

## THE ETHICS OF PUBLIC SECTOR DECISION MAKING

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In the BBC's political satire *Yes, Minister*, Jim Hacker's Principal Private Secretary, Bernard, once challenged Sir Humphrey Appleby with a relatively simple and self-evident proposition: "surely the citizens of a democracy have a right to know". The rebuff was swift and pointed. "No. They have a right to be ignorant. Knowledge only means complicity in guilt; ignorance has a certain dignity."<sup>1</sup>

Obfuscation may be dishonourable, but it remains a core and prized political skill. In the service of the public, government employees inevitably will be involved – usually by direction – in all sorts of recommendations, reports, studies, policy implementation and general paperwork that may or may not serve the public interest or rationalise political choices. Public sector administration is a complex beast and what constitutes the public interest is nuanced, potentially vague and frequently viewpoint-dependent. However, what constitutes the public interest to one species of public sector employee, the government lawyer, in many respects is not remotely vague. And, coincidentally, it has a certain dignity.

Whether or not the citizens of democracy know what occurs behind the scenes of public administration, the participants in that administration certainly do know. One matter the paper addresses is, whistle blower legislation aside, what can and must government lawyers do with what they do know when public administration departs from appropriate standards.

In theory, the ethical obligations of all lawyers are the same. However, the nature and circumstances of a lawyer's client affect the nature of his or her obligations. In this sense, the ethical obligations of government lawyers are different to private sector lawyers because government lawyers help governments to identify and exercise their considerable powers.

This paper considers some ethical issues arising from the exercise of public power and

the role of public sector lawyers in the wider preservation of the rule of law.

The paper will first consider the nature and extent of government power and some restrictions on its exercise. This will identify some particular challenges to fundamental legal principles that arise from the reach of the modern administrative state. It will then consider how government lawyers, as essentially the first check on government power, must discharge their legal and ethical obligations in this context. It will argue that government lawyers have a special responsibility to protect the rule of law from inadvertent erosion by the relentless expansion of public power and the regulatory state.

## I. THE RULE OF LAW

The rule of law is the condition necessary to prevent the exercise of arbitrary power.

It is fashionable to attribute the foundation of the rule of law to the *Magna Carta*; Lord Coke was an influential exponent of this school of thought<sup>2</sup>. Despite this, it was clear long before the *Magna Carta* that Kings ruled by laws and were subject to legal constraints that protected individuals from arbitrary power. As Lord Sumption recently noted extra-judicially, the barons at Runnymede knew perfectly well that the King could not do as he liked, either in theory or in practice. Sumption colourfully described claims that the *Magna Carta* was the foundation of the rule of law as “high-minded tosh”<sup>3</sup>. However, the *Magna Carta* remains an important spiritual foundation of the rule of law. Although squarely rooted in the economic and social conditions of 13<sup>th</sup> century England, it did outline some basic principles which have long been regarded as central to a liberal democracy.

In the Australian context, the rule of law derives from English legal history and was influenced by American constitutionalism. It features a separation of legislative, executive and judicial powers<sup>4</sup> provided for in the Commonwealth *Constitution*<sup>5</sup>. The *Constitution* is framed upon the assumption of the rule of law<sup>6</sup> and its operation is informed by it. The operation of some foreign constitutions is also based on English rule of law principles. For example, the due

process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States are based on article 39 of *Magna Carta*.

The rule of law stands in the peculiar state of being the preeminent legitimating political ideal in the world today without agreement precisely upon what it means<sup>7</sup>. Even authoritarian regimes use the concept as cover for political ends, although in the Western tradition it is clear that the rule of law (as opposed to rule by law) operates as a check on abuse of power rather than as a tool for abuse.

At its most basic level, there is no disagreement in Western society. We are a society governed by laws, not people. Laws should apply equally and prospectively and be declared publicly and with certainty. Laws are a product of the broader governance system, which includes constitutions, acts of parliament and the common law, as interpreted and enforced by the courts.

Others argue for a more expansive operation, that laws must have certain substantive content and provide certain minimum rights<sup>8</sup>. Whether or not this is a better view is for another discussion. For present purposes, there are at least two aspects to the rule of law upon which there is general agreement.

First, even if the rule of law does not prescribe the contents of laws (each of which essentially requires the consent of the governed either directly or through their representatives), the nature of the concept guarantees that it gives “security to the rights of individuals” through that process<sup>9</sup>. According to Dicey, this includes at least three characteristics – no one is punishable except for a distinct breach of the law established in the ordinary legal manner before the ordinary courts of the land; every person is subject to the ordinary law and amenable to the jurisdiction of the ordinary tribunals; and the rules of the (English) constitution are not the source but the result of the rights of individuals as defined and enforced by the courts<sup>10</sup>.

Secondly, in the Western tradition there are certain fundamental principles of justice that

form the starting point for all laws and for the exercise of power, even if it is within the purview of the government, properly acting, to modify their operation. These disparate fundamental principles have been articulated and developed from time to time by the common law courts. Each is best understood by reference to the relationships between the Crown (or government) and the people and the rights necessary to sustain law as the foundation of society.

## **II. GOVERNMENT POWER**

Governments are subject to the rule of law and government power is informed by it.

The starting point is the common law. There are two inter-related and fundamental rules that underpin our entire system. First, personal freedom does not depend on any express rule. Individuals are free to do absolutely anything they like unless they are constrained by a law<sup>11</sup>. Secondly, there is no such thing in Australia as unlimited official power. Power is conferred and constrained by the Constitution, statute and the common law. There is no such thing as absolute power. Governments can only exercise the powers vested in them. These principles are bulwarks of freedom.

An individual's freedom is interdependent with the freedom of others. We must each give others an equal amount of personal autonomy, which necessarily constrains our own autonomy. The common law has developed the rights required by equal freedom for all. Parliament operates in the same way, to restrict the freedoms of each of us as far as its policy determines to be desirable. By definition, most laws are rights-restrictive – they prohibit or regulate (or in some cases specifically require) actions that are designed to enhance the social, economic or physical freedom or liberty of others.

In short, people are absolutely free unless their rights are restricted. Governments can impose those restrictions, but only in accordance with properly exercised powers. Agency power derives from statutory power and is similarly constrained. This begs the question: what is the proper exercise of government power? This is answered by the simple proposition that

governments exist only to serve the public interest.

Public interest obligations are notoriously difficult to define and reasonable minds will disagree. Indeed, reasonable minds may determine that diametrically opposed courses of action would best serve the public interest. In a political system legitimised by representative democracy, there will be shifting views of optimal public policy. However, in the rule of law sense, public interest and public policy are different beasts. Public interest, regardless of the policy, is measured against antithetical concerns such as private, personal, parochial or partisan interests as the objective, rather than outcome, of the decision-making process<sup>12</sup>.

