Law Council
OF AUSTRALIA

Empowering the future lawyer

Speech delivered by Fiona McLeod SC, President of the Law Council of Australia, at the 2017 Presidents of Law Associations of Asia Conference (POLA), Colombo, Sri Lanka.

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Introduction

Thank you.

What a pleasure it is to be here in beautiful Colombo.

POLA summits have always provided a unique and important opportunity to build links and share information across our region.

And so I'm very grateful to be here.

I want to sincerely thank the Bar Association of Sri Lanka for hosting what promises to be a terrific event.

Our topic is the factors that restrict and constrain the independence of lawyers and the legal profession.

Of course, I am conscious that in comparison to the experiences of many of the nations represented here, Australia has a relatively positive story to tell.

By global and regional standards, Australia enjoys low levels of corruption.

We have solid, well-resourced institutions.

And we have long-standing, well-established conventions supporting the independence of the legal profession, the existence of rule of law and constitutionally enshrined separation of powers that have supported the development of a world-renowned and highly independent judiciary.

This is not, by any means, to paint Australia as occupying some kind of optimal position.

Or even to present it as an exemplar to the region.

But I am certainly conscious of the strengths of Australia's legal system and the immense benefits it confers on both legal professionals and Australian society.

Recent issues

Yet having said this, there have nevertheless been a range of incidents over the past year that have reminded us how we cannot, even in Australia, take our conventions and traditions for granted.

No matter how solidly rooted they may appear, they are, in fact, perennially fragile.

The legal profession can never afford to drop its vigilance when it comes to defending its independence and the rule of law.

In Australia, we have seen a troubling trend play out in recent times.

Key members of Australia's ostensibly moderate government have shown an increasing willingness to make negative public comments about Australia's legal institutions, and the independence and judgement of judicial office holders.

This year, talking in relation to a terrorism case, Government Ministers suggested the "attitude" of key judges had "eroded any trust that remained in our legal system" by conducting "ideological experiments."

The ministers involved subsequently apologised to the court.

Lawyers acting for refugees in Australia's offshore detention facilities had been characterised by members of the government as obstructing and delaying the will of the people.

Environmental groups taking action to oppose the approval of a large coal mine in Queensland have been labelled “vigilante litigants” as though there is something lawless about resorting to the courts.

And there was a concerted campaign by a range of figures in the Australian Government to undermine the authority and credibility of the President of Australia's Human Rights Commission, Gillian Triggs.

Funding for community legal centres has been restricted to prevent the use of Commonwealth funding to undertake policy or law reform work. CLCs are at the coal face of legal assistance in Australia and are arguably best placed to inform necessary justice reforms.

Expansion of ministerial powers

These recent public attacks on the judiciary and the legal system have been accompanied by a trend to increase and concentrate executive powers.

The most recent example of this is the decision by the Australian Prime Minister, Malcolm Turnbull, to establish a new Home Affairs ‘Super’ Department. The Government describes these changes as the most “significant reform of Australia’s national intelligence and domestic security arrangements in more than 40 years.”

The Law Council is currently considering the implications of this decision, however it is clear that these changes will bring together a range of coercive powers within a single portfolio. Powers in relation to national security, counter-terrorism, cybersecurity, organised crime, intelligence, migration and citizenship.

It is not yet clear how these changes will be implemented, and there may prove to be some significant benefits – for example a better separation of enforcement and oversight powers. What is clear however is that these changes represent a significant consolidation of executive powers within a single portfolio. Even if no additional powers are created subsequent to implementing these changes, it remains to be seen how existing powers will be combined and exercised under the new arrangements.

Another decision made prior to this reorganisation gave the Immigration Minister the power to overrule independent citizenship decisions made by Australia’s Administrative Appeals Tribunal.

This decision has, in the Law Council’s view, weakened Australia's system of checks and balances.

Much of the national security and anti-terror legislation that has been introduced to the Australian Parliament in recent years has created broad powers that have been used only rarely.

