theory allows that some wars may be justified, so it is not pacifist, but it is close to pacifism in its scepticism about most wars and its emphasis on the governing role of an ideal of peace. Since most wars are exercises in irrational aggrandisement, blood lust, and delusion, just war thinking should often coincide with pacifist condemnations. But there is no doubt that the strict criteria of the just war conditions are often ignored or cynically or sloppily interpreted by political leaders and by commentators. Yet this is the fate of many moral and political theories—witness the nonsense and malicious hypocrisy so often attached to the noble idea of democracy.

To return to the question of innocence. In the just war tradition, the innocent are basically non-combatants. The category is not concerned with people who are morally pure or politically inert, but with those who are or are not engaged in prosecuting certain harms. So warriors, war leaders, spies, informers, civilians directly engaged in the war effort such as intelligence consultants, applied scientists working on new weapons and so on are part of the chain of agency directing the evils against which defensive violence may be legitimate. Others not working to inflict the harms are deemed innocent. So



A major question nowadays is not whether it is immoral to target non-combatants (it is), but how death and injury to non-combatants can be defended.

not all civilians are non-combatants, though the categories overlap sufficiently to make the usual conflation of innocents and civilians understandable.

As the influential just war theorist, Francisco de Vitoria, put it in the 16th century: ‘...the foundation of the just war is the injury inflicted upon one by the enemy...but an innocent person has done you no harm’. Here Vitoria makes it plain how the just war principle of discrimination (as it is called) is justified by the basic moral drive of just war thinking, namely, the fact that lethal political violence can only be justified as a way of dealing with perceived wrong-doing of a grave nature. Usually,

it is a matter of self-defence. But if this is the justification, then the violence may only be directed at the attackers, not at those who are not perpetrators.

Extending the Just War Tradition

The just war tradition can be extended beyond a concern for interstate war to take in other complex forms of group political violence, such as armed revolution or resistance to invasion. In all these cases, it is sometimes a difficult matter to determine who are legitimate targets and who are innocent, but some examples are easy enough. Babies in arms and small children can hardly be regarded as perpetrators of aggression or oppression, nor can most ordinary civilians. This is why the pictures of dead and injured mothers and children from theatres such as Palestine, Chechnya and Iraq carry such power.

It used to be common to challenge the applicability of the distinction between combatants and non-combatants on the grounds that modern states were too highly integrated for it to make sense. It is surely anachronistic, some critics claimed, to think of contemporary war as waged between armies; it is really nation against nation, economy against economy, peoples against peoples—it is total war. But although modern war has many unusual features, its ‘total’ nature is more an imposed construction than a necessary reflection of changed reality. Even in World War II not every enemy citizen was a combatant. In any war, there remain millions of people who are not plausibly seen as involved in the enemy’s lethal chain of agency. There are, for instance, infants, young children, the elderly and infirm, lots of tradespeople and workers, not to mention dissidents and conscientious objectors. This challenge to the distinction requires there to be no serious moral difference between shooting a soldier who is shooting at you and gunning down a defenceless child who is a member of the same nation as the soldier. The conclusion is perhaps sufficiently absurd or obscene to discredit the argument.

In fact there has been a remarkable change on this issue in the strategic doctrine and military outlook of many major powers since the end of the Cold War. It is now common to pay at least lip service to the principle, as evidenced by some degree of restraint shown or announced during the first Gulf War, and the bombing of Serbia, and by the widespread condemnation of Russian brutality in Chechnya. The rhetoric, at least, of the recent US-led wars in Afghanistan and Iraq is also respectful of the distinction, though there remains room for concern about how it is observed in practice. A major question nowadays is not so much whether it is immoral to target non-combatants (it is), but how ‘collateral’ damage and death and injury to non-combatants can be defended. Since my concern is the tactic of directly targeting non-combatants I shall not here pursue those important questions.

State Terrorism

My definition of terrorism not only connects it with the just war tradition, but makes it clear that the tactic of terrorism cannot be restricted to sub-state or non-state agents, as the media and governments have a strong tendency to do. States can and frequently do use the tactic against their adversaries both when those enemies are other states and when they are individuals and sub-state groups. In fact state terrorism, of which the bombings of Hiroshima and Nagasaki are outstanding examples, has wrought far more damage and death than any forms of revolutionary or insurgent terrorism. It is also an important consequence of my definition that sub-state political violence need not be terrorist—it depends upon what tactics are employed. The fashion for calling all armed insurgents or revolutionaries ‘terrorists’ merely blurs important moral distinctions.

