

Bede Harris

# Constitutional Reform as a Remedy for Political Disenchantment in Australia

The Discussion We Need



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*This book is dedicated to my wife, Veronica,  
and to my daughter, Elizabeth,  
and to Tabby, Buttons and Adeline, who  
watched as I wrote it.*

# Preface

This book is about both politics and constitutional change. It invites the reader to adopt a completely new approach to constitutional reform – one which is unfettered by the past and which involves a blank-slate consideration of what our constitution should look like. It is deliberately subversive in that its purpose is to identify flaws of the current constitution so as to encourage the reader to reject the status quo and consider alternatives.

The book is also the product of observing Australian politics and teaching constitutional law for the past 20 years. As a migrant to Australia who had lived in countries that either were undergoing or had undergone significant constitutional change, the absence of debate on this topic in Australia came as a surprise.

First, debate on constitutional reform is rare among politicians and the general public. The statement by renowned constitutional law academic Geoffrey Sawer that Australia is a “frozen continent” in so far as constitutional change is concerned remains as true now as it did when it was made more than 50 years ago. This is despite the fact that a constitution, like any other statute, requires regular scrutiny and updating when necessary. Indeed, given that the constitution is the foundation upon which all law rests and also determines the balance of power between the individual and the state, the case for regular review becomes all the more strong.

Second, there was – and still is – a prevailing view that Australia’s constitution does not need improvement. This is despite the fact that, as I will endeavour to show in this book, our constitutional arrangements are severely – and very obviously – deficient in a number of respects. It was as if the evolution in constitutional doctrine that occurred elsewhere in the world during the twentieth century was thought to be of no application here and consequently of no relevance to the constitution.

My third observation was that, there is a significant lack of public knowledge and understanding of how the constitution works, as was revealed by the generally low level of debate on an Australian republic, on rights protection during the National Human Rights Consultation process and on Indigenous constitutional recognition. This makes it obvious that civics education in Australia is in drastic need of improvement. Of even greater concern is the fact that constitutional debate takes place

without reference to the more fundamental question of what theory does (or should) underpin a constitution.

The fourth and final observation, and the one which has led me to write this book, is that there is enormous and growing dissatisfaction with how the country is governed. Yet despite this, voters do not make the obvious connection between how government is conducted and the *rules* by which government is conducted which are, of course, found in the constitution. It is only by changing the constitution in such a way as to remedy the shortcomings which enable sub-standard government to occur that the roots of political dissatisfaction will be addressed.

The notorious conservatism of voters when presented with constitutional amendments (only 8 of 42 referenda held over the past 119 have succeeded) is understandable in that people are naturally reluctant to change which they do not understand. Politicians – particularly those from the Coalition and Labor – are adept at stoking fear of change because many of the necessary constitutional reforms would be adverse to those parties' political interests. Yet this gives rise to a terrible paradox: Notwithstanding voter distrust of current political processes, fear of change means that there is little appetite to change those processes – which acts to the benefit of the very politicians with whom the public has become disillusioned. The purpose of this book is to explain how the things that are a source of popular dissatisfaction with government have their roots of constitutional flaws and to show that we have nothing to fear, and much to gain, from reforming our constitutional law. The book ends with an Appendix containing a proposed new constitution which embodies the changes argued for in the body of the book.

One thing this book does not do – at least until the final chapter – is to engage in speculation about which changes would or would not be palatable to voters. Too often, debate on constitutional reform in Australia proves abortive from the start because commentators say “Voters will never accept that” or “Constitutional change is too difficult in Australia.” It is that type of thinking that has prevented us from answering the hard questions that need to be addressed if our system of government is to be improved. In this project – as in life – logic dictates that one should first decide what needs to be done before turning to practical questions relating to how to do it. The setting of goals, which are matters of principle, should not be subordinated to technical questions of how to achieve them, which are matters of pragmatics. Only once we have determined the goals we want to achieve should attention be focused on what difficulties there may be and how they can be overcome – and overcome them we can if we approach the task with optimism and ingenuity.