In addition to public interest obligations, the courts will hold governments to higher standards than others, as moral exemplars required to lead by example<sup>13</sup>. This should be regarded as axiomatic - because the state is the “source and fountain of justice”, it is “bound to maintain the highest standards of probity and fair dealing, comparable to those which the courts, which derive their authority from the same source and fountain, impose on the officers under their control”<sup>14</sup>.

In dealings with citizens, governments are subject to a variety of legal imperatives such as to act fairly<sup>15</sup>, reasonably and proportionately, to act with accountability and transparency, and to act in good faith, even in contractual dealings<sup>16</sup>. The state and all agencies must conduct themselves as model litigants and adhere to principles of fairness in litigation. This duty arises before, and is more onerous than, the duty of all parties and their lawyers in proceedings before the court “to assist in the achieving of the overarching purpose of facilitating the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible”<sup>17</sup>.

The courts have developed doctrines and remedies, many of some antiquity, that reinforce the rule of law, promote freedom and constrain power. These included the prerogative writs of habeas corpus (requiring lawful justification for detention)<sup>18</sup>, certiorari (to correct errors), prohibition (to restrain excess of power), mandamus (to compel the performance of public duty)<sup>19</sup>, ne exeat regno (restraining departure<sup>19</sup> from the jurisdiction) and procedendo (to require a

proceeding to be heard). The supervisory role of the Supreme Courts and the enforcement of the limits on the exercise of executive power, exercised through the grant of these prerogative writs, is a defining characteristic of those courts<sup>20</sup>.

Governments must not only be concerned about the proper exercise of the powers properly vested in them, but also not to act in a manner that purports to oust or appropriate the jurisdiction of the courts. This is at the core of the separation of powers.

There are many examples<sup>21</sup>, but two will suffice for present purposes. In *Kable v DPP*<sup>22</sup>, the High Court held that, under our constitutional structure, state courts form part of an integrated Australian legal system through which judicial power is exercised, effectively importing federal constitutional separation of powers considerations into the state judicial sphere and, in doing so, invalidating state legislation used to extend a prisoner's detention. In *Plaintiff S157/2002*, the High Court held that it is beyond the legal capacity of the Parliament to confer upon an administrative tribunal the power to make an authoritative and conclusive decision as to the limits of its own jurisdiction, because that would involve an exercise of judicial power<sup>23</sup>. This concept is informed by the broader statement of Lord Denning that if tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end<sup>24</sup>.

The *Kable* decision also is an important reminder of the moral power of the rule of law. The parliament of New South Wales in that case sought unsuccessfully to invoke the judicial authority of the Supreme Court to sanction fundamentally objectionable conduct (detention without trial) by dressing it up as a judicial process. Parliaments generally have constitutional powers to pass legislation affecting even the most basic rights – but it is for parliament to do that, to do it expressly, and to accept the consequences.

### **III. FUNDAMENTAL PRINCIPLES OF JUSTICE**

It has already been noted that there are certain fundamental principles of justice that

form the starting point for all laws and for the exercise of power, even if it is within the province of the government, properly acting, to modify their operation. These common law principles include the principles of legality and other principles recognized by a variety of legislatures under different labels (such as fundamental legislative principles or human rights charters).

Although expressed as rules of statutory construction, the principles of legality have a constitutional character<sup>25</sup>, reflecting and protecting centuries of fundamental principles and systemic values<sup>26</sup> and engaging a particular aspect of the rule of law, namely that government action (whether legislative or executive) which intrudes on the rights and liberties of individuals should be justified by legal authority<sup>27</sup>.

In essence, the principle of legality is that courts will not interpret legislation as abrogating or contracting fundamental rights or freedoms unless clear words are used<sup>28</sup>. Former Chief Justice Gleeson has noted that the presumption is not merely a common sense guide to what Parliament in a liberal democracy is likely to have intended – it is a working hypothesis, an aspect of the rule of law, which is known both to Parliament and the courts upon which statutory language will be interpreted<sup>29</sup>. As Lord Hoffmann said:

[T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.<sup>30</sup>

The High Court has noted that the principle ought not to be extended beyond its rationale. It exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law. The principle does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the

enacting legislature<sup>31</sup>. As McHugh J pointed out<sup>32</sup>, modern legislatures regularly enact laws that take away or modify common law rights. Subject to constitutional limits, where a parliament has decided to enact a law which abrogates such a right or freedom, its decision must be respected<sup>33</sup>.

The fundamental rights and freedoms protected by the doctrine are multifarious. They include preserving access to the courts (although this is considerably more than a presumption of interpretation)<sup>34</sup>; preserving equality before the law<sup>35</sup>; non-retrospectivity of statutes extending the criminal law or of changes in rights or obligations generally<sup>36</sup>; providing rules of general application<sup>37</sup>; procedural fairness (including natural justice<sup>38</sup>, presumption of innocence, privilege against self-incrimination and the right to silence<sup>39</sup>, the need for and the standard of proof<sup>40</sup>, the principle that courts sit in public<sup>41</sup>, and a person's right to know of a decision before their rights can be adversely affected<sup>42</sup>); freedom of speech<sup>43</sup>; freedom of movement<sup>44</sup>; freedom from trespass by police officers on private property; the writ of habeas corpus; mens rea as an element of legislatively-created crimes; freedom from arbitrary arrest or search; legal professional privilege to name a few<sup>45</sup>. The principle can apply to any legislation which departs from "the general system of law"<sup>46</sup>.

As governments can only exercise the powers vested in them, it follows necessarily that agencies have no power to infringe the principle of legality unless clear words are used. This does not extend the principle of legality beyond its interpretative roots; it is a natural consequence of how administrative power, which is only conferred by statute, must be interpreted. In this sense, the principle of legality constitutes an imperative to agencies to adhere to fundamental principles unless clearly directed by statute to the contrary.

The courts also have referenced fundamental rule of law concepts to consider whether the institutional integrity of courts is impaired by legislative acts. Even if parliament uses clear words to oust a principle of legality, this will not be effective if it undermines or appropriates judicial power, which is the exclusive province of the courts. In *Kable v DPP*<sup>47</sup>, the High Court



noted that the impugned review process established under state legislation seriously departed from fundamental adjudication requirements such as the standard of proof, rules of evidence, judicial discretion and the existence of a contestable dispute.