The terrorism employed against Hiroshima was, of course, merely the culmination of the widespread state terrorism of World War II, waged by both Axis and Allied powers. This, in turn, merely continued less drastic versions of the tactic dating back to the initial uses of air power terrorism in World War I. The list of terrorist crimes by air bombardment in World War II included the German bombings of English and other European cities, the greater devastation still of the Anglo-American (especially British) bombings of German cities, the American bombings of Tokyo, and the Japanese attacks in China, especially in Nanjing. There were and continue to be apologists for these crimes. These range from those who deny any scope for moral restraints on the waging of war, to those who offer utilitarian-style justifications. The terror bombing of German cities, for instance, was sometimes justified by the argument that it would end the war more quickly thereby saving lives on both sides. The idea was that the collapse of German civilian morale would erode support for the war and its leaders and produce an early capitulation. Most post-war research showed that this was not so, and even Churchill admitted in the Autumn of 1941 that advocates

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of the bombing campaign had probably 'greatly exaggerated' its likely effects.

Similar justifications were offered for the atomic bombings. Invasion of the Japanese mainland would have protracted the war and produced dreadful casualties whereas the slaughter at Hiroshima and Nagasaki was the only thing that would bring the Japanese to the peace table, or so it was argued. Debate still rages about the role of the atom bombs in producing a Japanese surrender. My own view is that the destruction was unnecessary and its longer-term consequences very damaging for a peaceful world. But the crucial point is that the terms of the purported justification are quite misplaced. In war, as in other human activities, the end does not necessarily justify the means. The wrongs of slavery, torture, and rape are plain enough whatever long-term benefits may be urged on their behalf. Similarly, there is no right to kill the innocent in war no matter how useful it may be thought to be at the time.

Many contemporary Western political philosophers have come to this conclusion about the bombings of Hiroshima and Nagasaki, including the prominent American philosophers Michael Walzer and John Rawls. True, both Walzer and Rawls think that in certain very rare and extreme circumstances ('supreme emergency' as Walzer calls it) the innocent may be legitimately attacked and killed, so that some of the bombing of German civilians in the early stages of World War II may have been justified, but they do not think that this applied in the case of Japan. Elsewhere, I have argued that it did not apply in the case of Germany, and I have grave doubts about the category of supreme emergency altogether, but I will not pursue that matter here. Whatever my reservations about supreme emergency, however, I believe it is a credit to American intellectual culture that some of its more prominent intellectuals have openly rejected the usual justification for the Hiroshima/Nagasaki destruction, just as many Americans criticised the evasions of the *Enola Gay* exhibition at the Smithsonian.

The Symbolism of Terrorism

I want to finish with some comments on the symbolism of terrorism. The interpretation of awful acts of terrorism

will naturally differ with the point of view. For the perpetrators and their sympathisers, the great good for which they murdered will loom so large that they will sanitise and celebrate the crime they have committed. So Osama bin Laden and his sympathisers view the pictures of the planes striking the Twin Towers in Manhattan as scenes of martyrs' deaths and triumphant images of battered imperial power. Similarly, the *Enola Gay* exhibition at the Smithsonian was presented as a witness to American military power and the success of scientific know-how in ending a horrible war at (almost) a stroke. In both cases the agonising deaths and sufferings, and their moral significance in terms of who has been attacked, are ignored or elided. For those who identify with the victims and emphasise their innocence, the pictures will have a very different significance. Vastly more people, of course, were killed and maimed in Hiroshima and Nagasaki than in New York and Washington, in consequence of the difference in weapons used, but the type of crime was the same.

Given the above analysis, there is a further point to be made about the contemporary argument concerning weapons of mass destruction (WMD) and proliferation. All of us must be conscious of the dangers of arms proliferation, especially of WMD, but there are several blind spots in the contemporary rhetoric about this matter. The powerful states that worry so much that so-called rogue states and terrorists might get hold of WMD are most of them already possessors of WMD and one of them, the United States, has already used them in devastating terrorist attacks on Hiroshima and Nagasaki. As for the others, if they come to use the weapons, it will certainly be for terrorist purposes. In addition, the powerful states have turned a blind eye to the nuclear arming of Israel and have been lukewarm about curbing the nuclear ambitions of Pakistan. Given these facts, it is not surprising that much Western agitation about terrorism and WMD is bound to be widely perceived as hypocritical.

*There are several
blind spots in the
contemporary
rhetoric about
WMD.*

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Note: The 2005 AAPAE Conference will be held in Adelaide from 28 to 30 September – more details on the web site.

Michael Walzer to visit CAPPE

Professor Michael Walzer from the Institute for Advanced Study, School of Social Science, Princeton, will visit CAPPE during late July / August 2005, as a recipient of the University's Miegunyah Distinguished Fellowship award. As part of the award he will present a public lecture

The Paradox of National Liberation

Date & time: Wednesday 3 August 2005, 6pm sharp

Venue: Copland Theatre, Economics and Commerce Building, The University of Melbourne.

