speaking UP

By Julian Burnside QC

This is an edited version of Julian Burnside's keynote address to the national conference of the Australian Lawyers Alliance in Melbourne on 21 October 2004.

It comes as somewhat of a surprise to me to find myself in a place like this, addressing a group like this, and on a subject like this because I've never been involved in politics. I've never been interested in politics, I've never been engaged in political activity, I've never been a member of a political party, and even though I spent my university days at Monash during the Vietnam War, I managed to avoid political engagement even then.

That reflects no credit on me, but it is the fact that I am not interested in politics or political engagement (the arts have always been my primary interest).

My recent involvement in what could be described as political activity was a two-stage process. I was born in the year that Robert Menzies began his record run as Liberal Prime Minister in Australia, and I graduated the day after Gough Whitlam became Prime Minister of Australia, so I spent all of my formative years with a Liberal government in Canberra. My parents voted Liberal, their friends voted Liberal, and from the time I was eligible to vote, it did not seem to be a question; one simply voted Liberal because that's what happened. Since I was not interested in politics, I did not take time to think about it.

I mention this because a lot of people think that because I have recently been critical of the present government, I must therefore be a rusted-on leftie, playing out some tragic agenda. Nothing could be further from the truth – so it comes as a surprise to find myself doing this sort of thing. The best explanation I can offer is captured in a story I heard a long time ago about a family who had a child who, up to the age of eight years, had never spoken a word. There was no organic reason for this; they'd been to all the doctors, they'd done all the tests, and he just did not speak. One morning the mother decided to experiment with a new taste sensation and served porridge for the first time. The child tasted a spoonful of porridge, looked up and said, "I think porridge is revolting." His parents were astonished. They said, "My God, you can speak! Why have you been silent all these years?" The boy replied, "Everything has been satisfactory until now."

That sense began dawning on me when I was involved in the MUA case. During that case it became plain that the government, at the highest levels, had deliberately conspired to break their own *Workplace Relations Act*, and that shocked me. That was a real 'porridge event' in my life.

A couple of years later I became involved in the Tampa litigation. Until then I did not know what we were doing to refugees. I had not engaged with the implications of Australia's refugee policy. The only excuse I can offer is that I was busy doing other things, and I had swallowed the great political lie that people come here, they're illegal, we have to lock them up so we can remove them. If you accept the argument at that level, it seems reasonable enough. What I learnt through that case, by meeting people who knew a great deal about refugee law, was that things were very different.

And that led me to the position that it was no longer possible to stay here and stay quiet. This was 'the big porridge'.

What I rapidly discovered is that dealing with contentious political matters, especially when the government does not like it, can be a very disagreeable activity. It reminds me of the aphorism: "Never wrestle with a pig, you both get dirty >>

and the pig loves it." Anyone who's been involved in the campaign to resist tort law reform will understand that sentiment. But even though it may be a disagreeable task, it is a necessary one.

But why is it that lawyers should do it? Why lawyers in particular rather than anyone else? I think there are three answers.

The first is that lawyers have the knowledge to see what the problem is, to see where the difficulties lie and what the solution might be. It's very easy when you've been in practice for a few years to forget how mysterious the law is for people who are not lawyers. (God knows it is mysterious enough for those of us who are lawyers, but for people who are not lawyers, even the most basic elementary things are mysterious.) So lawyers have the great advantage of our specialised knowledge of the legal system and the substantive law.

The second answer is – and this may sound vain but you'll understand it – as lawyers, we have a certain position in society which adds credibility to anything we may say by way of seeking to change public opinion. It's unfair, but nevertheless a fact, that if a letter to the editor is signed by a person who is a lawyer, it's likely to command a little more respect than if it is signed by a person who's at the third desk from the back of the room in the insurance clerk's office.

The third reason is that we have skills in analysing difficult circumstances and mounting arguments to produce better outcomes.

But then the question arises: even if lawyers have the advantage of knowledge, position and skill, why get involved in lobbying for political change at all? Why not just leave it to someone else? This is something that has become clearer to me in the last few years. It ultimately boils down to our reasons for studying law and being lawyers in the first place.

