

THE HON T F BATHURST AC
CHIEF JUSTICE OF NEW SOUTH WALES
THE PLACE OF LAWYERS IN POLITICS
OPENING OF LAW TERM DINNER

31 JANUARY 2018*

1. As a young boy learning his table manners in the 1950s, the old adage “never discuss politics in polite company” was a lesson that was not lost on me. Even for those of you who did not grow up in the era of Emily Post, I am assured the adage still holds true.
2. When I stood here to give this same address last year, I was under the naïve impression that I had given the topic a wide berth. That is, until I woke to the unwelcome image of my face splashed across the front page of the morning paper. So, eager to avoid my naivety being mistaken for political pointedness and at the risk of casting aspersions on the “polite” character of the present company, I’ve decided to throw the old rule book out the window, launch myself into the bear pit and confront the issue head on. Tonight I want to ask: to what extent should lawyers, in their professional capacity, involve themselves in political debate, criticise government policy, or advocate for particular political outcomes.
3. The particular topic was inspired, oddly enough, by an incident which occurred in discussion surrounding the same sex marriage issue. You will recall that Mr Alan Joyce, the Chief Executive Officer of Qantas came out in support of a ‘Yes’ vote at the plebiscite. It was suggested to him that he should stick to his knitting. That comment interested me for three reasons. First, it was not a comment that I’d heard since the time I was learning my table manners in the 1950s. Second, knitting and managing and running an international airline seems an odd analogy. And third, and most seriously, I wondered if lawyers should stick to their knitting, and indeed, what is their knitting? It also made me wonder whether I am correct in encouraging lawyers in my admission speech to “correct ignorance in public debate”.
4. The revered American legal scholar, Roscoe Pound, famously claimed that the most important defining feature of a profession is that it “is

* I express thanks to my Research Director, Ms Bronte Lambourne, for her assistance in the preparation of this address.

practiced in a spirit of public service”.¹ On one view, a lawyer’s duty of public service is satisfied in the honest, competent and diligent provision of legal services: by faithfully going about the business of the law, a legal practitioner administers and facilitates an essential public good. At one time, however, fulfilment of the duty of public service was envisioned in the figure of the lawyer-statesman, a lawyer who, having mastered the virtue of practical wisdom in the resolution of legal disputes, applied these skills to broader areas of social policy, often undertaking a period of parliamentary service.² A notable example in this State was Sir James Martin, after whom Martin Place is named. He served as Premier on two occasions and subsequently as Chief Justice.

5. Indeed, there is a deep historical connection between lawyers and politicians, and not just as two of the most reviled professions. Those who structured the governments of many modern democracies were most commonly lawyers. In Australia, we need only observe that our first Prime Minister, Sir Edmund Barton, resigned from that position to become a founding justice of our High Court but beyond this, and for obvious reasons, many of the constitutional drafters and participants in the federal conventions were both lawyers and politicians – Andrew Inglis Clark, Samuel Griffith and Alfred Deakin are to name a notable few.
6. While the lawyer-statesman may be a dying breed, it continues to be common for our Prime Ministers to claim a legal background. To update a statistic provided by the current Attorney-General at the inaugural Sir Garfield Barwick address in 2010, in the 116 years since Federation, Australia has been led by a barrister for over 41 years and by a solicitor for another 16 and a half years, members of the profession thereby having led the nation in aggregate for just over 57 years.³
7. As key contributors to the founding of modern democracy, there are many reasons for arguing that lawyers have an ongoing role in ensuring its continuing health and preservation, and not only by standing as members of Parliament. As the beneficiaries of a legal education, lawyers belong to a privileged class who can navigate the complexities of legislative drafting and understand the concrete implications of policy decisions, with the obligation to use this knowledge to the advantage of society. As a class who profits from the monopoly on legal practice,

¹ Roscoe Pound, “What is a Profession - the Rise of the Legal Profession in Antiquity” (1944) 19(3) *Notre Dame Law Review* 203, 205.

² See Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Harvard University Press, 1993).

³ George Brandis QC, “The Lawyer’s Duty to Public Life” (Speech delivered at the Sir Garfield Barwick Address, 28 June 2010, Sydney).

lawyers may repay their debt to society by taking on responsibilities as guardians of democracy and the rule of law. As a profession that is independent of elected office, separate from both government and societal factions, with the capacity for long term vision, lawyers are specially placed to “mediate between populism and plutocracy in the service of the common good”.⁴

8. In recent decades, and particularly with the rise of commercialism, many have lamented the apparent loss of the profession’s soul, calling upon lawyers to revive the idealism and selflessness which supposedly characterised its earlier forms.⁵ In the current political climate, we may be witnessing a re-energising of the profession. In his speech to the International Bar Association last year, former Attorney-General George Brandis observed a variety of international phenomena – from the defiance of the international rules-based order in East Asia to the emergence of an aggressive populism in the West – which threaten human rights and “the legitimacy of the liberal democratic model of governance itself”.⁶ While noting that these involved profound political questions and thus invoked the domain of politicians, Senator Brandis urged that such threats also invited the concern of lawyers who had obligations as custodians and guardians of the rule of law.⁷
9. In some ways, international threats to the rule of law may be a call to arms for lawyers. Last year as American lawyers mobilised to assist detained travellers affected by the Trump administration’s travel ban, crowds cheered outside the federal courthouse in Brooklyn, congregations at the San Francisco airport chanted “let the lawyers in” and the media headlines reflected something they had not in decades – an appreciation for the legal profession.⁸ I’m not sure I envy those judges or feel sorry for them. On balance, I hope I never have a crowd outside the court cheering, or more probably hissing, me.

⁴ Robert W Gordon, “The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections” (2010) 11 *Theoretical Inquiries in Law* 441, 453.

⁵ See eg, Kronman, above n 2; The Hon Justice Michael Kirby AC CMG, “Legal Professional Ethics in Times of Change” (Speech delivered at the St James Ethics Centre Forum on Ethical Issues, 23 July 1996, Sydney).

⁶ George Brandis QC, “Address at the Opening of the International Bar Association annual Conference” (Speech delivered at the International Bar Association Annual Conference, 8 October 2017, Sydney).

⁷ Ibid.

⁸ See eg, Jonah Engel Bromwich, “Lawyers Mobilize at Nation’s Airports After Trump’s Order” *New York Times* (29 January 2017); Dhalia Lithwick, “The Lawyers Showed Up” *Slate Magazine* (28 January 2017); Kaveh Waddell, “An Army of Attorneys Descends on Dulles” *The Atlantic* (29 January 2017); Mark A Cohen, “With U.S. Democracy In Crisis, It’s Suddenly, ‘Thank God For Lawyers’” *Forbes* (31 January 2017).