Parking is available on campus: Entrance via Gate One, Tin Alley, off Swanston Street.

Cost: \$4.00 in coin.

CAPPE 'Ethics and Public Life' Public Lecture Program for the remainder of 2005

Venue: Public Policy Lecture Theatre, 234 Queensberry Street **Time:** 6 – 7pm

7 September

Dr Rhonda Galbally, AO, CEO, Our Community

Ethics and Life: Disability, Ageing and Dying

12 October

Ms Pamela Tate, SC, Solicitor-General of Victoria

The Legislative Recognition of Fundamental Rights

Presented in the Dean of Arts Public Lecture series 2005

Moreover, the idea of a weapon of mass destruction is somewhat opaque. Its usual extension is clear enough—nuclear weapons, and chemical and biological agents that are weaponised. So the picture is one of a high-tech weapon with fairly immediate and widespread devastating effects; but other weapons can also produce mass destruction fairly quickly. Machetes and small arms did a convincing job of mass destruction in Rwanda, as did 'conventional' bombs on the Japanese mainland before the atomic bombings. Conventional weapons in Iraq were geared to widespread destruction, as have been powerful, conventional weapons in the Sudan.

This suggests that the proliferation of weapons generally is a major problem that can be obscured by the concern solely with WMD proliferation. Moreover, the technology of modern war keeps pressing the boundaries of efficient killing in ways that constitute threats to non-combatant immunity, even where the standard WMD are not at issue. For one thing, the use of cluster bombs and depleted uranium shells inevitably bring unacceptable harm to the innocent, and the technologies for precise killing at night at a distance are frequently used with little concern for discrimination. As with the atomic bombs, these technologies put a certain sort of 'distance' between the killers and those they destroy. Just as the crew of the Enola Gay could see themselves as merely hitting a big target (and helping to end the war) rather than delivering sudden or lingering death and agony to tens of thousands of innocent people, so contemporary warriors can often view what they are doing as a technical exercise, rather like a computer game.

Of course, some people enjoy killing and hurting face to face, but most human beings find it hard to kill and maim

face to face unless their lives are directly threatened or unless their victims have been dehumanised. Distancing the carnage generally makes it easier to do and less morally disturbing.

Understanding the Hiroshima bombing as an act of terrorism can help give a realistic perspective to the current war on terrorism, for it reminds us that terrorism can have its home in any nation, race or political system. It can be inflicted by states or sub-state groups and be open to the same attempts at 'justification'. The most subversive and futile temptation is to use terrorism to defeat terrorism.

This article is an edited version of a talk given by Professor Coady in July 2004 at a conference in Hiroshima organised by the Hiroshima Peace Institute of Hiroshima University.

Sources used in the preparation of this article include:

Coady, C.A.J., 'Terrorism, Morality and Supreme Emergency', *Ethics*, Vol. 114, No. 4, July 2004, p. 772.

Coady, C.A.J., 'Terrorism and Innocence', *Journal of Ethics*, Vol. 8, No. 1, 2004, p. 37.

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Coady, C.A.J., 'The Morality of Terrorism', *Philosophy*, Vol.60, 1985.

Garrett, Stephen A., *Ethics and Airpower in World War II: the British Bombing of German Cities*, New York: St. Martin's Press, 1993.

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The Ethics of Law Reform

by Marcia Neave

Do we need an ethical framework to guide the law reform and policy making process? Marcia Neave, Chairperson of the Victorian Law Reform Commission, says we do, and discusses the principles which such a framework should incorporate.

How do law reformers deal with ethical issues? Here are some of the questions which the Victorian Law Reform Commission has had to deal with in its first four years:

- Should people who kill when they are in a rage be treated by the criminal law as less culpable than people who kill in cold blood?
- How should the criminal law treat a woman who kills her sleeping partner because he has abused her for many years?
- To what extent should a person's race and culture be seen as relevant in determining whether their culpability for killing another person is reduced?
- Should gay and lesbian couples be eligible for infertility treatment to enable them to have children?
- Should a lesbian woman's female partner be recognised by the law as a parent of a child who has been conceived with her agreement?
- Should employees have any right to privacy while they are working?
- Should employers be legally entitled to electronically monitor their employees?