We must abandon the current pessimistic tone of discussion about constitutional reform which, because it is designedly focussed by those who have a vested interest in the status quo on reasons why the constitution should *not* be reformed, inevitably favours their interests. We also need to broaden our approach to debate on constitutional matters, which is currently marked by insularity and an unwillingness to learn from other countries or to adopt solutions devised by them. The questions that Australia faces are not unique: They have been addressed – and successfully answered – by many other countries. Such problems as those resistant to constitutional change put forward as reasons why we should not reform our constitution

turn out, on closer inspection – and with the benefit of the experience of other countries – not to be the insurmountable obstacles to the reform they are presented to be. Adopting a new way of thinking about constitutional reform will improve our system of government and thereby help Australia achieve its enormous potential.

Albury  
March 2020

Bede Harris

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## About the Author

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# Chapter 1

## Public Disillusionment with Politics in Australia



**Abstract** This chapter examines why there is growing disillusionment with politicians and, by extension, with the political system, in Australia. Drawing on examples from the past 20 years, it illustrates how diminishing respect for the rule of law, political corruption, poor standards of personal behaviour and failure of leadership have affected people's confidence in the system of government. It also examines how the dominance of Australian politics by the two major political blocs, Coalition and Labor, has enabled this to happen. The chapter also argues that voters should recognise that the causes of their discontent with how politics is conducted lie in the rules of the system – that is, in the Constitution – and that therefore the solution lies in constitutional reform. The chapter also discusses impediments to constitutional reform – principally conservatism born of fear of changing a mechanism that most people do not understand, along with self-interested misrepresentation of the implications of reform by politicians. The chapter encourages people to think boldly, without fear and with regard to the experience of other countries in analysing what is wrong with the Constitution and how it might be improved.

### 1.1 Disillusionment with Politicians

Australians have a poor view of their politicians. Survey results indicate a profound dissatisfaction with the political class. A 2015 survey by the Swinburne Leadership Institute found that 59% of respondents viewed politicians as untrustworthy (the highest percentage for untrustworthiness recorded across a range of leadership groups).<sup>1</sup> Politicians were also considered less competent than any other leadership group, ranking equal last with trade union leaders in caring more about the short term than the long term. A 2018 study conducted by the Australian National University showed that only 26% of voters thought that politicians could be trusted, while 72% believed that those in government looked only after themselves.<sup>2</sup> The survey also found that 52% of respondents felt that politicians were out of touch with the concerns of ordinary people. A 2018 survey conducted by the Museum of

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<sup>1</sup> Wilson and Fein (2015).

<sup>2</sup> Cameron and McAllister (2018).

Australian Democracy and the University of Canberra found that only 23% of Australians trusted ministers and members of parliament (the lowest level of trust when compared to medical practitioners, judges, businesspeople, trade unionists and journalists), that only 31% trusted the federal government and that 61% believed that politicians have low standards of honesty and integrity.<sup>3</sup> These survey results are unsurprising because, as this chapter will show, voters have reason to be aggrieved by the behaviour of their elected representatives.

Perhaps nothing so inflames disdain for the governing class as the spectacle of politicians engaging in misconduct but suffering no adverse consequences. Despite the claim by politicians that they are accountable to parliament – and ultimately to the people – the public is confronted with what seems to be a never-ending stream of scandals. ‘Accountability’ has become a buzz-word devoid of meaning. This chapter focuses on different types of misconduct that have occurred over recent decades in order to demonstrate that Australians’ disenchantment with their politicians is justified. The catalogue of malfeasance appears long, but it is important to gain an appreciation of just how low is the calibre of our politicians. Space requires that its focus be limited, so I have chosen the past two decades as a reasonable period to examine. Examples of misbehaviour are drawn from across party lines – no party has a monopoly of either virtue or vice, although it should also be noted that, as the Coalition has been in power for all but six of the past 23 years, its representatives feature more numerously, simply because they have had more opportunity to engage in wrongdoing. These problems are systemic in that their roots lie in the way politics is conducted. How politics is conducted in turn determined by the constitutional system. That is why constitutional reform is key to ensuring that these problems are addressed.