AML legislation and the independence of the profession

However tempting it is to focus on these surface issues, as lawyers we must always look beyond distractions to find the substance. So when we are talking about the future independence of the legal profession, we should also focus carefully on structural changes that can have much further reaching consequences than the sound and fury of political commentary.

I am of course referring to anti-money laundering (AML) legislation and its potential impact on the everyday work of the legal profession.

The case for AML legislation is framed by reference to the extent of the problem globally, and of course the numbers are staggering.

We can and should look to join our international counterparts by taking firm action against foreign corruption, including the laundering of the proceeds of foreign corruption.

Increasingly, however, it has become clear that AML/CTF (counter-terrorism financing) policy –both in Australia and elsewhere – has been ineffective at preventing or intercepting the laundering of proceeds of corruption.

Indeed the overwhelming weight of international evidence from jurisdictions in which the AML/CTF regime has been introduced indicates it has had no real discernible effect on money laundering, terrorism financing, or predicate offending.

One possible reason for this is that money laundering offences involving proceeds of foreign offences, including corruption offences, are not frequently prosecuted.

In explaining this issue, Australian authorities cited difficulties of obtaining offshore evidence to prove the foreign predicate offence.

But they also noted a lack of effective coordination between federal and state law enforcement, especially in relation to the property market.

Yet while the laws are having little impact on the criminal activity targeted, they do undermine the role and independence of lawyers.

This is because strengthening Australia's anti-corruption framework is not as simple as introducing additional layers of regulation.

It will require diligence and effort to get the balance right.

A major concern surrounding AML/CTF policy initiatives is the absence of cost benefit analyses, in circumstances where compliance costs are substantial.

In New Zealand, introducing their relatively smaller scheme, the compliance cost for the legal profession is in the region of $800M p.a.

In Australia, the ball park estimates of the costs of compliance have been assessed at $2.1 billion annually.

There are also important considerations around the evidence for change and the impact on legal privilege.

There is currently no clear evidence that there is a systematic problem with the legal profession being used to launder the proceeds of crime.

As with any area of legal policy development, changes should also only proceed on the basis of clear evidence that existing regulatory frameworks are insufficient.

In the absence of this evidence, it is impossible to say whether proposed AML reforms affecting the legal profession will help to prevent money being laundered in Australia. It is impossible to develop targeted reforms to address specific, identified problems if these problems have not been identified.

The potential for the erosion of client legal privilege and the duty of confidentiality are also important considerations going to the heart of the lawyer-client relationship.

These important pillars of legal practice are what enables a client to speak openly with their legal representative and this in turn is what enables a lawyer to fully understand their client's circumstances and provide advice on what the law does and does not permit.

These duties facilitate legal compliance so it makes no sense to introduce a regime that undermines these duties in the name of increasing legal compliance.

The changes under consideration in Australia would require legal practitioners to immediately report any matter that appears suspicious.

This would alter the role of legal practitioners from trusted advisor to law enforcement informant.

If a client is not able to rely on the security of client legal privilege from the very outset of their relationship with their solicitor or barrister, it risks diminishing the effective and proper administration of justice.

For this reason the Law Council has been steadfast in our opposition to the full introduction of these laws in Australia – although it remains a live issue.

Conclusion

I know that some of the examples I have mentioned paint a bleak picture of the current climate in Australia.

When, in fact, there is much to be grateful for.

Yet recent trends have certainly heightened the awareness of the Australian legal profession that true independence – and the true separation of powers – can never be taken for granted.

Beyond populist cries about ‘unelected,’ ‘out of touch,’ or ‘overreaching’ judges and lawyers, we must keep a keen eye on the structural changes that go to the heart of legal practice.

It becomes the responsibility of the profession to ensure that the importance of its independence, and the professional ethics, duties and obligations that go to the heart of what it means to be a lawyer, are well understood and respected by the public.

We must argue for evidence based policy, grounded in commitment to the rule of law and access to justice.

The legal profession emerged from these principles and its continued existence and independence is sustained by them.

In Australia – and across our region – bar associations and law societies must remain vigilant, and dedicated to our advocacy efforts.

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