All these questions arise in areas of law which have been referred to the Victorian Law Reform Commission by the Attorney-General. My purpose is not to discuss the answers to these questions, but rather to talk about the way that law reform commissions should go about their work. The main question I consider is whether there are ethical and unethical ways of going about law reform and public policy reform. I will illustrate some of the ethical dilemmas that law reform commissions face by drawing on examples from the Victorian Law Reform Commission's references on sexual offences law and the laws regulating assisted reproduction.

Defining Terms

My argument deals with the ethical responsibilities of bodies which have been established by parliament solely or mainly for recommending changes to areas of law or procedure in subject areas which have been referred to it by the Attorney-General. I call this 'institutional' law reform. These ethical obligations are not necessarily relevant to other bodies which provide advice on policy issues or law reform to government, such as Royal



Commissions, ad hoc advisory committees of experts appointed by government, government departments and inter-departmental committees.

What do I mean by 'law reform'? Justice Astbury, an English Judge once complained of 'reform, reform, aren't things bad enough all ready?' Unfortunately the word 'reform' is sometimes used simply as a substitute for the word 'change'. I would prefer to avoid Orwellian doublespeak.

When I use the word reform I mean reform in the more optimistic sense used by Professor (now Justice) Ronald Sackville, who in 1983 described law reform as a process of adapting law to meet changing social needs. The change is intended to make the content of the law or the way that the law operates in practice fairer, more accessible and better adapted to solving human problems. By using reform in this sense I do not mean to suggest there is always agreement about how this can be achieved. Often there will be dispute and argument. But I am assuming that all those involved in the dispute are intending to improve things. They are not simply trying to avoid a difficult political issue or wanting to appear to be doing something with the intention that nothing will really change. Nor are they simply engaged in trying to shore up existing sources of power.

The Concise Oxford Dictionary defines ethics as 'the science of morals in human conduct'. I argue below that law reform commissions have some distinctive ethical obligations, which flow from the part they play in the democratic process. What are the ethical issues which arise in doing law reform and what is an ethical law reform process?

Four Main Issues

In answering this question it is necessary to consider four main issues. First, it is necessary to take account of changes in the work of law reform commissions which have occurred since the 1970s. I argue that these changes make it particularly important to develop a set of ethical principles to guide the law reform and policy making process.

Secondly, I consider the extent to which guidance about ethics is provided by legislation that establishes law reform commissions. I argue that although the legislation is usually silent on this issue, some ethical responsibilities are implicit in the creation of a separate body to undertake law reform.

Thirdly, I suggest that one of the most important functions of an institutional law reform body is to contribute to the building of deliberative democracy, through processes of open and fair community discussion. I will discuss the approach which law reform commissions in Canada, England and Australia have

taken to community consultation. I argue that consultation imposes ethical responsibilities, and I make some suggestions about what these might be.

Finally, I will discuss how this idea of deliberative democracy can be applied in one of the Victorian Law Reform Commission's current projects —our reference on assisted

reproduction technology and adoption. How should the Commission decide what changes should be recommended to government in an area where there is widespread social disagreement?

Changes in the Nature of Law Reform

In Australia there is a federal law reform commission, the Australian Law Reform Commission, and separate state law reform commissions in New South Wales, Queensland, and Victoria.

When law reform commissions were originally established in many Commonwealth countries their main purpose was to modernise and simplify the law. For example, the *Law Reform Commission Act 1973* (Cth), which established the Australian Law Reform Commission, said that its functions were to modernise and simplify the law, to eliminate defects and to encourage the adoption of more effective methods of legal administration.

Given this conception of their role, it is not surprising that much of the early work of commissions was in relatively dry areas of technical law. Although the subjects covered may have excited lawyers, they were rarely of

By the 1980s, both the work of law reform commissions and their approach to consultation began to change.

interest to the media or the general community. When commissions consulted on these issues they mainly talked to academic and practising lawyers and judges.

By the early 1980s, however, both the work of law reform commissions and their approach to consultation began to change. Science had moved ahead of the law in a number of areas. Governments began to ask commissions to look at legal issues which crossed the boundaries between ethics, science and law. For example, in the 1980s the use of human tissue in transplants required the creation of new laws. Also in the 1980s, the New South Wales Law Reform Commission was asked to advise the government on regulation of assisted reproduction. In the past 10 years law reform bodies have also had to consider how to deal with DNA evidence and the issue of genetic privacy, as the result of scientific advances in the area of gene technology.

The work of law reform commissions also changed because federal and state commissions began to advise governments on broad social policy issues. For example, in 1981 the New South Wales Law Reform Commission was asked to make recommendations on reform of the law relating to family and domestic relationships. The terms of reference for this inquiry were broad enough to cover same-sex families, though the Commission's recommendations only applied to heterosexual couples. Similarly, in the early 1990s the Australian Law Reform Commission was asked to consider the reform of family property laws. The Victorian Law Reform Commission has received references on reform of sexual offences law, defences to homicide, family violence, workplace privacy, and assisted reproduction. All these references raise difficult ethical and moral issues, which require Commissioners to make value judgments about questions which are likely to be very controversial. These references require different types of research and different policy making processes to the technical legal questions which were traditionally referred to law reform bodies.

