THE Politics & Law TEACHER

BI-MONTHLY UPDATE

January / February 2018

Volume 1, Number 1

Stephen King

George Brandis' valedictory speech

The rule of law (11PAL)

Accountability of the executive (12PAL)

How Australia upholds the rule of law (12PAL)

Shortly after parliament resumed for 2018 Senator George Brandis gave his final speech to the Senate.

His valedictory speech is notable for its reproach of executive ministers' criticisms of judges and courts.

Brandis said, *"To attack those institutions is to attack the rule of law itself. And it is for the attorney-general always to defend the rule of law — sometimes from political colleagues who fail to understand it, or are impatient of the limitations it may impose upon executive power."*[1]

His warning follows criticism in late 2017 of Victorian courts over their handling of terrorism cases. Three cabinet colleagues of George Brandis, ministers Greg Hunt, Michael Sukkar and Alan Tudge were compelled to make apologies to the court or face of contempt of court charges after criticising the courts prior to the Court of Appeal making a ruling on an appeals cases.

The three ministers' unconditional apologies were accepted by the court. Fiona McLeod, President of the Law Council of Australia said the apologies were the right thing to do as they show "*respect for the separation of powers and the rule of law*".[2]

Late in 2017, George Brandis made a veiled criticism of Peter Dutton, current Minister for Home Affairs after he said that lawyers representing asylum seekers were un-Australian. At a speech to the International Bar Association, Brandis said, *"judicial power is not subordinated to executive discretion, and that ministers and officials always respect the rule of law and the authority of the courts as the ultimate arbiters of the rights of citizens".*

"Your role, as defenders of the rule of law, is never more important than at a time when there are, understandably, demands for greater state power in service of the protection of the security of the nation…."[3]

[1] Gratten, M, *George Brandis warns Liberal of the rise of the populist right*, http://citynews.com.au/2018/grattan-george-brandis-warns-liberals-rise-populist-right/

[2] SMH, http://www.smh.com.au/federal-politics/political-news/ministers-make-unconditional-apology-for-criticism-of-victorias-supreme-court-20170623-gwx1zq.html

[3] SMH, *George Brandis slaps down Peter Dutton over 'un-Australian' lawyers attack,* http://www.smh.com.au/federal-politics/political-news/george-brandis-slaps-down-peter-dutton-over-unaustralian-lawyers-attack-20171008-gywvcv.html

Application to PAL

- The threat of contempt charges by the courts is an example of executive accountability through judicial review.
- Brandis' criticism of his ministerial colleagues is an example of the attorney-general's role in upholding the rule of law.

Questions

1. What is the role of the Attorney General with respect to the rule of law?
2. Outline two ways by which ministers are held accountable?
3. Evaluate the extent to which the judicial independence is upheld in in Australia.
4.

Barnaby Joyce and ministerial accountability

Roles and powers of the opposition (12PAL)

Decline of parliament thesis (12PAL)

Accountability of the executive (12PAL)

Barnaby Joyce has caused a "world of woe" and "appalled all of us" according to Prime Minister Malcom Turnbull.

Turnbull was speaking at press conference following revelations that Barnaby Joyce had had an affair with a member of his office staff who became pregnant with his child.

At the time the scandal became public Joyce was the leader of the National Party and Deputy Prime Minister. He was also the Minister for Infrastructure and Transport.

More importantly for 12PAL are the implications for ministerial accountability. The opposition used parliamentary procedures (Question Time) to inquire into possible misuse of public money and breaches of the Ministerial Code of Conduct by Joyce. The opposition pursued allegations that Vicki Campion, Joyce's ex-media advisor and new partner, was moved from his office to that of Nationals minister Matt Canavan and then to the office of Nationals MP Damien Drum's office. If Campion's work opportunities were because she was in a relationship with Joyce it would be a breach of the Ministerial Code of Conduct.

Joyce was at the time also living rent free in a townhouse owned by his friend, wealthy Armidale businessman Greg Maguire. The opposition sought further information that Maguire may have benefited from Joyce's decision as minister to relocate the government department under his portfolio to the town of Armidale, NSW.

Using ministerial power for the benefit of partners and friends are serious

allegations. An allegation of sexual harassment from a prominent Western Australian woman against Joyce was the final straw.

