

JEWISH MUSEUM OF AUSTRALIA

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**THE DREYFUS CASE A CENTURY ON - TEN LESSONS FOR
AUSTRALIA***

The Hon Justice Michael Kirby AC CMG**

THE DREYFUS AFFAIR

A centenary reflection: It is exactly a century since Alfred Dreyfus, the French soldier who was Jewish, was finally cleared of the offence of high treason. A hundred years ago, he was described as the most famous man in the world since the death of Napoleon¹.

Yet who today remembers him or the story of the trials he underwent for providing military secrets to his country's most hated foe, Germany? Who recalls his conviction, punishment and eventual vindication? Who knows of the persistent struggle by his wife Lucie and his brother Mathieu to clear his name and by the band of intellectuals

* Text of an address at the opening of the centenary exhibition on the Dreyfus affair at the Jewish Museum of Australia, Melbourne, 26 March 2006.

** Justice of the High Court of Australia.

¹ M Burns, *France and the Dreyfus Affairs* (Bedford/St Martin's, 1999), vii.

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and civil libertarians who came to be convinced of his innocence? Who recalls the efforts of military and government leaders and churchmen in France to uphold his guilt, even when they were presented with overpowering evidence that he had been wrongly convicted? What lessons does *L'Affaire Dreyfus* have for liberty in contemporary Australia and for how we handle complaints about the misuse of governmental power? Of prejudice against minorities? Of miscarriages of justice by the very institutions that we entrust to protect society and its members from injustice?

In its day, the Dreyfus trials and their aftermath were like the Petrov case, the Lindy Chamberlain saga, the ordeal of David Hicks, the Mallard case, and the trial of Saddam Hussein, all wrapped into one. Yet none of those events, nor anything we have seen in Australia, is exactly like the ordeal to which Alfred Dreyfus was subjected. In its time, that ordeal became an illustration of how human institutions can go wrong, human justice can fail and pride and patriotism can swamp concern for the individual. All too easily, this can happen when that individual is a member of a minority subjected to irrational hatred - as Dreyfus, the Jew, was and as others in the century that followed have been.

The Dreyfus case was a warning of the Holocaust, of the show trials of Hitler, Stalin and Pol Pot, and of the occasional failings of elected democracies that marked the twentieth century. It was a

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warning that was not sufficiently recognised a century ago. We do well to reflect on it today so that we do not repeat its mistakes.

There are few in Australia today who remember the details of Dreyfus's case. We know vaguely of the long controversy that divided France, of his banishment to Devil's Island, of the brave band of supporters who never lost faith in his innocence, of the anti-semitism that played a part in his conviction and of the long time it took to clear his name. But we do not know the details.

It is in the detail that the wrongs of the Dreyfus affair are to be found. The greatest wrong was not the mistaken conviction of Dreyfus for treason. Human justice makes human errors. No human effort is immune from error². What was important was how the conviction came about in the first place; how it was reconfirmed in the face of overwhelming evidence; and how ultimately institutions of government and other powerful forces elevated the insistence on Dreyfus' conviction above the proof of his innocence. Maintaining his guilt became a badge of honour for elements in the army, the Church, the government and the population at large. Even today in France, streets and statues that honour Dreyfus are desecrated. In France, murders still happen that are

² E C Hughes, *Men and Their Work* (1958) cited in O Quick, "Outing Medical Error" (2005) 14 *Medical Law Review* 22 at 23.

attributed to anti-semitism³. Closer to home, violence against ethnic and religious minorities shocks Australians who are convinced that the national acceptance of multicultural ideals will spare Australia from the worst of such prejudice.

So come back a hundred years to when the Dreyfus affair was still on the lips of most informed people, even in Australia⁴. How did it happen? Why should contemporary Australians give any thought to events that occurred so long ago and so far away?

Sources of anti-semitism: To find the answers to these questions it is necessary to dig deep into an infantile tendency of human beings. A root cause of the Dreyfus affair was anti-semitism. A fear and hatred of Jews in France arose because of several factors: their minority numbers; their exclusive, counter-majoritarian, habits; their involvement in money lending and finance; their often unusual clothing; their distinct culinary habits; and their disproportionate educational and professional success. Above all, there was the supposed "blood guilt" of Jews for the death of Jesus Christ. The foundation for this blood guilt was a passage

³ S Rotella, "Racism a Factor in Murder of Jew Says Magistrate", *Sydney Morning Herald*, 22 February 2006, p 13 (concerning the death in France in on 13 February 2006 of Ilan Halimi).

⁴ See eg *Sydney Morning Herald*, 11 September 1899; *The WestAustralian*, 12 September 1899 cited in H L Rubinstein, "A Disgrace to Christendom': Australian Reactions to the Dreyfus Affair" in (1994) 12 *Journal of Australian Jewish Historical Society* 467 at 467-468.

in St Matthew's Gospel, when Pontius Pilate, the Roman Governor of Judea, offered to release Jesus but the Jewish people of Jerusalem chose Barrabas and said to Pilate, of Jesus, "His blood be on us, and on our children"⁵. On those nine words was hung a terrible hatred.

The hatred was reinforced, until recent times, by prayers in church services at Easter for the conversion of "the perfidious Jews"; by deep feelings of animosity towards the Jews amongst many Christians and others; and by governmental, political and church attitudes that fuelled anti-semitism throughout Europe and beyond.

Revolutionary and military causes: It was a mark of the embrace of notions of universalism and rationality after the French Revolution that they eventually gave rise to an edict of liberation for the Jews of France. Although prejudice endured, it waned in nineteenth century France. Gradually, notions of secularism, reserving religion to a private zone, began to prevail. This was a feature of France in the Belle Epoch that reassured Dreyfus that he would be protected by the French legal system against any lingering attitudes of prejudice against Jews. After all, decades earlier, Christian symbols had been removed from French courthouses. The French *Declaration on the Rights of Man and of the*

⁵ St Matthew's Gospel, Ch 27, v 25. See also C Thornton-Smith, "Reactions of the Australian Catholic Press to the Dreyfus Case" (1997) 14 *Journal of Australian Jewish Historical Society* 57 at 64.