Changes in the kinds of references which commissions received required them to reconsider how they should encourage community participation and consultation. Commissions began to experiment with different ways of encouraging public responses to law reform proposals. Today it is common for governments to hold focus groups and undertake surveys of public opinion. It is often forgotten that law reform commissions were in the

Justice Astbury once complained of 'reform, reform, aren't things bad enough already?'

vanguard in developing these techniques.

Some Basic Ethical Obligations?

What ethical obligations guide law reform commissions when they are designing public consultation processes and making recommendations to government? As a lawyer my first response to this question is to look at the legislation establishing the body. The laws which establish standing law reform bodies rarely provide guidance on the ethical values which the Commission is expected to bring to the task of law reform. The English Law Commission, for example, was set up to keep under review 'all the law' with a view to its systematic improvement, but the criterion for judging whether or not a change was an 'improvement' was not clearly spelled out.

Along similar lines, the federal Attorney-General Kep Enderby's second reading speech explaining the reason for establishing the Australian Law Reform Commission alluded to government's responsibility to ensure the law was suitable to the needs of the time and reflected 'current values and philosophies', but left open what these values and philosophies might be. The Victorian *Law Reform Commission Act* is completely silent about the values on which its law reform proposals should be based.

The lack of legislative guidance on ethical principles provided to law reform commissions can be contrasted with the more explicit statements of values in other legislation that creates statutory bodies with more specific purposes, for example bodies with responsibility for protecting privacy or preventing discrimination. The federal *Privacy Act* requires the Privacy Commissioner in the exercise of his or her functions to 'have due regard for the protection of important human rights and social interests that compete with privacy, including the general desirability of a free flow of information. Similarly, the State *Equal Opportunity Act* articulates clear objectives, including the acceptance of the principle of equality of opportunity and the elimination of discrimination and harassment.

Why does legislation establishing standing law reform bodies not include statements of ethical principles? One reason may be that it was originally assumed that the work of law reform commissions would usually involve technical legal craft, rather than making choices between competing moral principles.

Another reason may be that it is simply impossible for the legislation to make useful ethical statements which can apply broadly to the wide range of projects a com-

There are three broad principles which should guide institutional law reform...independence, intellectual honesty and rigour, and community involvement.

mission is likely to be asked to consider.

Despite the absence of general ethical principles in the legislation establishing law reform bodies, I argue that there are three broad principles which should guide institutional law reform.

These principles can be inferred from the conventions which have guided law reform commissions from the time they were first created. The three principles I propose are independence, intellectual honesty and rigour and community involvement.

Independence

First, the creation of a standing statutory body to provide law reform and policy advice distinguishes law reform commissions from bodies which also advise the executive, such as government departments. There would be no point in establishing a separate body if it simply replicated the work of government departments. Because commissions were created as entities separate from government, we must act independently of government.

Independence is partly a matter of legal structure. Ideally, a law reform commission should receive its funding directly from parliament, rather than have it passed on by a government department. But independence also means independence of thought. This means that the views of executive government or the concerns of the bureaucracy cannot determine our policy recommendations. We should never make a recommendation simply because this is what is wanted by the government of the day.

Law reform commissions have historically taken this obligation of independence very seriously. In Victoria, one of the reasons given for the abolition of the former law reform commission was that it was insufficiently independent of government. I do not believe that view was well-founded. Today, there seems to be considerable recognition of the value of independence. When the Attorney-General launched the Victorian Law Reform Commission he said that it was 'independent of government to enhance the integrity of the advice provided'.

The ethical principle of independence means that commissions should leave political judgments to politicians. It is up to the government to decide whether to introduce legislation to implement a commission's recommendations. In framing its recommendations, the commission should never limit its proposals to what is likely to be politically acceptable.

However, drawing the line between making practical recommendations which have a chance of being

implemented and only making politically acceptable recommendations is not always clear. Let me give you an example. When the New South Wales Law Reform Commission considered reform of family relationships laws in the early 1980s, it decided to deal only with heterosexual relationships. This view was taken because it was felt the community would recognise that current law treated people in heterosexual de facto relationships unjustly, but was not ready to accept any changes to the laws affecting people in same-sex relationships. Was this an ethical decision or an example where the commission restricted its recommendations to what was politically acceptable? This was a matter of considerable discussion at the time.