Joyce resisted pressure to resign from the executive until Friday 23 February. He remains in parliament as a private member on the backbench.

Malcolm Turnbull modified the Ministerial Code of Conduct in response to the Joyce affair. He added a ban on sexual relations between ministers and their office staff and advisors.

Application to PAL

- As a minister and Deputy Prime Minister, Joyce's conduct is subject to the conventions of Westminster responsible government. The opposition's role is to utilise parliamentary procedures (Question Time) designed to enable parliament to hold ministers responsible under the convention of individual ministerial responsibility.
- The opposition's power to force the resignation of Joyce is limited because any motion to censure him would almost certainly fail to pass the government-dominated House. This demonstrates the weakness of the ministerial responsibility conventions and supports the decline of parliament thesis.
- The Ministerial Code of Conduct is a modern approach to holding ministers accountable. The Code is entirely within the power of the Prime Minister, not the parliament, to develop and enforce. It is a relatively weak form of accountability because there is no separation of power in its operation – the executive holds itself to account by the Code. And, the Code is not law. There is no enforceability by either parliament or the courts.

Questions

1. Explain how ministers are held accountable by parliament.
2. Describe the role of the opposition in holding the government to account.
3. Evaluate the ministerial code of conduct as a way of upholding ministerial accountability.

The High Court and Section 44 cases

Roles and powers of the High Court (12PAL)

Accountability of parliament by judicial review (12PAL)

How Australia upholds the rule of law (12PAL)

Throughout 2017 and into 2018 the Section 44 constitutional citizenship issue

has been playing out in the parliament and the High Court.

In 2017 Senators Malcolm Roberts (PHON), Jacqui Lambie (JLN), Scott Ludlam (GRN), Larissa Waters (GRN), Foina Nash (NAT), Stephen Parry (LIB) were all disqualified by the High Court (sitting as the Court of Disputed Returns under the *Commonwealth Electoral Act 1918*) from the Senate because they were not validly elected under Section 44(i) of the Australian Constitution. Critically for the Turnbull Government's slender one-seat majority in the House of Representatives, Barnaby Joyce (NAT) was also disqualified for the same reason, leaving the government in a precarious position. All these MPs were all found to hold entitlements to foreign citizenship.

In 2018 Senator Skye Kakoschke-Moore (NXT) was prevented by the Court from replacing herself following her resignation after discovering she was a dual national. David Feeney (ALP) could not produce documentary evidence he had renounced his British citizenship and also resigned from parliament.

Senators who resign or are disqualified create a casual Senate vacancy. Upper house vacancies are filled by processes decided by the High Court, usually involving a count-back of ballot papers from the previous election. House vacancies, such as those created by Joyce's disqualification and Feeney's are filled by by-elections in the affected electorates.

Application to PAL

- These cases, with possibly more to come in 2018, illustrate the roles and powers of the High Court in holding parliament to account. Specifically, teachers and students are encouraged to note that it is the High Court sitting as the Court of Disputed Returns under the *Commonwealth Electoral Act 1918* that has the task of holding parliamentarians accountable for the constitutional validity of their election. It also has power to determine Senate vacancies.
- The independence of the judiciary and the requirement for law-makers to obey the law are examples of how Australia upholds the rule of law.

Questions

1. Outline how casual vacancies are filled for the House of Representatives and the Senate.
2. Explain the role of the "Court of Disputed Returns" as used in the source.
3. Explain the rule of law in the Australian context.
4. Evaluate the extent to which Australia upholds the independence of the judiciary.

Murray Darling Basin Plan

Accountability of the executive – Senate committee and disallowance of regulations (12PAL)

Federalism (11PAL) – Sections 51xxix and 51xx (12PAL)

In mid-February 2018 the Senate disallowed regulations that would have reduced water set aside for environmental purposes by 18%.

By the middle of the first decade of the 21st Century a 10 year drought had devastated ecosystems along the Murray Darling River System. Late in John Howard's final term the commonwealth succeeded in bringing the four "basin states" (QLD, NSA, VIC & SA) into an agreement to regulate the Murray Darling River System. A $10bn fund was set aside and made available to the basin states under Section 96 of the Constitution. Section 96, by setting conditions on state access to the fund, allowed the Howard Government to use the commonwealth's financial powers to legislate to incentivise the basin states to comply with river-water extraction regulations.

