Chapter Three

The Rule Of Lawyers, Not Law

Paul Sheehan

In the federal Parliament there are far more lawyers than any other group, even union officials, and the proliferation of lawyers reflects the proliferation of laws, implemented by a bureacracy that has never been more large, and a legal system that has never been more slow, more costly, or more omniverous.

We are drowning in a sea of red tape. Yet there are legal activists in Australia committed to the cause of more compulsion, more coercion and more codification. They want a whole new layer of law. Ideally, they want a comprehensive Charter or Bill of Rights enshrined in the Australian Constitution. As an interim measure, they will accept a State charter of human rights.

It sounds noble, but fortunately in New South Wales this baby was strangled at birth by Bob Carr, a non-lawyer, while he was Premier for more than a decade. As soon as Carr departed, the campaigners regrouped.

I was told by Michelle Burrell, who heads the Bill of Rights lobby group in NSW:

> "Australia is the only democratic nation in the world that does not have a national Charter or Bill of Rights. Both Victoria and the ACT have enacted new human rights laws, and a process is now underway for this in Tasmania… New South Wales risks being left behind other parts of Australia and other modern democracies".

We should hope so. To quote Bob Carr:

> "A Bill of Rights is only a device for shifting decision-making from elected governments to unelected judges".

At the 2020 ideas conference organised by the Prime Minister earlier this year, none of the delegates appeared to grapple with this social ailment of a rising tide of litigation, compulsion and intrusion, a creeping sense of entitlement over obligation, and the proliferation of tribunals with nebulous roles.

Instead, there were more calls for a Bill of Rights, coming from the existing layer of human rights and anti-discrimination bureaucracies which have proved to be largely pointless and useless. They have done nothing to reduce the systemic child abuse and neglect in Aboriginal communities. Instead, they provide a forum for vexatious zealots, such as Muslim fundamentalists attacking Christian evangelicals, while, for example, denying even the existence of hundreds of sexual assaults by Muslim men against non-Muslim women.

The human rights industry has already proved itself to be highly selective, highly ideological, and slyly vexatious. It was the human rights industry which manufactured and concocted the greatest social libel in Australian history, the claim that 50,000 Aboriginal children were stolen from their families in what amounted to *de facto* genocide – a fabrication blithely repeated by the Prime Minister in Parliament this year when he issued an apology for the excesses of the time.

In the spirit of the occasion, we were too polite to mention the lie at the time. Far from protecting the country and its international reputation from such intellectual calumny, the human rights industry actually constructed and implemented the lie.

We should all be grateful for the heroic efforts of Keith Windschuttle, who was able, single-handedly, to demolish this lie. I am delighted to see him in the audience today.

As for the creeping proliferation of litigation, complaint and legal imposition in our culture, new laws and regulations are constantly being passed while existing laws are rarely repealed. Thanks to Chris Berg, the former Director of the Institute of Public Affairs, we know that between 1980 and 2006, the number of pages of legislation passed in those 26 years was five times greater than all the legislation passed during the previous 80 years.

At the time of Federation, only 358 pages of legislation were required to lay the framework for the entire Commonwealth. Today, the Income Tax Assessment Act alone has grown from 120 pages to more than 7,000 pages.

The tide of regulation keeps rising, and thus the need for lawyers keeps rising. There are now more than 50,000 legal practitioners employed, and the amount of disputation and litigation continues to rise faster than the increase in the population. Yet what goes on in our courtrooms and tribunals often bears only a passing resemblance to the moral code by which the vast bulk of society lives and which maintains social cohesion.

We have a legal profession which professes to operate as rigorously impartial pursuers of the truth and natural justice. This is simply not true. We live with a legal system which rewards complexity, opacity and delay. We have an adversarial process so ingrained in the culture of legal practice that lawyers believe their obligation to their client is higher than their obligation to the public.

This stark divide between the rhetoric of the law and the reality of common legal behaviour was distilled in the April issue of the *Law Society Journal*, in a review of the book *The Making of Me*, by Tegan Wagner. It tells the story of her gang-rape, her ordeal with the legal system, and her efforts to reclaim her life.

