



## Honesty And The Issues

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Let me first plead guilty to being one of the teacher-preachers. But I do not come to canonise or demonise John Howard, just as I have never canonised or demonised any of his predecessors as prime minister in the years that I have been publicly engaged in advocating the rights of Aborigines, refugees, and other marginalised groups in Australia. I have no doubt that John Howard would prefer a senior public servant to keep the truth from him if that would help the government politically. And I have no doubt that senior public servants are now well schooled in keeping the politically explosive truth under wraps.

I returned to Australia on the Australia Day weekend, having been in Indonesia, Thailand and Cambodia during the previous month. And before Christmas I had been in Vietnam. When I return from such countries, I come with a heightened sense of the gift and the burden it is, being Australian and wanting to give as much as we receive in this part of the world. Each time I return, prizing more our democracy and the rule of law. I can criticise John Howard if I want to and he cannot just throw me in jail even if I annoy him greatly.

I also return each time a little more worried about the state of our democracy and the rule of law, precisely because honesty in public life is now such a fickle commodity. There are some issues where truth does not matter, provided the majority approves the outcome. When a government has been in power a long time, when the upper echelons of the public service are rewarded for keeping their political masters in the dark, when the Opposition has been in disarray, and when the public has been afraid, there seems to be less political oxygen for the usual checks and balances on the Executive which acts in harness with its media scrum of supporters. The Senate

gets treated like "unrepresentative swill" (to quote Mr Howard's immediate predecessor). The judiciary gets sidelined because they are unelected and deemed to be soft in the head. Church leaders get head-butted, except those who caution their fellow church leaders to leave the government alone. The leaders of civil society get told to stand for election or shut up. And those who appeal to public morality are told by people like Andrew Bolt to wake up to ourselves because we are so out of touch with what the people want. For example, Andrew Bolt is right when he claims to have told me on the ABC *Lateline* program two years ago that the government's policy of mandatory detention was popular and would stand. I continue to respond, "That may well be so. I could not care if the policy is supported by 99% of Australians. I will continue to decry a policy and its implementation that results in a seven year old child being hit with baton and tear gas and public servants glibly denying that any such thing occurred or was even reported." Let me be so bold to declare that these marginalising assaults on groups which provide some check and balance to the Executive and their supporters are more likely to occur unchecked when the Liberals are in power. Because when they are in Opposition, they are more likely than Labor to stand up for senators, judges, clerics and the like, or at least to decry the indecency of the government attacks on the nation's traditional institutions.

Having been a long time campaigner for Aboriginal rights under both types of government, I thought I had seen most of the dangers. But I think there is an increasing flabbiness in our consideration of honesty and the issues. Let me commence with three anecdotal examples before considering three case studies of the honesty of government in its treatment of asylum seekers in the name of border protection.

### **The Devine Praises**

I returned from East Timor two years ago. I was immediately called to Woomera where asylum seekers were sewing their lips and throwing themselves on the razor wire. I then met with Minister Philip Ruddock who said he understood my purpose. I was opposed to detention and I would do what I could to reverse the policy. That was true but I told the minister there was little point in an unelected member of the elite fulminating against a policy which enjoyed bipartisan support in the parliament and which, with rigorous implementation, had assisted in the return of the government. But I assumed Ruddock and I were *ad idem* in wanting to ensure no further breach of human rights inside detention centres. Presumably the regular attendance of a credible citizen with access to government would be a useful thing. On that basis we then corresponded often and met regularly.

There is a bevy of highly paid armchair journalists who have never visited one of these centres and yet they not only defend the government policy to the hilt. They feel obligated to "do in" any of us who dare to suggest there might be a better way than holding seven year old children behind the razor wire at places like Woomera for four years. For some of these journalists, the publication of my *Tampering with*

*Asylum* was the last straw. Some reviewers have pointed out that the book is very unemotional. I am pleased to hear it. One of my government deep throats told me early in my visits to Canberra, "Frank, we're sick of the moral outrage." So I set about writing a book that might have some prospect for shifting the terms of the debate.

Frank Devine's "ad hominem" piece appeared under the headline, "Do gooder Priests should stay out of the asylum debate" (*The Australian* 12 December 2003). He said:

Brennan has apparently had an unusual freedom of access to boatpeople in detention camps. Yet he tells us little about them as human beings. Sparse anecdotes are used to belabour the Government for its harsh treatment of them. We learn next to nothing about their experiences, their values, their aspirations.