The chapter addresses a number of key areas which have given rise to popular dissatisfaction with politicians and political processes – diminishing respect for the rule of law, dishonesty, poor standards of inter-personal behaviour, poor leadership and frequent governmental instability. The chapter also discusses how public disquiet over these issues has undermined confidence in the system of government itself and why the first step towards addressing them lies in overcoming attitudinal obstacles to constitutional reform.

## 1.2 Diminishing Respect for the Rule of Law

Although ‘the rule of law’ is lauded by lawyers, politicians and the general public, there is limited understanding of what it means. This is in part due to the fact that the concept is nebulous and has been given a range of definitions.<sup>4</sup>

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<sup>3</sup>Stoker, Evans and Halupka (2018, pp. 21–2).

<sup>4</sup>For an interesting recent discussion of the rule of law see Laws (2017).

According to the narrowest definition, the rule of law means that government operates by law rather than by arbitrary will, that law is made by a defined process, that it is ascertainable, that it applies to everyone equally without prejudice and that it is enforceable by independent courts. As was stated extra-judicially by Lord Bingham of Cornhill, former Lord Chief Justice of England and Wales<sup>5</sup>

The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.

Even this minimalist definition makes the rule of law a powerful concept in that it demands that the government itself, like any other person, be subject to the law.

Broader definitions go beyond these mere procedural requirements and impose obligations relating to the *content* of the law, requiring that the law be consistent with human rights and that governments comply with international law.<sup>6</sup> This approach, which has long been accepted in jurisdictions which have bills of rights, and is increasingly accepted even in countries such as the United Kingdom which do not, adds an entirely new dimension to the rule of law, acknowledging that effective restraint on state power requires that law must conform to some external standard of justice.

Related to the rule of law is due process, which relates to the manner in which the law is applied. Key requirements of due process are that any deprivation of rights by the state must ultimately be subject to review by the courts, that the law must protect the right to legal advice and that judicial processes must be conducted in a procedurally fair manner. In the United States due process has been expanded even further, and it is now accepted as a general principle there that wherever the *effect* of the application of law on a particular group is less favourable than on other groups, the law breaches the constitutional right to due process and is therefore invalid.

In Australia there has been an observable diminution in respect both for the rule of law and for due process over the past two decades. No single event has had more of an impact on the relationship between the governors and the governed in Australia than the 9/11 attack in the United States, which led to a marked change in how state power is applied in our country. This is evidenced not only by the large volume of anti-terrorist legislation that has been enacted but, more significantly for purposes of this chapter, by the attitude and demeanour of those in power – in particular their willingness to express disdain for, and act contrary to, what were assumed to be the constraints imposed by the rule of law and the norms of a free society. This attitudinal change has impacted on areas as diverse as foreign policy, race relations, civil liberties and the plight of refugees, but has as a common thread a world-view that anything is justifiable in the name of protecting the country from external risks (some of which are real, some are not) and that all other considerations should be subordinated to that objective. Most of these measures were enacted during periods

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<sup>5</sup>Bingham (2007, p. 69).

<sup>6</sup>Bingham (2007, pp. 69–84).

when the Coalition was in power. However long-standing bipartisanship on national security, coupled with a fear of being seen as ‘soft’ in this area, has had the consequence that Labor has not discharged the proper role of an opposition in this area and did nothing to wind back the securocratic state when it was itself in power. It has been left to a few backbenchers and minor party MPs to sound the alert over policies inimical to the rule of law. A number of events illustrate how the rule of law and due process have been undermined:

The attitudinal shift to the rule of law was first brought home to Australians by the case of David Hicks, an Australian citizen who was captured by American forces in Afghanistan and then taken to the Guantanamo Bay detention centre before being charged with engaging in activities in support of terrorism. The Howard government refused to ask the Americans to send Hicks home to Australia – a request the Americans would in all likelihood have acceded to, given that they agreed to send UK nationals home when requested by that country. The reason for this – frankly admitted by the government – was not because Hicks was guilty of a crime, but rather because he was *not* guilty of any crime under Australian law.<sup>7</sup> Hicks suffered prolonged assault and torture and more than 5 years of imprisonment before pleading guilty to a charge in order to bring his detention to an end.<sup>8</sup> The guilty plea and the conviction were subsequently overturned on the ground that the charge was invalid because it related to acts that were not offences at the time they were committed,<sup>9</sup> and because the process by which the plea was obtained was unlawful in that it was made involuntarily.<sup>10</sup> This latter ground was the result of the application of the fundamental legal principle that inculpatory statements are inadmissible if obtained by duress, and that prolonged detention without trial itself constitutes duress. Fear of never being released works as a powerful stimulus to an accused to confess to crimes – even if they are innocent, which is of course why we have statutory requirements that suspects must be charged and tried within defined time periods. The Australian government’s conduct in condoning Hick’s treatment not only displayed contempt for international human rights law in general and due process in particular, but also threw into doubt the sincerity of Australia’s claim that its fight against terrorism was motivated by a desire to defend liberal values.

Another example of government indifference to the fate of Australian citizens was provided by the Mamdouh Habib. Habib, a dual Egyptian and Australian citizen, was arrested in Pakistan in 2001 and questioned by Pakistani intelligence officers and by the CIA. The CIA subsequently moved him between Egypt and Afghanistan before imprisoning him at Guantanamo Bay. At each location he was subjected to torture. Habib stated that his torture in Egypt was witnessed by Australian officials.<sup>11</sup> After being held at Guantanamo for three years, Habib was

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<sup>7</sup> Coorey and Banham (2007).

<sup>8</sup> Hicks (2010).

<sup>9</sup> *Hamdan v United States* 696 F.3d 1328 (DC Cir, 2012).

<sup>10</sup> *Hicks v United States of America* CMCR 13-004 18 February 2015.

<sup>11</sup> Habib and Collingwood (2008, pp. 107, 121, 127–8).

released without charge. On his return to Australia, Habib sued the Australian government for complicity in his torture. The government resisted his claim for six years, but then reached an out of court settlement with him three days after the publication of a statement by an Egyptian intelligence officer confirming the identity of an Australian intelligence officer who had witnessed the torture.<sup>12</sup>

The next significant case was that of Dr Mohamed Haneef, who was arrested in 2007 and held for 12 days before being charged with providing support for a terrorist organisation. He was released on bail but immediately put into immigration detention when the Minister for Immigration and Citizenship, Kevin Andrews cancelled his visa on character grounds. Ten days later the Commonwealth Director of Public Prosecutions dropped the criminal case against Haneef, admitting that it had been an error to bring the charges, but the minister refused to reinstate the visa. Haneef took legal action seeking review of the revocation. The Federal Court found that the minister had acted unlawfully in that he had incorrectly applied the character test contained in the legislation, emphasising in its judgment the importance of governmental compliance with the rule of law.<sup>13</sup> The minister unsuccessfully appealed to the Full Court of the Federal Court, which confirmed the re-instatement of Haneef's visa.<sup>14</sup>

The Haneef affair was the subject of an inquiry conducted by former New South Wales Supreme Court Justice Michael Clarke.<sup>15</sup> The case raised a number of concerns for the rule of law including the prolonged detention prior to the laying of charges (which was made possible by anti-terrorism provisions contained in ss 23CB and 23D of the *Crimes Act 1914* (Cth) and the laying of charges when there was insufficient evidence to support them. However, the most concerning aspect of the case was the possibility that public power was being used for political ends.<sup>16</sup> The government was trailing in opinion polls in advance of a general election, and the appearance of being tough on terrorism would play to its political advantage. Evidence presented to the Clarke inquiry revealed that the AFP had concluded that there was insufficient evidence to charge Haneef<sup>17</sup> several days *before* charges were laid, that ASIO had informed the AFP that their agency had no intelligence suggesting Haneef's involvement in terrorism<sup>18</sup> and that the Commonwealth prosecutor considering the case had determined that there was insufficient evidence to lay charges.<sup>19</sup> The fact charges were nevertheless laid obviously indicates that they were laid under political direction.