Citizen drew no distinctions on the grounds of race or religion. At first, Dreyfus's confidence was to prove misplaced.

The seeds of the affair were planted by the military humiliation of France in the Franco-Prussian War of 1870. The defeat of the army, that still boasted of the Napoleonic conquest of Europe, was a great blow to French honour and pride. The defeat was commonly attributed to German spies. Only spying, it was believed, could explain the collapse of an army and nation so historical, glorious and unique. Paranoia over superior German spying capacity was never far from the surface in the last years of the nineteenth century. Financial collapse, economic depression and the political instability of the Third Republic turned conservative politicians and newspapers into messengers of fear and suspicion of the supposed enemies of the nation in its midst. The loss of Alsace and Lorraine made those who stayed behind in France suspect in the eyes of some fellow citizens and the newspapers that pandered to their fears. This was especially so if they were German-speaking, with German-sounding names. It was particularly so if they were of the Jewish minority.

Discovery of the bordereau: Into this potent mix of fear and suspicion intruded a remarkable event⁶. A document was discovered, probably by a French concierge working at the Germany embassy in

⁶ M P Johnson, *The Dreyfus Affair: Honour and Politics in the Belle Epoque* (1999).

Paris. It was handed to French security who then worked in a section of the General Staff of the army. Torn into six pieces, this memorandum (*bordereau*) was a communication in French with a German contact about military secrets, including details about a new French field gun. It was signed with the initial "D". It suggested that a senior military official of France was providing secrets to the German military attaché in Paris.

The *bordereau* led immediately to a search for the culprit. That search led the senior members of the French army to suspect Alfred Dreyfus. He was descended from a wealthy Jewish family from Alsace. He had made the French army his career. He was a non-observant Jew who enjoyed an income many times greater than his military salary. He had been a top student. At the age of thirty, his outstanding service led him to be assigned to work in the Ministry of War in Paris, with the rank of captain. For a soldier, he lived an unusually quiet family life. His misfortune was that the leaders of the General Staff were openly anti-semitic. They were determined, without delay, to rid the army of the author of the inculpatory document.

The *bordereau* was discovered in late September 1894. By late October 1894, the intensely conservative and right-wing Christian newspaper, *La Libre Parole*, was fed the news that the suspect in the spying was a Jewish officer. Dreyfus had been asked, on a pretext, to write a letter based on the wording of the *bordereau*. Because of perceived similarities between the handwriting in the two documents, he was arrested and imprisoned. The Dreyfus affair had begun.

Conviction and exile: In December 1894 Dreyfus was put on trial before a court martial. He had an excellent lawyer who was convinced of the innocence of his client and demanded an open trial. However, the military judges insisted on a trial held in closed court. They said that this was essential to preserve national security. Handwriting experts called by the army attested to the similarity of the writing in the *bordereau* and Dreyfus's writing. However, two superior experts called for the defence pointed to many dissimilarities. Dreyfus' lawyer was sure that his client would be free at the end of the trial.

As is now known, contrary to procedural fairness and the French law governing courts martial, an officer of the War Ministry provided a secret dossier to the members of the court martial whilst it was deliberating. The dossier contained a letter from an Italian military attaché inculpatng Dreyfus. Neither Dreyfus nor his lawyer were given access to this secret evidence. Nor did they know of its provision. The course adopted was later justified in the name of national security⁷. Vehemently professing his innocence, Dreyfus was unanimously convicted of treason. He was condemned to military degradation and perpetual deportation.

⁷ H T Tamplin (ed) "The Dreyfus Case" (1898) 15 *The Cape Law Journal* 23.

In an electric scene in the courtyard of the *Ecole Militaire* in the centre of Paris, Dreyfus had his military insignia torn from his uniform and his sword broken in his presence. A famous cartoon of the time showed him bowed and humiliated. But photography had arrived by 1894. A photograph showed him unbowed and erect. He declared in a voice that those nearby could hear: "I forbid you to do this to me". And because the square was so large, Dreyfus was led around its perimeter to be humiliated in front of the assembled army officers and antagonistic citizens. He was far from bowed. Repeatedly he declared "*Innocent! Innocent! Vive la France!*". It was an unsettling response that led many who witnessed it to quit the assembly in a state of disquiet.

But disquiet was not present in the vast majority of witnesses. Dreyfus's protestations were drowned out by cries "Death to the Jew!". In the legislature, politicians of all persuasions welcomed the outcome of the court martial and the eradication of a blemish on the honour of the French army. Uncovering so swiftly the treasonous spy was a cause for congratulations to the government and the army. Even the radical politician, Georges Clemenceau, who was later to become a supporter of Dreyfus, asked Parliament why an ordinary soldier would be condemned to death for treason but a captain spared of his life? Politicians of the right, the left and of the centre, jumped on the bandwagon of excoriation. Dreyfus was exiled to Devil's Island off the coast of French Guyana, as soon as his petition for appeal was rejected. On that island, he spent his time in solitary confinement in a malarious

environment. However, his spirit was not broken, nor that of his wife and brother.

A saga of iniquity began that represents the essence of the Dreyfus affair. The army had wanted no publicity and a quick conclusion to the matter. However, no motive had been shown why a wealthy captain, with a promising career, would have acted as claimed. The motive hinted at was Dreyfus's origin in Alsace, his knowledge of the German language and his Jewishness. Religious newspapers like *La Libre Parole* and *La Croix* supported the conviction whenever it was questioned. As the growing evidence of wrongdoing mounted, these forces in government, in the army and the Church railed against the questioners. For them, patriotism demanded unquestioning loyalty. But the questioners would not let up.