*The Australian* finally agreed to publish my response dealing with the substantive issues a month later. But the editors omitted my one reference to Frank Devine. I had said, "Frank Devine be warned. This column is written by a priest and contains some references to decency." Some elites are protected from public criticism. Meanwhile the manager of the Tiger XI soccer team, a group of mainly Afghan asylum seekers in Brisbane, had written to Devine inviting him to meet the boys. I had quoted these boys' experiences extensively in the book. Devine declined the invitation, saying, "As an individual I don't doubt that I would be moved and sympathetic by making contact with the members of Tiger XI, and their generous supporters. However as a journalist commenting on policy, in this particular instance, I don't believe my store of knowledge would be enhanced."

It would not matter how much detail I gave of the experience of these boys or others like them. Professional journalists know all the answers in this policy area without ever having visited a detention centre. All they need to do is access the government web sites and turn on the drip.

### **The Windschuttle Connection**

I have not bought into the contemporary academic culture wars. While surfing the net for other things, I stumbled across Keith Windschuttle's address to the Samuel Griffith Society in May 2003 entitled, "*Mabo* and the Fabrication of Aboriginal History". I had thought I had put the Hugh Morgan-Ray Evans Catholic conspiracy to rest in my unanswered letter to *Quadrant* in September 1999. But not a bit of it. Here it was, back again, in a more simplistic, virulent form. Windschuttle wrote:

One of the critical issues in the debate over native title is the attitude the pre-contact Aborigines had to the land. Most discussion assumes they had clearly defined territories, which were exclusively theirs. This concept was one of the principal assumptions on which the *Mabo* decision was made. Justice Sir Gerard Brennan has made clear that his own judgment had been informed by his son, Father Frank Brennan, the Jesuit barrister and advisor to the Catholic bishops on Aboriginal affairs.

I contacted Mr Windschuttle intimating that this statement was not only unsourced but also unfounded and untrue. Justice Brennan had made no such thing clear. Neither could he, because it was a lie. Windschuttle replied:<sup>1</sup>

I can also now see that my statement that Justice Brennan's views had been informed by your own work could have been better worded. I should have said: "Justice Sir Gerard Brennan's judgment made it clear that his views were informed by his son, Father Frank Brennan ... " In support of that statement, I should have cited Franklin's lengthy discussion of the subject in *Corrupting the Youth* (pages 388-98), which shows it is a reasonable inference to draw since your earlier opinions were couched within the framework of the same Catholic natural law principles that informed your father's judgment.

Windschuttle's claim is historically unfounded, philosophically stupid and logically false. Consider the logic: "X and Y are influenced Theory Z. Therefore X's views are informed by Y." For example, Windschuttle and Reynolds are influenced by the historical method. Therefore Windschuttle's views are informed by Reynolds." Writing of his opponents in this oration, Windschuttle says, "I have been checking the footnotes of the other historians in this field, and have found a similar degree of misrepresentation, deceit and outright fabrication". Meanwhile he can find support for bold assertions about Justice Brennan's mindset with a general reference to the writings of James Franklin. Rather than being misled by Franklin, would not the serious historian interested in discerning what has informed the judges in the formulation of their views about land rights and the legal propriety of land claims be better off researching the writings and activities of the judges?

I was only 14 years old when F. G. Brennan QC appeared for the Fijian landowners in the Denning Commission of Inquiry which determined the future of CSR in Fiji. I was only 18 years old when the Commonwealth of Australia briefed him to prosecute the murder trial involving many Tolai landholders in PNG charged with the murder of the Commonwealth district patrol officer. The issue was at its core a land rights dispute. I was only 19 years old when he was briefed by the Commonwealth as the senior counsel for the Northern Land Council in the Woodward Royal Commission. Woodward is on the public record having acknowledged that Brennan drafted key sections of the land rights bill then presented to government. It is spurious to suggest that my father's professional legal activities were being informed by my views at this time. I have no doubt that such experiences did directly inform his judicial mind. Justice Brennan then spent more than ten years on the High Court before the determination of Mabo hearing numerous land rights appeals from the Northern Territory. Like his brother judges, he was more aware than Windschuttle of the different perceptions of land rights between people in Arnhem Land and Torres Strait Islanders.

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<sup>1</sup> Windschuttle thinks I owe him an apology for quoting these remarks, having 'broken a confidence by publicly repeating what was a private conversation between the two of us, without seeking my permission.' The prompt correction of the public record warrants the publication of his own inadequate correction and defence. I am not aware of any private confidence between us being broken. My purpose has been a correction of the public record. I was never consulted prior to the publication of his uncorrected, false statement to the Samuel Griffith Society. I do not need his permission to correct the public record, given his failure to do so.