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<sup>12</sup> O'Brien (2011).

<sup>13</sup> *Haneef v Minister for Immigration and Citizenship* (2007) 242 ALR 290.

<sup>14</sup> *Minister for Immigration and Citizenship v Haneef* (2007) 234 ALR 606, 634.

<sup>15</sup> Clarke (2008).

<sup>16</sup> For a comprehensive discussion of the case, and in particular its political aspects, see Head (2009).

<sup>17</sup> Head (2009, pp. 108–9).

<sup>18</sup> Head (2009, p. 108).

<sup>19</sup> Head (2009, p. 109).

So far as the visa was concerned, the Clarke inquiry found that its cancellation and the placing of Haneef into Immigration Detention to prevent his being released after he was granted bail, was ‘mystifying,’ particularly in relation to its timing.<sup>20</sup> Despite all of this, the inquiry found that there was no evidence of a political motive behind the laying of charges or the cancellation of the visa.<sup>21</sup> However this finding was reached without Clarke being able to access key cabinet documents relating to the case.<sup>22</sup> In other words, the deliberations of very forum in which political discussions would have taken place were placed off-limits. Furthermore, Clarke lacked the power to subpoena cabinet members, including the former Prime Minister and Attorney-General, whom the evidence disclosed had been involved in multiple discussions about the case, and these ministers refused to make statements under oath or to be questioned by Haneef’s legal representatives.<sup>23</sup> The conclusion one must reach, therefore, is that the inquiry’s findings that there was no political motivation for the laying of charges or for the cancellation of the visa were unsustainable. The implications of the Haneef affair for the rule of law are obvious, not only in relation to the conduct of the Howard government, but also of the Rudd government, whose decision it was not give the inquiry the power to compel witnesses to give evidence.<sup>24</sup>

The treatment of asylum-seekers by successive governments – Coalition and Labor – has been found to be incompatible with various aspects of the rule of law. Violations of the rule of law begin with denial of due process when asylum-seekers are first encountered by Australian authorities. In 2012 the Gillard government introduced so-called ‘enhanced screening’ under which an immigration officer determines whether a person is lodging a claim for asylum. The problem with this procedure is that refugees are not advised that they have a right to claim asylum or that they have a right to legal representation – even if it would be possible to access legal advice, which is unlikely, particularly in cases where screening takes place at sea.<sup>25</sup> The implications of this practice for due process are obvious. Even more serious were reports in 2014 that navy personnel had burned the hands of refugees on a boat exhaust. These were dismissed by then Immigration Minister Scott Morrison as ‘allegations’ (ignoring the fact that of course every investigation of wrongdoing begins with an allegation) and were never investigated by agencies other than ones with a direct interest in the outcome. This was despite detailed corroborating evidence from several witnesses coming to light which contradicted self-exculpatory findings by the departments of Defence and of Customs and Border Protection.<sup>26</sup> Even more serious was the suspected failure of Australian authorities to come to the rescue of a vessel – SIEV X – in 2001, which resulted in the drowning of 353

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<sup>20</sup> Clarke (2008, p. viii).

<sup>21</sup> Clarke (2008, p. 227).

<sup>22</sup> Head (2009, p. 104).

<sup>23</sup> Head (2009, p. 105).

<sup>24</sup> Head (2009, p. 105).

<sup>25</sup> Evershead, Farrell and Laughland (2014).