Our perception of justice can be blunted by exposure to its processes, but at the start of our careers as law students we saw law and justice as synonymous – later exposure to it produces cynicism and despair as you see the gulf between law and justice widening. In that context, we might remember the observation made by Bismarck (in a different setting) when he said, "Those who like sausages and law should not see either in the making." It came as a shock to me, and it reminded me of my original ideas about studying law, to see the extraordinary injustice that was being inflicted on asylum seekers in this country.

Some of you may be aware of a man called al Kateb, who came to Australia and sought asylum in late 2000 or thereabouts. He applied for a visa and was refused. He found conditions in Woomera so intolerable that he asked to be removed from Australia. Eighteen months later he was still here because, being a stateless Palestinian, there was no country where he was entitled to be and no country was willing to receive him.

The *Migration Act* provides that a person who comes to Australia without papers must be detained, and they must remain in detention until either they get a visa or they are removed from the country. When the Keating government introduced those measures in 1992, one supposes that Parliament suspected that either of those two outcomes would be available in every instance.

They had not allowed for the anomalous case of stateless people. You might think that a government which has paraded itself virtuously as committed to a fair and decent society, with family values and so on, might quickly amend the law to account for these few anomalous cases. But what

the government did, in fact, was to argue at every level of the court system (and ultimately successfully in the High Court) that al Kateb, although he has committed no offence in Australia, can be held in detention for the rest of his life.

The thought of an innocent person being jailed for the rest of his life is so shocking that it is impossible to resist the impulse to try and do something about it. Anyone, even the most hardened practitioner, must find it a dreadful thing to imagine the circumstances of a person being held in detention forever when they have not committed any offence.

Only one notch down the scale is the recent success in the High Court to challenge Queensland legislation which provides that a convicted sex criminal who, although having served his sentence, is regarded as likely to re-offend and can be ordered by a court to stay in jail.

In the theory of the law, as the High Court has accepted it, imprisonment in these circumstances is not a punishment – in the case of asylum seekers it is merely administrative processing, and in the case of a suspected future offender, it is protective rather than punitive. I suspect that viewed from their position, it looks awfully like punishment.

The other case to mention is a case of a man who was about to be removed forcibly to Iran. He knew very clearly what happens to people who are forcibly repatriated to Iran – there is plenty of impartial information to demonstrate that people forcibly repatriated face the certainty of torture or death. This man was scared witless at the prospect of being sent back to Iran. We brought a case that the power to remove a person from the country is ambiguous, and should not be construed to mean sending them back to the one place on earth where death or torture is a certainty – send them somewhere else if you must, but at least let us construe the power to remove so that it conforms with our obligations under the Torture Convention.

The government thought this was legal nonsense and sought to strike out the application. It ran in quick succession up to the High Court, where the court held that, even on the assumed fact that this man's death or torture was a certainty, the government had the power to send him to that one place where he would be killed or tortured.

In a liberal democracy, in a time of peace and prosperity, the idea that the government actively argues for the right to become a torturer's apprentice, or a murderer at one remove, strikes the mind as shocking...yet it is the case.

Another example is the case of a refugee from Iran who had been in Australia for a couple of years with his daughter. In July last year they were held in Baxter. Baxter was described by Mr Ruddock as the 'family-friendly detention centre'. (This 'family-friendly detention centre' is surrounded by a 9,000-volt electric fence.)

This man was in his room with his seven-year-old daughter on 14 July 2003, when three guards from the private prison operator came into their room and ordered him to strip. His seven-year-old daughter was in the room, so he refused to take his clothes off. They flexi-cuffed him and beat him up a bit and took him to the Management Unit, which is a series of solitary confinement cells. Solitary confinement is used in Australia's detention centres without any form of regulation.