Professor Tony Coady has observed in his review of Franklin's *Corrupting the Youth* that "Franklin's idea that Catholic philosophy via natural law theory had a big influence on the Mabo decision" is "unconvincing", "since resorting to morality to justify legal decisions has other foundations other than natural law, as is clear in the work of the Oxford philosopher Ronald Dworkin and in much of the human rights movement."<sup>2</sup> It is extraordinary that there are still Australians credited as thinkers and academics who can seriously postulate that it is only a Catholic mindset that could result in the High Court finding for Aborigines in their common law claims to land. Most other superior courts in other equivalent countries have done the same regardless of the religious affiliations of the judges.

I would have thought any fair reading of the majority judgments in *Mabo* would have given rise to the conclusion that the Brennan judgment was the most conservatively and judicially crafted of those judgments. Unlike others, he did not quote historians such as Henry Reynolds. He actually confined himself to the historical record regarding the Torres Strait Islands. I have always presumed that is why the Brennan judgment commanded the assent of Chief Justice Mason and Justice McHugh, two judges very unlikely to subscribe assent to a judgment "informed by" a priest who was a son of the judge.

When it comes to Aboriginal and refugee rights, much "academic writing" as well as the journalistic comment is little less than unreflected prejudice.

### **Headbutting Carnley**

Enough of Catholics! Let me take an example from the government's treatment of the primate of the Anglican Church. Anglicans Howard and Downer continue to be upset about the remarks made by the Anglican Primate after the Bali bombing in October 2002. Preparing for the next election, John Howard is not prepared to let go the Carnley interviews of that time. *The Adelaide Advertiser* of 16 February 2004 carries this report of the Prime Minister:

"I think church leaders should speak out on moral issues but there is a problem with that justification being actively translated into sounding very partisan," he said, in an interview with *The Advertiser*.

"I don't deny the right of any church leader to talk about anything.

"But I think, from the point of view of the unity of the church, it stresses and strains when the only time they hear from their leaders is when they are talking about issues that are bound to divide their congregations."

Mr Howard singled out an attack by Anglican Primate of Australia Peter Carnley after the Bali bomb blast, which included suggestions the bombers believed Australia was too close to the US.

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<sup>2</sup> "From Aquinas to Mabo", *The Age Review*, 14 February 2004, p 5

Echoing a speech by Foreign Affairs Minister Alexander Downer in August, Mr Howard said a church leader's first responsibility should have been to deplore the attack.

"I know something of the composition of church congregations," he said.

"There are a range of political views and you can offend.

"Particularly (when) some of the church leaders have been particularly critical of our side of politics, they end up offending a large number of their patrons."

Some church leaders also mounted a campaign just before the Iraq war last year, trying to convince Mr Howard to find a way to end the crisis peacefully.

Mr Howard, an Anglican, said the churches' "primary responsibility is spiritual leadership", which he respected and supported.

"They can say what they like but, equally, they have to understand that if they say things that are unreasonable, a lot of people are going to have a go back," he said.

Last August, Downer had commenced his Playford Lecture in this way:

Let me begin with a personal anecdote.

Listening to the ABC's AM on Saturday morning 19th October I was dumbfounded to hear the announcer Hamish Robertson say "well, the head of the nation's Anglican Church says the Bali Bomb attack was an inevitable consequence of Australia's close alliance with the United States...Dr. Peter Carnley says terrorists were responding to Australia's outspoken support for the United States and particularly its preparedness to take unilateral action against Iraq."

Here was the head of my own church, reported by the ABC as rushing to judgment and blaming the Australian Government for bombing incidents in which so many of our people were killed or terribly injured.

Whether this report was fair or not, it struck me hard.

There was no concentration on comforting the victims and their families, no binding up of the broken-hearted while a shocked nation mourned.

Yet surely that first and foremost is what was needed and what we were entitled to expect.

It was a stark reminder of the tendency of some church leaders to ignore their primary pastoral obligations in favour of hogging the limelight on complex political issues –and in this case a national tragedy –in ways which would have been inconceivable in the Playford era.

This is something that has troubled me for some time.

