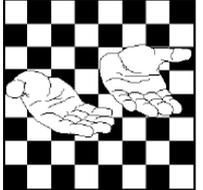


Event Brief

AboveBoard



PUBLIC ACCOUNTABILITY FORUM

Saturday, 12th May 2007

10.00am to 3.00pm

Drawing Room, University House
The Australian National University



THE AUSTRALIAN NATIONAL UNIVERSITY

Supported by the

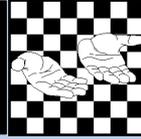
ANU Law Students' Society

ANU College of Law

Australian Institute of Administrative Law

ACT Young Lawyers Committee

IPAA Young Professionals Network



Foreword

Justice Michael Kirby

High Court of Australia



I love administrative law. Why? Because it is about the control of power and improvement of the governance of our society. It also mixes the mind games of high legal theory with the practical outcomes of promoting more accountability and transparency in decision-making.

I also like administrative law because I know quite a lot about it. From 1976, it was my privilege to participate in the Administrative Review Council. I was there when the new federal administrative law was created. The *Administrative Appeals Tribunal Act 1975* (Cth), the *Ombudsman Act 1976* (Cth), the *Administrative Decisions (Judicial Review) Act 1977* (Cth), the *Freedom of Information Act 1982* (Cth), the *Privacy Act 1988* (Cth) and many more laws and policies were adopted to improve federal administration in Australia. It was an exciting time. Much was achieved. I learned a lot about the theory and practice of this corner of the law. When I get a case concerned with administrative law, my heart leaps up.

All branches of government at every level should be accountable to the people. In the case of the executive government, the provisions of the *Constitution*, s 75(v) help to make this so. I encourage the participants who are taking part in this Forum. Especially the young participants, for they will have the responsibility of continuing the advance of accountability so that democracy in Australia is a reality and not merely an empty boast.

A handwritten signature in black ink, which appears to read 'Michael Kirby'. The signature is fluid and cursive.

Handling the Truth: Absolute Right or Qualified Privilege?

All undergraduates, particularly those attempting Administrative Law this semester, as well as recent graduates, are cordially invited to participate in the **AboveBoard Public Accountability Forum**, an event that is certain to be a highlight in the academic calendar.

Public accountability and open government are of paramount importance to the continuity and evolution of Australian parliamentary democracy. The **AboveBoard Public Accountability Forum** is a unique opportunity for those who will shape our future law and policy to work closely with the contemporary architects of public accountability in Australia.

A daytime workshop scheduled for **Saturday, 12th May 2007** will host a collaborative group of parliamentarians, academics, journalists and senior public servants, serving to stimulate and challenge the minds of enthusiastic undergraduates concerning this crucial aspect of the public's relationship with the Commonwealth and its decision-makers.

The **AboveBoard Public Accountability Forum** has come to fruition by way of the hard work of a dedicated **Working Party** comprised of students from the **ANU College of Law**. It is envisaged that the forum will be a recurring event on the College's academic calendar, thereby enabling students and graduates to be able to better understand their administrative and public law studies in the context of Australia's broader accountability regime.

In the interests of promoting informality at the **AboveBoard Forum**, the **Dress Code** for the event is one of **Smart Casual**, with a general guideline to all participants of ***no ties, but no jeans please!***

The AboveBoard Working Party

- Stephanie Elliott
- Jess Casben
- Charles Gascoigne
- Matt Stevens
- Hannah Delaney
- Matt Sherman
- Mark Smyth

Special Guests



Keynote Speaker
Guest Panelist and Law Enforcement Discussion Group Adviser

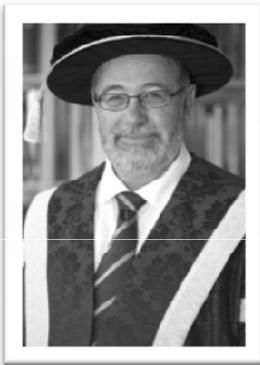
Professor John McMillan

Acting Integrity Commissioner
Australian Commission for Law Enforcement Integrity