The *Water Act 2007* is the legislation that established the fund and set the Section 96 conditions. It also delegated legislative power to the government for the regulation of irrigation water withdrawals from the river system.

Teachers and students might note that the *Water Act 2007* drew on the external affairs power (section 51xxix) to make water available for environmental purposes. The Bonn Convention is an international agreement to protect the habitat of migratory water birds. The ratification of the Bonn Convention gave the commonwealth power under S51xxix to make laws for the diversion of river water to wetlands. River water could now be diverted by the commonwealth executive from irrigation to wetlands – from economic to environmental purposes.

Also of relevance is the use of the corporations power (section 51xx). The commonwealth lacked the power to force the states to legislate for water withdrawals. Instead, the commonwealth used the corporations power to regulate farmers' use of water directly, by-passing the states. Most farming businesses along the river were incorporated bodies subject to regulation under section 51xx.

By 2018 the basin states were in disagreement over water withdrawals. Inadequate monitoring of water extraction and arguments that too much was being set aside for environmental purposes had caused the Murray Basin Plan to fall into crisis.

The 18% reduction in water for the environment was favoured by South Australia – the state at the end of the river and most dependent on the river for Adelaide's water supply and for the health of the Coorong Estuary at the river mouth . The northern states opposed the reduction, instead arguing for more water to be available for their farmers.

Application to PAL

- The Senate Regulations and Ordinances Committee recommended in its February publication of the "Disallowance Alert" that the regulation to reduce extractions by 18% be disallowed. The Senate vote was carried by the ALP, Greens and NXT. The successful disallowance motion prevents the 18% reduction preferred by the federal government. It is a parliamentary check on executive power because regulations are made under the *Water Act 2007*, which delegated legislative power to the executive.
- The *Water Act 2007* makes use of the Bonn Convention to empower the commonwealth. This is an example of section 51xxix being used to increase commonwealth power relative to the states.
- The direct regulation of farming business's use of water, is an example of the use section 51xx to by-pass the states.

Questions

1. What is the external affairs power?
2. Explain two ways in which the commonwealth is able to legislate in areas of state power.
3. Evaluate the effectiveness of Senate Estimates Committees in holding the executive to account.

Government agrees to amendments to national security bill

Operating principles of liberal democracy: (11PAL)

Roles and powers of the parliament [legislating] and the opposition (11PAL 12PAL)

Pressure groups and political parties influencing law-making (12PAL)

The government introduced the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* late last year. The aim of the bill is to enhance protection against foreign interference in Australian democracy. It also aims to protect sensitive security information.

The bill is an example of a government bill. Introduced in the House on 7 December 2017 the bill was still before the House in February 2018. As a controversial bill that will affect political rights and freedoms it is being debated in detail in the House rather than the Federation Chamber (the committee which contains all MHRs and is a "fast-track" pathway for uncontested bills).

Pressure groups are seeking to influence the law during its passage through the parliament. Pressure groups are associations of people exercising their political freedoms and rights to engage in political participation with the aim of influencing law-making.

The Media Entertainment and Arts Alliance (MEAA) is arguing for amendments to the bill that would remove the threat of criminal prosecution for journalists who report national security matters. The MEAA is supported by the Law Council of Australia (LCA). Both the MEAA and LCA are hybrid pressure groups[4]. They argue that bill goes too far and will limit political freedoms and rights. Both pressure groups argue the bill unnecessarily restricts freedom of the press and political communication. As initially written the bill would require journalists to be absolutely sure that their stories were "fair and accurate" or face a possible 20 year prison sentence. The MEAA and the LCA have argued that these words be changed to "reasonably believe that a story is in the public interest" before they publish it.

The effect of the MEAA and LCA recommendations is to allow greater freedom of the press to publish without fear of prosecution.

Further, both the opposition ALP and the Greens have said they will not support the bill unless it protects freedom of the press and political communication adequately. As political parties they too seek to influence law-making. In this case by using parliamentary processes such as the second reading debate and consideration-in-detail stages of the legislative process to propose and vote on amendments. They will also use their powerful positions in the Senate to vote against the bill if it is not changed to their satisfaction.