<sup>26</sup> Bachelard (2014).

asylum-seekers, which occurred during the tenure of the Howard government and which the Rudd government failed to investigate despite having previously promised to do so.<sup>27</sup>

The policy of mandatory detention is itself a breach of due process, made possible by the fact that the constitution does not include express protection for the right to personal liberty. The High Court has held that the doctrine of separation of powers in Chapter III of the constitution prohibits parliament from vesting in the executive a power to deprive a citizen of liberty without ultimate oversight by a court.<sup>28</sup> However, this due process right is significantly limited in that the court has held that its protections do not apply to categories of so-called ‘non-punitive’ detention – that is, detention which occurs outside the realms of criminal law, examples of which include detention for public health purposes and immigration detention.<sup>29</sup> Importantly, the court has also held that the list of circumstances in which non-punitive detention may be authorised is not closed.<sup>30</sup> Because non-punitive detention stands outside the protection afforded to people suspected of having committed a crime, a person can be detained by the executive without bringing them before the courts. Furthermore, the High Court has held that the duration of detention is not subject to the constraint of reasonableness – indeed it can be indefinite<sup>31</sup> – and has also held that detention does not become punitive even if its conditions are inhumane.<sup>32</sup> The bizarre consequence of this is that a person who is detained because they are suspected of having committed a crime is in an infinitely better position than a person who is detained for non-criminal reasons. The effect of this have been felt only in the case of non-citizens and of people in off-shore detention, but in Australia as well, where a 2007 report by the Commonwealth Ombudsman found that 247 citizens and lawful residents had been unlawfully detained under the *Migration Act 1958* (Cth).<sup>33</sup>

The off-shore detention regime has been particularly problematic from a due process perspective. In 2016 the High Court held that Australia had the power to transfer asylum-seekers to Nauru for detention and that people detained there were not, in law, detained by Australia, despite the obvious fact that Australia was the instigator and financier of the detention.<sup>34</sup> In 2015 the Australian Human Rights Commission released a report which found that the treatment of child

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<sup>27</sup> Hutton (2011).

<sup>28</sup> *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27–29.

<sup>29</sup> *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 32.

<sup>30</sup> *Kruger v Commonwealth* (1997) 190 CLR 1, 164.

<sup>31</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562, 651 and *Re Wooley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, 77.

<sup>32</sup> *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, 499.

<sup>33</sup> Commonwealth Ombudsman (2007).

<sup>34</sup> *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42.

asylum-seekers breached Australia's international human rights obligations.<sup>35</sup> The government's response was defiance rather than contrition, and the Human Rights Commissioner, Professor Jillian Triggs, was subject to bullying tactics by government senators – one of whom, Senator Ian McDonald, had not even read the report<sup>36</sup> – when she appeared before a parliamentary committee. Even the act of affording refugees legal representation has attracted the ire of the government. In 2017 Minister for Immigration and Border Protection Peter Dutton said that it was 'un-Australian' for lawyers to represent refugees – an attitude towards due process which is wholly inconsistent with the rule of law.<sup>37</sup> The United Nations has condemned the detention regime on several occasions, most recently describing it as arbitrary and open-ended.<sup>38</sup> In late 2018 Medecins Sans Frontieres issued a report stating that the psychological harm inflicted on detainees was akin to torture.<sup>39</sup>

Disrespect for the rule of law has also been manifested within Australia's borders in particular in the government's attitude to race. The most alarming instance of this was 'Operation Fortitude', in which the Immigration Department ordered Border Force officers to patrol the streets of Melbourne to check the migration status of 'any individual [they might] cross paths with'.<sup>40</sup> How the officers were to ascertain whom to question was not made explicit, but the operation raised the obvious suggestion of racial profiling, and was abandoned after protesters intervened on the streets of Melbourne to bring it to a halt. The Immigration Department published a ham-fisted explanation to the effect that the document announcing the operation had been 'clumsily worded', unconvincing to anyone who had read what was, in fact, a clearly worded document authorised both by the Border Force commander and by the Border Force Assistant Secretary for Communications and Media, and which had (twice) been sent to the minister's office.<sup>41</sup>

The racism reflected in Operation Fortitude was covert, in the sense that it was presumed that in the absence of expressed criteria that would be used to determine who would be challenged to prove lawful residence in Australia, appearance – that is, race – would have been the obvious marker which would have invited official attention. But there have also been overt statements which indicate that in the minds of some – and in that of Immigration Minister Peter Dutton in particular – 'Australianess' was synonymous with whiteness. This became evident in 2016, when Dutton said that the Fraser government had made a mistake by allowing Lebanese migrants to settle in Australia, because two-thirds of the people who had been charged with terrorist offences were 'from second and third generation

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<sup>35</sup> Australian Human Rights Commission (2014).