There is always need for caution when you have a senior politician with a team of researchers and speech writers ten months later deciding not to quote directly what his victim said. In the AM interview, Carnley actually said, 'I wouldn't say the Howard government brought the bomb attack on the Australian people.' Downer was taking exception to Carnley's address to the WA Synod on 18 October 2002 in which he actually said:

Most of us now believe that such a well planned and strategic placing of a bomb speaks clearly enough for itself. Retaliation against America's allies has been verbally threatened for some months.

The targeting of a nightclub, which is known to have been popular with young Australians on holiday, suggests that this terrorist attack was aimed both at Australia, as one of the allies of the United States of America and, at the same time, at what is seen by militant Muslims to be the decadence of western culture.

Does anyone now seriously doubt what Carnley was saying? Australians were being targeted both because we are identified with the decadent west by militant Muslims and also because of our close relationship to the United States. There may also have been other factors, including our intervention in East Timor.

There was controversy at the time with Carnley's address. He then sought to set the record straight with his published letter of 29 October 2002:

A number of your correspondents have alleged that I laid the blame for the nightclub bombing in Bali on the Australian Government. This is incorrect.

Those who take the trouble to read the text of my Synod address on the evening of Friday 18 October, and the transcript of the press conference that followed it, will find that at the press conference Tanya Nolan explicitly asked: 'So are you therefore criticising the Howard government's vocal support of American-led action.'

The record shows that my reply was: "No I'm not wanting to criticise the Howard government's support. I think we did think earlier on that we were unwisely supporting unilateral action by the United States in Iraq. I think we've moderated that position. If anything I think the Howard government is to be commended for backing away from that and for supporting UN inspections."

It is public knowledge that I wrote to John Howard as long ago as 8 August expressing the concern of Anglican Bishops at Australia's support of the US 'first strike' policy. That is a matter of fact. It might now be alleged in the spirit of "I told you so" that the bomb attack in Bali had been brought upon the Australian people. In response to that suggestion I once again said: "No; I wouldn't say the Howard government brought the bomb attack on Australian people. I think it was our lot in fact to suffer because of our close association with America anyway. I think any government with an alliance with America would have been in the firing line.'

Clearly, far from laying blame I resisted being led in such a simplistic direction. The fact is that the Church is not into the culture of blame. Its business is to help people process the trauma of an utterly despicable event that we will wrestle to understand and agonise about for many years to come. Some of your correspondents are apparently content to contend that the bombing was a reprisal for Australian support of independence for East Timor, or even that the large number of Australians killed or injured can be explained simply as a kind of geographical accident: the proximity of Australia to Bali means that naturally there would be a good number of Australians there.

For many of us, however, such an explanation of a well planned and deliberate targeting of a nightclub when it was common knowledge that large numbers of Australians would be present, seems both too narrowly focused and at the same time too shallow. The shadow side of human motivation to hatred is surely much more complex.

We will be whistling in the dark if we do not take note of the actual reasons expressed by the terrorist network itself. Within recent weeks there have been explicit reported threats against America and its allies. For this reason alone, it is entirely understandable that a Newspan conducted last week for a Sydney newspaper found that 69% of respondents believed our support for the US was a factor in the Bali attack.

Islamic fundamentalist invective against western culture- whose global intrusiveness is resented and hated- has been long sustained. The addressing of hatred is a religious and not just a political matter. You cannot bomb away hatred. That is why Christian leaders have a responsibility to enter into dialogue with moderate and peaceable Islam and work actively to overcome the deep seated alienation that so clearly exists at present between East and West.

It is not by denial, but in owning up to some of the harsh and difficult realities of our situation, and in grappling with them together, that we will be able to move forward. By this means we will give ourselves the understandings to marginalise- and eventually neutralise and eliminate- the destructive forces of suspicion and hatred that feed world terrorism.

Though this lengthy correction of public misperception by Carnley counts for nothing with Howard and Downer, should they not at least acknowledge that Carnley was trying to deal with a highly nuanced issue in a responsible way? How can anyone honestly read this letter and then ten months later make Downer's outburst about clerics " hogging the limelight on complex political issues –and in this case a national tragedy".

It is quite dishonest of Downer ten months later to claim, "There was no concentration on comforting the victims and their families, no binding up of the broken-hearted while a shocked nation mourned." As Downer well knows, on 14 October 2002, before the Synod address and immediately after the bombing, Primate Carnley issued a statement full of comfort for the victims and binding up of the broken-hearted. Consider the text for yourself:

The head of the Anglican Church in Australia, Archbishop Peter Carnley of Perth, today expressed his horror at the murderous attacks in Bali yesterday.