The book was reviewed by Andrew Haesler, SC, who happened to be one of the three senior barristers who cross-examined Ms Wagner, then 17, over a period of three days. After offering faint praise, Haesler wrote:

> "Her desperate desire for affirmation and self-righteous tone irritates, in a way the parents of a teenager would know. Tegan is not a dispassionate observer. Her critique of the trial process suffers as a consequence…
> "Tegan claims she was raped by three brothers. Only two were convicted. I acted for the brother who was acquitted. There were sound reasons for that acquittal. Tegan's 'fairer' system would have seen my client jailed for a very long time. Her rapes were unjust and wrong, but so too would be the conviction and long-term imprisonment of an innocent boy".

I spent every minute of every day in court during the Tegan Wagner rape trial, and what Andrew Haesler, SC neglects to tell his readers is that Innocent Boy had already been convicted of gang-rape. Twice.

Innocent Boy was serving time in jail after being sentenced by Justice Brian Sully on April 22, 2004, more than a year before Tegan Wagner was cross-examined in May, 2005.

Innocent Boy had avoided trial by jury because his elder brother, and co-accused, had deliberately aborted the trial. He then avoided conviction because Justice Peter Hidden, although he made it clear to Ms Wagner that he did not doubt the veracity of her testimony, said he could not convict in the absence of any corroborating evidence.

Innocent Boy is now the subject of a fourth gang-rape complaint, independent of the three earlier gang-rape cases.

Had he been on trial before a jury of his fellow citizens, instead of a judge alone, he would have been convicted of rape, like his brothers. By what logic can a senior counsel describe his client as an Innocent Boy, and by implication, himself as the man who saved him?

The truth is different. Here is a brief taste of what I saw in court:

> Haesler: "I suggest that in your evidence, Ms Wagner, and in your tapes, that you invented much of what happened in the bedroom?".
> Tegan Wagner: "I didn't invent anything".
> Haesler: "I suggest that both in your evidence and in the tapes you have hidden some of the things that you know occurred in the bedroom?".
> "I didn't hide anything. Everything that I remember I put down in my statement…".
> Haesler: "I suggest to you then you have not told the truth about who you went into the bedroom with initially?".
> "No, I have told the truth…".
> Haesler: "Then I suggest that you have invented or added at least one extra person?".
> "I have not invented or added anybody. It was three".
> Haesler: "You agree that your memory was affected in some respects by what occurred that night?".
> "Yes".

That was the core of Haesler's case: confusion or invention by the witness.

It took him 432 questions. He and the two other senior defence counsel representing the three accused asked Tegan Wagner a total of 1,971 questions over three days, during which they repeatedly questioned her veracity and reliability.

Now, lest you think that this talk is going to be an orgy of lawyer bashing from a mere journalist, let me make mention of my last two books. They have coloured my experience. The first is *The Electronic Whorehouse*. It is about the media. I think the title tells you enough. I am not merely aware of the short-comings of the media, I have attempted to chronicle them.

The second book is *Girls Like You*. It was published in 2005 and republished in a second, updated edition in 2006. It depicts a series of criminal trials which turned into a legal circus. It follows the course of Tegan Wagner's case, which was postponed 14 times by legal delaying tactics. This book chronicles perjury on an industrial scale. Yet not a single charge of perjury was ever laid.

My professional life is spent on the front lines of the culture wars. In the end all wars require combat on the ground, at close quarters. Most of my antagonists are ideologues or lawyers, or both. There are so many possible examples to chose from I will confine myself to very recent incidents involving senior lawyers, and by that I mean judges and magistrates.

These exchanges have been robust, and public. On May 26, 2008, the Editor of *The Sydney Morning Herald* received an email from a NSW judge, whose name and court I will not reveal, for reasons that will become obvious. It was a formal complaint. And I quote:

> "To the Editor,
> "I was absolutely appalled by Paul Sheehan's column today on the Bill Henson controversy. Sheehan's reference to 'a subculture of paedophilia among gays...' is outrageous and constitutes malicious and ill-informed vilification of the gay community.
> "Where on earth did Sheehan obtain this information? Of course paedophilia is a problem within the whole community but Sheehan's remark suggests it is a particular problem within the gay community. That is of course offensive.
> "Let me assure you as a judge of the [name of court withheld] who regularly hears child sexual abuse cases, that the vast majority of such cases involve allegations of red-blooded heterosexual males sexually abusing female children.
> "Sheehan's reference to a subculture of paedophilia among gays was undoubtedly intended by him to be a slur on the entire gay community. I demand that Sheehan and the *Herald* apologise and withdraw this remark and its implication, otherwise I will be lodging a complaint with the Australian Press Council that Sheehan's article breaches the Council's Statement of Principles.
> "Given the position that I hold I do not consent to this email being published by you".