Host and Panel Discussion Moderator

Ms Virginia Haussegger

Journalist, Author and Presenter
ABC TV News



*Adviser to International Affairs and
Defence & Security Discussion Groups*

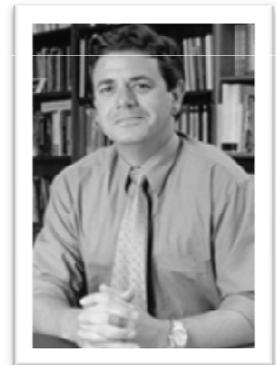
Dr Allan Hawke

Chancellor
The Australian National University

Law Enforcement Discussion Group Adviser

Professor Steve Bottomley

Associate Dean and Head of School
ANU College of Law



*Guest Panelist and
Administrative Review Discussion Group Adviser*

Professor Robin Creyke

Director of Teaching and Learning
ANU College of Law

*Guest Panelist and
Administrative Review Discussion Group Adviser*

Ms Sue Tongue

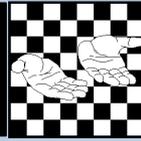
Visiting Fellow
ANU College of Law



*Guest Panelist and
International Affairs Discussion Group Adviser*

Dr Malcolm Cook

Program Director – Asia and the Pacific
Lowy Institute for International Policy



Special Guests



Ministerial & Parliamentary Discussion Group Adviser

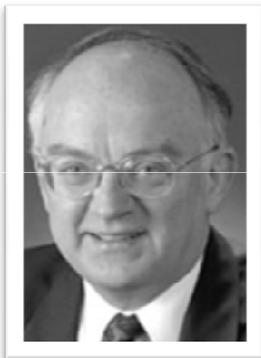
Senator Gary Humphries

Senator for the Australian Capital Territory
Liberal Party of Australia

Ministerial & Parliamentary Discussion Group Adviser

Senator Penny Wong

Shadow Minister for Public Accountability
Australian Labor Party



Guest Panelist

Mr Bob McMullan MP

Shadow Minister for Federal/State Relations
Australian Labor Party

Guest Panelist

Mr Bill Stefaniak MLA

Leader of the ACT Opposition
Liberal Party of Australia



*Guest Panelist and
Defence & Security Discussion Group Adviser*

Mr Ian Carnell

Inspector-General of Intelligence and Security
Australian Government

*Guest Panelist and Adviser to Defence & Security
and International Affairs Discussion Groups*

Colonel Mike Kelly

Director of Operations and International Law
Defence Legal Service



Running Order

- 10:00 – 10:10 10 mins Introduction by the Working Party
- 10:10 – 10:30 20 mins Keynote Address by Professor John McMillan
- 10:30 – 11:30 60 mins Panel Discussion – Moderated by Virginia Haussegger
- 11:30 – 11:45 15 mins Morning Tea
- 11:45 – 12:15 30 mins Panel Discussion – Hypothetical
- 12:15 – 12:35 20 mins Small Group Discussion
- 12:35 – 13:15 40 mins Lunch Break
- 13:15 – 14:05 50 mins Small Group Discussion (cont)
- 14:05 – 14:50 45 mins Presentation of Discussion Results
- 14:50 – 15:00 10 mins Conclusion, Thanks and Informal Discussion

Can WE Handle the Truth?

Small Discussion Group Topics

Watching the Detectives: Arresting Law Enforcement Inequity

Adviser: John McMillan & Steve Bottomley Chair: Steph Elliott

- Police Corruption
- Prosecutors & Judges
- Corporations
- Ethical Investigations
- Fraud
- Securities & Investments

Expect the Inquisition: The Constricted Python of Review

Advisers: Sue Tongue & Robin Creyke Chair: Matt Sherman

- Privative Clauses
- Conclusive Certificates
- Right to Reasons
- Migration Review
- Freedom of Information
- Standing

Face Off: Defining the Parameters of Ministerial Responsibility

Advisers: Gary Humphries & Penny Wong Chair: Jess Casben

- Private v Public Life
- Financial Disclosure
- Committees
- Ministerial Staffers
- Parliamentary Privilege
- The Media