A second letter is discovered: The case against Dreyfus began to collapse in March 1896 when another letter was intercepted in the German embassy. This could not have involved Dreyfus, safely locked away on Devil's Island. Because a new government had taken office in Paris, the Dreyfus file was reopened. A military official, Georges Picquart became convinced, against his earlier belief, of the innocence of Dreyfus and of the guilt of another army officer, Major Ferdinand Walsin-Esterhazy. Esterhazy, a big spending soldier, originally from Hungary, with a weakness for women and gambling, was identified by his stockbroker, de Castro, who saw a photographic reproduction of the

incriminating *bordereau* in a newspaper. It had been published to confirm Dreyfus's guilt. Instead, it shifted a spotlight onto Esterhazy.

Esterhazy demanded a court martial to clear his name. In the heated atmosphere of the times, the army pulled out all the stops to reaffirm the guilt of Dreyfus and to clear Esterhazy. False rumours had been circulated that, before departing France, Dreyfus had confessed his guilt to military colleagues. In the face of his astonishing performance at the *Ecole Militaire*, this proved unconvincing. A leak from military headquarters to a sympathetic newspaper contained a mention, for the first time, of the existence of the incriminating secret file provided to the court martial in 1894. This unintended slip propelled the Dreyfus family to petition the Chamber of Deputies for review. Picquart was transferred to a dangerous post in Tunisia, presumably in the hope that he would die or disappear. He did not oblige. Another conservative newspaper, unsympathetic to Dreyfus, *Le Matin* boastfully published the *bordereau* as evidence of Dreyfus's guilt and de Castro saw it. But the biggest mistake that then occurred was the interference by military operatives in the evidence that had been used to convict Dreyfus.

Forged messages were inserted in the military file, naming Dreyfus as the spy. Eventually these forgeries were revealed as such. One of them, prepared by a master forger, came undone when examination under magnification showed a discrepancy between the size and colour of the lines in the paper at different parts of the reconstructed page. The identification of Dreyfus's name appeared on

paper that had obviously been skilfully inserted in the original that had contained no such identification. It was like a modern case of reconstruction by photocopying. It showed the extent to which the army would go to keep the Dreyfus case closed.

Émile Zola's accusation: Unsurprisingly, Esterhazy was acquitted by his court martial. Lucie Dreyfus's petition was rejected by the French legislature. At the end of 1897, the French Prime Minister declared to the National Assembly "There is no Dreyfus affair whatsoever". However, by this time, a group of civil libertarians and intellectuals had taken up the Dreyfus cause⁸.

Émile Zola published the first of a series of public letters urging his fellow citizens to interest themselves in the wrongful conviction of Dreyfus. International handwriting experts denounced the opinion that Dreyfus was the author of the *bordereau*. Zola stepped up his public campaign. On 13 January 1898, in Clemenceau's newspaper *L'Aurore*, Zola wrote a letter to the President of the French Republic. It appeared under a full-page headline, composed by Clemenceau, "*J'accuse ...!*". Writers of great distinction, such as Marcel Proust and Anatole France joined the campaign. But anti-semitic hoodlums took to the streets to defend France against "Masons, Protestants and Jews".

⁸ W E Dwight, "An Episode in the Affaire Dreyfus", 8 *Yale Law Journal* 272 at 272 (1898).

By February 1898, the French League for Human and Civic Rights was founded to provide a focus for the voices asserting that the Dreyfus conviction was a miscarriage of justice. Contemporaneous with these developments was a heightened resolve by officials to affirm Dreyfus's conviction and to keep his file firmly closed. Their resolve was evidenced by the outcome of Zola's letter. Instead of the reopening the Dreyfus case, it resulted in a long prosecution of Zola for criminal libel. He was convicted and, after appeal, retried and reconvicted. He fled to Switzerland and then to England where he awaited the outcome of his campaign. He was denounced personally and, not content with this, his critics also traduced his father.

Yet by August 1898 senior army officers were also beginning to share some of the doubts about the forged materials discovered in the army files. They moved to dismiss Esterhazy from the army. His dismissal was not for treason, but for "habitual misconduct". Even in the face of plain forgeries, the army continued to cover up. Indeed, an inquiry was initiated against Picquart, working for a reopening of the Dreyfus case from within the army. He was arrested and imprisoned. Still more violent anti-semitic demonstrations broke out in Paris. Mobs took to the streets to assert the guilt of Dreyfus and to condemn the lack of patriotism of those who questioned it. Evidence was not the concern of these people. Fear of German spies and of Jewish aliens was what drove them. By December 1898, in response to the League for Human and Civil Rights conservative forces founded the League of French Patriots. It was to survive the outcome of the Dreyfus case and to laud

the 'patriotic' officers who had forged documents in order to uphold the army's honour. Eventually, this body was to provide the personnel who initiated the anti-semitic campaigns of Vichy France during the Second World War.

Second trial and its outcome: All of this notwithstanding, by 1899, despite the passions and the cover-up, it had become impossible to keep the lid on the errors of the Dreyfus trial. A Court of Appeal in June 1899, overturned the court martial verdict of 1894. Dreyfus was summoned back to France for a new court martial. He was remanded in custody at Rennes. Foreign journalists noticed that, in the second court martial, conducted in a local high school, Christian symbols remained on the walls, as if to indicate that in military affairs, secularism would not intrude too far. In August 1899, a fanatic shot at Dreyfus's lawyer in an attempt to kill him. But the second trial proceeded a week later. To the astonishment of foreign observers, Dreyfus was not acquitted but for the second time, this time by majority, he was found guilty of treason. The verdict was qualified by a rider of "extenuating circumstances". Dreyfus's imprisonment was reduced to ten years detention⁹.

The outcry against this verdict was enormous and instantaneous. Within days the French Cabinet had recommended that Dreyfus should be pardoned by the President. Dreyfus only accepted the pardon on

⁹ See Burns, above n 1, 176 describing the Rennes verdict and its immediate annulment.

condition that he could continue to assert and prove his innocence. The President agreed to this stipulation. The pardon issued. The Minister of War declared: "The incident is over"¹⁰. Paris was preparing for the inauguration of the Universal Exhibition of 1900. The Chamber of Deputies passed an amnesty law. Many hoped that Alfred Dreyfus would quietly disappear into old age. But the turmoil was not so easily put to rest.