I was notified of this formal complaint by the Managing Editor of the *Herald*. He was nervous. This was a threat of action not from a mere reader, but from a judge, a judge in high outrage. He felt we were vulnerable. I disagreed. I thought it was the judge who was vulnerable.

After consultation with the paper's chief lawyer, and after I had conferred with a friend who is a friend, we agreed that the demands being made by this judge compromised his position. It was agreed that I could respond in print, and could even name the judge, though I chose not to do so.

The following Monday, June 2, 2008, my usual Monday column in the *Herald* began by publishing the judge's letter in full. I then replied with my own open letter:

> "Dear Judge [name withheld],
> "Your letter has been responded to and passed on to me. I found it quite compelling. I think it should be published. You say that 'given your position' your correspondence must remain private. Yet you have demanded a public response.
> "Further, you have written that unless you receive a public response to your private demand you will proceed with a complaint to the Australian Press Council. The Press Council is a public forum.
> "As neither I nor the *Herald* will be publishing an apology and withdrawal as you demand, and as you have already foreshadowed your intention to go public on this matter, I urge you to do so,

especially as you have expressly invoked your position as a judge to give weight to your private ultimatum.

"The issue you have raised, and the manner in which you have raised it, would be better served by the transparency and astringent sunlight of a public complaint and a public response rather than behind-closed-doors demands…

"There are also several troubling elements of your intervention. You baldly state: 'Sheehan's reference to a subculture of paedophilia among gays was undoubtedly intended by him to be a slur on the entire gay community'.

"Given that it is not what I wrote, not what I intended and not what I believe, how can you make declarations about my 'undoubted' intent? Had I intended to smear the entire gay community (itself a non-existent monolith and abused generality), I would have used the term 'gay culture' not 'gay subculture'. There is a world of difference.

"Which leads to another troubling aspect of your complaint – your language. You rely on the shrill terms 'loaded', 'outrageous', 'malicious', 'ill-informed', 'vilification', 'offensive', 'slur', 'demand', 'apologise' and 'withdraw', all while failing to point out a single error of fact.

"Or do you actually contend that there is no subculture of paedophilia among homosexuals? If not, your entire argument is based on mere supposition.

"Given that you chose to invoke your position as a judge while seeking to privately pressure the *Herald,* an objective reader of your complaint would be entitled to ponder your capacity for rigorous impartiality when confronted with a perceived affront to gay culture".

We didn't hear from the judge again. The point had been made. Would you want an irrational ideologue like this sitting in judgement on your case?

Within two weeks, I was involved in another skirmish with another member of the bench, this time the Deputy Chief Magistrate of NSW, Helen Syme. It stemmed from a column I had written about a criminal who cannot be named because he was a juvenile offender when he entered the justice system. I called him Weasel, which is the name the police and prosecutors use. It is a play on his real name.

This is what the offending column said, in part:

"A criminal, who I shall call Weasel, was fleetingly and inadvertently named by broadcaster Alan Jones when he read out a news report in *The Daily Telegraph.* The newspaper had published his name by mistake in breach of a suppression order.

"Under the *Children (Criminal Proceedings) Act*, it is illegal to publish or broadcast the names of juveniles involved in court cases in any capacity, even as a witness or a victim, and even if the victim is dead, unless the judge lifts the prohibition, which the legislation allows them to do. The penalties include a criminal record and up to two years in prison. An action was brought against Jones by the Director of Public Prosecutions.

"This case was heard by the Deputy Chief Magistrate, Helen Syme. She rejected Jones's defence, found him guilty of a criminal breach of the Act, issued a fine, put him on a bond, and upbraided him, saying he had 'ample time' between reading the article and speaking on air to check whether the newspaper had approval to name the witness.