Eyes on Soldiers and Spies: Disciplined Defence and Intelligence

Advisers: I Carnell, M Kelly & A Hawke Chair: Matt Stevens

- Necessary Secrecy
- Role of the IGIS
- Training & Penalties
- Agent Recruitment
- Discipline Theory
- New Military Court

Global Citizenship: Everybody Needs Good Neighbours

Advisers: M Kelly, A Hawke & M Cook Chair: Charles Gascoigne

- Humanitarian Law
- Command Responsibility
- Cooperation
- Peacekeeping
- Pacific Relations
- Chequebook Diplomacy

Small Discussion Group Topic

Watching the Detectives: Arresting Law Enforcement Inequity

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- Police Corruption
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Members of the police forces and judiciary play an important role in the enforcement of laws made by executive government. It is the role of the police to apprehend law-breakers and collect evidence. It is the role of the judiciary to determine questions of guilt and punishment. The contradiction evident in circumstances where individuals have broken the very laws whose enforcement is entrusted to them makes corruption in law enforcement a public accountability issue.

Some recent examples of admitted or alleged corruption have included:

- Justice Marcus Einfeld recording a dead person as the driver of his car in order to avoid a speeding ticket
- the failure of the Queensland Department of Public Prosecutions to prosecute Senior Sergeant Chris Hurley over the death in custody of Palm Island resident Mulrunji, and the conduct of the Queensland Police Union in relation to the same
- allegations of illegal conduct against former NSW Supreme Court Judge David Yeldham, leading to his suicide
- allegations by the Canberra Times that ACT policing are improperly withholding information from the public
- the guilty plea of NSW Deputy Senior Crown Prosecutor Patrick Power to a charge of possessing child pornography, and
- the resignation of Queensland Federal Court Magistrate Jennifer Rimmer following allegations that she plagiarised the judgments of her colleagues.

The *Watching the Detectives* group will be advised by Professors John McMillan and Stephen Bottomley. Professor McMillan is currently on leave from his position as the Commonwealth Ombudsman, performing the role of the Acting Integrity Commissioner at the Australian Commission for Law Enforcement Integrity. Professor Steve Bottomley is the Associate Dean and Head of School of the ANU College of Law.

This discussion group will examine the public accountability of the police forces and judiciary in Australia. It will discuss the workability and pitfalls of a number of anti-corruption reform proposals, ask whether restrictions should be placed on convicted criminals to ensure that they may not become members of the police or judiciary, discuss the encroachment of privatisation on law enforcement and ask whether the privatisation of gaols is a public accountability issue, and examine issues of inequity in the prosecution or otherwise of high profile public figures.

Small Discussion Group Topic

Expect the Inquisition: The Constricted Python of Review

Advisers: Sue Tongue & Robin Creyke Chair: Matt Sherman

- Privative Clauses
- Conclusive Certificates
- Right to Reasons
- Migration Review
- Freedom of Information
- Standing

Of all the accountability mechanisms, judicial review by the courts is perhaps the most formal and demanding. It aims to determine the lawfulness of actions taken by the executive. The courts also provide guidance on legal issues for decision makers in agencies and review bodies. Judicial review in administrative law is a dynamic area of jurisprudence as the courts respond to developments in public administration.

A main focus of attention in administrative law in recent years has been in the migration jurisdiction. To curb the large number of applications for judicial review Part 8 of the *Migration Act* 1958 restricted the grounds for judicial review. Following a period of judicial activism by, in particular, the Federal Court, these grounds were further curtailed by the introduction of a privative – or ouster – clause. The 1997 bill introducing this provision came into force in 2001 at the time of heightened concern following the events surrounding the arrival of the *MV Tampa*. This provision limits the review jurisdiction of the courts.

The privative clause states that administrative decisions made under the *Migration Act* are “privative clause decisions” and are deemed “final and conclusive”. They cannot be “challenged, appealed against, reviewed, quashed or called into question in any court”.

The *Freedom of Information Act 1982* (FOI Act) came into force in 1982. It gives people access to information in the possession of the Commonwealth Government and its authorities in two ways. First, it requires agencies to publish information about their operations and powers affecting members of the public as well as their manuals and other documents used in making decisions and recommendations affecting the public. Secondly, it requires agencies to provide access to documents in their possession unless the document is within an exception or exemption specified in the legislation.