Vindication and innocence: Many members of the Chamber of Deputies were gravely disquieted by the official conduct during the affair. This disquiet grew when the army itself, in October 1903, raised the possibility of a further retrial of Dreyfus. In March 1904, the Criminal Chamber of the Court of Cassation granted Dreyfus's request for a reinvestigation of his case. That investigation concluded with an outcome favourable to Dreyfus. The decision was referred to an extraordinary sitting of the Supreme Court of Appeal in November 2004. On 12 July 1906, after still further inquiry, the Supreme Court of Appeal, with all three Chambers of France's highest court sitting jointly, annulled the Rennes verdict. It pronounced the total rehabilitation of Dreyfus. It proclaimed his innocence. A week later in the same courtyard of the *Ecole Militaire* in Paris, Dreyfus was decorated a Knight of the Legion of Honour. When the crowd shouted "Long live Dreyfus!", he replied in the

¹⁰ J D Bredin, *The Affair: The Case of Alfred Dreyfus* (1986); A David, *Famous Political Trials* (Learner, 1980) at 45.

words he had used in that place twelve years earlier: "*Vive la France!*"¹¹. Picquart was there to witness the scene.

The Vichy aftermath: Some observers declared that the ultimate outcome of the Dreyfus affair was a delayed vindication of French institutions and a reaffirmation of civic equality in the face of stigma and discrimination. Yet the legacy of the case was a deep sense of disquiet both by supporters and opponents of Dreyfus. His supporters noted the long interval of denial, forgery and cover-up to which, even in a democratic country like France, great governmental institutions would stoop. His opponents continued to hate those who had supported Dreyfus. They considered that their damaging campaign had questioned the honour of the French army and the nobility of the nation: values that were to be maintained at all costs - even, if necessary, at the sacrifice of a person like Dreyfus. Some of the anti-Dreyfusards would never believe his innocence. A number of them took their vengeance in the anti-semitic laws of Vichy France. After 1942, that regime tightened the noose around the lives of the Jewish refugees in France and, ultimately, even French citizens of Jewish origin.

On the perimeter wall of one corner of the *Ecole Militaire* in Paris, where the beginning and the end of the Dreyfus drama was played out, is a memorial. It records a group of French Jews ordered to assemble

¹¹ A L Goodhart, "Three Famous Legal Hoaxes" (1968) 6 *Alberta Law Review* 1 at 9.

there, who were deported to the Nazi death camps with almost total loss of life and true loss of national honour. Anti-semitism did not die out in France with the rehabilitation of Alfred Dreyfus. It lay in wait for further victims.

What are the lessons for today that we should derive in Australia, as we reflect on the story of Alfred Dreyfus in France a century ago?

TEN LESSONS FOR TODAY

Vigilance against miscarriages: The first lesson is that we must be vigilant against miscarriages of justice. It is easy for the mind, especially the lawyer's mind, to slip into formalism. Easy to forget the ultimate purpose of law and of its institutions: to do justice according to law. The fact that a trial has gone through all the correct procedures does not relieve us of the duty to consider any flaws that are alleged in the process or the outcome that amount to a miscarriage of justice.

Human justice is imperfect. Most serious injustices happen long before cases come before courts. If police investigation is defective or partisan, justice may never be rescued. If the prosecutor does not act fairly, the accusation may never be properly tested. If officials lie and falsely claim (as in the Dreyfus case) that confessions have been made,

great wrongs can follow¹². This is why the High Court of Australia ultimately insisted on verification of confessions to officials, leading Parliaments throughout the country to provide for sound and video recording of them¹³. Vulnerable and inexperienced witnesses can undermine their own cases¹⁴. In such instances, it is not enough for a court to admit to lingering "anxiety"¹⁵. This was what the High Court did at the beginning and end of its reasons dismissing the appeal of Rupert Max Stuart, an Aboriginal accused of, and sentenced to, death for the murder of a young girl based on a flawed confession¹⁶. In the end, it was a media campaign, the agitation of civil libertarians and the disquiet of some politicians that saved Mr Stuart's life - not the Australian courts of justice.

More recently, there have been other instances of suggested miscarriage of justice where the courts have been divided. The Lindy

¹² *The Queen v McKinney and Judge* (1991) 171 CLR 468. Also relevant is the decision upholding the right to legal representation of the indigent in serious criminal trials: *Dietrich v The Queen* (1992) 177 CLR 292.

¹³ See eg *Kelly v The Queen* (2004) 218 CLR 216 considering the *Criminal Law (Detention and Interrogation) Act 1995 (Tas)* s 8(1) and *Nicholls v The Queen* (2005) 219 CLR 196 considering the *Criminal Code (WA)*, s 570D(2).

¹⁴ *Tuckiar v The King* (1934) 52 CLR 335.

¹⁵ *Stuart v The Queen* (1959) 101 CLR 1.

¹⁶ *Ibid*, at 3, 10 per Dixon CJ, McTiernan, Fullagar, Taylor and Windeyer JJ; cf M D Kirby, "The Stuart Case - A Story in Black and White" (2002) 23 *Adelaide Law Review* 195.

Chamberlain case is an instance¹⁷. The eventual outcome of that saga was also secured outside the courts. Ultimately, it followed a Royal Commission. Yet more recent examples show the increased vigilance of Australian courts against the risks of miscarriage. This is usually the central issue in most criminal appeals¹⁸.

In the *Mallard* case¹⁹, the importance of the fair conduct of the prosecution was given fresh emphasis by the High Court. In our system of law, the prosecutor for the Crown is not just another litigant, determined to win its case. Like the court itself, the prosecutor is subject to duties of fair conduct, which includes fairness to the accused. This is a universal feature of a just system of criminal procedure²⁰. We are not exempt from it. Yet the *Mallard* case had earlier come to the High Court and been refused leave to appeal²¹. I was a party to that refusal. It was only when further evidence was accumulated and analysed by supporters who believed in Mr Mallard's innocence, that the matter was returned to the courts on a petition of mercy, reopened, re-explored and found wanting.