"I am shocked at the ferocity of the attacks and deeply concerned for the victims and their loved ones," Dr Carnley said. "The loss of life and injury caused is tragic. This has shattered any illusions we may have had about the threat to Australians posed by terrorists. Terrorism can rear its ugly head even in the most idyllic surroundings."

"This tragic event also reminds us that evil people are operating close to home."

Dr Carnley said he had some sympathy for the suggestion that Australia might need to give priority to using its military and intelligence resources to pursue the architects of terrorism within Australia and in cooperation with its near neighbours.

Archbishop Carnley said that for the Balinese, who depend so heavily on tourism, this was a double blow. They had suffered heavy casualties as Australia had, and many would lose their livelihoods.

Dr Carnley said that all Anglican parishes would offer prayers for the victims, their friends and families, regardless of their nationality or faith. He said he had called on

members of the Anglican community to offer whatever support they could at a local level.

"My prayers are with the families and friends of those who are victims of this atrocity."

While the nation's leading Anglican politicians have maintained their campaign to do in Carnley, Archbishop Jensen of Sydney has rightly observed that this particular attack on Carnley was "amateurish" and "under-researched". It is also dishonest.

Two months before Downer's Playford Oration, the government was arguing for an expansion of ASIO's powers in the Senate. Government Senator Santoro told the Senate:<sup>3</sup>

We know from horrific experience that not only do Australians face the same level of threat as any other people but also, as was the case in Bali in October last year, they are very specific targets.

What Santoro said is quite consistent with Carnley's position. So what's the problem? Are we not permitted to speculate on why Australians are very specific targets. Or is that no role for reflective church leaders?

Though there was spirited debate and cabinet resignations in the UK because of Mr Blair's ready membership of the Coalition of the Willing, Canberra compliance with prime ministerial directives was complete. It was very troubling to hear the mixed messages from Prime Minister John Howard and Mr Tony Abbott about the increased risks of terrorism to Australian citizens. Abbott, the Leader of the Government in the House, told Parliament, "There is the increased risk of terrorist attack here in Australia".<sup>4</sup> Next day, the Prime Minister told us, "We haven't received any intelligence in recent times suggesting that there should be an increase in the level of security or threat alert."<sup>5</sup> Regardless of who was right, their contradictory statements provided incontrovertible evidence that there was minimal debate, discussion and discernment within our Cabinet and political party processes prior to making a commitment to war in such novel political circumstances. The thinking was done in Washington. We signed on, presuming that our national interest and the international common good would be served by Alliance compliance. In these circumstances, there is a place for church leaders to speak out. If they are misunderstood and then correct the public record, that should be acknowledged by our very sensitive political leaders. If I were Peter Carnley, I would be feeling regrettably vindicated by the candid observation of Federal Police Commissioner Mick Keelty after the Madrid bombing when he answered Jana Wendt's question "Could this happen here?":

If this turns out to be Islamic extremists responsible for this bombing in Spain, it's more likely to be linked to the position that Spain and other allies took on issues such as Iraq. And I don't

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<sup>3</sup> Senate Hansard, 17 June 2003, 11685.

<sup>4</sup> House Hansard, 18 March 2003, 12551.

<sup>5</sup> Interview with Steve Price, Radio 2UE, 19 March 2003.

think anyone's been hiding the fact that we do believe that ultimately one day, whether it be in one month's time, one year's time, or ten years' time, something will happen.<sup>6</sup>

### **The Dishonesty in seeking a coherent rationale for the detention of children**

Last week, the Commonwealth Solicitor General went to great pains to avoid any suggestion that the mandatory detention policy was designed as punishment or a deterrent. Mr David Bennett QC submitted to the High Court that "that the legitimate non-punitive purpose has two aspects; it is the facilitation of removal or deportation and prevention of absorption into the community. Both those purposes are capable of applying to children of all ages". The Commonwealth feels constrained to make such submissions for fear that the High Court would rule that mandatory detention imposed by Parliament without any court order or review, and designed to be a deterrent would be unconstitutional. No doubt there were a few shivers around Canberra when the influential Justice Gummow observed, "Undoubtedly, it is punitive. The question is whether there is an exception. Of course it is punitive. ... They are locked up."<sup>7</sup>

The Commonwealth's submissions are in line with Mr Ruddock's oft-repeated remark that "Detention is not arbitrary. It is humane and is not designed to be punitive."<sup>8</sup> The Commonwealth's submissions are more difficult to reconcile with the Prime Minister's general observations on his policy, including mandatory detention, when he told Fran Kelly on the ABC in London on 14 November 2003:

The point of our policy is to deter people from arriving here illegally. That's the starting point. That's what people have got to understand. Our policy is to say to the world – we will take 12,000 humanitarian refugees a year, we'll have that policy, we'll run a non-discriminatory immigration policy, but we will not have people arriving here illegally and we will act to deter that occurring.