Intellectual Rigour

Secondly, I believe that establishing a stand-alone body to propose law and policy changes implies an ethical obligation to ensure that recommendations are well researched, based on strong evidence and convincingly argued. Recommendations on complex issues of the kind I described at the beginning of this talk always involve value judgments. Not everyone will agree with our conclusions, but they must be able to understand why we have reached them.

A good law reform report will set out reform options which it has rejected and the reasons for doing so. Arguments for particular approaches should be dealt with carefully and respectfully, even if they are not accepted.

Law reform commissions in Australia have a good reputation for the quality of their work. Their reports are often used as accurate statements of the law by legal practitioners and legal academics. In this respect, the work of commissions is often closer to research in universities than to the policy work often done under acute time pressures in government departments.

Institutional law reform commissions can play an important role in supporting a civil society based on a notion of community discussion and debate.

Deliberative Democracy

Thirdly, I believe law reform commissions have an obligation to encourage and equip the community to become involved in debate about law and policy reform. In the 1970s this was conceived as an obligation to give the public an opportunity to comment on policy proposals. The usual law reform process was to publish an issues or option paper explaining the legal problem to be addressed and putting forward possible solutions. Submissions were invited in response to the paper and a final report was published making recommendations to government.

Today, consultation processes have become much more sophisticated. I believe we should now move away from the idea of law reform as a process which involves public consultation, to the idea of law reform as a process based on the ideal of deliberative democracy. In other words, commissions should, and to some extent have, moved away from a top-down process to a more egalitarian conception of the nature of the law reform process.

I have borrowed the term 'deliberative democracy' from political theory. I use it as an idea, rather than as a precisely defined term. In his book *Deliberative Democracy in Australia* John Uhr says 'deliberative democracy has been defined to focus attention on the importance to effective democracy of fair and open community deliberation about the merits of competing political arguments'. The word 'political' is not intended to refer to party political arguments but to issues of public debate.

Uhr says the concept of deliberative democracy is a way of qualifying the idea that law and policy are, and should be, based solely on preferences of the majority, with few protections for the rights of the minorities. Deliberative democracy is interested in the ways in which minority groups, or those who normally take no part in discussion about policy making, could be assisted to participate more actively in public policy processes.

The theoretical discussion of deliberative democracy generally focuses on parliament and the executive arm of government. Obviously, applying it to the area of law reform requires some modification. My argument is that institutional law reform commissions can play an important role in supporting a civil society based on a notion of community discussion and debate. When a law reform commission makes recommendations, it is the executive government which will decide whether to introduce legislation implementing those recommendations, and the parliament which will decide whether to pass that law. But a law reform commission based on the notion of deliberative democracy will be committed to giving individuals who are affected by it an opportunity to take part in discussions about the way the law should be changed.

There are many practical reasons for seeking the views of those who will be affected by proposed legal changes. Public consultation can serve a number of purposes. It can contribute to wider public understanding about the need for change. By providing information about the present law it can build the capacity of groups in the community to campaign for change.

It can identify practical problems with the law or administrative processes which might not otherwise have been recognised. People whose lives have been affected by the law are likely to see it very differently from lawyers and

judges. They will often be able to identify problems which are invisible to those who are more familiar with legal processes and the workings of courts. This came home to me starkly in our recent project on sexual offences law. Generally speaking, the criminal barristers we spoke to seemed to believe that the present law works well. By contrast, people who had given evidence in a sexual assault case regarded the experience as almost as traumatic as the original assault.

Consultation and debate can also assist in generating options for reform or help in identifying the advantages and disadvantages of options which are being considered. It may result in experimentation within particular bodies to address problems which have been identified, even before a law reform commission makes formal recommendations for change. For example, the Director of Public Prosecutions has already made some changes as the result of problems identified in the course of our sexual offences project.

However, my support for a deliberative approach to law reform is not based simply on the practical benefits of public consultation. In my view, encouraging public debate on complex public policy questions, such as eligibility for access to infertility treatment, has two other important purposes.

The first purpose is to give people whose views have typically been suppressed or ignored an opportunity to be treated with dignity and to have their concerns taken seriously. Law reform commissions should make special efforts to engage with groups which have historically faced barriers to participation in civil society. These may be barriers based on gender, disability, language and culture, as well as barriers created by historical injustice.

Let me use an example from our project on sexual offences laws. We know there is a high rate of sexual offences and family violence in Aboriginal communities. We also know that Aboriginal women are reluctant to report these offences to the police and even more reluctant to give evidence in court. The oppression and injustice experienced by Aboriginal people has contributed to these problems. For this reason, the commission has made considerable effort to engage Aboriginal people in our consultations and to learn about the reality of their experiences with police and courts. Our consultations told us Aboriginal people were not terribly interested in some of the technical questions we were considering, but were very keen to think about ways of reducing sexual assault and helping those who are the victims of it.