Some legislatures have endeavoured to summarise various fundamental principles or aspects of the principle of legality for the purposes of creating new legislation. In Queensland, the *Legislative Standards Act 1992* articulates “the principles relating to legislation that underlie a parliamentary democracy based on the rule of law” (which include principles relating to the rights and liberties of individuals and the institution of parliament)<sup>48</sup>. The Office of the Queensland Parliamentary Counsel has a statutory responsibility to advise on the application of fundamental legislative principles in drafting legislation. Explanatory notes for bills and significant subordinate legislation must contain a brief assessment of the consistency of the legislation or bill with fundamental legislative principles or the reasons for any inconsistency. The approach in Victoria focusses on a Charter of Human Rights and Responsibilities<sup>49</sup> which incorporates many rule of law principles. Under the Charter, public authorities are required to act compatibly with Charter rights and to properly consider them when making decisions. Failure to do so is unlawful and, in certain circumstances, remedies and relief can be sought as a result. Parliament receives a statement of compatibility with the Charter of all proposed bills. Courts must consider human rights when interpreting laws. The Commonwealth Parliament also has a system for scrutiny of bills against human rights obligations, but this system is designed to complement Australia’s international treaty obligations and serves a somewhat different purpose to the Queensland and Victorian legislation<sup>50</sup>. Indeed, it is not unusual for Commonwealth legislation to pass before any human rights report on it is made.

In essence, the fundamental underpinnings of the rule of law and the principles of legality are the baseline against which all laws and administrative acts can be assessed. A reflexive assumption that an administrative act or proposal is valid is entirely the wrong way to look at any government action<sup>51</sup>. Rather, government powers<sup>52</sup> must always be assessed by asking: what is the source of the power; is the power or its exercise consistent with fundamental

principles; if not, is the departure from fundamental principles expressly authorised; and is the power or its exercise not otherwise compromised, for example as a transgression of judicial power?

#### **IV. THE ADMINISTRATIVE STATE**

Popular discourse about our justice system usually centres on the separation of powers, the tripartite relationship of the legislature, the executive and the judiciary. In terms of established legal philosophy, the separation of powers is the paradigm in which issues such as what our laws should reflect, what laws courts can make, and what powers governments should exercise are debated. Ronald Dworkin famously declared that “the courts are the capital of law’s empire, and judges are its princes”<sup>53</sup>. It should be evident to government lawyers, if not to others, that Dworkin entirely ignored the administrative state.

The legal principles comprising administrative law have developed relatively recently. In 1964, Lord Reid observed that there was not then a developed system of administrative law in the United Kingdom “perhaps because until fairly recently we did not need it”<sup>54</sup>.

In much earlier times of limited bureaucracy, public accountability was assessed on wholly different terms. Legislation was quite general, much like common law rules, and the enforcement of rights and obligations was largely left to the courts. As power was not devolved in any significant way, elected officials were more directly accountable for their actions and the people they employed were more likely to be appointed (and therefore able to be replaced) at the pleasure of their masters. Constituents with grievances had accountable people to whom they could complain and, for the most part, solutions to issues were just as likely to be political as legal. Any constraints imposed by the law were largely limited to an obligation on decision makers to act in good faith.

The administrative state has grown exponentially in recent decades. The power and reach of regulation is extraordinary and continually increasing as legislators have concluded

that delegation of their powers would best assist them to discharge their duties. This is reflected in both increased public sector administration, under the control of the executive, and the proliferation of independent regulatory agencies. Some make new rules; some enforce them; some do both. The justifications for the transformation in governance include the need for specialist expertise and sector knowledge, the distribution of supervisory authority to handle the scale and complexity of modern society, the stated greater democratic legitimacy of agencies over courts, and, in some instances, the need for more efficient public responses free from political interference<sup>55</sup>. Whatever the reasons or justifications, they are beyond the remit of this paper.

We now have a highly developed system of administrative law. The system, as it has developed to provide structure and function to public decision-making, provides for a different form of accountability to the environment that preceded it, framed around concepts of not only of good faith but also fairness, relevance, rationality and legal authority. In this system, access to the courts is typically deferred to a process of administrative review (such as internal review, appeal rights to administrative tribunals and external agency interventions such as ombudsmen) or bypassed through broader public accountability of processes at a macro level (such as parliamentary commissions and formal inquiries). Access to the courts is further limited to determinations on the legality of the decision, not its merits. This, of course, is not materially different to the approach taken in appeals from decisions of lower courts, with the significant exception in the latter case that the decision appealed from is the decision of a court. Nevertheless, in all respects the system of administrative law derives from the rule of law.

An expanding regulatory state does have its critics<sup>56</sup>, issues also beyond the remit of this paper. Some care is needed in this regard because, although the proliferation of administrative law is a world-wide phenomenon, there are important jurisdictional differences. The most famous doctrine of United States administrative law is the Chevron doctrine<sup>57</sup>, which requires judges to defer to reasonable agency interpretations of statutes. According to one leading academic, the long arc of the law has bent steadily towards deference to the administrative

state and, although judges preserve the power to say what the law is, this “thin fabric” of concealment relegates the courts to policing the outer bounds of administrative action<sup>58</sup>. This is evidenced, at least in the United States, by administrators having broad leeway to set policy, determine facts, interpret ambiguous statutes and even define the boundaries of their own jurisdiction. This, it is argued, arose from the law itself, by legal logic that deference was the wisest course of action – “the last and greatest triumph of legalism was that law deposed itself”<sup>59</sup>.

This has never been the position in Australia; there is no doctrine of deference<sup>60</sup>. There are limits to a court’s power to review the exercise of administrative discretions<sup>61</sup>; the merits of executive action are for the repository of the power alone<sup>62</sup>. Administrative decisions will not be in the public interest if they are not made lawfully or if they are tainted by extraneous considerations<sup>63</sup>. Examples of unlawful decisions include matters going to both power (such as absence of jurisdiction, improper exercise of power or error of law) and process (such as bias, absence of evidence, irrelevant considerations, bad faith or failure to accord natural justice). Examples of extraneous considerations include private interests, conflicts of interest or duty, and non-affected third party interests.

None of this denies that administrative decision making is different to judicial decision making. To be sure, it cannot be the same. The scaffolding around administrative law, developed by the courts and reinforced by legislation governing judicial review, has been designed to minimise and counter the risks of process abuse inherent in a system of distributed authority. What is important for present purposes is to recognize that, whatever system of rights adjudication is adopted, the fundamental obligations of citizens are not changed. For example, nothing in the law of judicial review says anything about narrowing the application of fundamental principles of justice to decision makers the subject of review. To the contrary, if legislation is presumed not to infringe fundamental principles without clear words, it must follow that the lesser authority of delegated decisions and administrative actions, which can only be taken under authority of legislation, similarly cannot infringe fundamental principles unless the

authorising legislation provides for that specifically.

