



Date: 11 April, 2013

Statement from Michael D Wyles S.C.

Chairman, Foley's List

Legal Aid's refusal to provide sufficient funds for proper representation is a threat to the rule of law

The "State" (Federal and Commonwealth) has for all intents and purposes given up all but the merest pretence of facilitating just trials by providing legal aid for accused persons. The rule of law demands that all persons accused by the "State" be given every opportunity to establish their innocence. The role of the prosecution is to lay the evidence before the Court. If it is sufficient beyond a reasonable doubt, conviction will follow. But ours is an adversary system. A system which can only function if the accused is represented by advocates skilled in the law. The refusal of Legal Aid to provide sufficient funds for proper representation is a threat to the rule of law.

I do not criticise those administering the meagre legal aid made available by governments. Those poor administrators must be at their wits' end as their political masters continue to demand that they perform the "loaves and fishes miracle".

As a community we must all be concerned for the future of the rule of law if the State will not adequately fund the defence of the socio-economically disadvantaged.

I understand the pressures upon government to meet the multitude of demands on the public purse. The proposed national disability assistance scheme is decades overdue. The absence of a national dental health system cannot continue. But the need for legal aid to offer a vibrant and realistic opportunity to achieve justice ranks equally, if not ahead of these many demands. We do not have a Constitutional guarantee that accused persons have a right to legal representation (in the United

States the Sixth Amendment provides such a guarantee – how it is translated into practice may be another matter). It is time for the legal profession to lead the community in grappling with the legal aid issue, not just as a funding issue, but as one which goes to the very essence of our unique Australian way of life. In the words of U.S Supreme Court Justice Lewis Powell Jr: *“It is fundamental that justice should be the same, in substance and availability, without regard to economic status”*. More recently French CJ has reminded us: *“At the heart of the common law tradition is ‘a method of administering justice.’¹ That method requires judges who are independent of government to preside over courts held in public in which each party has a full opportunity to present its own case and to meet the case against it.”²*

Legal aid funding is a rule of law issue. Our role as advocates is to pursue and further the rule of law in ordering the relations within the Australian community. If governments cannot be trusted to continue to abide by the “fair go” principle and adequately fund representation of those “accused” who are socio-economically disadvantaged from themselves securing adequate representation, we need to assist the Australian people to place that safeguard in our Constitution. For all our sakes, and for the sake of our children and grandchildren. If the rule of law is allowed to be undermined by the conduct of unfair trials that rule will eventually break down. We cannot stand by and let that happen.

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¹ Goodhart, “What is the Common Law”, (1960) 76 *Law Quarterly Review* 45 at 46.

² *Condon v Pompano* [2013] HCA 7 at [1].