Presuming the voters are not to be told one thing while the courts are told another, we have to assume now that the purpose of mandatory detention is not punishment or deterrence. (But it would be a good thing if someone told that to the Prime Minister.) We citizens are entitled to a coherent rationale for detention once it is established that someone arriving without a visa is not a health or security threat and once their identity is established. This is especially the case if the detained person is a child suffering the proven traumatic effects of ongoing detention.

All non-government parties now accept that mandatory detention at the processing phase is irrational and unacceptable. They also accept that rejected asylum seekers should not be detained if there is no immediate prospect of their being returned home and if they are not a flight risk.

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<sup>6</sup> *Sunday*, Channel 9, 14 March 2004.

<sup>7</sup> Applicants M276/2003, Ex parte - Re Woolley & Anor [2004] HCATrans 2 (3 February 2004)

<sup>8</sup> *Medical Journal of Australia* (21 January 2002, Vol 176, No 2, p.85)

We should all keep the Howard government focussed on providing a sensible answer as to why they detain all unvisaed asylum seekers once they are known not to be a health or security risk, while at the same time allowing other asylum seekers to reside in the community even if they did not make a full disclosure of their circumstances when they applied for a tourist or business visa. This week Justice McHugh wrestled with the circumstances in which you could impose mandatory detention on all members of a class (unvisaed asylum seekers). He said, "The reason may be that you just cannot deal with a class and seek to detain a class of people, unless there is some cogent evidence that more or less every member of the class is a person who may breach the particular purpose that the legislature is seeking to achieve."<sup>9</sup> 90% of this class end up being proved to be refugees. Very few of them are removed from Australia each year. On average, they constitute only 222 of the more than 10,000 removals each year. How can you justify detaining this class, most of whom are proved to be refugees, while allowing another class (previously visaed asylum seekers) to reside in the community during their processing and appeals even though most of them are proved not to be refugees? Mr Ruddock's explanation was always very feeble, namely, "The situation for people who overstay their visa is fundamentally different. We know who they are and have already assessed that they do not constitute a danger to the Australian community."<sup>10</sup>

### **Was a seven year old child hit with baton and tear gas at Woomera?**

I was in the Woomera facility at Easter two years ago when the riots broke out. I returned to the facility a couple of days later and saw the baton bruises to a 7 year old boy with my own eyes. I heard from others, including the ACM manager, that tear gas had hit some children during the disturbance. I immediately wrote to Mr Ruddock saying that this was no place for children. There was no need for children to be hit with baton and tear gas in modern Australia. Two weeks later, DIMIA denied that any child had been injured. With indecent haste and professional negligence, Mr Stewart Foster, the Director of DIMIA's Public Affairs section in Canberra, posted a denial on the departmental webpage within six working hours of the publication of my complaint in the newspapers.<sup>11</sup> He checked neither with the minister nor with the relevant sections of his department who had received copies of my complaint two weeks previously.

After an inquiry by HREOC, the Australian government has now apologised to the child and his mother for the breach of his human rights. The government acknowledged "that at the end of an exhaustive investigation, where the delegate duly and fairly considered submissions from all concerned parties", HREOC found "on the balance of probabilities, that (the child) was struck with a baton by an unknown Australasian Correctional Management (ACM) officer and that this

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<sup>9</sup> Applicants M276/2003, Ex parte - Re Woolley & Anor [2004] HCATrans 2 (3 February 2004)

<sup>10</sup> P. Ruddock, Address to the Australian Anglican Synod on 27 July 2001

<sup>11</sup> At 2.41pm on 18 April 2002, DIMIA posted a letter on its web site: "Misleading injury claims" in response to my reported comments in *The Canberra Times*, 18 April 2002

constituted a breach of his human rights."<sup>12</sup> For its part, ACM continues to claim that the delegate's finding "was against the weight of the evidence before him" and "not established to the requisite standard of proof". ACM continues to claim that it did not discover the allegation of the assault until a month after it occurred. But even ACM admits that its own doctor had a record of the assault shortly after it occurred. Given that the mother and child were being held in detention, surely notice of the assault given to an ACM employee constitutes notice to ACM.