It would be obvious that, despite the protective scaffolding of administrative laws, the administrative state has some critical weaknesses that can promote conduct incompatible with fundamental principles. These include legitimacy, administration, enforcement and review risks.

The legitimacy risks are numerous. The rule of law is ingrained in the judicial system but not necessarily in the administrative system. Put another way, because the administrative state empowers non-lawyers to make rights-affecting decisions, it is even more important that those decision makers understand and work within the rule of law. This does not mean that lawyers have all the answers but it does reflect that lawyers must ask certain questions that expediency might overlook.

Although regulatory authority by definition is authorised by parliament, the harsh reality is that second-order regulation or decision making has less democratic legitimacy. The overwhelming majority of laws are promulgated under statute rather than by statute. Disallowance procedures<sup>64</sup> for subordinate legislation are different to affirmative resolutions on matters impacting rights and effectively lead to less parliamentary scrutiny. Some regulators, in particular independent agencies, effectively write the rules in the first place. Despite industry or consumer consultation processes and mandatory statutory reporting of the agencies themselves, they operate within an accountability framework entirely different to that of elected officials. This inevitably affects both the nature of the rules they develop and their approach to administration of them. Regulators that both write and enforce laws ought, in principle, to be required to afford greater accountability for their actions. The aim of separation of powers is to prevent abuse of power and the absence of separation increases the risks of abuse.

Perhaps the most problematic legitimacy issue is a government agency hiding behind process. This has always been an issue for bureaucracies, but the problems are magnified systemically by the ubiquity of regulation and the framework within which administrative decisions are reviewed (which includes a legal test that will uphold any administrative decision

within power provided that it is not so unreasonable that no reasonable person could have made it<sup>65</sup>). At the heart of the matter is, in some cases, an absence of merits reviews and, in all cases, the false assumption that equates due process with the desired outcome.

Injustice is often the product of the harsh application of inflexible processes. Experienced lawyers well understand that laws and regulatory processes are clumsy tools to manage the messiness of a pluralistic community and the wisdom to know when a rule should be applied and when a rule should be bent. As Windeyer J observed, “a capacity in special circumstances to avoid the rigidity of inexorable law is the very essence of justice”<sup>66</sup>. This, of course, is a two-edged sword. The greater the discretion, the less objective is the rule to be applied. There is clear public interest and justice imperative in the certainty of rules. Discretion can be a tool of liberation or abuse.

Processes can also be manipulated under the cover of apparent reasonableness, whether for meritorious or malicious ends, to achieve desired outcomes. In a government context, this applies to tenders, policy decisions, administrative actions (including enforcement actions) and countless other decisions. The point is not exaggerated and need not be laboured. It is an inherent risk in any organisation and can only be managed by people acting in good faith and, in the government context, for proper purposes in the public interest.

The greatest strength of administrative decision-making, specialist knowledge and experience, is also one of the greatest risks to fundamental principles of justice. The risks stem from rights and obligations being viewed through the prism of the portfolio discipline. The administrative state has created substantial agencies with deep policy and subject matter expertise. Although agencies form part of a larger government, they also operate in a very real sense as subject matter interest groups with their own agendas. This is not a pejorative statement; it simply reflects the realities of large and complex public administration. A House of Lords select committee report on regulation in the United Kingdom reported that regulators often “assume that they are there to do good and therefore have a view of what is good”, which

“weakens the presumption of their due accountability”<sup>67</sup>. Policy blinkers can obscure broader public interest mandates and lead to unbalanced decision-making, over-zealous administration or business capture by prominent interest groups. Further, the nature of specialist agencies is that they recruit people predisposed to the objectives of the agency, reinforcing the culture. It clearly is in the public interest, and democratically legitimate, for government policy to be implemented but there is a danger, particularly in special purpose agencies, that competing legitimate interests are ignored or downplayed or that disagreement with agency policy is reflexively treated as an act of the enemy. This could be evidenced in an attitude that a person objecting to a tax assessment is a tax avoider, an applicant for an environmental authority is likely to pollute, a competition issue arises in every business transaction and the like. Under cover of reasonableness, all such presumptions could safely be implemented, deliberately or inadvertently.

The desirability of rule certainty must also be considered in regulations that allow or require agencies to grant permissions or approvals. General criteria amount to the granting of discretion, which is open to abuse and which will be difficult to review successfully. (To be sure, clear criteria remain open to process abuse, as discussed earlier). Approvals can also be granted conditionally, but for the condition to be applied lawfully it must relate to the approval power.

Other administrative risks to fundamental principles arise from the very nature of government – the need to juggle competing interests. When I deal with government, it is generally in my private capacity. But to what extent do my private interests affect others’ private interests or the public interest? Third parties often have, or assert, standing to intervene, but their motivations are not all the same. Third parties may assert rights disproportionate to their legitimate interests. Agencies have a responsibility to all parties to assess these matters fairly and objectively. Moreover, they have a responsibility to act according to law. The inherent public administration risks in managing these issues include the temptation of forging compromises detached from the principles at stake.

The enforcement risks to fundamental principles arise in at least three key respects. First, the very nature of distributed decision-making affects the quality, qualifications and experience of the decision-maker. Administrative decision makers do not act judicially. The system of judicial review is squarely directed to managing this weakness, but that system itself has challenges. Secondly, the sheer volume of regulation and micromanagement affecting our lives means that, in many respects, enforcement decisions could be regarded as essentially arbitrary and discretionary. United States Supreme Court Justice Neil Gorsuch recently made this point very effectively in extra-judicial comments on criminal statutes<sup>68</sup>:

What happens to individual freedom and equality—and to our very conception of law itself—when the criminal code comes to cover so many facets of daily life that prosecutors can almost choose their targets with impunity?

Thirdly, it has become normal for some agencies to issue guidelines on the administration of their areas of responsibility or of their interpretation of governing legislation. Although an agency ought to have a thorough comprehension of its constituent legislation and powers, any such guidelines are at risk of inaccuracy or, worse, being deliberately misleading.