In response to pressure group and parliamentary pressure to change the law to protect public interest journalism Malcolm Turnbull said, "There is no desire by the Turnbull government to limit the legitimate work of journalists or their employers. A free media is a foundation of our democratic system".

[4] The MEAA and the LCA may be considered "hybrid" pressure groups because they represent both a section of society (media and the legal profession respectively) and they advocate for strong protections for political rights and freedoms which are in the community's interest.

The government has agreed to change the laws in response to pressure from the MEAA, LCA and the ALP and Greens.

Application to PAL

- The *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* illustrates the legislative process of the parliament. The importance of the second reading and consideration-in-detail stages is demonstrated by the government willingness to improve the bill.
- Pressure groups and political parties have successfully influenced the law-making process.
- The opposition has been successful in holding the government to account and using parliamentary processes to force changes to a bill.
- Pressure groups and political parties are examples of political participation and the freedom of association.
- The parliament has been responsive to community concern about a law – an example of representative democracy in action.
- The changes to the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* represent respect for the protection for the political freedoms of the press and communication.

Questions

1. Define "pressure groups" in the Australian political and legal context.
2. Describe two ways in which Australians can exercise political rights and political freedoms to influence law-making.
3. With reference to the source, explain how parliamentary parties can influence law-making through the parliament.
4. Evaluate the capacity of either pressure groups or political parties to influence law-making through the parliament.

Commonwealth funds hospital plan, with conditions

Federalism (11PAL) – Sections 96 (12PAL)

COAG (12PAL)

The Turnbull Government has offered the states access to a $100m "innovation fund" if they agree to sign up to a new hospital funding arrangement.

The new funding plan, ready for signing at February's COAG meeting, would see the commonwealth pay 45% of hospital costs but with its contributions limited to 6.5% annual increases over five years. The states are unhappy with the cap on the growth of commonwealth contributions. They are concerned that they will have to pay more if costs increase by more than 6.5% per annum.

The new hospital funding plan is a Section 96 specific purpose grant (SPP). With an SPP the commonwealth grants money to the states for the specific purpose, in this case paying for hospitals. The money cannot be used by the states for other purposes. The commonwealth must monitor how the states use the grant money to ensure compliance with the conditions of the grant. Monitoring grants imposes an administrative cost on the commonwealth and is relatively inefficient.

Because of the VFI[5] and their lack of state revenue the states are often compelled to accept conditions that limit their choices in residual powers such as health policy.

Despite the need for the funds several states have resisted signing the agreement.

In order to incentivise states to sign up to the unpopular hospital funding agreement the Turnbull Government offered the additional $100m innovation fund. Only states that signed up to the $10bn hospital funding agreement would get "innovation money".

The separate $100m innovation fund is also a Section 96 grant. It may be considered as an incentive payment – a kind of grant only available after a state fulfills the conditions of the Section 96 grant. The administrative cost to the commonwealth of this type of Section 96 grant is much less than a traditional SPP. The burden of proving compliance with Section 96 conditions rests with the states – they must demonstrate they have met the conditions before they get the money. Incentive payments are a common form of SPP because they are more efficient from the commonwealth's perspective.

Application to PAL

- The hospital funding agreement is a traditional Section 96 SPP grant with tied conditions.
- The separate innovation fund is a Section 96 grant with conditions that create incentives for the states to adopt commonwealth priorities.
- Commonwealth financial power is being used to strongly encourage states to implement federal policy in an area of state residual power.
- The hospital funding agreement and the innovation fund are examples of coercive federalism.

Questions

1. Define "vertical fiscal imbalance".
2. Describe two ways in which the commonwealth can use its financial power to coerce the states to adopt commonwealth policy.

[5] The Vertical Fiscal Imbalance (VFI) means that the states raise much less tax revenue than they need pay for state government services like hospitals. Meanwhile the commonwealth raises much more than it needs resulting in surplus commonwealth revenues. Section 96 allows the commonwealth to transfer surplus revenues as grants to the states. It also allows the commonwealth to attached conditions to the grants "as it thinks fit".

3. Evaluate the impact of Section 96 of the Constitution on Australian federalism.