¹⁷ *Chamberlain v The Queen [No 1]* (1983) 153 CLR 514; *Chamberlain v The Queen [No 2]* 1984) 153 CLR 521.

¹⁸ *Weiss v The Queen* (2006) 80 ALJR 444 where the relevant cases concerning criminal appeals are collected.

¹⁹ *Mallard v The Queen* (2006) 80 ALJR 160.

²⁰ *Mallard v The Queen* (2006) 80 ALJR 1 at 8 [68]ff.

²¹ *Mallard v The Queen* (1997) 191 CLR 646.

The lesson of the Dreyfus case, and of countless cases since, is that decision-makers who have control over important decisions on behalf of society, must always preserve an open mind. They must never join a popular bandwagon. Society must reserve to itself a questioning attitude towards officialdom. The supporters of Dreyfus elevated the "duty to question" over the "duty to obey"²². Some patriots and institutional conservatives at the time resented this. But in the end, the questioners were proved right.

Alert to stigmatised minorities: The second lesson of the Dreyfus case is that we should be alert to the dangers of prejudice towards stigmatised minorities.

There is no doubt that Dreyfus suffered - and was kept on Devil's Island long after the gravest doubts of his guilt were demonstrated - because he was a member of such a minority. A Jew in a society with widespread and latent anti-semitism. There are other such minorities, including in Australia. The Aboriginals, like Stuart. The communists. Arabs and Muslims. A minority I know well, of roughly the same proportion as the Jews: the homosexual minority, still hated, feared and discriminated against, often at the behest of the same religious people

²² Burns, above n 1, viii.

who hated the Jews. Convicted prisoners, the mentally disabled and the unconventional are also easy to target.

The lesson of the Dreyfus affair is that we must be on our guard that prejudices do not affect official decision-making. The objective evidence against Dreyfus was extremely weak. There was no motive, simply contested handwriting evidence. What made up the evidentiary deficit was anti-semitism. In Australia, we must make sure that we never make up any evidentiary deficit in a case with attitudes of fear or loathing against members of a minority. Everyone in Australia is equal before the law. Attitudes of prejudice sometimes exist on the streets. They have no place in a court of law or other independent tribunal. These institutions do not answer to populism or mob rule. The commitment to equality before the law is tested by the way we treat vulnerable minorities. Members of the great majority do not generally face this problem.

Beware of military tribunals: Dreyfus was twice convicted by a military tribunal. The first conviction was reached on the flimsiest evidence. The second occurred in the face of demonstrable proof of his innocence. Loyalty to the army swamped the evidence. One member of the first court martial admitted that he had scarcely looked at the handwriting tendered to secure the conviction. Accusation by the most senior officials of the nation was enough to prove the accusation.

Loyalty, love of nation and belief in its institutions are marvellous things. In the modern world, patriotism has its place, at least in sporting contests. But there is a danger of tribunals that operate outside the independent courts deciding questions of liberty. It is why the independence of the courts, and the tenure of the judges, is so important for our freedoms.

An examination of outcomes in the Australian Refugee Review Tribunal, after members were not regularly reappointed, shows a fall-off in decisions favourable to applicants for refugee status²³. This is what can happen where decision-makers do not enjoy guaranteed tenure. It is true that such guarantees sometimes entail disadvantages and cloak individual inadequacies. But over the centuries, judicial tenure has been a great protection for our liberties. It did not exist in the first or second tribunals that tried and convicted Dreyfus. Those military tribunals were not really independent. They evinced loyalty for their conception of the nation and for their military superiors. An affirmation of civilian rule is crucial to the just trial of serious accusations. It is ironic to read the American comments on the Dreyfus trials in the 1890s and the asserted superiority of American civil courts²⁴, contrasting them with the defence of military commissions today.

²³ Mary Crock, "Reviewing the Merits of Refugee Decisions: An Evaluation of the Refugee Review Tribunal" in Conference Proceedings, *Retreating from the Refugee Convention* (1997), Northern Territory University, Darwin.

²⁴ S D Thompson, "The Revision of the Dreyfus Case" (1899) 11 *Green Bag* 9 at 13: pointing to the need to "maintain the supremacy

In Australia, courts martial are an exception to the general principle of civilian courts for contested federal accusations²⁵. In this, Australian law normally reflects a longstanding British tradition that restricts courts martial, essentially to military accusations arising out of conduct on the battlefield²⁶. A recent High Court decision has had the effect of expanding this exceptional military jurisdiction. It was my opinion in that case, and still is, that the present is not a good time to be expanding the jurisdiction and powers of military tribunals²⁷. Doing so is contrary to our constitutional history and, in my view, to the constitutional text.

Anyone in doubt about the defects that can intrude in military tribunals in fraught circumstances should read about the Dreyfus case, and especially about the second outcome at Rennes. They provide a reason for deep concern, mentioned by many observers, about the proposed military commissions in the United States for trying the

of the civil over the military power, and to purge themselves of the rank corruption and gross injustice which fester in the Dreyfus case".

²⁵ *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 and *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.

²⁶ Discussed in *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at 341 [103] citing *Re Tracey* (1989) 166 CLR 518 at 558 and *Burdett v Abbot* (1812) 4 Taunt 401 at 449-450 [128 ER 384 at 403].

²⁷ *Re Aird* (2004) 220 CLR 308.

prisoners kept for four years in the military base at Guantanamo Bay²⁸. The subordination of the military power to the civilian power is one of the key elements in a successful modern democracy. We must keep it unimpaired in contemporary Australia.

Beware of secret trials: The Dreyfus case also teaches the great care that must be observed in deciding serious accusations behind closed doors. The giving of decisions in secret, based on secret evidence not made available to an accused or the public, was a serious flaw in Dreyfus's first trial. It was only repaired when, later, mistakenly hoping that it would condemn Dreyfus, a photograph of the document on which he was convicted, the *bordereau*, was published by a newspaper aiming to satisfy its readers of his guilt.