The risks to fundamental principles inherent in the system of review itself are well known. Clearly, courts have wide powers to review legal errors and, in that regard, fundamental principles of justice are as well protected as in any other part of our legal system. However, it is extremely difficult, absent legal error, to overturn an administrative decision. It is a high bar to establish that an agency decision, rationalised in writing by people who know how to cover their tracks, is manifestly unreasonable on its face. In a system focussed on rewarding process compliance rather than acceptance of outcome responsibility, there is the very real prospect that all forms of minor and major injustices can disappear under agency paperwork. Despite the legal scaffolding created to allow the administrative state to work not only efficiently but accountably, the reality is that arguably our system of administrative review protects the decision-maker as much as, if not more than, the person affected by the decisions. “Challenge



constitutes the most powerful form of accountability<sup>69</sup>. If effective challenge is difficult, accountability suffers.

None of these issues is new to government. Indeed there is legislation, such as the *Legislative Standards Act 1992* (Qld) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic), designed precisely to address many of these concerns as far as possible in the legislative process. But as the sheer quantity of regulation increases, the risks inherent in properly administering it correspondingly increase. I am not suggesting that regulation is bad or unnecessary – the rule of law, after all, is predicated on the existence of rules. Nor do I mean to suggest for one moment that public officials cannot be trusted and spend their days devising ways to abuse their powers; far from it. The point is that the administrative state is so large, and many of its well-intentioned functionaries so captured by its necessary processes, that it is inevitable that fundamental principles of justice – principles that underlie the rule of law authorising the administrative state itself - will be overlooked, I suspect quite routinely. Inherent risks cannot be managed if they are not understood or if their ubiquity is not appreciated.

## **V. GOVERNMENT LAWYERS**

The rapid growth of the regulatory state, combined with weaknesses or risks inherent in the regulatory model, make it more vital than ever for government lawyers to ensure that regulation is only applied appropriately and that fundamental requirements of justice are served. The complexity of modern administration obscures what, in a lightly regulated environment, would otherwise be clear duties, largely because the sources of decision-making are so distributed. The question for government lawyers is how do their legal ethics cope with the realities of the administrative state?

In one sense, the ethical obligations of all lawyers are the same. However, the nature and circumstances of the client affect the nature of the lawyer's obligations. In this sense, the ethical obligations of government lawyers are different to private sector lawyers because governments have public interest obligations and because government lawyers occupy a

special position as both an executive officer and an officer of the court<sup>70</sup>. As professionals who are usually involved, often intimately, in seeking or exercising government powers, government lawyers are essentially the first check on government power.

As officers of the court, lawyers are subject to exacting legal and ethical duties and their duty to the administration of justice is paramount<sup>71</sup>. Lawyers' duties arise in many guises, specific or general, rigid or nuanced, certain or intangible. Fundamental to a lawyer's calling, however mercenary the matters within their charge, is the promotion and protection of the rule of law. They are not spectators or mere bit-players; lawyers are part of the process<sup>72</sup>.

Just as governments exist only to serve the public interest and the courts will hold governments to the highest standards, public officials are duty-bound to both act in and uphold the public interest. For government lawyers, these standards overlay and inform their professional standards. These duties flow from common law, as an incident of the nature of public office, as well as from specific legislation regulating public service employment and ethics<sup>73</sup>.

In short, a government lawyer is a duty-bound public official, representing a corpus which exists only to serve the public interest, who as a matter of both law and professional ethics must act to preserve and protect the rule of law in everything that they do. It follows inevitably that, as a public official with a paramount duty to the administration of justice, a government lawyer's duty can only be discharged by ensuring that every act of government within their influence is undertaken in the public interest and according to law.

I do not propose to deal in any detail with model litigant obligations. The obligations attach to the state or relevant agency. They arise both from common law and the assumption of conduct rules by particular agencies (or generally by the state in respect of its jurisdiction) either voluntarily or under legislation<sup>74</sup>. Government lawyers are duty bound to ensure that their client agencies comply with model litigant obligations, but the obligations are narrower than (and for all relevant purposes subsumed within) lawyers' broader ethical obligations. There is a level of

debate within the legal profession about what the principles do and do not require, but the principles must always be considered as a threshold of conduct rather than the standard. However it is worth noting that model litigant obligations are more than ethical duties. Departures from model litigant behaviour can, in particular circumstances, constitute professional misconduct, a contempt of court or an attempt to pervert the course of justice<sup>75</sup>.

Matters of express power and judicial review ought to be front of mind to government lawyers, who routinely assess proposed actions against clearly articulated laws. From time to time, clear constitutional issues may also require the lawyer's attention: advising on privative clauses; express limits on the court's jurisdiction; the undertaking of judicial processes administratively; or the secondment of the courts to apply executive decisions without judicial process.

Administering the law in accordance with fundamental principles of justice is a less exacting science, particularly as fundamental principles will not be specified in the relevant legislation (rather, in accordance with principle of legality they will be presumed not to be departed from without express authority). Potential breaches of fundamental principles in the administration of legislation could quite easily fly under the radar of people who are not legally trained and, in those circumstances, the issues are unlikely to be raised specifically for legal review.

Lawyers also are part of the executive team. They often will be privy to the underlying (and unstated) reasons for decisions, the approach of bureaucrats to matters within their remit and the practical framework in which government decisions are made. Bureaucracy may be opaque to the citizen but not to the government lawyer.

Government lawyers have a sightline to circumstances when governments may act improperly, through inadvertence, ignorance or otherwise. There are not separate internal and external standards of proper conduct, there is one standard. Externally discoverable improper conduct may be corrected by judicial review, as difficult a hurdle as that may prove for affected

parties. The internally hidden improper conduct, if known or obvious to government lawyers, must be corrected by them. Lawyers must ensure that the agency complies with the spirit and letter of the law and must do this even if there is no prospect that the affected citizen will ever know. As the government is bound to high standards, its lawyers are bound to ensure its compliance - to uphold the fundamental principles of the rule of law and to identify risks to them in the morass of regulation that confronts them.

As lawyers for the Department of Homeland Security, your job is not to stop the boats. As lawyers for the Department of the Environment, your job is not to save the planet or even prevent pollution. To be sure, as a government employee your job is to act for your agency to the best of your ability and to implement lawful agency policy. To fail to respect lawful agency policy would undermine the legitimate authority of public accountability. But these responsibilities are secondary to the primary duty to the administration of justice, to ensure that the agency, in stopping the boats or preventing pollution, does so lawfully in every respect, as inconvenient as this may prove to agency objectives.

The ethical imperative goes further than understanding how a decision might be treated on review. It extends to at least two positive obligations in addition to the core duty to comply with the law – to prevent (or counsel against) acts contrary to the public interest before they occur, and (whether looking forwards or backwards) to insist on substance over form, so that the relevant agency complies with the spirit of the law as well as any formal processes.