10. In light of this increasingly volatile and polarised political climate, there are two questions I want to grapple with tonight concerning the role of lawyers in public affairs. First, while it may be accepted that lawyers have a duty to serve in the public interest and pursue the common good, how do we define the common good; are lawyers in fact better positioned to determine this or are questions of policy best deferred to elected politicians? Secondly, even if lawyers do have a role in politics, what are the appropriate channels or modes for that participation?
11. To begin, I want to consider the place of politics in the purely professional realm, that is, in the context of the lawyer-client relationship.
12. In litigation and the exercise of state legal power, law is ostensibly anathema to politics. The legal system – from the jurisdiction possessed by the courts, to the character of the judicial officers who constitute them, to the legal representatives who appear before them – is infused by the cardinal values of independence and impartiality. This resides in the doctrine of separation of powers, one of the cornerstones of Australian democracy and, it may be argued, “the ‘most resilient’ of the fundamental implications from the text and structure of the Constitution”,⁹ which dictates that the judicial power should be strictly insulated from the exercise of legislative or executive powers.
13. This manifests itself, first, in the subject matter over which it is deemed appropriate for courts to adjudicate. Courts are not considered the appropriate forum to determine questions of pure policy, involving a decision between different policy outcomes or different methods of achieving those outcomes, so long as there is no legal criteria by which to judge that decision.¹⁰ Moreover, courts, generally speaking, confine themselves to the resolution of existing disputes between subject and subject and state and subject. This may be contrasted with the Supreme Court of India, for example, which from time to time has made general declarations or orders on matters which we would more commonly regard as within the province of the legislature on the basis that part of the Court’s remit is to protect the fundamental rights conferred in the Indian Constitution. Thus, in a recent decision, the Court unanimously declared that everyone had a right to privacy, as that was part of the right to life and personal liberty conferred by the Constitution. I don’t know quite how Google, Facebook et al will cope with that decision.

⁹ Fiona Wheeler, “The rise and rise of judicial power under Chapter III of the Constitution: A decade in overview” (2000) 20 *Australian Bar Review* 282, 283.

¹⁰ See eg, *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274.

14. Under our system of democracy, such decisions are left to be settled by the majoritarian parliamentary system, for which decisions politicians are electorally accountable. In administrative law, this is further reflected in the legality/merits distinction which demands that courts only adjudicate upon the lawfulness of governmental action and not the worthiness or correctness of its decision. Although it must be recognised that the bright line distinction is being somewhat blurred, particularly in cases where judicial relief is sought on the ground of unreasonableness.¹¹
15. The rules of standing also reinforce the role of the courts in our adversarial system which is to assess individual claims rather than vindicate public rights at large. A person seeking to enforce a public right must show either that they have a special interest in the subject matter or that some private right has been infringed. One of the reasons for this is to prevent challenges motivated by purely intellectual or emotional concerns rather than tangible stakes and thus to avoid more theoretical policy debates.¹²
16. Secondly, apart from delineating the appropriate subject matter for legal disputes, the separation of powers ensures that the judicial officers who resolve those disputes both are in fact free from political influence and are seen to be independent and impartial.¹³ This is a principle that has only been strengthened in modern jurisprudence.¹⁴
17. It is clear that courts and judges have no role to play in partisan politics. The question becomes whether legal representatives, as the bridge between society and the legal system, must also exclude political considerations from their professional role. In other words, to what extent can a barrister or solicitor let their own politics influence their choice of client or presentation of a client's case?
18. Under the traditional ethical model, the answer is clearly, to no extent at all. Subject to the practitioner's duty to the court,¹⁵ a practitioner must act in the best interests of the client,¹⁶ in the case of a barrister they "must promote and protect fearlessly ... the client's best interests ... and do so without regard to his or her own interest".¹⁷ While exercising

¹¹ *Minister for Immigration v Li* (2013) 249 CLR 332; [2013] HCA 18, [66]-[76], [90], [111].

¹² *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493, 530; see also *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27.

¹³ *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1, 14.

¹⁴ See *Kable v Director of Public Prosecutions* (1996) 189 CLR 51.

¹⁵ *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW), r 3.1 (ASCR); *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW), r 23 (CBR).

¹⁶ ASCR r 4.1.1.

¹⁷ CBR r 35.

independent forensic judgment,¹⁸ a practitioner must follow client instructions¹⁹ and may not express views in court which convey their personal opinion on the merits of the case.²⁰

19. The duty of the practitioner, grounded as it is in client loyalty, depends upon sublimation of the self with no room for the lawyer's own moral or political vision. Accordingly, the images associated with the legal practitioner are those of servitude. The disinterestedness required of legal representatives asks that they devote their best efforts to presenting their client's case without personally judging the legitimacy of those interests. The reason that such judgment is excluded rests in the adversarial model which holds, in the famous words of Lord Eldon, "that truth is best discovered by powerful statements on both sides of the question".²¹ It is a characteristically legal way of thinking and reasoning which assesses the merits of an argument in principle divorced from personal preference and prejudices.²²
20. One manifestation of the principle of disinterestedness, which applies only to barristers, is the cab rank rule. Now before all the solicitors in the room say we did not come here to listen to an ancient barrister talk about the Bar and how altruistic it is, I am only using it to show how the rule illustrates one view of the role of the lawyer in representing his or her clients' interests irrespective of their personal beliefs. Regardless of the strength or enforceability of the actual rule, the spirit of the rule is to secure access to the legal system for all, including the powerless and unpopular. Even if a lawyer does not approve of a client's cause, they are obliged to offer their technical skills in support of it, since this is the only way the client may fully participate in the legal system.
21. However, disinterestedness on behalf of the legal representative does not mean that a client's cause goes unjudged, it simply means that such judgment is deferred to the law and lawmakers rather than legal advocates. As Thomas Erskine said in his famous defence of Thomas Paine, who had been charged with seditious libel for his publication of *The Rights of Man*, "if the advocate refuses to defend from what he may think of the charge or of the defence, he assumes the character of the judge".²³

¹⁸ ASCR rr 17.1-17.2; CBR rr 42-43.

¹⁹ ASCR r 8.1.

²⁰ ASCR r 17.3; CBR r 44.

²¹ *Ex parte Lloyd* (1822) Mont 70, 72.

²² Bret Walker SC, "Lawyers and Politics" (Speech delivered at the Hal Wootten Lecture, 4 August 2016, Sydney).