ACM tried at the hearing to suggest that the mother had simply invented the injury to her son so people like me would take up her cause. At no time did ACM choose to question me even though I came to the hearing in Adelaide having provided an affidavit of what I had seen and heard at Woomera. ACM submitted to HREOC that tear gas does not cause harm. They also claimed that "a full and thorough investigation into the assault found" could not "remedy or reduce the loss or damage suffered by (the child) as a result of the baton strike found".<sup>13</sup>

### **Was Justice Mildren told the truth and was he given the assistance he could rightly expect from the Commonwealth as a model litigant?**

We are used to politicians in the Howard government attacking unelected judges. That seems to be the prerogative especially of grey suited ministers trained as lawyers and priding themselves on their conservatism. It is just not altogether clear what they are conserving when they engage in this sort of political sport. But now things have been taken to a new level. Unelected public servants are now given licence to attack judges.

When the Minasa Bone was being towed out on to the high seas two weeks ago, lawyers sought the intervention of the Supreme Court of the Northern Territory to ensure that the 14 Turkish Kurds could obtain assistance and pursue their asylum claims if they had any, which of course was highly likely.

The Commonwealth saw fit to inform the court by affidavit: "On 6 November 2003 the AFP/DIMIA team boarded the vessel and conducted interviews with the crew and passengers to elicit intelligence information regarding possible people smuggling."<sup>14</sup> Why did the Commonwealth not see fit to inform the court of the interviews conducted or about the information received about asylum claims? The government now admits that asylum claims were made across the Turkish-English language barrier without translation services being made available.

During the hearing of the case on 7 November 2003, the judge asked the Commonwealth's key witness, Mr John Charles Eyers, Assistant Secretary, Legal Services and Litigation Branch, DIMIA: "Do you know whether or not any of the

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<sup>12</sup> Letter of DIMIA to complainant, 23 December 2003

<sup>13</sup> Letter of ACM to HREOC, 5 December 2003

<sup>14</sup> Affidavit of John Charles Eyers, Assistant Secretary, Legal Services and Litigation Branch, DIMIA, 7 November 2003

persons who arrived on the vessel asked for assistance?" He answered, "Not to my knowledge, Your Honour". He clarified this answer saying, "I don't know whether they did or not." When the judge delivered his written reasons two weeks later, he said:<sup>15</sup>

Mr Evers (was not) able to advise whether or not any interpreters in either Turkish or Indonesian had been employed at any time either by the Navy or by the Australian Federal Police/DIMIA team. Mr Evers was asked specifically why Ms Cox's request to seek access to those on board the vessel was not acceded to. He replied that it was normal procedure that unless a person requested legal assistance it is not provided. He said that he did not know whether any of the persons concerned had asked for legal assistance or not and did not know whether any of them had asked for asylum. Even allowing for the urgency under which this affidavit was sworn I found it incredible that the (Commonwealth's) principal witness could not answer these questions.

Next day, Mr Stewart Foster issued a statement saying that "a number of comments made by Justice Mildren in his judgment on the Minasa Bone case need to be clarified". Mr Foster wanted the public to understand, as Justice Mildren had not, that one reason for the government pronouncement of a "temporary air exclusion zone" around the boat was "to protect the privacy of those on board the Minasa Bone".<sup>16</sup> Justice Mildren had the temerity to observe, "Behaviour of this kind usually implies there is something to hide." You can imagine the public servants giggling at their word processors inventing these lines. "We don't give a damn if these people have a right to asylum but we do want to maintain their right to privacy while they are with us!" It is pretty sick stuff. In the old days it may well have been contempt of court. And it definitely would have been only the minister who was a party to the proceedings and not the public servants given licence to take pot shots at the judge. Now it is just Canberra entertainment.