A feature of our legal system, inherited from Britain, is a revulsion against secret trials²⁹. Even where there is confidential information, courts must ordinarily be trusted to adopt expedients to keep the trial, and the evidence, open whilst treating with sensitivity particular material recognised as sensitive. The light of public scrutiny must be shone on

²⁸ cf *Hamdi v Rumsfeld* (2004) 159 LEd 2d 578; 124 SCt; I Barker, "Human Rights in an Age of Counter-Terrorism" (2005) 26 *Australian Bar Review* 1 at 10.

²⁹ See eg *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 50-58; *John Fairfax and Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465; *In the Matter of an Application by the Chief Commissioner of Victorian Police* (2005) 79 ALJR 881 at 900 [114]; cf *Scott v Scott* [1913] AC 417 at 437-438.

all serious trials. Otherwise, they may become a cosy self-fulfilling enterprise denying fundamental rights to the accused.

The fact that national security was repeatedly asserted as the reason for the secrecy of the Dreyfus trial should make us cautious about that claim. But for the gradual emergence of the truth, the army and many other powerful interests in France, would have closed the Dreyfus case. Gradually, most people would have forgotten him. He would have rotted away on Devil's Island. Politicians of all persuasions, and the demonstrators on the streets, would have continued to denounce Dreyfus as a traitor. It was only a band of supporters, and the gradual emergence of the truth, that saved this innocent man from that fate. That was not the outcome of the closed and secret trial which officialdom wanted.

Protection for people of conscience: The Dreyfus case also demonstrates the importance of protecting and honouring people of conscience. Protests might have been expected from Dreyfus's wife and brother: declaring his innocence and working for his vindication. Families are like this. But they often cling to ideas of innocence in the face of overwhelming evidence to the contrary. The community tends to discount family claims, as the French community originally did in the case of the Dreyfus family's pleas.

What changed the outcome of the Dreyfus case was the gradual adherence of intellectuals and civil libertarians to the Dreyfus side. In

Australia, we do not much like the notion of intellectuals. They are called "egg-heads". They often fall, as the first victims, to the tall poppy syndrome that has existed in Australia since the earliest convict days. Further, there are people in our own society who condemn civil libertarians and reject their role. On some occasions, it is true, civil libertarians buck the system and challenge authority with its important tasks to perform. Yet, it was the Dreyfus case that led to the establishment in 1898 of the French League for Human and Civic Rights, the equivalent of the Australian Councils for Civil Liberties. Writers and philosophers and journalists and lawyers joined the League. It focussed the disquiet about the Dreyfus conviction. It mobilised the belief that a wrong should be righted.

A British admiral who brought his nuclear warship into Sydney Harbour had to combat Australian protestors, one of whom tried to clamber on board. Far from joining the local denunciations of the protestors, voiced by embarrassed local authorities, the admiral defended their right to protest and to object. He said, indeed, that this was the ultimate role of the defence forces: to protect a free society in which people could protest. As Justice Murphy once put it, the world has been greatly improved by protestors objecting to injustice as they saw it. Sometimes they have brought the world round to their persuasion. Mr Neal, he famously declared, was "entitled to be an agitator"³⁰.

³⁰ *Neal v The Queen* (1982) 149 CLR 305 at 316-317 per Murphy J.

It is necessary to acknowledge that, eventually, some of the crucial converts to the Dreyfus cause were officers of the French army. Georges Picquart became convinced that Dreyfus had been framed. He paid for his conviction, and the disclosure of the reasons for his anxiety, by being arrested, court martialled and imprisoned. Fortunately, he lived to see the vindication of his suspicions. He was present when Dreyfus was welcomed back to the *Ecole Militaire* in 1906. Yet when he acted as he did, he could not have known the outcome.

Some whistle-blowers are obsessive, misguided, intolerant people who will never accept overwhelming evidence. But, as Commandant Picquart illustrates, some are vital agents for truth. Where it is important, and a person is suffering loss of liberty and honour, society must protect conscientious officials and others who adhere to truth, even if sometimes they prove wrong and misguided.

Picquart was not alone. A decade after Dreyfus's conviction and following his pardon, more senior army officers began to have, and to express, doubts. True, the army leadership was complicit in the cover-up. Most of its leaders never accepted Dreyfus's innocence. But there were military people and officials of conscience and integrity who were eventually won round. Sadly, it took a very long time.

Scrutiny of authority: The story of the Dreyfus affair is one about spies. Acting on partial information, embracing a theory, defending

national security and honour as they saw it, their "intelligence" and "proof" took a great democratic republic, France, down the road where it seemed willing to sacrifice an individual to defend the honour of the nation and its army.

The cover-up was remarkable. When a military officer prepared the forged documents, and slipped them into the military file, he thought his ploy would never be discovered. It would help prove what he knew, in any case, was the truth. But the forgery was discovered. When this perfidy was revealed, the army officer committed suicide. Yet immediately, he was praised for his "honourable" actions. They were excused as patriotic. A national collection was invited for the support of his widow³¹.

People exist who are so blinded by their concept of duty and patriotism and distorted by their participation in espionage, that they forget society's commitment to truth and justice. A civil society, respecting liberty, must always be on its defensive against such honour-blind people. It must beware of their cover-ups. It must retain a healthy scepticism about their accusations of anti-State activity. The terrible wrongs of the Gestapo in Germany, of the NKVD, Stalin's secret police, of Pol Pot's Khmer Rouge, and even of the Un-American Activities

³¹ P Quillard, "The Henry Monument" cited in Burns above n 1, 130.

Committee in the United States show what grave wrongs can be done in the name of patriotism and national security.

Every society has a right and duty to protect its citizens against genuine affronts to security. But, in the long run, the best guarantee against attacks on society is a steady adherence to the institutions and ways of a temperate democracy. This steady adherence was demonstrated in Australia in 1951 in the decision of the High Court in the *Communist Party* case³². That decision invalidated the law designed to outlaw Australian communists. That case will always stand in marked contrast to the decision of the Supreme Court of the United States, at the same time, upholding a similar law to deprive communists in that country of their rights to assembly and to free speech, although expressly guaranteed in the American Constitution³³.