²³ (1792) 33 Geo III, 412.

22. The cab rank rule also serves a dual purpose: to secure access to counsel for the unpopular and to save counsel from “dogmatic identity with the client’s cause”.²⁴ The lawyer must have “political immunity”²⁵ if access to justice is to be assured. Once a lawyer begins selecting their clients, they risk becoming chargeable for the clients’ views. In such an environment, lawyers are likely to feel pressure to only represent those with opinions that are widely accepted or mainstream at the time.
23. Disinterestedness is not a trait peculiar to lawyers but is shared by many professions. For this reason, the cab rank rule has been likened to the doctor’s Hippocratic Oath.²⁶ Just as a doctor is to apply their medical skill and knowledge to treat a patient without judging whether the patient is worthy of that treatment a lawyer is to apply their legal skills and knowledge without regard for the merit of the client’s cause. Prominent Australian defence barrister, Robert Richter QC used this analogy to magnify the separation of personal from professional ethics: “If I were a doctor and they brought Hitler in with a bullet wound” he said, “I’d do my job and treat him. Maybe later, as a person I’d kill him”.²⁷
24. The analogy is clearest for the criminal defence lawyer who is protecting the liberty of the client as a doctor is protecting a life. However, some have argued that the principle begins to break down when entering the realm of civil litigation and large corporate clients.²⁸ In *Giannarelli v Wraith*, Justice Brennan identified one of the major justifications for the cab rank rule, observing that “If access to legal representation before the courts were dependent on counsel’s predilections as to the acceptability of the cause or the munificence of the client, it would be difficult to bring unpopular causes to court and the profession would become the puppet of the powerful.”²⁹
25. If the rationale for the cab rank rule is to secure representation for the powerless, must a barrister accept a brief from a powerful but unsavoury client with whose political or social activities the barrister disagrees? In a society shaped by corporate influence, the terms have arguably changed and the barrister may start to be “seen more as a gun for hire

²⁴ Gordon Samuels AC, “No More Cabs on the Rank? Some Reflections About the Future of Legal Practice” (1998) 3(1) *Newcastle Law Review* 1, 3.

²⁵ Pauline O’Brien, “Changing Public Interest Law: Overcoming the law’s barriers to social change lawyering” (2011) 36(2) *Alternative Law Journal* 82, 83.

²⁶ Samuels, above n 24, 1, fn1.

²⁷ Abbe Smith, “Defending the Unpopular Down Under” (2006) 30 *Melbourne University Law Review* 495, fn 104.

²⁸ See eg, Samuels, above n 24, 12.

²⁹ (1988) 165 CLR 543, 580.

by the powerful than a cab for hire by anybody”.³⁰ Some may consider the cab rank rule has morphed into the gunslinger rule or perhaps the hire car rule.

26. With the view that advocates should be able to mould their choice of clients to their own social and political ideals we witness a new approach to legal ethics. In the United States there is a considerable body of literature on this phenomenon known as “cause lawyering”.³¹ The phrase and practice are less common in Australia, but not absent. Christine Parker, a professor at Melbourne Law School, labels this ethical model of lawyering the “moral activist” in contrast to, amongst others, the “adversarial advocate”.³² Unlike the adversarial advocate approach, which assumes a functioning system and defers moral judgment to the law, the moral activist argues that the system might need to be changed and that lawyers have a responsibility to “use legal practice to change people, institutions and law to make them conform better to general ideals of social and political justice”, which includes representing “only those clients that embody ‘worthy causes’”.³³ Such an approach disavows any separation between the professional and the political.³⁴
27. There are, undoubtedly, significant limitations to the cab rank rule and situations where an advocate’s aversion to a client’s cause may be so significant as to create a genuine ethical dilemma – the case of Robert Richter, a defence barrister and member of the Jewish community, when asked to represent alleged Nazi war criminal, Konrad Kalejs, in his extradition hearing is often cited as a good example of this³⁵ – but abandoning the rule and the traditional ethical model wholesale is dangerous. It is notable that Richter still felt compelled to represent Kalejs even after considerable objection from the Jewish community and ultimately only declined the brief on conflict of interest grounds.

³⁰ Sir Gerard Brennan AC KBE, “Profession or Service Industry: The Choice” (Speech delivered at the Australian Bar Association Conference, San Francisco, 18 August 1996).

³¹ See especially, Stuart A Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (Yale University Press, 1974); Austin Sarat and Stuart Scheingold, *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford University Press, 1998); Stuart A Scheingold and Austin Sarat, *Something to Believe In: Politics, Professionalism, and Cause Lawyering* (Stanford University Press, 2004); Austin Sarat and Stuart A Scheingold, *Cause Lawyers and Social Movements* (Stanford University Press, 2006).

³² Christine Parker, “A Critical Morality for Lawyers: Four Approaches to Lawyers’ Ethics” (2004) 30 (1) *Monash University Law Review* 49.

³³ *Ibid* 66.

³⁴ See Richard Abel, “The Professional is Political” (2004) 11 *International Journal for the Study of the Legal Profession* 131.

³⁵ See Parker, above n 32.

28. Once one abandons the lodestar of the client's interests, the lawyer is treading in murky waters, guided only by an amorphous, personal sense of the public good and allowing the law to sway with political opinion. Despite currently retaining the cab rank rule, we already witness what happens when the rule fails to be properly understood or respected. Perhaps the greatest example, in a political context, was the criticism that attended Dr Evatt's acceptance of the brief for the Waterside Workers Federation in the *Communist Party Case* where attempts were made in Parliament to smear Dr Evatt as a communist sympathiser in order to politically discredit him.³⁶ This, ironically enough, was done without regard to what the then Prime Minister, Sir Robert Menzies, had said in an earlier incarnation as a lawyer: "a lawyer is never seen to better advantage than when representing a client against whom every man's hand is turned".³⁷ The criticism prompted a bipartisan response from the Victorian bar committee, tabled in Parliament, which clarified that "a barrister is not entitled to refuse a brief merely because of the character of the cause or of the client, or because he does not share the ideals involved in the former or dislikes the latter".³⁸ Evatt himself responded that he did not see this as "a question of counsel's rights, but of counsel's *duty*".³⁹
29. Attacks against lawyers on the basis of their clients are, unfortunately, not a phenomena confined to the politically toxic environment of the 1950s. To this day, politicians on both sides of the aisle have been guilty of using the fulfilment of an advocate's duty of client loyalty to political advantage, whether it be members of the Labor party criticising a Greens candidate for representing brown coal,⁴⁰ or members of the Liberal party discrediting advocates who represent asylum seekers.⁴¹
30. Furthermore, it is not desirable that lawyers start being assigned political labels or affiliations, a practice which, as demonstrated in the United States, has the propensity to bleed into the judiciary. In this regard I echo Bret Walker SC in his address last year at the Hal Wootten lecture in which he remarked upon the foreignness to an Australian audience of the fuss that surrounded opposing counsel in *Bush v Gore* when they

³⁶ George Winterton, "The Significance of the Communist Party Case" (1992) 18 *Melbourne University Law Review* 630, 648.