The Act contains exemptions from disclosure for some documents since access to all documents in the possession of the Government is not possible. Confidentiality must be maintained where it is necessary for the protection of essential public interests and the private and business affairs of persons and organisations in respect of whom information is collected. While the Act generally works well in providing individuals with access to documents relating to their personal affairs, many commentators believe that governments unduly rely on the exemptions in the Act, denying access to information by the media and other interested parties. The Act allows for the issuing of conclusive certificates by a Minister to prevent the release of documents that contain sensitive information.

Small Discussion Group Topic

Face Off: Defining the Parameters of Ministerial Responsibility

Advisers: Gary Humphries & Penny Wong Chair: Jess Casben

- Private v Public Life
- Financial Disclosure
- Committees
- Ministerial Staffers
- Parliamentary Privilege
- The Media

'Ministerial responsibility' is best thought of as one label covering several forms of political conduct, with several norms of appropriate ministerial conduct. Dr John Uhr RSSS, ANU

Recent Examples

- Allegations of prominent Parliamentarians meeting with disgraced ex-party member Brian Burke - some while they held office, others prior to their entry into politics,
- The recent death of ACT CPO Audrey Fagan and the role public and media scrutiny,
- The resignation of Shadow Attorney-General Kelvin Thomson over the writing of a reference for notorious underworld figure Tony Mokbel,
- Police raid of three Federal Liberal MPs' offices in Brisbane,
- The Australian Wheat Board 'cash crop' incident,
- Private Jake Kovco's death, and the loss of his body and the inquiry's report,
- Santo Santoro's resignation and alleged conflict of interest regarding shareholdings,
- The ACT Bushfire Inquiry, and
- Cornelia Rau's immigration detention.

This group will focus discussions on the concept of ministerial responsibility in the Australian political system – at state and federal levels: its relevance to the idea of accountability more generally, its place in systems of political representation and the public / private divide. The issues raised by the panel will form a basic platform for discussion. In this discussion ministerial responsibility will be taken to apply to all parliamentarians and elected officials.

Questions for Consideration

- Is ministerial accountability more a case of what a member *fails* to do as opposed to what they have done?
- Does the media play a more visible role in holding parliamentarians accountable than parliaments themselves?
- Are there 'levels' of ministerial responsibility – is it more important to examine how a Minister behaves with relation to their portfolio, their party political duties, the constituents or their personal life?
- Is ministerial responsibility founded on the fact that parliamentarians are employees of the Government, the Party or the public?
- Codes of conduct: should the Party, the Government or the Parliament produce these standards?

Small Discussion Group Topic

Eyes on Soldiers and Spies: Disciplined Defence and Intelligence

Advisers: I Carnell, M Kelly & A Hawke Chair: Matt Stevens

- Intelligence Community • Role of the IGIS • Military History
- Accountability Drivers • Discipline Theory • Military Court

Six Commonwealth Agencies Form the Australian Intelligence Community AIC

- | | | | | |
|----------------------------|------|------|-----|---|
| - Intelligence Collection: | ASIO | ASIS | DSD | DIGO |
| - Intelligence Analysis: | ONA | ASIO | DIO | <i>Defence Intel & Security Group</i> |

Protecting Australia's National Security Calls for Necessary Secrecy & Accountability

Accountability arrangements are essential in giving confidence to the community that the agencies' powers will not be abused. Dennis Richardson, Ambassador to US, fmr ASIO D-G.

- The Inspector-General role was created in 1986 following Royal Commissions into the AIC,
- Several media reports had exposed malfeasance in the AIC, including major public failures.



Need for Formal Discipline in the Australian Defence Force

Promoting Goals: - Punishing wrongdoing - High standards & morale - Respect for authority

- Some military offences have no civilian equivalent and need special procedural measures
- Australia owes obligations at international law to maintain discipline in the Defence Force

History of Australian Military Discipline Law

Controversy has surrounded military trials and disciplinary law since prior to Federation:

- How far have we evolved since the Breaker Morant court-martial of 1902, when Australian officers were executed by order of British commanders during the South African Boer War?