Maintenance of secularism: Another lesson of the Dreyfus case is the importance of keeping religious beliefs separate from the institutions of the State. It is not a coincidence that, in December 1905, in the aftermath of the vindication by the Criminal Chamber of the Court of Cassation of Alfred Dreyfus's appeal, a law was enacted by the French

³² *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

³³ *Dennis v The United States* 341 US 494 (1951), Vinson CJ for the Court; Black and Douglas JJ dissenting.

legislature establishing clearly the separation of Church and State in France³⁴.

France had been moving in the direction of secularism in the nineteenth century. However, the strong support for the forces lined up against Dreyfus by anti-semitic elements in the Church, army and politics of France, led to a strong feeling of revulsion against these institutions when the injustice and cover-ups of the Dreyfus case were laid bare. Secularism in France was reinforced. It is still strong.

A study of Australian Church journals in the years of the Dreyfus affair shows that they never reflected the antagonistic attitude to Dreyfus revealed in various Church-supported newspapers and other publications in France³⁵. Instead, the Australian religious press noted the suggested double standards of the English media towards the French trials and the trials of the Irish and Boer accused in the British Empire. The strong bias against secret military tribunals, that has long existed in English-speaking countries, was evident in Australia.

The institutions that grew up supposedly to defend patriotism and the honour of the army and the nation in the Dreyfus case, were later to

³⁴ See C Thornton-Smith above n 5 at 76ff for the concerns in the Australian Catholic community about the secular movement in France as it affected the Church.

³⁵ C Thornton-Smith, above n 5, 76ff.

flourish and to spawn the extremist politicians and officials who led the anti-semitism of the Vichy period of French history. It was not a noble time for Christian adherents or for the universal principles of their faith. But it was a lesson of the need to keep the religious dimension private and for the State to protect and defend equally all people in its jurisdiction, whatever their religion, ethnicity or features of special difference.

If anything, the separation of religion and the State has become more important and urgent as the decades have passed. In the modern age, insistence upon legal enforcement of religious beliefs is again intruding into law and governance³⁶. Demands that religious law should predominate over the laws made by a civilian Parliament need to be resisted where they affect the basic civic rights of others. We know, from contemporary experience, that sometimes religious minorities target vulnerable minorities. Those minorities may be Jews. But they may also be gays. Or members of the Baha'i faith. Islamic believers. Or Christians in some countries. In a modern, democratic and pluralistic State, the law should be there for everyone. People should not be punished for changing their religion or renouncing religion altogether. These are fundamental individual human rights.

³⁶ See eg R A Fenton, "Catholic doctrine Versus Women's Rights: The New Italian Law on Assisted Reproduction" (2005) 14 *Medical Law Review* 73 at 75 concerning recent polarisation in the Italian Parliament over a law on assisted reproduction. There are many examples in many countries on many issues.

Respect for the right to religion and for the dignity of each religion does not extend to punishing people because they are of a different religion or because of the characteristics attributed to that religion. I hope that we have grown out of sectarian attitudes in Australia. Such attitudes, between Catholics and Protestants and against Jews, were still present in the Australia of my youth. The wrongs of the Dreyfus accusations demonstrated the perils of anti-semitism.

Witnessing them, Theodor Herzl, reporting for the Viennese newspaper, *Der Judenstaat*, came to the conviction that a separate national homeland for the Jews was essential. If Jews could not be protected effectively in their liberties, even in comparatively liberal and secular France, Herzl believed they were in peril everywhere. The State of Israel was thus an indirect outcome of the affront to justice of the Dreyfus affair. In all societies, lawyers and other citizens must build a protection for religious minorities. However, there must equally be an insistence on respect, under the law, for religious freedom. Religious freedom includes the right to change one's religion or to renounce religion altogether. The killing of apostates and of gays or women or other groups on supposed religious grounds has no place in the modern world. Respect for religious or cultural values must not involve

deprivation of the fundamental human rights of non-adherents or minority adherents³⁷.

Ambivalent role of the media: The media played an ambivalent role during the Dreyfus affair. On the one hand, in the earliest years, sections of the media inflamed the anti-semitism so evident in the news and editorials of the Church-supporting newspapers *La Libre Parole* and *La Croix*. These journals played their part in suppressing the early attempts to right the wrong of the Dreyfus conviction. They affirmed his guilt substantially because of his Jewishness.

On the other hand, the publication in *L'Aurore* of the famous letter by Émile Zola, "*J'accuse!*" was a turning point in the campaign for justice for Dreyfus. Liberal newspapers took up his cause. So did journalists from overseas³⁸. In a sense, the case became an early global illustration of infotainment. Part of the media attention arose out of the genuine concern of journalists and editors, affronted by the cover-up and injustice. Others just liked a good story. Not a few, in Australia and England, enjoyed pontificating about the superiority of British justice.

³⁷ See eg the provision on this subject of the UNESCO *Universal Declaration on Cultural Diversity* of 2 November 2001 and the *Universal Declaration on Bioethics and Human Rights* of 19 October 2005 (art 12); cf R Inglehart and P Norris, "The True Clash of Civilisations", *Foreign Policy*, March/April 2003, 63.

³⁸ See eg *The Times of London*, 23 December 1894 in Burns, above n 1, 46-48.

Ultimately, as Lord Russell of Killowen reported to Queen Victoria in 1899, the rehabilitation of Dreyfus was "brought about mainly by the efforts of Frenchmen". His trial had not occurred in the civil courts of the land where his conviction would much earlier have been quashed³⁹. Even Lord Russell felt obliged to acknowledge that "with all his grossness and exaggeration, the name of Zola ought not to be omitted". Where the media failed was in identifying the systemic and deep-seated problems which the Dreyfus case illustrated. Amongst these, the issues of ultra-patriotism, the misuse of claims of national security and the ubiquity of anti-semitism were inadequately addressed.