³⁷ See A M Gleeson AC, "Graduation Ceremony" (Speech delivered at the University of Sydney on 7 May 1999).

³⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 October 1950, 1547.

³⁹ *Ibid* 1550.

⁴⁰ See eg, Royce Millar and Rafael Epstein, "Outcry at Greens Smear" *The Age* (1 November 2010).

⁴¹ See eg, Bianca Hall, "Lawyers representing asylum seekers are 'un-Australian': Peter Dutton" *Sydney Morning Herald* (28 August 2017).

appeared together in the same-sex marriage case.⁴² The established lack of identity between counsel and their clients' causes in Australia speaks to this indifference to lawyers with different political or ideological allegiances appearing together. With US Senate reform in recent years diminishing the need for bipartisan support of federal judicial appointments, such politicisation of the legal system has only been exacerbated. Fortunately, however, governments of both political persuasions in this country have not appointed judges on the basis of their political ideology and certainly not on the basis of parties whom they have represented from time to time.

31. All that being said, in Australia, solicitors are not bound by the cab rank rule and it is of course common practice for solicitors to narrow their choice of clients, including on ideological grounds, the most notable example being those who practice in public interest law. Unlike the traditional ethical model, this may see a reorientation of the lawyer's focus around causes rather than clients or may involve seeking out a client to fit the chosen cause.
32. While in no circumstances is this always the case, such a subordination of client to cause may sometimes be necessary to resolve important legal questions affecting society. An example of this was the action taken by the Victorian Public Interest Law Clearing House in the wake of the Tampa crisis. Being unable to contact rescues of the Tampa to receive any instructions or obtain authority to bring an application, the Victorian Council for Civil Liberties and a solicitor, Mr Vadarlis, were named as the plaintiffs. In this way, the action was shaped around the cause rather than the wishes of an individual client.⁴³
33. While the action was ultimately unsuccessful, the Full Federal Court determined, by majority, that there should be no costs order made against the plaintiffs. In their reasons, Chief Justice Black and Justice French, as he then was, justified this decision on the basis that the case "involved matters of high public importance and raised questions concerning the liberty of individuals who were unable to take action on their own behalf to determine their rights. There was substantial public and, indeed, international controversy about the Commonwealth's actions. The proceedings provided a forum in which the legal authority of the Commonwealth to act as it did with respect to the rescued people

⁴² Walker, above n 22.

⁴³ Parker, above n 32, 67.

was, and was seen to be, fully considered by the Court and ultimately, albeit by majority, found to exist.”⁴⁴

34. Nevertheless, lawyers who adopt an approach to lawyering which may have a tendency to preference causes over clients must be careful to ensure that their desire to obtain a certain policy outcome does not eclipse the legal and personal needs of the client, or for that matter their obligation to the court. This may be exacerbated in the case of disadvantaged clients where, guided by a public interest goal, the lawyer may be less mindful to frequently seek and clarify instructions.⁴⁵
35. The truth is, the choice for lawyers is not limited to one between a hired gun and a moral crusader, the traditional ethical model does have room for public interest concern. Zealous advocacy of the client to the exclusion of all other interests better reflects the American ethical framework than the Australian one. In Australia, the practitioner’s primary duty is to the court. As “officer of the court and guardian of the legal system”,⁴⁶ the Australian practitioner brings an independent judgment to their practice, as reflected in the motto of the New South Wales Bar Association, “Servants of All Yet of None”.
36. In the unique advisory position that they hold, lawyers have the ability to influence client behaviour. This is something that has proved particularly effective in the corporate client context. Client counselling need not involve self-righteous moralising but simply ensuring that the client understands the lack of identity between a legal right to do something and the correctness of that decision. In this way, the lawyer may preserve his or her own conscience and duty to society without overriding client autonomy by denying access to full legal information.⁴⁷
37. Similarly, lawyers can assert influence by improving procedural practices, for instance, by encouraging clients to act in accordance with the model litigant obligations currently imposed on government agencies. It should not be forgotten that the lawyer acts in the public good by ensuring that disputes are litigated only where necessary, that litigation is run efficiently and cheaply and that contentious legal questions affecting the public at large are resolved in court with the benefit of full argument, regardless of the substantive worthiness of the

⁴⁴ *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229, 242 [29].

⁴⁵ Penny Martin, “Defining and refining the concept of practicing in ‘the public interest’” (2003) 28(1) *Alternative Law Journal* 3, 5.

⁴⁶ Parker, above n 32, 61: Parker labels this approach to lawyer’s ethics the “responsible lawyer” approach.

⁴⁷ See Stephen Pepper, “Lawyers’ Ethics in the Gap between Law and Justice” (1999) 40 *South Texas Law Review* 181.

individual client's cause. Indeed, the requirements of s 56 and the succeeding sections of the *Civil Procedure Act* impose this obligation on lawyers.

38. It is necessary then to shift our frame of reference and consider the role of lawyers outside the representation of individual clients, as a profession as a whole. Do lawyers, as a professional body, have an obligation to engage with issues of broad social policy and "to take public stances for or against issues affecting the public interest"?⁴⁸
39. In answering this question I want to first focus on the role of professional bodies such as law societies and bar associations and then to consider the role of the individual lawyer in a more personal capacity. It is a not uncommon view that professional legal bodies, as representatives of a diverse constituency, should remain apolitical, adhering to policies of neutrality as regards the government of the day or as to the policies it adopts. Under this view, to speak on political issues is, as former Attorney-General Phillip Ruddock has said, "the professional equivalent of imperial overreach".⁴⁹ In his opinion, "lawyers can and should participate in debate on these issues. But these are issues of personal political conviction, not professional solidarity".⁵⁰
40. At the other end of the spectrum is the belief that "a Law Society or a Bar Council should function as the collective conscience of the legal profession".⁵¹ However, to speak of collective action on behalf of a body as diverse as lawyers is, as many critics have pointed out, unrealistic.⁵² Generally speaking, there are good reasons for implementing policies of neutrality. Most day-to-day political issues are questions of ideological preference that do not implicate the profession, nor can lawyers claim expertise in knowing the democratic will of the people. Furthermore, if legal professional bodies become embroiled in partisan politics they will fail to enjoy the confidence of all those they seek to represent.
41. However, due to the inevitable intersection between law and politics there are certain political issues that *will* implicate the profession, either in its silence or

⁴⁸ Lawyers, Conflict and Transition Project, "The Effectiveness of Bar Associations in Conflict & Crisis" (December 2016) available at: <https://lawyersconflictandtransition.org/themainevent/wp-content/uploads/2014/07/THE-EFFECTIVENESS-OF-BAR-ASSOCIATIONS-IN-CONFLICT-AND-CRISIS.pdf>

⁴⁹ Phillip Ruddock, "A Return to Traditional Ethics – the Role of the Modern Lawyer" (Speech delivered at the Australian Corporate Lawyers Association National Conference, Sydney, 3 November 2006).