There are 10 solitary confinement cells in the Management Unit. Each is three metres square, with bare concrete walls; the only furniture in the room is a mattress on the floor, the room is lit 24 hours a day, the occupant has nothing to read and nothing to write with, no television or radio, no company, no privacy because they are video monitored 24 hours a day, no form of activity, no form of distraction. When you watch the video record which is taken 24 hours a day, you see a deeply disturbing cycle of behaviour: sleeping, pacing around the cell, and (most disturbing of all) sitting on the mattress, knees hunched up, rocking backwards and forwards, hour on hour.

For between 10 and 30 minutes in each 24 hours, the occupant of the cell is permitted either a visit or some time in an exercise area which is open to the sky. For Amin, his respite each day was a visit from his daughter. But after he'd been in for nine days his daughter did not arrive for her visit and he complained, because it was the only thing that he looked forward to every day, and he was told that the manager of the centre had taken her to Port Augusta for shopping. He was assured she'd be there the next day...but the next day came and went and his daughter did not arrive.

The manager of the centre, employed by the Department of Immigration, came into Amin's cell and explained that his daughter was now back in Iran. They had taken her out of the centre and out of the country, under cover of a lie without even giving him the chance to say goodbye to her. >>

'A thing once seen cannot be unseen and when you have seen a great moral wrong, to remain silent is as much a political act as to speak against it.'

Arundhati Roy

He collapsed and remained in solitary for another eight weeks. When we learnt about this we brought an action seeking to have him removed from solitary confinement and taken to a different detention centre where he would not have to confront daily the people who had treated him like this. We were not trying to get him removed from immigration detention.

The response of the government was not to deny the facts. It argued that the court does not have the power to dictate the way people are treated in immigration detention. The judge disagreed and ultimately ordered that Amin be removed from solitary and be sent across to another detention centre. He is now in Maribyrnong detention centre on the outskirts of Melbourne.

Depressingly, but perhaps predictably, the government appealed, and on 5 March this year it flew senior counsel from Sydney to Adelaide and took up the time of three judges at the Federal Court arguing that it should have the unchallenged right to return him to solitary confinement as and when it wished. The judges disagreed. The shocking fact remains that the government argued for the right to use uncontrolled, unregulated solitary confinement, at will, without any possibility of interference from the courts.

The case of the Woomera escapees came on for hearing in the High Court, and was decided on the same day as the case of Mr al Kateb. The effect of the High Court's decision was that no matter how inhumane the conditions in immigration detention, that detention remains lawful – its legality is not affected by the harshness or the cruelty of the conditions. The court made the point that if a person suffered additional harm on top of the bare facts of detention itself, they had the right to bring proceedings, either for administrative remedies or for personal injuries.

That invitation was put to the test very quickly afterwards in another solitary confinement case in Victoria. A man had been thrown into solitary at Maribyrnong. This man has had serious back problems for a couple of years, a fact that was known to the guards in Maribyrnong. One day, driven to despair, he caused a disturbance. A couple of hours, later he was sitting watching television when seven or eight guards came and physically dragged him into a solitary confinement cell. They threw him on the floor and sat on him, his clothes came off in the process. He suffered an injured wrist, his back was increasingly painful, and he spent three and a half weeks in solitary confinement.

We brought proceedings in relation to the solitary confinement, but before we could get to court they removed him from solitary, so no administrative law remedy was relevant any longer. He decided to press on with the claim for personal injuries, only to be met with the argument that his injuries did not meet the threshold required for personal injuries action.

And so we have the spectacle of a government which has argued successfully for the right to hold an innocent person in detention for the rest of their lives, the right to put those same people in solitary confinement at will, the right to mistreat them or injure them without any realistic prospect of legal redress (because, after all, you've got to damage a person pretty badly to take them up to the threshold, given the base level of harm which is mandated by statute). And all of these things under a government that stands for a fair and decent society.

But let's not concentrate solely on refugee matters. Look at the legal aid system for a moment and consider whether we are really able to achieve justice in this community. Look at the current push of the federal government to be able to impose on lawyers personally orders for costs in cases that are regarded as unmeritorious. These are devices intended to make the government's life easier because, as Mr Ruddock is fond of saying, lawyers are not necessarily helpful in certain contexts.