The Future of Australian Military Discipline Law: The Australian Military Court (AMC)

- The AMC has recently been established and represents a significant change in the structure of the ADF's discipline system. It recognises the importance of military judges operating independently of the chain of command and with security of tenure and remuneration.
- A recent audit also found that the investigative capability of the ADF was in serious decline. The inquiry into the death of Private Jake Kovco underlined concerns about ADF investigations.

Small Discussion Group Topic

Global Citizenship: Everybody Needs Good Neighbours

Advisers: M Kelly, A Hawke & M Cook Chair: Charles Gascoigne

- Humanitarian Law
- Command Responsibility
- Cooperation
- Peacekeeping
- Pacific Relations
- Chequebook Diplomacy

I don't know what you're talking about, about international law.

I've got to consult my lawyer.

George W Bush

As Australians, we expect accountability in our international dealings. International relations and law are dependent on reciprocity, so Australia must be seen to be accountable by our partners. We have obligations towards the people of areas in which our military operates, sometimes facing down allies as well as enemies. We have a moral obligation to ensure our development aid is delivered in the most effective way possible which means accountability in the governance of recipient nations as well as our own. Accountability means overseeing everyone representing Australia's interests overseas, ensuring that they conduct our business in an open and accountable way.

Issues for Consideration

- Alexander Downer's "vitriolic" (*PM*, 9/2/07) open letter to Manasseh Sogavare, the Prime Minister of the Solomon Islands, threatening a return to mob rule if Sogavare were made Prime Minister.
- *Donor finance can affect accountability and the quality of public services for good or ill.* "Assessing Aid" World Bank policy research report (1988).
- An Australian FA/18 pilot's 2003 refusal of bombing orders by an American controller due to differing rules of engagement and inconsistent ratification of Geneva Convention Optional Protocols.
- The AWB scandal and the broader Oil for Food programme problems — "In the case of the Cole commission, the Government was 'cleared' before the show began. Only incompetent or honest governments get reports that end up flaying them."
Richard Ackland: "The key to this ruse is knowing what not to ask" *SMH*
- "Few grasp that in this moment of unusual self-obsession and fear, there is a takeover in progress. We are reaching a point where democracy and liberty can no longer be said to be the loose synonyms they once were."
Henry Porter, *The Observer* 29/4/07

International Affairs Small Discussion Group Advisers

- Colonel Mike Kelly is a senior military lawyer and future ALP Federal election candidate
- Dr Malcolm Cook is the Asia-Pacific Program Director at the Lowy Institute in Sydney
- Dr Allan Hawke is the ANU Chancellor and former High Commissioner to New Zealand

[AMICI]

Amicus curiae is a legal Latin phrase that literally means 'friend of the court', that is, someone who is not a party to the litigation, but who believes that the court's decision may affect its interest. The plural form of *Amicus* is *Amici*, and that is the name given to the new working group dedicated to exploring the issues of mental health and community-building at the ANU College of Law and in the Canberra legal community.

The **[AMICI] Working Party** came about due to a perceived need to address some of the concerns of undergraduate students who find themselves in various levels of distress at different times throughout the ANU LLB. The integration of first-year students into the university and law school lifestyle is dealt with fairly comprehensively by most law schools, and ANU is no exception. Where there is room for improvement, is concerning ongoing mentoring of law students, particularly in the middle years and even the final year of the undergraduate law degree.

The [AMICI] Working Party has resolved to create a **Peer Mentoring Program**, which will constitute just one measure designed to address the needs of the ANU legal community. With the support of the ANU College of Law, later-year and postgraduate law students are encouraged to engage in mentoring training, in order to support students who are in the early stages of their academic career. Particular attention will be paid to identifying the signs and symptoms of distress in their peers.

To express your interest in participating in the
[AMICI] Law Mental Wellness – Peer Mentoring Program
or to learn more about the program
please email the **Working Party** at this address:
AMICI@anu.edu.au

The [AMICI] Working Party

- Melanie Burns
- Dejan Lukic
- Eva Logan
- Aparna Rao
- Matt Stevens
- Niamh Lenagh-Maguire

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PUBLIC ACCOUNTABILITY FORUM