⁵⁰ *Ibid.*

⁵¹ Kieran McEvoy and Rachel Rebouche, "Mobilising the Professions?: Lawyers, Politics and the Collective Legal Conscience" in J Morison, K. McEvoy and G Anthony (eds) *Judges, Human Rights and Transition* (Oxford University Press, 2007) 275, 275 citing Interview Northern Ireland barrister, 25th August 2005.

⁵² *Ibid* 37.

its advocacy.⁵³ An important question to ask in this context is when does 'neutrality' become 'complicity'?

42. Kieran McEvoy is a professor at Queen's University Belfast who has studied the role of lawyers in conflicted or transitional country contexts. He warns that not 'speaking out' in some circumstances "is in fact a very meaningful act of language, an inherently active rather than passive response".⁵⁴ An interesting case study for these purposes is provided by the actions of professional legal bodies in Northern Ireland during the political violence between Catholic Nationalists and Protestant Unionists in the latter half of the 20th Century.
43. McEvoy describes the self-image of lawyers in Northern Ireland during this conflict as one "of a profession striving to remain 'above' politics".⁵⁵ This fierce commitment to neutrality, however, resulted in a silence that was, perversely, "quintessentially political".⁵⁶ The first political issue in which the profession's silence was noteworthy was the unionist government's expansion of emergency powers in response to republican violence, in particular, the power of the Minister for Home Affairs to issue an internment order against a suspected terrorist without legal trial. While an internee could make legal representations to the Minister's advisory committee, the traditional rules of evidence and appeal did not apply. Ultimately, in the words of Lord Gardiner, who conducted an inquiry into the emergency laws, "the quasi-judicial procedures [were] a veneer to an enquiry which ... [had] no relationship to common law procedures".⁵⁷
44. While a small minority of lawyers expressed their opposition to the process of internment without trial, on the whole, the legal profession's response was one of cooperation in the interests of political abstention. A lack of audible dissent also accompanied the suspension of jury trials. While there may have been reasonable arguments for suspension, such as jury intimidation, the lack of debate within the legal community was conspicuous. McEvoy notes that no formal submissions were made by either the Law Society or Bar Council to any of the reviews or commissions into the emergency laws.⁵⁸ This was justified on the ground that "taking 'a political stance' on issues such as emergency law would create sectarian division in the legal community".⁵⁹ The

⁵³ Lawyers, Conflict and Transition Project, above n 48.

⁵⁴ Kieran McEvoy, "What Did the Lawyers Do During the 'War'? Neutrality, Conflict and the Culture of Quietism" (2011) 74(3) *Modern Law Review* 350, 369.

⁵⁵ McEvoy and Rebouche, above n 51, 283.

⁵⁶ McEvoy, above n 54, 369.

⁵⁷ Lord Gardiner, *Report of a Committee to Consider in the Context of Civil Liberties and Human Rights, Measures to Deal with Terrorism in Northern Ireland* (HMSO, 1975) 44.

⁵⁸ McEvoy, above n 54, 365.

⁵⁹ *Ibid* 368.

result, however, was a failure to contribute to important issues affecting the justice system.

45. A second, and possibly more egregious, failure of the legal profession came in its reluctance to respond to death threats made against lawyers who had represented leading republicans. After the murder of a defence solicitor who was killed by a Loyalist paramilitary organisation with allegations of state collusion, the Law Society took no official action in calling for an inquiry or pushing for measures to protect the independence of lawyers,⁶⁰ meanwhile the Bar Council seemed to hold that the issue was “beyond their purview” since the threats were directed against solicitors rather than barristers.⁶¹
46. In preventing the Law Society’s Human Rights Committee from discussing a report into possible state collusion, the Law Society asserted that there was “an overtly political dimension” to the issue and that it “wanted to be absolutely neutral”.⁶² Meanwhile, when a solicitor who received a death threat sent a letter to the Law Society calling for action, he was told that this was not a matter for the Law Society and that he should take it up with his political representative.⁶³ This strict separation between law and politics is clearly untenable. No matter the profession’s commitment to independence and non-partisanship, there are some issues for which inaction is ultimately as political as action.
47. A second case study which illustrates this point is that of the legal profession in apartheid South Africa. In David Dyzenhaus’ famous critique of judges serving during the apartheid regime, he chronicles a tale of a profession deeply implicated in the atrocities of the apartheid era, a role played by silently maintaining and reinforcing the existing legal system and refusing to confront the political implications of legal acts.⁶⁴ In the final report of the Truth and Reconciliation Commission, it was noted that a general theme permeated the submissions of the legal establishment, including the General Council of Bars and the Association of Law Societies, namely, that “the doctrine of parliamentary sovereignty under the Westminster system required of lawyers ... to respect, and indeed to defer to, the will of the majority in Parliament”.⁶⁵ In their written submissions to the Commission, the Associated Law Societies wrote that “politics was not the business of the organised profession”,⁶⁶ while

⁶⁰ Ibid 370.

⁶¹ Ibid.

⁶² Ibid 371 citing Interview with Law Society representative, 13 December 2002.

⁶³ Ibid citing Interview with solicitor, 21 February 2003.

⁶⁴ David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Hart Publishing, 1998).

⁶⁵ Truth and Reconciliation Commission of South Africa, *Report* (1998) vol 4, 95.