It brings to mind the best argument for a bill of rights, which was Mr Howard's response when the ACT government introduced a bill of rights on 1 July 2004. He was asked his opinion about a bill of rights and he said that he thought they were a bad idea because they get in the way of how a government does business.

If these things trouble you, and I hope they do, then the question arises, do we take a stand? I can tell you from personal experience it's an uncomfortable thing, taking a stand. I'm really glad that APLA is now the Alliance because I have never regarded myself as a plaintiff lawyer, and did not think I was eligible for membership, but I'm going to sign a membership form before I leave today.

The problem with taking a stand is that you do put your head on the block and you are immediately exposed to criticism and vilification and other repercussions, which are fairly uncomfortable. My experience over the last few years

has been something I never would have wished for.

Arundhati Roy, the famous Indian writer, who is best known here as the author of *The God of Small Things*, wrote a book of essays called the *Algebra of Infinite Justice* a couple of years ago. She wrote that 'A thing once seen cannot be unseen and when you have seen a great moral wrong, to remain silent is as much a political act as to speak against it.'

And so we're all in the position where, when we know these things – and as lawyers we are well-placed to know them – we are faced with a choice between one or other of those political acts.

The practice of law offers many rewards: all of us as practitioners can play an important role in achieving real justice in society. We all know that every case is important to someone and I think we serve the law by making sure that the law is upheld and properly administered in every case, no matter how seemingly insignificant the individual case may be.

But there comes a time (and only rarely I think), where to help uphold the law is to betray justice. Any society that has legalised the mistreatment of innocent and defenceless people, is a great challenge for lawyers. We face a stark choice: we can lend our arm to enforcing immoral laws, or we can try to change those laws. We cannot advise people to break them, but we can help people to resist them, and we can take a stand ourselves in resisting laws that are not just.

As lawyers we can help to ameliorate the effects of unjust laws, we can help to change those laws either by direct challenge in court or by political lobbying. If justice is a lawyer's vocation, then we must not ignore its call when justice is threatened.

There are two things that everyone in this room might consider engaging in. One is a push towards a bill of rights in Australia. I've always been opposed to a bill of rights until recent years because of the problems about its enforcement (especially in America where it's an old document written in relatively opaque language and productive of great uncertainty).

But the main reason that I have been opposed to a bill of rights was that it seemed to me unnecessary. It seemed to me that there were certain baseline values that no government in this country would breach. Well, that has been contradicted over the last few years. We have a government now that has argued for results I would never have imagined any government in this country contending for. And the High Court, doing the best it can, has found those laws to be constitutionally valid and to have the meanings for which the government has contended. The only way to avoid that consequence is by having a bill of rights, which resets the limits and re-establishes, as a matter of law, the basic values that we all assumed were shared universally in this country.

The second project worth embracing is pushing for a legal aid system that deserves the name. The legal aid system seems to me little short of tokenism now. It is available to the very poor, and beyond that it is effectively not much use. It is ludicrous to have a system that takes pride in the idea of access to justice when, as a matter of practical reality, most people cannot afford the justice system.

I would like to see some attempt made to analyse the viability of a legal aid system that works like this: lawyers can take on cases and do those cases pro bono. By doing so, they can get a tax deduction referable to the true value of the pro bono work they've done. Now I do not say this with any reference to my last few years of pro bono work, because that is not what I am interested in, but it is an interesting possibility when you think about it. Of course it would need to be regulated carefully so it was not rorted, but a system like that would have the great advantage that it would attract the most experienced practitioners rather than the least, because then the tax deduction has the greatest value. It would mean that legal aid would become desirable for most practitioners and not just by a few good-hearted ones at the margins. It has the possibility – at least if carefully set up – of making justice genuinely available to a much wider range of people.

It seems to me that governments in this country have failed justice dismally and that a group like this can probably take great steps in the pursuit of justice by standing up and making their voices heard, both for a bill of rights and for a proper legal aid system. ■

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