The second purpose of debate is to build public trust and confidence in policy making processes. Recent research shows there has been a decline in public trust in many Western societies. Robert Putnam's book *Disaffected Democracies—What's Troubling the Trilateral Countries*

argues that there has been a decline in citizen's confidence across the Western world. Surveys show that confidence in politicians and parliament has fallen and there is a weakening attachment to the major political parties. Cynicism about governmental institutions damages the fabric of civil society and contributes to a feeling of social and political powerlessness.

The first ethical obligation is to create the conditions in which there can be a fair and relatively equal exchange of views.

A law reform commission which consults widely with individuals and interest groups, and which makes special efforts to talk to people whose voices may otherwise be silenced, could contribute to the building of civil society. Institutional law reform bodies need to spend as much time thinking about how to engage the community and groups within it in informed debate, as about the content of the final recommendations which they make to government. The consultation process can prepare the way for necessary change.

The law reform approach which I favour addresses disengagement and public distrust by putting community discussion and debate at the centre of policy making. It is based on the idea that all groups in the community have the right to engage in debate and have their concerns taken seriously. A process based on the principle of deliberative democracy may be valuable, even if its main outcome is to expose areas of disagreement. Encouraging public debate on controversial legal and moral issues helps to build public trust in government and the institutions of democracy.

An Ethical Law Reform Process

I have argued that processes for public participation in the law reform process should reflect the ideal of deliberative democracy. In other words, the role of a standing law reform body is not simply to consult on its proposals for reform but to create the conditions for the public to participate in debate on public policy issues referred to the commission.

What ethical obligations flow from this view of a law reform commission's role? I argue that there are four main requirements.

- Creating opportunities for meaningful participation;
- Fair processes;
- Avoiding raising expectations which cannot be met;
- Acknowledging disagreement and explaining reasons for dissent.

Creating Opportunities for Meaningful Participation

The first ethical obligation is to create the conditions in which there can be a fair and relatively equal exchange of views. Often the Commission is the main source of legal expertise on the matter which is being discussed. This creates an imbalance of power between the Commission and those who may lack information or have little experience in putting forward their views.

In discussions involving groups with very different perspectives there is also a danger that members of social groups which lack detailed knowledge, or are inexperienced in expressing their views, will be silenced by more powerful and experienced participants. Think for example of the difficulties of conducting a conversation about changes to sexual offences laws between women complainants who have gone through a sexual assault trial and lawyers who commonly represent men accused of sexual offences.

I believe commissions have an ethical obligation to assist groups which are lacking in power to participate effectively in the discussion. The typical law reform paper is a large and authoritative legal tome, which will probably be read by only a few people. This way of communicating is unlikely to help people in minority groups to express their concerns. Commissions need to provide information in more accessible ways to people who are likely to be affected by the proposed changes.

Recently, the Victorian Law Reform Commission has experimented with a format in which a small group is brought together to discuss a hypothetical, which is designed to expose a policy dilemma. Our assisted reproduction reference brought people together to discuss case studies which were intended to reveal inconsistencies in the current eligibility requirements for treatment. While this approach needs fine tuning it seems to me a good way of informing people about complex issues. After we held the forum a number of people said to me that they now understood the problems we were trying to address much more clearly. In some areas, for example our project on family violence, we have produced short papers written in non-technical language, which non-government organisations can use to obtain the views of their clients.

We also need to think of other ways of assisting groups which lack social power to become more involved in public policy making. For example, a law reform commission might decide to work with indigenous organisations to develop their understanding of and ability to participate in discussions on the law reform issues which are likely to affect them in the future.

Fair Processes

The second ethical obligation is to ensure that the processes used themselves reflect the values of delibera-

tive democracy. One problem is that it is ultimately the commission itself which will make recommendations to government, rather than groups which are called together to consider reform proposals. There is a danger that the commission will be seen as simply going through the motions of consultation. This problem can be addressed to some extent by making the purposes of consultation clear and by establishing clear ground rules under which the discussion will occur. Processes should require participants to agree to treat each other with respect, even when they have strong differences of opinion.

Commissions also need to think about the degree of formality which should apply to the discussion and whether it should occur in public, along the lines of a submission to a parliamentary committee, or in private meetings. My personal inclination is to use relatively informal processes. We sometimes hold discussions on the basis of an agreement that peoples' individual views will not be reported. While this process may encourage people to express their views more frankly and may be less daunting to people who are not used to participating in public debate, it may also be seen as inconsistent with the democracy part of 'deliberative democracy'. Perhaps the answer is to give people the opportunity to express their views in a number of different ways.