⁶⁶ Heide Rombouts, “The Legal Profession and the TRC: A Study of a Tense Relationship” (February 2002) available at: <http://www.csvr.org.za/docs/trc/legalprofession.pdf>

the General Council of Bars submitted that the Bar “should concern itself only with issues relating to the administration of justice, and should not engage itself in ‘political’ issues or matters of policy”.⁶⁷

48. In the face of these submissions, the Commission found that “the courts and the organised legal profession generally and subconsciously or unwittingly connived in the legislative and executive pursuit of injustice”, the most prevalent form of subservience being found in the maxim “silence gives consent”.⁶⁸ The organised profession’s attitude was described as one of ‘obsequiousness’ to government policies and ‘complacency’ in the face of injustice.⁶⁹ This damning rebuke emphasises the fallacy of political neutrality in certain unjust environments.
49. These are extreme examples, but they raise the question of what criteria professional legal bodies should use in guiding their response to social and political issues; in what circumstances are the legal profession justified or obliged to speak out? Three options appear to emerge from the case studies.
50. First, the narrowest ground on which lawyers might justify political intervention is when members of the profession are directly affected. Even on this narrow ground, the professional bodies in the Northern Ireland example would have been called upon to act to protect the interests of its members in the face of death threats.
51. At the International Bar Association Conference in Sydney last year, representatives from bar associations and legal societies spoke about the attitude of their professional bodies to political participation. An example of an approach grounded in purely professional interests can be found in the British profession. The Executive Director of External Affairs for the Law Society of England and Wales used the example of Brexit to illustrate their general policy. He began by explaining that the Law Society did not take a position on Brexit since it purported to represent up to 160 000 solicitors who held a multiplicity of views on the issue.⁷⁰ Rather than “take a full-throated position [on] ... an intensely political and controversial issue for the United Kingdom”, the Society claimed to support its members on a series of more narrow issues.⁷¹ So for instance, the Society supported retention of membership of the single market since leaving the single market would deprive UK lawyers of

⁶⁷ South African Press Association, “Bar Council Provides TRC with Three Volume Submission” (21 October 1997) available at:

<http://www.justice.gov.za/trc/media%5C1997%5C9710/s971021i.htm>

⁶⁸ Truth and Reconciliation Commission of South Africa, *Report* (1998) vol 4, 101.

⁶⁹ *Ibid* 103.

⁷⁰ Robert Khan, “The balance between migration, international security, rule of law and terrorism” (Speech delivered at the International Bar Association Conference, Bar Issues Committee Showcase, Sydney, 11 October 2017).

⁷¹ *Ibid*.

the ability to practice in the EU. As regards immigration, the Society claimed not to dictate policy but rather to focus on professional interests, supporting policies which allowed skilled migration so that lawyers could come and work in UK law firms. In this way, the Law Society claimed to avoid “taking a big policy decision but nevertheless doing things that we think are in the interests of our members and society”.⁷²

52. This reflects what has been described as the “trade union role”, leading to involvement in policy issues which impact directly on lawyers. As law societies and bar associations exist to represent the profession, it is quite appropriate that in that capacity they speak out and seek to influence policies which directly affect the lawyers they represent.
53. A second possible criterion, and one by which it is common for professional bodies to assert an obligation to actively speak out in public debate, is in response to perceived threats to the rule of law. In this vein, former High Court Chief Justice Sir Gerard Brennan has suggested that “the lawyer’s public role ... is to advocate the importance of preserving the safeguards of the rule of law unless it is tolerably clear that any proposed abrogation of the traditional laws, practices and procedures is necessary to protect the community, that the abrogation is proportionate to the apprehended harm and has a substantial prospect of achieving the desired protection.”⁷³
54. By addressing thorny issues like migration and security through the prism of the rule of law, lawyers remain planted within their area of professional expertise. This was a concern evident in the remarks of representatives at the International Bar Association Conference last year. Many of the represented associations argued that while they did not have a voice in politics or a right to dictate policy they had a mandate to ensure that any policy emanating from their government complied with the rule of law. The Vice President of the German Bar Association, for example, stated that the German Bar Association was “not in a position to take a political view”, both because it was forbidden by statute and because it was charged with representing lawyers with a wide range of political opinions, nevertheless, one of its obligations was to scrutinise legislation for compliance with the rule of law.⁷⁴ This meant, in particular, a focus on procedural rights. In the context of migration and security, this obligation manifested in the form of ensuring that immigrants had access to proper legal advice and that those charged with offences were provided with a proper legal defence.

⁷² Ibid.

⁷³ Sir Gerard Brennan AC KBE, “The Role of the Legal Profession in the Rule of Law” (Speech delivered at the Supreme Court of Queensland, Brisbane, 31 August 2007).

⁷⁴ Claudia Seibel, “The balance between migration, international security, rule of law and terrorism” (Speech delivered at the International Bar Association Conference, Bar Issues Committee Showcase, Sydney, 11 October 2017).

55. Defence of the rule of law has taken on renewed significance in the current international political climate with the rise of populist sentiment. As former High Court Chief Justice Robert French pointed out in his recent Sir Ronald Wilson Lecture, the legal system is often set up as the adversary of populist movements.⁷⁵ To define “populism”, the former Chief Justice drew on a report of the General Secretary of the Council of Europe, which described the term not as “a catch-all label for every person or movement which rocks the establishment” but rather as a description of “those who invoke the proclaimed will of ‘the people’ in order to stifle opposition and dismantle checks and balances which stand in their way”.⁷⁶ Understood in this sense, populism represents a threat to the rule of law: “While politicians, frustrated by judicial decisions, will often blame the law in question and seek legislative reform, the populist response to decisions hindering their political agenda is to blame the courts themselves”.⁷⁷ Thus an inevitable clash is established between populist movements and lawyers who seek to preserve the democratic processes and institutions which underpin our government and legal system. While this may appear to embroil lawyers in politics, who else can be charged with championing the rule of law if not the legal profession?
56. This does not mean that courts cannot be criticised, but it is not conducive to the rule of law to criticise judgments, or more particularly judges, who are merely applying a particular law which the critic deems unpalatable. This can be often avoided by a clear understanding of the judgment in question.
57. The difficulty with the rule of law as a criterion for intervention is that it is far from being an objective and uncontested concept. Indeed, its authority is invoked in support of both sides of the ideological divide.⁷⁸ While conservatives tend to rely on thinner, procedural conceptions of the rule of law, progressives argue that procedural compliance alone is insufficient and that a conception of the rule of law unaccompanied by values of substantive equality is better labelled “rule by law”.⁷⁹ Lord Goldsmith, for instance, posited that “the rule of law comprehends some statement of values which are universal and ought to be respected as the basis of a free society”.⁸⁰ In his famous book on the rule of law, former British judge Lord Bingham roundly

⁷⁵ Robert French AC, “Judicial Review: Populism, the Rule of Law, Natural Justice and Judicial Independence” (Speech delivered at the Sir Ronald Wilson Lecture, Perth, 1 August 2017).