The issues then are to identify government powers at risk of abuse and the government lawyer's legal and ethical checks on them. Some examples follow, but the misconduct, once understood, ought to be readily apparent to lawyers when it occurs.

The government lawyer must not allow decision makers to act in a manner which partisan interests may consider to be routine. Bringing blanket charges or making threats designed to secure a lesser plea or bring parties to the negotiating table are an abuse of process. A regulator may have a legitimate public interest in law enforcement, but must always

consider whether aggressive actions directed towards securing a high profile conviction as a deterrent are in the broader public interest where the pursuit involves unequal, selective or disproportionate treatment. On the other hand, fairness requires both consistency and discretion; the judicious application of rule enforcement is not inconsistent with the principle of equality if fair discretion is applied universally.

Unnecessarily putting citizens to proof may be a legitimate protection of the public interest, but routine deny and defend responses, however administratively efficient, constitute improper conduct. Relying on onus of proof obligations as a tactic alone is similarly objectionable.

Facilitating the right to a hearing or to make submissions is not the same thing as genuinely considering those submissions – lawyers should insist that consultation rights are more than merely formal. Conducting investigations without the participation of the subject of the investigation is both unfair and shuts out relevant considerations. Conversely, fact findings of convenience are not an appropriate assessment of available evidence.

A duty to consider must mean a duty to do so within a reasonable time, otherwise it becomes a failure to consider.

Extracting concessions from citizens, or imposing conditions on them, is satisfactory only if the concessions or conditions relate to the power being exercised – this applies not only to the granting of approvals but also the resolution of disputes that may incorporate defendant undertakings.

Hiding behind process is an abuse of that process – if the lawyer is aware of weaknesses or deficiencies in an administrative response, even if the response appears on its face to be formally defensible, the process should not be relied upon. Setting criteria to establish failure or predetermine success amounts to profound unfairness.

Publishing policies, guidance notes or legislative interpretations that adopt the agency's

desired interpretation of the law, particularly when they are thought or known to be controversial, is misleading and inappropriate and does not facilitate compliance with substantive legal obligations; and self-created rules and policies do not absolve an agency from determining matters according to law<sup>76</sup>. A process that is not achieving fair outcomes or that is adversely affecting rights is not defensible merely because it is being followed - if it is poorly constructed, it should be remedied.

Not all rights are equal or relate equally to the power being exercised. Wide inputs into public decision making include inputs from people directly affected, indirectly affected, unaffected but politically interested, or from potential competitors or people potentially aggrieved for other reasons – often behind confidentiality which prevents bona fides being tested by the aggrieved party. Secret evidence breaches fundamental rules and must be treated very carefully. Standard of proof hurdles must be considered; powers can only be exercised against evidence not complaints. Decision making is hard but lawyers must ensure it is at least principled.

Government lawyers can and must do their utmost to ensure that their client agencies do not engage in conduct of this nature. It is at the heart of their duty to ensure that every act of government, within their influence, is undertaken in the public interest. When government lawyers know that powers are not being exercised in accordance with fundamental principles, they have a clear ethical obligation – and probably a legal one – to intervene.

Less tangibly, Chief Justice Allsop has recently noted that implementing process fairness includes fairness from the perspective of the subject of the power. In his view, the concern of public law to prevent the exercise of power which is arbitrary, capricious, or unreasonable can be seen to reflect a concern with rejecting unfairness. “This is the reasonable expectation of each individual that power will not be exercised against her or him in a manner that fails to respect her or his integrity and dignity”<sup>77</sup>.

The duty to the administration of justice is, of course, not a government lawyer’s only

duty. However, it is their overriding duty and one upon which others in government are unlikely to focus critically or at all. Governments are entitled to robustly assert their view of the public interest and to seek advice from their lawyers about how best to comply with the law – or how to change it – to reflect their policy objectives. The lawyer’s duty to the client requires that they provide the legal assistance necessary to meet all such lawful requests. A great deal of valid legislation adversely affects fundamental rights and the rule of law also requires that these legislative choices must be respected. However, all departures from fundamental principles require the privilege of public consent and government lawyers must police this closely.

## **VI. CONCLUSION**

A complex society requires an effective system of administrative justice. Our laws require administrative decision-making to conform to universally accepted standards, such as rationality, fairness, consistency and transparency and for those who exercise administrative powers to be accountable. This is a system which the law itself has created. However, having that system – like any process – does not guarantee outcomes. Nor does it absolve the participants in that process from their fundamental responsibilities. Those responsibilities are increased when there are potential systemic weaknesses.

The rise of the administrative state did nothing to displace fundamental principles of justice. To the contrary, the avalanche of recent appellate court decisions on principles of legality suggests that those principles are more important than ever. Their continuing effective existence, and the protection of the rule of law from inadvertent erosion by the relentless expansion of public power in the regulatory state, is a duty of lawyers. Government lawyers can and must make a difference.

Through his civil service experiences with Jim Hacker and Sir Humphrey Appleby, Bernard grew to appreciate that, although he was formally accountable to Sir Humphrey, his ultimate loyalty as a “humble functionary” was to his (Prime) Minister. As the first check on the exercise of government power, government lawyers too have multiple loyalties, but their

overriding duty is to the rule of law. Failure to act upon knowledge of improper conduct is complicity in guilt. To discharge their duties, government lawyers must remain acutely aware of what the rule of law entails. In a complex regulatory environment, this difficult but important task requires vigilance.

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\* Partner, Gadens. Presentation to State Government Lawyers Seminar, 23 July 2018

<sup>1</sup> Yes, Minister, "Open Government" (series 1, episode 1) (1980)

<sup>2</sup> *Institutes of the Laws of England (Second Part)*, Sir Edward Coke (1642)

<sup>3</sup> *Magna Carta then and now*, Lord Sumption (Address to the Friends of the British Library, 9 March 2015)

<sup>4</sup> See Montesquieu, *L'Esprit des Lois* ("The Spirit of the Laws") (1748) Book XI, Chapter 6; Locke, *Second Treatise of Civil Government* (1690)

<sup>5</sup> Under Commonwealth *Constitution*, legislative, executive and judicial powers of the Commonwealth are vested in the Parliament, the Executive Government and the Judicature respectively (see sections 1, 61 and 71). There is no strict demarcation between the legislative and executive powers of the Commonwealth (and even less in the case of the states under their constitutions and at common law). However, the concept of separation of powers "informs and animates our understanding of the operation of our constitutional arrangements": P A Keane, *Reflections on the Separation of Powers*, Sir Harry Gibbs Lecture to University of Queensland Law Students (22 October 2014)

