



Law Council
OF AUSTRALIA

Rule of Law and the Independence of the Judiciary

Speech delivered by Arthur Moses SC, President, Law Council of Australia at the Australian High Commissioner's Residence, Kuala Lumpur.

11 January 2019

Good evening.

Thank you, Your Excellency, for your hospitality in hosting tonight's reception to mark the Opening of the Legal Year 2019.

It is a great honour to be here in Kuala Lumpur and to deliver this address on behalf of the Law Council of Australia.

I am delighted to acknowledge here this evening The Right Honourable Tan Sri Datuk Seri Panglima Richard Malanjum, Ministers, President of the Malaysian Bar, and distinguished guests and colleagues. Thank you for welcoming me so warmly to your beautiful city.

The legal professions of Malaysia and Australia enjoy a strong relationship that has developed over decades. This friendship is anchored in our mutual respect for the rule of law, and our shared commitment to promoting and upholding the rule of law both within and across our borders.

As President of the Law Council of Australia, I look forward to working with you in the year ahead to continue to strengthen the bond between our professions, to serve and to advance the administration of justice throughout our region. I am humbled to have been invited to Malaysia as my first official engagement.

Across the world, at a time where we see democracies struggling with crises of confidence in their own institutions, Malaysia stands as a symbol of hope.

This is due in no small part to the tenacity and commitment of Malaysia's legal profession. The Malaysian Bar Association is regarded as a forthright, courageous and principled organisation devoted to the rule of law and judicial independence in Asia, and an inspiration to professions and Bars throughout Asia.

The Bar Association and its members, past and present, have fought to instil the central principles of democracy, human dignity and accountability in Malaysia's political and judicial systems.

Though the struggle has been arduous and continuous, it has paid enormous dividends.

The change Malaysia has undergone has been immense – and the world is watching.

The Malaysian Bar

It has been 30 years since the 1988 Judicial Crisis, which saw the Lord President of the Supreme Court of Malaysia, Tun Salleh Abas, dismissed for "judicial misbehaviour".

His crime – speaking out publicly in defence of the judiciary.

The crisis saw two other Supreme Court Judges also removed from the bench.

Two decades on, in 2008, an Eminent Persons Panel convened on the initiative of the Malaysian Bar found all three had been improperly removed from office, and that Prime Minister Mahathir's involvement in the crisis had been "unmistakably a direct unabashed attack on the rule of law with intent to subdue, if not subvert, the independence of the judiciary".

Though what happened in 1988 was unacceptable, it has steeled Malaysia's legal fraternity with an unrivalled strength and determination.

It also serves as a stark reminder of the importance of the central tenet of the Westminster system – the separation of powers.

In the foreword to Tun Salleh's seminal 1988 book, *May Day for Justice*, one of Australia's most eminent legal minds, former High Court judge Michael Kirby, reflected that:

*“Recounting this story again cannot reverse the injustice done to independent judges of courage and conviction. It cannot unmake the history that has been written. It cannot restore confidence in institutions that have been damaged. But it can serve to remind judges and other lawyers of the need for courage in defending time-honoured concepts. It can help perpetuate the recollection of the integrity of people appointed to judicial office so that their example serves as an inspiration to successors”.*¹

Such inspiration is particularly critical as the judiciary and legal fraternity look to safeguard their defining values in the future and in the face of new challenges.

As the world continues to change at a remarkable pace, we are all forced to adapt and transform – and the legal profession and judiciary are no exception. Open, receptive dialogue is essential to empower both to adapt to disruption in legal practice and legal markets, as they strive toward a common goal of a just, strong, accessible and independent legal system.

I am impressed to see that Chief Justice Malanjum, although newly appointed, has already shown his ability to be forward thinking and look to the future – to be receptive to ideas to innovate and reform the legal system.

His example is one that should be followed into the future, a legacy that can ensure Malaysia's judicial independence evolves in line with democratic principles.

Today, the Malaysian Bar continues to play a leading role in upholding the independence of the judiciary. An independent legal profession is inextricably linked with the independence of the judiciary – a nexus that has been acknowledged by numerous international bodies and major law associations.