According to Mr Foster, "The Government's key witness was never asked if those on board the Minasa Bone had made a claim for asylum". But hang on. The key witness had told the court that interviews were conducted "to elicit intelligence information regarding possible people smuggling" and he did not know whether anyone on the boat had asked for assistance of any sort. What is DIMIA now suggesting? If Mr Evers had been asked directly about any request for assistance with asylum, would he not have answered, consistent with his more general answers, "I do not know". Or is DIMIA now intimating that if asked directly, Mr Evers would have told the court that he did know. That he did know what? Would he have asserted that no claim of asylum was made? Remember that two days after Mr Evers gave his evidence, Ministers Downer and Vanstone told us formally in a joint press release, "The passengers of the Minasa Bone did not claim asylum in Australia".<sup>17</sup> We now know that was false. At the time Downer and Vanstone made this statement, there were public servants who knew it was false. Is DIMIA now

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<sup>15</sup> Cox v Minister for Immigration Multicultural & Indigenous Affairs & Ors [2003] NTSC 111

<sup>16</sup> "Comments Need Clarification", Letter to the Editor, Northern Territory News, 21 November 2003

<sup>17</sup> Joint Media Release, The Minister for Foreign Affairs Alexander Downer and The Minister for Immigration, Multicultural and Indigenous Affairs Senator Amanda Vanstone, "Minasa Bone Returns to Indonesia", 9 November 2003

intimating that, if asked, Mr Eyers would have told us correctly that asylum claims had been made? Either he knew or he didn't. The judge thought it incredible that he did not know. If that requires clarification, then presumably Mr Eyers did know or else there must be some credible reason for the most senior public servant responsible for immigration litigation not knowing. If he did know, did he know the truth or did he know only the lie being peddled around Canberra at the time by his fellow public servants: that there had been no asylum claims made?

Isn't it time for DIMIA to wear the rap? Whether it be deceit, reckless incompetence or wilful institutional miscommunication born of the "Children Overboard" mindset in Canberra, public servants have caused senior ministers to mis-state the facts and have withheld from a court relevant information in a way the judge finds "incredible". Having heard from the government's key witness that he did not know whether any of those on board had asked for assistance of any sort, the judge was fully justified in finding it "incredible" that the key witness did not know whether any person on the boat had asked for asylum. It is even more incredible that public servants use the taxpayer funded web site to further obfuscate the truth, implying that the judge hasn't quite got it right. Unlike Downer and Vanstone, Justice Mildren was not led into error by the public servants. But neither was he assisted by them. Sadly in this high policy area, the Commonwealth is no longer a model litigant. It is time to put a stop to the government's word games.

If there is to be criticism of the judiciary, should it not come from elected politicians answerable to the Parliament (and presumably subject to the Standing Orders)? I am aware that the Howard government has engaged in a high level of criticism of the judiciary. But it is a novel development to license your public servants to challenge the findings and reasoning of judges suggesting the need for clarification of the judge's findings, especially when you have been a party to the proceedings, and especially when one of your public servants has failed to provide the judge with information which he thought could be provided by the Commonwealth as a model litigant. If Mr Foster continues this precedent, I suggest there be a formal amendment to the Commonwealth's model litigant policy.

## **Conclusion**

When we go through a down in the political cycle with government encountering little opposition in the parliament, it is difficult to conduct honest public dialogue about policies related to minorities and national security. Fear and flabbiness take over. We come even to a forum like this assuming that Andrew Bolt comes to canonise the Prime Minister and Frank Brennan comes to demonise him. I must confess that I do think Andrew exhibits canonising tendencies. Having maintained a robust, face to face dialogue with Minister Ruddock and now Minister Vanstone, I pride myself on not engaging in the business of demonisation. The temptation is more readily avoided when Labor was the first to institute the policy and Labor for so long was indistinguishable from the Howard government on the policy.

Not being a paid columnist, I make no pretence to being an expert in all fields of government policy. I confine myself to my last. So confined, I find an ongoing deficit in public honesty and rigorous inquiry when it comes to our treatment of asylum seekers and the identification of their deprivations with national security and border protection. I am staggered by the prejudice of some of our journalists and so called academics. I hope there is still a role for church people such as myself to name it as we see it, to correct the misperceptions if need be, and to espouse rational and coherent policies that do less harm to vulnerable people. While Howard and Downer continue to put their church leader in the public gun over Bali, while Devine rests in his Sydney armchair pontificating about Woomera, and while Windschuttle deludes himself and his supporters about the Catholic enactment of land rights, there is a need for more encounters between people like Andrew Bolt and myself. I am pleased to live in a country where government finally has to apologise to the mother of a seven year old boy assaulted with baton and tear gas. I lament that the mainstream media does nothing about it. I deplore the independent contractor's refusal to acknowledge fault. And I content myself with the thought that even Messrs Howard, Downer and Ruddock would prefer to live in a country where these things did not happen. The cost is allowing the Carnleys, the courts, the Senate, an independent media, and a robust civil society to express a contrary view, even if the majority are satisfied that the government will do what is best for "us" (as against "them") in tough times.