<sup>36</sup> Chalmers (2015).

<sup>37</sup> Hall (2017).

<sup>38</sup> Ben Doherty (2018).

<sup>39</sup> Metherell (2018).

<sup>40</sup> Mills, Hasham and Willingham (2015).

<sup>41</sup> Taylor (2015).

Lebanese-Muslim background.<sup>42</sup> This of course meant that they were Australians, rather than Lebanese, but the statement indicates a mindset that some migrants can never really become ‘real’ Australians. This attitude is deplorable not only because it is racist but because it is also dangerous: Australia undoubtedly faces a threat from terrorists motivated by Islamic extremism. Strategies for countering terrorism are heavily dependant on maintaining the co-operation of communities that might be targeted by terrorist recruiters, both in order to diminish the likelihood that extremist messages will fall on receptive ears and in order to maintain the flow of intelligence from the target community. It follows that statements which alienate ethnic or religious groups undermine anti-terrorist operations – and indeed make terrorism more likely.

These statements by Dutton reflected the same attitude to the rule of law as evinced by fellow ministers Greg Hunt, Alan Tudge and Michael Sukkar, who were forced to apologise to judges of the Victorian Court of Appeal in order to avoid being charge with contempt after saying that the judges were ‘hard left activists’ and the court itself an ‘ideological experiment.’<sup>43</sup> The same attitude was also reflected by Prime Minister Scott Morrison, who brushed aside concerns that a plan to deprive convicted terrorists of citizenship would breach international law if it rendered them stateless by saying ‘what I do is press on and just get it done.’<sup>44</sup> This exemplifies a cavalier attitude toward the law, as though law is a bothersome impediment to the government, which should be absolved from its legal obligations just so that it can ‘get things done’.

The reason why these instances of disregard for the rule of law are significant, is that they show that governments cannot be trusted to act lawfully. But they are also significant not only for what they reveal about the attitude of the government but also because they are deliberate: Being *seen* to have contempt for restraint on government power is part of a strategy designed to appeal to a conservative political constituency which resists social change, resents what it sees as propitiation of ethnic minorities and refugees, and which is therefore content to see state power expanded in order to ‘deal with’ such groups, even at the expense of individual liberty. Yet tolerance that conservative elements in Australian society have for the abridgement of the rule of law is both paradoxical and dangerous. The paradox lies in the fact that members of this constituency would object to ideologies – which they would perceive as leftist – involving an increase in the power of the state vis-à-vis the individual, and would consider such policies a threat to their own freedom. Yet they tolerate such policies when directed against marginal groups because they cannot imagine themselves as being members of such groups. The danger lies in the fact that once state power is unleashed, it becomes impossible to control, and policies inimical to the rule of law initially directed against the few are soon directed against the many.

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<sup>42</sup> Anderson (2016b).

<sup>43</sup> Wahlquist (2017).

<sup>44</sup> Calcutt (2018b).

### 1.3 Political Corruption

To say that the public considers politicians to be dishonest is a truism and the stock in trade of comedians, but political dishonesty in its various manifestations has become a significant problem in the mind of the Australian public. A 2018 survey by Transparency International Australia indicated that 85% of respondents believed that federal politicians were corrupt, while 56% had personally witnessed or suspected favouritism by a politician or an official in exchange for donations or support.<sup>45</sup>

Particularly corrosive to the public interest is favouritism in the exercise of power. The most recent example of this was provided by the 2018 au pair scandal, which arose from the revelation that Immigration Minister Peter Dutton had intervened to grant visas to two au pairs who were about to be deported. One au pair, who was going to work for a relative of a major donor to the Liberal party, admitted that she planned to breach the conditions of her visa, yet the minister overruled departmental advice that she should be deported.<sup>46</sup> The au pair saga also illustrates how insubstantial is the convention, common to all countries with a Westminster system of government, that misleading parliament is one of the misdeeds for which a minister should resign. When the au pair scandal broke, Dutton made a categorical statement to parliament that he did not know the people for whom the au pairs worked, but it subsequently transpired that one of them worked for a former colleague of his from his days in the Queensland Police Service.<sup>47</sup> There then ensued a semantic dance over the meaning of the word 'know', and whether it could be said that one did not know a person merely because one had not had contact with them for some time. Although a Senate committee found that Dutton had misled parliament, he did not resign and was indeed given public support by the Prime Minister.<sup>48</sup>