In 2015, the International Bar Association Task Force on the Independence of the Legal Profession quoted former Malaysian Bar Council president Param Cumaraswamy when it concluded that the independence of the legal profession is not only a moral and ethical right but also a legal right by virtue of Article 38 of the *Statute of the International Court of Justice*.

LAWASIA – in which former Malaysian Bar Council presidents Chris Leong and Steven Thiru occupy senior positions and which was previously led by another former Malaysian Bar Council president, Dato Mah Weng Kwai – has previously passed a resolution in support of an independent legal profession, and the International Commission of Jurists has published international standards on this issue.

The Commonwealth Lawyers Association – of which former Malaysian Bar Council president Dato Cyrus Das is now an honorary life president – enshrines the integrity of the legal profession in its constitutional objectives

In recent times, both the Law Society of England and Wales and the American Bar Association – two of the largest and most influential national bar associations in the world

¹ Tun Salleh Abbas with K Das, *May Day for Justice*, Magnus Books, Kuala Lumpur, 1989

– have likewise undertaken initiatives which reinforce the importance of maintaining an independent legal profession.

I mention this because the Malaysian Bar epitomises the virtues and values of a national bar association which fiercely asserts its independence, something which is widely recognised and applauded by lawyers throughout the world and particularly in the Asia Pacific region.

In Australia, we have followed developments in Malaysia closely, especially the public statements made by Malaysian Bar President George Varughese emphasising an independent judiciary, judicial reform, and the need for the judiciary to be impervious to political pressure, to uphold and honour the rule of law.

The Law Council of Australia unreservedly supports these sentiments and is encouraged by the public demonstration of support shown by the Bar for this year's appointments of a new Chief Justice, President of the Court of Appeal and Chief Judge of Sabah and Sarawak.

Without fear or favour, the Malaysian Bar continues to fight for the rule of law. These efforts include the Bar's:

- Unabashed and determined advocacy for the abolition of the death penalty and corporal punishment;
- Support for the presumption of innocence and the right to a fair trial, notably in relation to charges against former Prime Minister Najib Razak in relation to the 1MDB scandal; and
- Defence of human rights in Malaysia, including on topics that resonate with current legal issues in Australia – law and security; deaths in custody; freedom of religion; indigenous peoples' rights; and observance of international human rights treaties and responsibilities.

The Law Council of Australia is privileged to share a long history with the Malaysian Bar. Our history was formalised through the signing of a Memorandum of Understanding in 2000.

The Law Council is very proud that this was the first MOU signed by the Malaysian Bar with any foreign counterpart – a testament to our enduring and continued relationship.

The MOU references:

- Our mutual interests in the law;
- A desire to strengthen cooperation and support the rule of law throughout the world; and
- The growing importance of trade and other ties between Australia and Malaysia, including the vital role the law plays in developing and maintaining these relationships.

These words are not empty. They have been matched by action and resolve and continue to represent our solidarity between professions.

In 2014, at the height of the abuse of Malaysia's sedition laws, the Malaysian Bar organised a protest march to deliver a petition to the parliament.

Former President of the Malaysian Bar, Chris Leong, was himself threatened with arrest for sedition for speaking out against the archaic laws. Mr Leong was by no means the first office bearer of the Malaysian Bar to find himself, or herself, in this situation, or to demonstrate such selfless service to the administration of justice. I recognise the presence of other former presidents of the Bar here this evening.

As you will all recall, more than 2000 members attended the march dressed in their robes and wigs despite the threat of violence and conspicuous silence of police, who had been asked to ensure the safety of participants.

The Law Council's former president, Duncan McConnel, marched with the Bar as an international observer, but also as a fearless supporter and reminder to the government that the rule of law knows no borders.

Whether the presence of international observers and their statements of support compelled police to safeguard the protestors is not known.

What is known, is that the Malaysian Bar did not stand alone at a time of great need.

In Australia, the legal profession has not faced threats of this nature. But we do face different challenges, and we must remain vigilant.