Not Raising False Expectations

The third ethical obligation is to avoid raising false expectations about the benefits of participating in the law reform process. We are frequently approached by people who have experienced various forms of injustice. We do not provide people with legal advice on particular cases and we need to make it clear that changes we propose may not assist them. In effect, we are asking them to participate altruistically to assist others. This needs to be made completely clear.

Sometimes individual stories are the most effective way of changing popular opinion. When journalists write up our proposals they often want us to produce a victim who personifies a particular legal problem, but I believe commissions need to be careful about responding to this demand. While personal stories can provide insight into defects in the law, in my view it is preferable to base public policy on the systemic effects of particular stories than on the problems of individuals. The consequences for individuals in being exposed to media scrutiny are unpredictable.

Acknowledging Disagreement

Finally, while the viewpoints of all those who participate in a deliberative process should be taken seriously, the commission's goal should not be to achieve a compromise by papering over the cracks between opposing views. Treating people with dignity involves accepting that there will often be disagreement. A law reform

commission has an obligation to identify differences of view and report them fairly. It also has an obligation to provide transparent reasons for reaching a particular conclusion. While some groups may not get the answers they want, they ought to at least be able to say that the process was fair and that their views were reported fairly.

A Case Study for Deliberative Democracy Approach—Assisted Reproduction and Adoption

Let me conclude with an example based on what may prove to be the commission's most controversial reference: access to assisted reproduction technology and adoption. The Commission has published a consultation paper on the current law which exposes some serious anomalies. At present, a single woman or a woman in a lesbian relationship is eligible for infertility treatment if she has a medical condition which prevents her from conceiving. If the only reason she cannot conceive is that she does not want to have intercourse with a man, she is not entitled to seek artificial insemination in a licensed clinic, though she can inseminate herself with sperm donated by a friend. Ironically, this means that a single woman of 45 is probably eligible for treatment because her age makes her infertile, but a 35-year-old woman would not be eligible for treatment.

The commission has been asked to advise the government on whether eligibility requirements should be changed. It is clear there is widespread disagreement on this issue. Some in the community believe only married couples should be entitled to treatment. This position is not legally tenable because it conflicts with the federal sex discrimination legislation. However, there may be other ways in which access to treatment could be limited. Others in the community believe that assisted reproduction should be treated in the same way as other medical procedures. Anyone who needs medical treatment to conceive should be entitled to receive it. We have received over 200 written submissions, from people who feel very strongly about these issues.

It is the commission, a body of 9 distinguished people with expertise in law and social policy, who will have to decide what to recommend. Our terms of reference require us to have particular regard to the rights and best interests of children and to the provisions of international conventions to which Australia is a signatory.

The recommendations we ultimately make cannot be based on logic alone. We certainly cannot proceed by counting up the submissions and making recommendations based on the majority view. Our processes are intended to inform the community and groups within it about the social policy issues on which we will advise government, to encourage everyone with an interest to participate in the debate and to foster discussion between those with different views.

In the end, each law reform commissioner will have to apply their own ethical values in deciding what to recommend, though these values will inevitably be constrained by the debate which occurs before recommendations are made and the values which other commissioners inject into that debate.

Whatever our final report says, it is inevitable that our recommendations will be criticised. Unfortunately, individuals and sometimes political parties who do not agree with particular law reform recommendations attack the integrity of commissioners.

While it is important that our processes are respected and seen to be fair, the fact that not everyone will agree with our recommendations is irrelevant. Unlike politicians, we do not measure our success through approval ratings. The task of a law reform commission is not to convince everyone that our answers are correct, but to ensure that the law reform process reflects the ethical principles of independence, intellectual rigour and deliberative democracy. Such an approach will build public trust in the integrity and accountability of institutional law reform bodies like the Victorian Law Reform Commission.

This is the text of a lecture given by Professor Neave in CAPPE's public lecture series at the University of Melbourne on 11 August 2004.

Sources used in the preparation of this lecture include:

Putnam, Robert D., & Pharr, Susan J., (eds), *Disaffected Democracies—What's Troubling the Trilateral Countries*, Princeton: Princeton University Press, 2000.

Uhr, John, *Deliberative Democracy in Australia: the Changing Place of Parliament*, Melbourne: Cambridge University Press, 1998.

Sackville, Ronald, 'Law Reform—Limitations and Possibilities', in Blackshield, A. R., (ed), *Legal Change: Essays in Honour of Julius Stone*, Butterworths: Sydney, 1983, 223–240.

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