Unfortunately, instances of ministers retaining their jobs despite having misled parliament are not uncommon. Significant examples in the recent past include Foreign Affairs Minister Alexander Downer telling parliament that Asian countries had not raised with him the withdrawal of an Australian aid programme whereas corresponded revealed that they had,<sup>49</sup> Aged Care minister Bronwyn Bishop telling parliament that checks on nursing homes were 'continuing' whereas in fact they had

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<sup>45</sup>Transparency International Australia (2018).

<sup>46</sup>Probyn and Jennett (2018).

<sup>47</sup>Crowe (2018).

<sup>48</sup>Senate Legal and Constitutional Affairs Committee (2018).

<sup>49</sup>Murdoch (1996).

not even begun,<sup>50</sup> Defence Minister Robert Hill stating that the government was unaware of the abuse of prisoners in Iraq even though the Department of Defence had had knowledge of the events for several weeks,<sup>51</sup> the notorious Children Overboard scandal which involved Prime Minister Howard, Defence Minister Peter Reith and Immigration Minister Phillip Ruddock all maintaining that asylum-seekers had thrown children overboard despite having been informed by the navy that that had not happened,<sup>52</sup> John Howard's three denials to parliament that he had had discussions about ethanol subsidies with a businessman, subsequently found to be untrue,<sup>53</sup> Veterans' Affairs Minister De-Anne Kelly giving parliament incorrect information about the date on which she had approved a grant because on the date she had actually authorised the grant it fell outside her ministerial responsibilities,<sup>54</sup> Foreign Minister Alexander Downer<sup>55</sup> and Trade Minister Mark Vaile<sup>56</sup> telling parliament that they were unaware that the Australian Wheat Board had been breaking sanctions on Iraq whereas they had been aware of these activities six years previously, Employment Minister Michaelia Cash, telling a Senate committee five times that neither she nor her staff had been involved in tipping off the media about an AFP search of the offices of the AWU, whereas in fact one of her advisers leaked the location and timing of the raid to the media,<sup>57</sup> and Attorney-General George Brandis telling the Senate that he had consulted the Solicitor-General over a new process for providing legal advice by the latter whereas in fact he had not.<sup>58</sup> Special mention is warranted of the government's dishonest justification of Australia's participation in second Iraq War,<sup>59</sup> which was based on misrepresentation by both Alexander Downer and John Howard of what intelligence agencies said was the level of threat posed by suspected Iraqi weapons of mass destruction.<sup>60</sup> Taking a country into an unjustifiable war obviously ranks as one of the greatest evils a government can engage in, and the dishonesty was compounded by a subsequent inquiry the terms of reference of which were framed so as to omit any investigation of what the government knew at the time.<sup>61</sup>

Why do these instances of misleading parliament not lead to ministerial resignations? The reason is that the conventions which governed politics a generation ago – think of the Profumo scandal in the United Kingdom – are no longer followed.

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<sup>50</sup> Wright (2000).

<sup>51</sup> Colvin (2004).

<sup>52</sup> Allard (2004).

<sup>53</sup> Seccombe (2003).

<sup>54</sup> Maher (2004).

<sup>55</sup> Rudd (2017, pp. 415–16).

<sup>56</sup> Hart (2006).

<sup>57</sup> Seccombe (2017).

<sup>58</sup> Senate Legal and Constitutional Affairs Committee (2016).

<sup>59</sup> Swieringa (2013).

<sup>60</sup> Rudd (2017, pp. 305–15).

<sup>61</sup> Rudd (2017, p. 420).