"Like every other judge or magistrate who has had anything to do with Weasel, she ended up looking deluded and naive. Breaches of suppression orders are so rare it would be absurd to check every news report ever quoted.

"As for the gross injustice to Weasel, allow me to summarise his parade through our criminal justice system:

"The parade began in June, 2003, during a confrontation with police in which he said: 'You can't do anything. You can't touch us". Tells a female police officer, 'F*** you, you slut. You will get yours'. Spits at a police officer, saying, 'F*** you, you pig c***'. For this he was charged and convicted of assault, with no time served".

(I then listed the 11 occasions, from 2003 to 2008, that Weasel had come before the courts, either charged with a variety of violent crimes, or as a witness who committed flagrant perjury.)

> "What all this means is that in the wider context of public safety and community values, Helen Syme delivered a sanctimonious lecture on behalf of a bad person, a bad law, a bad principle, and an odoriferous prosecution. Her decision was dismissed on appeal".

A few days after this column appeared, a letter of demand arrived from a solicitor acting on behalf of Ms Syme. She wanted a correction and an apology.

Even though her judgment had been set aside on appeal, the appeal judge had found the facts proved against Jones but did not record a conviction. He also found that the mistake had been "inadvertent". Further, he did not believe Jones needed to make an apology. Nor did the judge believe the offence warranted a criminal penalty of any kind. He added that Jones was a man of exemplary character.

In summary, everything of substance Helen Syme had found in her judgment had been thrown out except for the uncontested fact that there had been a breach of the law. But Syme wanted a correction because I had compressed all this down and said her decision had been dismissed on appeal.

She also wanted an apology, and her lawyer even proffered the form of words, which included an admission that the criticisms in the column were "unduly personal and went beyond legitimate discussion of Her Honour's decision in the case".

There was nothing quite so dainty when she had used her position on the bench to lambast Jones, convict him of a criminal offence, all while the criminal and serial perjurer Jones had fleetingly referred to was presented as an innocent victim.

The *Herald* declined to publish an apology, and the kindest description I can muster for the Deputy Chief Magistrate's reaction is "precious".

It would be a shame, while on the subject of a clash of cultures with the bench, not to mention the paradigm of judicial sanctimony, Marcus Einfeld. Two years ago, on August 21, 2006, I wrote of Einfeld:

> "The more you examine the career of the Honourable Marcus Einfeld, QC, the less you find. The great mystery is why it has taken so long for the media to take an axe to this rooster.
> "Last week, as Einfeld's saga of absurd denials and evasions became ever more threadbare and pathetic… Enough. Marcus Einfeld has made a career out of portentous moralising. The man now enmeshed by small falsities and large vanities is the same man who has resorted to the big deceits to gain moral advantage – the claim of genocide and the comparisons with Nazis.
> "This son of a Labor politician, and Labor judicial appointee, has played the political game with ferocity. He has invoked the Nazi era ('The thuggery of the guards at Woomera … not much different to that shown by the SS guards in the name of the Third Reich …')
> "Inevitably, he cried 'genocide' after the *Bringing Them Home* report on the removal of Aboriginal children was published, a report whose claim of genocide, when subjected to the forensic scrutiny of the courts in *Cubillo v. Commonwealth* (2000), disintegrated.
> "Now he has become Marcus Minefield, or Justice Seinfeld, and it no longer matters who was driving his Lexus in Mosman on January 8. He had seven months to get it right, kept blustering to reporters, and the axe has come down. All that's left is blood and feathers".

What makes Einfeld a valuable case study is that he made his reputation as a human rights lawyer and jurist, and is thus the living embodiment of the vexatious excesses and moral blackmail which so often afflicts this area of law.

Let us finish this section with two words: Pat O'Shane. Almost 10 years ago, the columnist Janet Albrechtsen wrote a column about O'Shane's anger. The magistrate sued for defamation. Even though the column had largely quoted O'Shane's own descriptions of her anger, she was awarded damages of $200,000, plus costs, which amounted to another $100,000. I will say no more, and don't need to.

These examples are merely mosaics from the big picture, and the big picture asks the question: who will judge the judges? Do we want them to have a new tool with which to spread their interpretive power? And why is it that our legal profession can pursue all other professions for negligence, and makes a tidy living doing so, yet lawyers cannot be sued for negligence by their clients?