⁷⁶ Thorbjørn Jagland, “State of Democracy, Human Rights and the Rule of Law: Populism — How strong are Europe’s checks and balances?” *Report by the Secretary General of the Council of Europe* (2017) 4.

⁷⁷ French, above n 75.

⁷⁸ Brandis, above n 6.

⁷⁹ Lord Goldsmith QC, “Government and the Rule of Law in the Modern Age” (Speech delivered at the LSE Law Department and Clifford Chance Lecture Series on Rule of Law, London, 22 February 2006).

⁸⁰ *Ibid.*

rejects a thin definition on the basis that “a state which savagely represses or persecutes sections of its people cannot ... be regarded as observing the rule of law” no matter how detailed, duly enacted or scrupulously observed are the laws which allow such persecution and repression.⁸¹

58. Such an example of the insufficiencies of too thin a conception of the rule of law are provided by the case of apartheid South Africa, where the white rulers were “unusually conscientious about securing statutory authority for their abuses”⁸² and exercised oppression “not by the random terror of the death squad but by the routine and systematic processes of courts and bureaucrats”.⁸³ As the Truth and Reconciliation Commission found, it was ultimately “not enough for South African lawyers to parade the sovereignty of Parliament as if that alone explained (and excused) their conduct”.⁸⁴ Depending on one’s understanding of the rule of law, it may provide “the framework within which we can enjoy our rights and freedoms”, but does not necessarily guarantee them.⁸⁵
59. This brings me to the third basis on which professional legal bodies may claim a mandate to speak in politics: the protection of human rights and civil liberties. It is clearly here that legal bodies meet the strongest ideological opposition. In the UN Basic Principles on the Role of Lawyers, an instrument which sets out international standards for the legal profession, lawyers are obliged to “seek to uphold human rights and fundamental freedoms recognized by national and international law”.⁸⁶
60. The special role of lawyers in defending human rights is justified on a number of grounds, typically along the lines that lawyers are the guardians of individual rights in litigation,⁸⁷ that human rights are part of the international legal order and that lawyers are well-positioned to understand the consequences of an erosion of individual rights.⁸⁸ Around the world, we frequently see lawyers taking up the mantle of human rights advocacy. For example, late last year in Pakistan, following Bar Association meetings across

⁸¹ Tom Bingham, *The Rule of Law* (Penguin Books, 2011) 67.

⁸² Joseph Lelyveld, *Move Your Shadow: South Africa, Black and White* (Times Books, 1985)

81.

⁸³ Martin Chanock, “Writing South African Legal History: A Prospectus” (1989) 30(2) *Journal of African History* 265, 265.

⁸⁴ Truth and Reconciliation Commission of South Africa, Report (1998) vol 4, 105.

⁸⁵ Robert French AC, “Rights and Freedoms and the Rule of Law” (Speech delivered at the Victorian Law Foundation Oration, Melbourne, 9 February 2017).

⁸⁶ United Nations, *Basic Principles on the Role of Lawyers* (27 August - 7 September 1990), art 14.

⁸⁷ Fred C Zacharias, “The Lawyer's Role in a Contemporary Democracy, Promoting Social Change and Political Values, True Confessions About the Role of Lawyers in a Democracy” (2009) 77(4) *Fordham Law Review* 1591, 1598.

⁸⁸ Lex Lasry QC, “Defending Unpopular Causes in a Climate of Fear” (Speech delivered at the Law Week Oration, Melbourne, May 2006).

several districts, lawyers engaged in demonstrations and boycotts to protest the persecution of Rohingya Muslims in Myanmar, demanding that their government use diplomatic channels to prevent further breaches of human rights.⁸⁹

61. This more substantive, proactive ground for intervention is evident in the attitude of the American Bar Association which frequently takes substantive policy positions on political issues. The ABA is commonly known to submit amicus curiae briefs in support of constitutional rights and is vocal in its advocacy of predominantly liberal causes. This approach, however, does not go uncriticised – take Republican Senator Ben Sasse’s recent condemnation of the ABA in the Senate in his attempt to discredit the Association’s assessment of judicial candidates: “The ABA cannot make liberal arguments to the nine members of the Supreme Court”, he argued, “and then walk across the street and seriously expect that the hundred members of this body, in the United States Senate will be treating them like unbiased appraisers.”⁹⁰
62. The difficulty is that human rights occupy “the hinterland between law and politics”.⁹¹ While it would be hard for anyone to argue that legal bodies should not intervene in gross abuses of fundamental human rights, the question of what constitutes those rights worthy of protection and in what situations those rights are unjustifiably impinged are more difficult questions.
63. The advantage of using human rights as a ground for lawyers’ intervention is that it invokes a familiar legal language and can in fact abstract the debate from contentious political issues into a more rational legal frame. In Northern Ireland, McEvoy argues that the intervention of international actors and human rights groups was crucial to shifting the position of the law societies away from sectarian concerns:⁹² it provided “the compass for an engagement in politics ... while avoiding the charge of political alignment”.⁹³
64. However, using human rights as “the steer through shark infested political waters” is not a failsafe.⁹⁴ Where is the profession left when rights conflict? Often certain freedoms and civil liberties will lie on both sides of the political equation; where the individual lawyer falls is a matter of personal ideology.

⁸⁹ See eg, “Lawyers boycott courts to protest against Rohingyas crisis in Myanmar” *The Express Tribune* (6 September 2017) available at: <https://tribune.com.pk/story/1498637/lawyers-boycott-courts-protest-rohingyas-crisis-myanmar/>; “Lawyers boycott courts to protest killing of Rohingya Muslims” *Dawn Report* (8 September 2017) available at: <https://www.dawn.com/news/1356365>.

⁹⁰ Ben Sasse, “Sasse to ABA: “The American Bar Association is not neutral” (Press Release, 16 November 2017).

⁹¹ Martin, above n 45, 6.

⁹² McEvoy and Rebouche, above n 50, 290.

⁹³ *Ibid* 314.

⁹⁴ *Ibid*.

