

The importance of the rule of law

By Greg Barns



The petulance of prime minister Gillard over a High Court decision that dared to tell the executive it must adhere to the rule of law saw her immigration minister, Chris Bowen, introduce amendments to the *Migration Act* that were as offensive to fairness as the Howard government's anti-terror legislation.

When he released it on 15 September, Bowen chillingly noted that "the government has released draft exposure legislation that would give effect to its commitment to restore power to the executive enabling the removal of irregular maritime arrivals for third country processing".

Note that phrase, 'restore power to the executive'. This is a not too subtle way of saying that persons seeking asylum will have no recourse to a court of law which in a democracy ordinarily acts as a necessary check on the executive.

The Gillard government's draft law invested enormous power in one person – the minister responsible for the administration of the *Migration Act*. It would have enabled the minister to decide, purely on the inherently nebulous and therefore dangerous ground of the 'national interest', that another country will be a destination to which asylum seekers can be sent.

The proposed changes to the migration law unveiled by the Gillard government – they relented slightly to

try and get opposition party support – should frighten Australians in the same way that the Howard government's anti-terror laws should have almost a decade ago. Both represent an extreme reaction to an event or series of events, and both amount to a suspension of what is most fundamental in a democratic society, adherence to the rule of law.

Tom Bingham, a now sadly departed leading English judge, observed in 2010 that if there is to be any departure by a government from the rule of law – whereby all people in a state should be bound by laws that are publicly administered by the courts – then there needs to be a clear justification.

In the case of these migration laws, as it was in the case of the anti-terror laws which allowed controls on the movement of people despite their not having been convicted of any offence – there is no such justification.

Oh, and don't think the coalition opposed Bowen's amendments because it has a conscience on the issue – it doesn't. The man who wants to be prime minister, Tony Abbott, would tow boats back to sea, risking the death by drowning of all those aboard.

What makes the attacks on the rule of law by both the major political parties in Australia more insidious is that, unlike in other democracies, those same parties have refused to enact a human rights charter or Act.

At least in the UK, Canada, New Zealand, South Africa and even in the US, on occasion, when governments trample on rights and suspend the rule of law, aggrieved parties can head to the courts and seek the protection of a human rights law.

In the UK, for example, draconian provisions introduced by governments over the past decade to make life intolerable for asylum seekers have been overturned by the UK courts on the grounds that they are incompatible with that country's human rights laws. And in the US, recourse to that country's Constitution earlier this year forced the end to cruel Californian prison practices which had seen prisoners being forced to 'live' in cages.

Australian political leaders love to boast about what a wonderful country we live in and how free we all are. At one level that is true, but on a deeper level that freedom is being threatened by serious erosion driven by a lack of respect for the rule of law. No truer manifestation of this unsettling state of affairs exists than in the current asylum seeker policy. ■

Greg Barns is National President of the Australian Lawyers Alliance and is a member of the Tasmanian Independent Bar in practice at Michael Kirby Chambers Hobart and Equity Chambers Melbourne.

PHONE (04) 1969 1846

EMAIL publicone@ozemail.com.au