All of which leads back to the beginning, and the larger front of this cultural war, the battle over the Charter or Bill of Rights – or, as I call it, the bill of wrongs.

Fortunately, while Victoria lost the war, in NSW, after the departure of Bob Carr as Premier another senior Labor leader, the Attorney-General of NSW, John Hatzistergos, took up where Carr left off. On April 10 this

year he delivered a lucid summary, not only about what was wrong with a Bill of Rights, but what was wrong with the people who most ardently wanted one. He said:

> "In all my time in public life, not one ordinary constituent whose door I have knocked has pleaded for a Bill or Charter of Rights… Instead, the constituency for such change has come not from ordinary citizens but rather professional lobbyists and law school élites.
> "Recognising that a constitutional amendment is a hopeless cause, the protagonists have turned their attention to a statutory Charter model.
> "In essence, whether one talks about of Bills or Charters of Rights, essentially one is discussing the degree to which the primary power for making decisions about rights will shift from legislatures to the courts.
> "And this to me is the crux of the problem… The sophisticated electoral system and proportional representation of our bicameral Parliament, together with a free press, and ministerial accountability, all work to ensure that competing rights and interests are weighed up and decided in a democratic way.
> "To put it simply: Parliaments are institutions specially designed for consultation on, discussion and resolution of difficult political questions. On the other hand, the judicial branch of government is set up to achieve different ends: the adjudication of private conflicts and the applications of law.
> "By transforming social and political questions into legal ones, a Charter of Rights threatens to harm the integrity of both institutions… It generates uncertainty about the meaning of laws, and deprives legislation of its finality… A Bill or Charter of Rights will not serve to clarify the law and help Australians to understand their legal rights; it will impose an additional layer of interpretation over all legislation".

Thanks to the admirable Professor James Allan of the University of Queensland, who has tracked the stealthy nature of the Bill of Rights campaign, we know that this legislation is being introduced at a State level in ways which evade and by-pass the implacable roadblock of public opinion and public need. Professor Allan has also tracked the ways in which the sweet rhetoric of the Bills' proponents is at odds with the reality of how a Bill of Rights has and can be used to extend judicial, bureaucratic and ideological power:

> "A statutory Bill of Rights may leave Parliament with the last word in name, but it gives judges a steroid-enhanced power of interpretation. They get to use a new 'human rights-friendly' method to interpret Parliament's words. In effect, they get a blank cheque…
> "Proponents of this Bill of Rights say that can't happen here. So why should any voter worry about it? Because of what has actually, in real life, happened in Britain and New Zealand. In Victoria the voters themselves didn't get a referendum to decide whether they'd have a Bill of Rights; the Government decided that for them. So much for the 'right to take part in the conduct of public affairs' ".

He is right. We are now likely to get a Bill of Rights by stealth, because the last thing the utopian Left wants is a referendum or popular vote, because the people cannot be trusted to know what is good for them. That is why the utopian Left has begun avoiding the democratic process over the Bill of Rights – because it is exactly the democratic process it is seeking to by-pass and contain.

In short, this campaign is part of several insidious trends in the culture of our legal system:

- There is a creeping primacy of international law over Australian law.
- There is a headlong evolution of law schools toward ideology rather than legal practice and precedent.
- There is a subtle shift under way from elected Parliaments to unelected tribunals.

A superfluous layer of human rights bureaucracy and advocacy already exists, and this industry, via people such as the federal Human Rights Commissioner, Graham Innes, are agitating for a Bill of Rights. Of course. The Human Rights and Equal Opportunity Commission, like the NSW Anti-Discrimination Board and their counterparts in the rest of the country, are used, by their very nature, as a punitive machinery for the

vexatious, the dogmatic, the ideological, the axe-grinders and the grudge-holders who can and will exploit the nebulous area of "human rights" to cause pain through process.

Pain through process. The outcome of their complaints does not matter. What matters is the burden of accusation. That's why religious and secular fundamentalists wage war through the human rights and discrimination machinery. They do because they can.

This is the culture we are becoming inured to, the culture of litigation and threat of litigation, more compulsion, more intrusion, of more lawyers calling for more laws, and more regulators calling for more regulations.

A society under the rule of lawyers, not law.