65. A second consideration, which distinguishes the Australian position from the American one, is our constitutional setting. While the ABA may structure its policy positions and curial interventions around civil liberties codified in the US Bill of Rights, the Australian Constitution does not confer rights on individuals, but rather limits government power. Rights discourse primarily draws support from international norms, which are bolstered by political rather than legal arguments.⁹⁵ Legal bodies in Australia are thus faced with a flimsier frame on which to hang substantive rights-based interventions. The situation may be different for lawyers in Victoria and the ACT who might use the Charters of Human Rights existing in those jurisdictions as a platform for greater intervention in the protection of rights, as does the introduction of some of the international norms into Australia as a result of the ratification of treaties or international conventions. In taking on this higher level of activism, however, legal bodies in those jurisdictions risk the same partisan labelling seen in the United States.
66. While there is general consensus amongst legal bodies that breaches of fundamental human rights demand professional action, each association, depending on the unique socio-political conditions of their home country, must draw the difficult line as to where civil liberties shade into those rights and freedoms that are subject to a more political calculus.
67. At the heart of the lawyer's public role is an inherent tension. Just as we saw a conflict between choosing substantively just causes in the representation of clients and providing procedural justice in the form of universal access to the legal system, the lawyer in social and political debates has a role both conservative and progressive. On the one hand, the lawyer forms part of the governing institution, being a member of the legal system and officer of the court.⁹⁶ In this role, they have a duty to protect, and preserve confidence in, legal institutions. We see this role enacted in the defence of democratic structures against populist attack. On the other hand, the lawyer is an independent check on government and custodian of rights and liberties, in this role, they are specially positioned to agitate for social change. As Richard Abel observes, the fact that law can check power at all "reflects the fundamental contradiction of liberalism. Law is simultaneously rule and politics, ideal and reality, neutral and partisan, above the fray and in the midst of it".⁹⁷

⁹⁵ Martin, above n 45, 6.

⁹⁶ Yaniv Roznai, "Revolutionary Lawyering? On Lawyers' Social Responsibilities and Roles during a Democratic Revolution" (2013) 22 *Southern California Interdisciplinary Law Journal* 353, 371.

⁹⁷ Richard Abel, "Speaking Law to Power: Occasions for Cause Lawyering" in Austin Sarat and Stuart Scheingold (eds) *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford University Press, 1998) 69.

68. It is because of this dual function that lawyers must take their role in public debate seriously. They have the capacity to either confer legitimacy on, or withdraw legitimacy from, the acts of governments. In no image is this better captured than in that of the three thousands lawyers marching towards Tahrir Square in their black robes during the Egyptian revolution.⁹⁸ Through their monopoly on legal knowledge and authority, lawyers speak with enhanced “symbolic capital”.⁹⁹ This means they have a greater responsibility in speaking out against injustice, yet equally, they must be careful not to destroy the credibility or authority of governing institutions when it is unwarranted.
69. This brings me to the final point I want to consider tonight and that is the responsibilities of the individual lawyer in public debate. As an individual, a lawyer is obviously given much greater freedom to publicly express a personal political opinion. This will, of course, be moderated by their position in the legal community. As a judge who is charged with appearing independent and unbiased, expressions of political view are severely limited. By contrast, academics are frequently called upon to contribute a legal perspective on political events and respond to media inquiries.
70. As a lawyer who is also an engaged citizen, contribution to public debate, far from being discouraged, may in fact be considered a duty. But to think that a lawyer can ever speak in a purely personal capacity, disassociated from their profession, is probably naïve. This begs the question, should the public contributions of a lawyer be in some way regulated or constrained?
71. There is a spectrum of roles lawyers may take in public debate. On the one end is the traditional lawyer-technician, who puts forward the strictly legal implications of executive or legislative action and considers further comment on social and political consequences as outside their remit. This detached approach has its advantage in heated public debate by employing a rational, almost scientific method of reasoning and a unique lawyerly perspective.¹⁰⁰ At the other end is the social campaigner who forcefully advocates for a particular political point of view, with the assistance of the law, and ventures into topics beyond the strict confines of their lawyerly expertise, largely on the basis that there is in fact no strict division. Of course, lawyers are people beyond their profession and have opinions worthy of public expression. Using the law to supplement a personal ideological opinion is another way of contributing to full and thorough debate.

⁹⁸ Roznai, above n 96, 354.

⁹⁹ McEvoy and Rebouche, above n 51, 34 citing Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge University Press, 1977) 171-83.

¹⁰⁰ See Walker, above n 22.

72. Both modes of contribution have their place, so long as the lawyer does not distort or misrepresent the legal situation; nor can it hurt to take a leaf from their legal education and avoid reductionist or absolutist language. Essentially, lawyers in the ‘personal’ sphere should be guided by their own preference for political participation, but always mindful of the profession that they carry with them.
73. One area in which lawyers voices can and should become more prominent is in correcting and educating the public about the existing state of the law. This is a duty with which lawyers are charged under the rule of law and takes on added significance in the age of “fake news”. Initiatives taken by bar associations overseas give an idea of the type of influence lawyers can have in this space. During the Brexit debate, for instance, the President of the Law Society of England and Wales made multiple media appearances and spoke to journalists in attempts to explain to a non-legal audience the difference between the European Court of Justice and the European Court of Human Rights, a distinction that was often confused in discussions about leaving the European Union.¹⁰¹ Meanwhile, the American Bar Association has established a legal fact check website which responds to legal misinformation or confusion in the news. As an example, when President Trump, in one of his notorious tweets, suggested that anyone who burned an American flag should have their citizenship revoked, the ABA clarified, through its fact check website and by reference to case law, that according to the present state of constitutional law, such acts were protected under their first amendment.¹⁰²
74. Thus it can be seen that it is not easy to define what exactly lawyers’ knitting is. It is probably more diffuse than for the Chief Executive of an airline. What the random thoughts I have inflicted on you tonight do probably show is that lawyers cannot and should not ignore matters which impact on the rule of law and matters affecting the ability of all persons in this country to get fair and impartial justice. For them not to do so would, in my view, be an abdication of responsibility. The same may be said equally for professional associations of lawyers.
75. Beyond that, lawyers as individual citizens have a right to express views as politically partisan as they like. Informed debate on issues is fundamental to the successful operation of a democratic system, provided the lawyer’s contribution is not such as to bring the profession or the rule of law into disrepute. By contrast, professional associations should, generally speaking,

¹⁰¹ Khan, above n 70.

¹⁰² Hilarie Bass, “The balance between migration, international security, rule of law and terrorism” (Speech delivered at the International Bar Association Conference, Bar Issues Committee Showcase, Sydney, 11 October 2017); American Bar Association, “Flag Burning” (2017) *Legal Fact Check*, Available at: <https://abalegalfactcheck.com/articles/flag-burning.html>

confine their comments to matters of policy as distinct from matters of partisan politics. I recognise that the line is not easy to draw. One advantage of being a judge is that, generally speaking, we are consistently advised to keep quiet. I think at this stage I should take that advice and stop talking. Thank you all for listening to me tonight.