<sup>6</sup> *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 (Dixon J); *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2 at [31] (Gleeson CJ)

<sup>7</sup> Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004)

p4

<sup>8</sup> Tamanaha (n7)

<sup>9</sup> A V Dicey, *Introduction to the study of the law of the constitution* (1889) p 172

<sup>10</sup> Dicey (n9) Chapter IV

<sup>11</sup> See for example *Attorney-General (SA) v Adelaide City Corporation* [2013] HCA 3 at [145] (Heydon J); *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 283 (Lord Goff); *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

<sup>12</sup> Chris Wheeler, *How do public interest considerations impact on the role of public sector lawyers?*, Public Sector In-House Counsel Conference, Canberra 30-31 July 2012

<sup>13</sup> *Olmstead v United States* 277 US 438 (1928) at 485

<sup>14</sup> *Sebel Products Ltd v Commissioners of Customs and Excise* [1949] Ch 409 at 413

<sup>15</sup> *Hughes Aircraft Systems International v Airservices Australia* [1997] FCA 558 (Finn J). See also *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342 (Griffith CJ)

<sup>16</sup> See for example *NSW Rifle Association v Commonwealth* [2012] NSWSC 818, [108], [109]

<sup>17</sup> *Shord v FCT* [2017] FCAFC 167 at [169] (Logan J)

<sup>18</sup> Crown servants are not immune from writs of habeas corpus unlike for mandamus (see n19): see P W Hogg, *Liability of the Crown* (1971) p17

<sup>19</sup> Mandamus does not lie against the Crown or against any Crown servant to compel performance of the Crown's duties. (The original justification was that there would be an incongruity in the Queen commanding herself.) It does lie against a public official charged with the performance of a public duty as a *persona designata*, rather than merely acting as a servant of the Crown: *R v Lords Commrs. of the Treasury* (1872) L.R. 7 Q.B. 387, at 394, 398; *Federal Commissioner of Taxation, Re; Ex parte Just Jeans Pty Ltd* (1986) 10 FCR 69. However, in the absence of mandamus, a declaration is usually available. It is generally assumed that the writs of certiorari and prohibition also will not lie against the Crown, however those writs in any event are only directed towards those who are under a duty to act judicially: Hogg (n18) p15.

<sup>20</sup> *Kirk v Industrial Court of New South Wales* [2010] HCA 1 [98]



<sup>21</sup> Such as *Re Nolan; Ex Parte Young* (1991) 172 CLR 460, where Gaudron J noted (at 497) that it is “beyond dispute that the power to determine whether a person has engaged in conduct which is forbidden by law and, if so, to make a binding and enforceable declaration as to the consequences which the law imposes by reason of that conduct lies at the heart of exclusive judicial power”; and *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, where it was held that the involuntary detention of a citizen in custody by the State “is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt” (Brennan, Deane and Dawson JJ at 27).

<sup>22</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. See also *Assistant Commissioner Condon v Pompano Pty Ltd* [2013] HCA 7 and *Attorney-General (Qld) v Lawrence* [2013] QCA 364

<sup>23</sup> *Plaintiff S157/2002* (n6) at [5], [9]

<sup>24</sup> *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 QB 574 at 586.

<sup>25</sup> J D Heydon, *The “Objective” Approach to Statutory Construction*, Current Legal Issues Seminar Series (8 May 2014)

<sup>26</sup> *Lee v New South Wales Crime Commission* [2013] HCA 39 [313] (Gageler and Keane JJ)

<sup>27</sup> *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* [2016] NSWCA 37 at [39] (Basten JA, Macfarlan and Leeming JJA agreeing) citing Oscar M Garibaldi, *General Limitations on Human Rights: The Principle of Legality* (1976) 17 Harv Int'l LJ 503, 505-5

<sup>28</sup> *Potter v Minahan* (1908) 7 CLR 277 at 304 per O'Connor J; *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 206 (Higgins J); *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523 (Brennan J); *Bropho v Western Australia* (1990) 171 CLR 1 at 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 43 (Brennan J); *Coco v The Queen* (1994) 179 CLR 427 at 436–437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 30-31 (French CJ); *Lee v New South Wales Crime Commission* (n26). For England, see in particular *R v Home Secretary; Ex parte Pierson* [1998] AC 539 at 587, 589 (Lord Steyn).

<sup>29</sup> *Electrolux Home Products Pty Ltd v Australian Workers' Union* [2004] HCA 40, [21] (Gleeson CJ); see also *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19 [30] (French CJ, Crennan and Kiefel JJ)

<sup>30</sup> *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 131

<sup>31</sup> *Lee* (n26)

<sup>32</sup> *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at 284 [36] (McHugh J). McHugh J also questioned whether the principle of legality is an interpretative fiction, noting that “such is the reach of the regulatory state that it is now difficult to assume that the legislature would not infringe rights or interfere with the general system of law”: *Malika Holdings Pty Ltd v Stretton* [2001] HCA 14 at [29]. This view has not been taken up by the High Court despite numerous subsequent opportunities. French CJ did note, in *Momcilovic v The Queen* [2011] HCA 34 [43], that there are difficulties with the designation “fundamental” on the basis that the principle of legality does not constrain legislative power. However, he also noted that “the principle is a powerful one”. Whether there are certain common law rights and freedoms which constrain legislative power is an unexplored question: *South Australia v Totani* [2010] HCA 39 [31]

<sup>33</sup> *Lee* (n26) at [3] (French CJ)

<sup>34</sup> *Plaintiff S157/2002 v Commonwealth* (n6)

<sup>35</sup> *Puntoriero v Water Administration Ministerial Corporation* [1999] HCA 45 (where the court refused to read general immunity provisions as protecting ordinary actions for breach of contract or negligence). Note also that there is a difference between equal treatment as a democratic principle and as a justiciable rule of law; the fact that equality of treatment is a general principle of rational behaviour does not mean that it should necessarily be a justiciable principle: see *Matadeen v Pointu* [1999] 1 AC 98 at [9] (Lord Hoffmann); *R (on the application of Gallaher Group Ltd) v The Competition and Markets Authority* [2018] UKSC 25

<sup>36</sup> *Maxwell v Murphy* [1957] HCA 7; *Chang Jeeng v Nuffield (Australia) Pty Ltd* (1959) 101 CLR 629 (in which Dixon CJ (at 637-8) expressed the general rule that “a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events”); *Australian Education Union v General Manager of Fair Work Australia* (n 29)

<sup>37</sup> *Kable* (n 22)

<sup>38</sup> *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23 at [59] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), in which it was held that the *Migration Act 1958* did not exclude the Minister's obligation, imposed by common law, to afford a visa applicant the opportunity to comment on adverse

information before the Minister prior to a decision on the application being made. See also *Kioa v West* (1985) 159 CLR 550.