Need for institutional changes: The need for institutional changes and improvements are illustrated by what happened to Alfred Dreyfus. In a way, his case sounded a warning against anti-semitism. Inadequately attended, that scourge was to produce unparalleled suffering fifty years later, including in France.

Thinking on the Dreyfus case today, we can conclude that improvements in society's institutions are needed, including sometimes in the attitudes of those officials who people those institutions. Minimising the role of military tribunals; resisting secret trials; examining closely claims of national security; protecting stigmatised minorities:

³⁹ Lord Russell of Killowen to Queen Victoria, 16 January 1899 extracted from R B O'Brien, *The Life of Lord Russell of Killowen* (1901) in Burns, above n 1, 152.

upholding secularism. All of these are shown in stark relief by what happened to Alfred Dreyfus.

In many countries the awful happenings of the first half of the twentieth century, including the Dreyfus affair, led ultimately to the acceptance after 1945 of notions of legally enforceable fundamental human rights. In Australia, we have accepted those notions as binding on the country, in the form of international treaty law. In some instances, we have also translated the notions into enforceable Australian law - such as the law on refugees, the law against racial discrimination, against sex discrimination and on other topics. But we have still not taken the final institutional step of embracing, nationally, an enforceable Australian charter of fundamental rights. Even Britain, Canada and New Zealand, in their different ways, have done so, as has India, South Africa and, long since, the United States. Of course, such charters are no guarantee against wrongdoing, cover-up and official mistakes. But they are an institutional protection for what are partly institutional problems. At the least, they shore up the values that set society's standards which need to be given weight when cases like Dreyfus come along.

Proffering apologies for wrongs: There is one final point. It is also illustrated by the Dreyfus affair.

In France, there was a persistent reluctance of the old anti-Dreyfusards to acknowledge the wrongs done to Alfred Dreyfus. They people would blame everything and everyone except the elements that

they adored - in the government, the army and the Church who had assailed Dreyfus and played on anti-semitic sentiment to keep him imprisoned as an embarrassment who had attracted 'unpatriotic' and 'suspect' supporters. That sentiment came to the fore again in France under the Vichy regime from 1940 to 1944.

By 1985, the French government, at its highest level, determined on a corrective. The socialist President, François Mitterand, commissioned a statue of Alfred Dreyfus. It was presented to the army for placement in the *Ecole Militaire*. The army declined to accept it⁴⁰. In 1988 it was placed in a corner of Tuileries Gardens in Paris. Soon after, it was covered with painted swastikas. Anti-semitic profanities were marked on Dreyfus's tomb at the Montparnasse cemetery in Paris.

On the centenary reflections on Dreyfus's arrest in 1994, the official military history, whilst literally accurate, omitted many details and ignored the crimes done by supposed 'patriots' in the name of the honour of the French army. The official account, written by Colonel Paul Gaujac, declared that "Dreyfus's innocence is the thesis generally accepted by historians"⁴¹. That observation showed that some people will never admit error. For them Dreyfus's guilt is still an open question - an equal hypothesis or an arguable theory.

⁴⁰ Burns, above n 1, 189.

⁴¹ P Gaujac, "A Theory of Innocence" quoted from *Le Monde*, 10 February 1994 in Burns, above n 1, 189-190.

In 1998, President Jacques Chirac took a bold and healing step. A conservative politician, he commemorated the centenary of Emile Zola's public letter "*J'accuse...!*". It had been written by Zola as a letter to the President of the French Republic. At last, a President of the Republic responded. He took the occasion to remind his fellow citizens of the "sinister forces, intolerance, injustice" that can "creep into the State's highest level". Half a century after Vichy, and a century after Dreyfus's ordeal, it was timely to make that acknowledgment frankly, openly and humbly. It was an acknowledgment of "what Émile Zola and Alfred Dreyfus are saying to us across the years"⁴².

President Chirac emphasised the suffering of Alfred Dreyfus. He also pointed out that Dreyfus had known how to forgive. He declared that it is patriots of this kind, not shallow, prejudiced, discriminating, covering-up nationalists, who constitute "the conscience of humanity". It is they who teach their fellow citizens that love of country includes rejection of intolerance and hatred⁴³. Blind patriotism and unquestioning belief in the nation, whatever its wrongs, is not the ethos of a modern civic society.

⁴² J Chirac, Letter of the President of the Republic on the Centenary of "*J'accuse*", January 1998 in Burns, above n 1, 199 at 192.

⁴³ *Ibid*, 193.

We in Australia have not condemned a fellow citizen for treason to an equivalent of Devil's Island or Guantanamo Bay. Indeed, accusations of treason are exceedingly rare in this country's history. But Australians have certainly made mistakes. Some we have repaired. Others we have failed to repair. We have shown discrimination against vulnerable minorities. Such discrimination still exists. It exists not just in the streets. It exists in the law, in legal ways and in our hearts. We must learn to recognise these mistakes and, like President Chirac, where they are shown, to acknowledge them, to express regret for them to learn from them and to teach the next generation. That is the way to progress the journey towards greater human enlightenment.

The Dreyfus case speaks powerfully to Jewish people everywhere, including in Australia. This is especially so because of the genocide that followed. But it also speaks clearly of wrongs done to Aboriginals, to Asian Australians, to Arab and Islamic Australians, to gays and other sexual minorities, to women, to the very old and young, to the mentally and physically disabled, to prisoners, refugees and to unconventional people. We must not think that these wrongs are over or that a full enlightenment has arrived. Dreyfus belongs to Jewish people. But he also belongs to all human beings. Down the years, and even down the centuries, his cry as he was sent to exile from the courtyard of the *Ecole Militaire* in Paris will ring out as a warning against miscarriages of justice:

"Innocent! Innocent! Vive la France!"

JEWISH MUSEUM OF AUSTRALIA

MELBOURNE, 26 MARCH 2006

**THE DREYFUS CASE A CENTURY ON - TEN LESSONS FOR
AUSTRALIA**

The Hon Justice Michael Kirby AC CMG