Values of democracy, the exercise of freedom and the rule of law are hard won but easily undermined, and complacency can be just as dangerous as ill intent.

Legislation, no matter how well-intentioned, that is ill-considered, rushed through our houses of parliament or poorly drafted undermines the administration of justice, human rights and the liberties we take for granted.

Therefore, in Australia it is also vital that the legal profession speak out in defence of the rule of law and the independence of the judiciary. As President, I take this responsibility extremely seriously.

To this end, we must also continue to support other nations fighting for a fair and just legal system.

Successful leaders see the opportunities in every difficulty rather than the difficulty in every opportunity and, without doubt, a hallmark of the Malaysian Bar is the quality of its leaders.

Indeed, they serve an institution older than Malaysia itself.

Speaking to a group of Australian lawyers in Sydney in 2016, Chris Leong observed that:

Whilst there may be times where we are powerless to prevent injustice, there must never be a time when we fail to act or speak up against it.²

These words are both an enduring hope and a personal challenge to each and every lawyer, regardless of which jurisdiction they practice in.

These words are also a timely reminder of the essential role the law plays in the lives of all people and the challenges Australia is facing.

² Chris Leong, Law Society of New South Wales Annual Members' Dinner, 27 October 2016, Sydney.

Last August, the Law Council released the landmark *Justice Project* report, which painted a grim picture of the challenges Australians face in accessing justice.

It found that Australia's legal assistance sector is critically underfunded.

While around 14 per cent of Australians live under the poverty line, legal aid is only available to eight per cent of people.

Our community legal centres, which are often relied upon for civil legal assistance, turned away nearly 170,000 people nationally in 2015-16.

Aboriginal and Torres Strait Islander-specific legal services are under extreme pressure, with some family violence prevention legal services turning away 30-40 per cent of people seeking help.

Furthermore, under-resourcing of Australia's court system is having a significant and deleterious impact on justice outcomes, including the delivery of timely and fair justice.

The Justice Project calls for a whole-of-government approach to justice issues, including the introduction of Justice Impact Tests, which would require governments to actively consider the trickle-down impact of new legislation or policies on the justice system.

It also highlights the need to address underlying causes of imprisonment and engagement with the justice system stemming from complex and multiple forms of disadvantage.

Other priorities include:

- The establishment of a national integrity commission;
- Promoting the development and adoption of a federal human rights statute and the consolidation of federal anti-discrimination law;
- Championing the rule of law in the South Pacific, including through the Law Council's central involvement and stewardship of the South Pacific Lawyers' Association;
- Supporting constitutional change and legislative reforms to promote self-determination and empowerment of Aboriginal and Torres Strait Islander peoples;
- Working to address the critical issue of indigenous incarceration and deaths in custody;
- Advocating for criminal and national security laws that accord with the rule of law; and
- Continuing to promote the adoption of a legislative and policy response to asylum seekers that is clear and readily available, applied fairly and equally, and subject to appropriate oversight and review.

While we are privileged to have strong institutions and adherence to the rule of law in Australia, there is still much work to be done to safeguard these. Many areas require urgent and significant reform, and with a national election to be held in Australia in 2019

we will be calling for all candidates to put forward policies that address these areas of need.

Access to justice is a fundamental right. Unfortunately, it is not always a reality.

That is why our commitment across borders to the rule of law will always be important, as is our solidarity and encouragement of each other.

Ladies and gentleman, in conclusion, we are strongest as a profession when we stand together with our colleagues across jurisdictions and across borders.

On behalf of the Law Council of Australia and the Australian legal profession, we look forward to continuing our close relationship between our legal professions as we face the challenges and seize the opportunities in the year ahead.

I wish you all the best in 2019.

Disclaimer:

This document remains the property of the Law Council of Australia and should not be reproduced without permission. Please contact the Law Council to arrange a copy of this speech.

Patrick Pantano

Director, Public Affairs

T. 02 6246 3715

E. Patrick.Pantano@lawcouncil.asn.au