<sup>39</sup> *Lee* (n26)

<sup>40</sup> *Malika Holdings Pty Ltd v Stretton* (n32)

<sup>41</sup> *K-Generation Pty Limited v Liquor Licensing Court* [2009] HCA 4 [48] (French CJ)

<sup>42</sup> *R v Secretary of State for the Home Department ex parte Anufrijeva* [2003] UKHL 36 [28] (Lord Steyn).

This was stated to be an aspect of “the constitutional principle requiring the rule of law to be observed”.

<sup>43</sup> *Attorney-General for the State of South Australia v The Corporation of the City of Adelaide* [2013] HCA 3; Blackstone, *Commentaries on the Laws of England*, (1769), Book IV at 151–152; *Bonnard v Perryman* [1891] 2 Ch 269 at 284 (Lord Coleridge CJ); *R v Council of Metropolitan Police; Ex parte Blackburn* (No 2) [1968] 2 QB 150 at 155 (Lord Denning MR); *Wheeler v Leicester City Council* [1985] AC 1054; *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 203 per Dillon LJ

<sup>44</sup> *Kruger v Commonwealth* (1997) 190 CLR 1

<sup>45</sup> See Heydon (n 25)

<sup>46</sup> *X7 v Australian Crime Commission* [2013] HCA 29 at [86]-[87] (Hayne and Bell JJ, Kiefel J agreeing)

<sup>47</sup> *Kable* (n22). See also *Assistant Commissioner Condon v Pompano Pty Ltd* [2013] HCA 7 and

*Attorney-General (Qld) v Lawrence* [2013] QCA 364

<sup>48</sup> *Legislative Standards Act 1992* (Qld), s4(1).

<sup>49</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic)

<sup>50</sup> The Parliamentary Joint Committee on Human Rights is established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). The committee's main function is to examine all bills and legislative instruments for compatibility with human rights, against Australia's core treaty obligations, and to report to both Houses of Parliament on its findings.

<sup>51</sup> There is a general principle that a court should not decide a constitutional question unless it is necessary to determine the rights of the parties (the relevant authorities are summarised by Perry J in *Roach v Minister for Immigration and Border Protection* [2016] FCA 750); axiomatically, that principle cannot apply to an assessment of the power itself.

<sup>52</sup> With the exception of prerogative powers

<sup>53</sup> Ronald Dworkin, *Law's Empire* (1986) p 407

<sup>54</sup> *Ridge v Baldwin* [1964] AC 40 at 72

<sup>55</sup> *Regulatory Policies in OECD Countries – From Interventionism to Regulatory Governance*, Reviews of Regulatory Reform (Paris: OECD, 2002) p97

<sup>56</sup> Rhetorical opponents of large government have argued that that the administrative state is counter to the rule of law. Some respectable commentators have even argued that aspects of administrative law (in the United States context) are unlawful: *Is Administrative Law Unlawful*, Philip Hamburger (Chicago, 2014)

<sup>57</sup> Named after *Chevron USA Inc v Natural Resources Defense Council* 467 U.S. 837 (1984)

<sup>58</sup> *Law's Abnegation*, Adrian Vermeule (Harvard, 2016)

<sup>59</sup> Vermeule (n 58) p2

<sup>60</sup> *Corporation of the City of Einfeld v Development Assessment Commission*: [2000] HCA 5 [44]

<sup>61</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 (Mason J)

<sup>62</sup> *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36 (Brennan J)

<sup>63</sup> These areas may overlap.

<sup>64</sup> For example, the *Statutory Instruments Act 1992* (Qld) requires that subordinate legislation must be tabled before, and may be disallowed by, the Legislative Assembly. Similar provisions apply federally (*Legislation Act 2003* (Cth)) and in other jurisdictions.

<sup>65</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223

<sup>66</sup> *Cobiac v Liddy* (1969) 119 CLR 257 at 269

<sup>67</sup> *The Regulatory State: Ensuring its Accountability*, House of Lords Select Committee on the Constitution, Volume I, paragraph 101(a) (6 May 2004)

<sup>68</sup> Neil Gorsuch, address to Federalist Society, quoted in *The Atlantic* (September 2017) – see <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/>

<sup>69</sup> *The Regulatory State: Ensuring its Accountability* (n 67), paragraph 219

<sup>70</sup> Now enshrined in legislation such as *Legal Profession Act 2007* (Qld) s 38

<sup>71</sup> *Australian Solicitors Conduct Rules 2012* rule 3.1. The rules apply, in addition to the common law, in considering whether a solicitor has engaged in unsatisfactory professional conduct or professional misconduct. Other fundamental, but subsidiary, duties include to act in the best interests of the client, to be honest and courteous in all dealings, to deliver legal services competently, diligently and as promptly as reasonably possible, and to avoid any compromise to their integrity and professional independence

<sup>72</sup> *Ethics and the rule of law*, Daubney SC, North Queensland Law Association Conference (2 June 2007)

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<sup>73</sup> For example, *Public Service Act 2008* (Qld) s 26; *Public Sector Ethics Act 1994* (Qld) s 12H and s 18. Note also that the *Code of Conduct* for the Queensland Public Service obliges all public service employees to act to the highest ethical standards and with honest, fair and respectful engagement of the community.

<sup>74</sup> For example, in Queensland model litigant principles are issued at the direction of Cabinet and oblige the State, in the conduct of litigation, to act in accordance with specified fairness principles. The principles are not intended to be applied rigidly and do not override any legislative requirement or authority concerning an agency's functions. See *Model litigant principles* published at [www.justice.qld.gov.au](http://www.justice.qld.gov.au). Federally, the Model Litigant Policy is Appendix B to the *Legal Service Directions 2017* issued by the Attorney-General pursuant to s 55ZF of the *Judiciary Act 1903* (Cth).

<sup>75</sup> *Shord* (n 17) [174]

<sup>76</sup> *R v Torquay Licensing Justices, Ex parte Brockman* [1951] 2 KB 784; *Conyngham v. Minister for Immigration & Ethnic Affairs* [1986] FCA 283 [41]. It has long been recognized that a statutory decision-maker may lawfully adopt a policy to guide the making of particular decisions provided that they do not apply that policy inflexibly or deny to an applicant the opportunity to argue that the policy should not be applied in a particular case.

<sup>77</sup> Chief Justice Allsop, *Values in Law: How they Influence and Shape Rules and the Application of Law* (20 October 2016)