The High Court's Human Sacrifice to the Alter of High Policy: An Alternative Solution to the Slaughter

KONRAD DE KERLOY & KATJA LEVY†

The High Court has recently reaffirmed the rule that ignorance of the law is no defence: Ostrowski v Palmer.[1] *This article considers the implications of the decision and suggests one way in which it might be circumvented.*

THE High Court of Australia may have been surprised by the public outcry over its recent decision in *Ostrowski v Palmer*,[3] a case which concerned the application of the principle that ignorance of the law afforded an innocent citizen no excuse. While the decision was defensible both on the grounds of a particular construction of the relevant sections of the Western Australian Criminal Code and by reference to 'high public policy', the reaction to the decision suggested that neither the construction nor the policy sat well with the general public. The Editorial in *The West Australian* newspaper two days after the decision proclaimed:

> Jeffrey Ryder Palmer is a human sacrifice to the law. He is also a scapegoat for bureaucratic incompetence and political failings. The High Court's decision to reinstate a conviction against Mr Palmer, a former crayfisherman, for fishing in a prohibited area, was based on legal technicalities. But it failed to deliver justice.[4]

The Sydney Morning Herald of the same date published an article by Richard Ackland which commenced:

> 'Ignorance of the law is no excuse.' Chief Justice Gleeson and Justice Kirby on Wednesday cited that well-worn dictum as being just about the only thing many people know about the law. Another equally cherished rule that most people know, but one not mentioned by the High Court judges, is that 'the law is an ass'.

† Lawyers, Freehills, Perth. The authors appeared as counsel for Mr Palmer in his appeals to the Full Court of the Supreme Court of Western Australia and to the High Court of Australia.

1. (2004) 206 ALR 422.
2. (1995) 184 CLR 19.
3. *Palmer* above n 1.
4. 'Justice Denied in Crayman's Legal Nightmare' *The West Australian* 18 Jun 2004, 22.

> And so it was with the outcome of the extraordinary four-year legal struggle by a West Australian commercial rock lobster fisherman, Jeffrey Palmer.
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> If ever there was a case that showed the yawning divide between law and justice, this is it. Importantly, even though the High Court unanimously found against Palmer, some of the judges were pained by the injustice of it all.[5]

Two members of the Court observed that 'on any fair and objective view [Mr Palmer] was not culpable in any way'[6] and openly recognised that his prosecution in the circumstances of the case had 'the appearance of an act of mindless oppression'.[7] Notwithstanding this observation, the High Court unanimously held that Mr Palmer's conviction should be reinstated. Why then did the High Court allow itself, in effect, to become the final instrument of that act of 'mindless oppression'? This article explores the ratio decidendi of the decision, the policy underlying it and suggests an alternative approach which is neither precluded by the decision nor inconsistent with its underlying policy but which may avoid the perception of injustice in cases like *Palmer* in the future.

THE FACTS

The facts of the case were not in dispute. Mr Palmer was an experienced fisherman who knew that areas of Western Australian waters may be closed to commercial fishing as a matter of law and that substantial penalties may follow as a result of a breach of such a law. Before embarking upon fishing in an area known as 'Zone B' (an area in which Mr Palmer had not previously fished), Mr Palmer visited the Fremantle office of the Fisheries Department of Western Australia (the Department responsible for administering the Fisheries Act and the Fisheries Regulations) to obtain information to enable him to determine which areas in Zone B were open to commercial rock lobster fishing.

He was told by an unidentified official that a copy of the Regulations was unavailable but that if he returned two days later a copy would be available for him. Two days later, Mr Palmer returned to the Fisheries office in Fremantle where an employee at the public counter told him that the office 'still did not have the Regulations on hand'. She volunteered however to photocopy 'the copy that they had themselves'. Mr Palmer was given a photocopy of the 'West Coast Rock Lobster Limited Entry Fishery Notice 1993' made under section 32 of the Fisheries Act 1905 (WA) and a bundle of notices given pursuant to the Fisheries Act. He was told that was 'all that he required for his needs'.

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5. R Ackland 'Between A Rock Lobster and a Heartless Place' *The Sydney Morning Herald* 18 Jun 2004, 15.
6. *Palmer* above n 1, Callinan & Heydon JJ 444.
7. Ibid, Callinan & Heydon JJ 440.

Mr Palmer believed that he had been provided with a complete set of all the regulations governing rock lobster fishing in Zone B. The High Court held that, on the uncontradicted account of Mr Palmer, that inference was irresistible.

In fact, the bundle of documents which he was given was not complete. It did not contain and made no reference to regulation 34, which would in the result prove critical.

Between 5 and 10 February 1999, Mr Palmer fished with 54 rock lobster pots in waters prohibited to commercial rock lobster fishing by regulation 34. Mr Palmer was observed checking and resetting the rock lobster pots by Fisheries officers. They made no attempt to rebuke or stop him from continuing to fish. There was no suggestion that Mr Palmer sought to conceal his activities in any way or that he was doing otherwise than attempting to earn a living in a responsible and lawful manner. There was no doubt that Mr Palmer knew the location of each of the 54 rock lobster pots. Mr Palmer was charged with a breach of regulation 34 of the Regulations and convicted by a magistrate at Carnarvon. The magistrate found that:

> [Mr Palmer] did not direct his mind to that Regulation because he did not know anything about it ... that means there is no evidence before the court about a reasonable belief as to the operation of Regulation 34. It follows ... that section 24 does not arise, the honesty and reasonableness of [Mr Palmer's] belief are not such as required to be negatived by the prosecution. Section 22 operates: ignorance of the law is no excuse.[8]

In consequence of the conviction the magistrate was obliged to impose a mandatory penalty of $27 600 and in addition ordered that Mr Palmer pay a fine of $500 and costs of $2 000.[9]

The magistrate, the Full Court of the Supreme Court of Western Australia and the High Court all held that Mr Palmer honestly and reasonably believed that his licence permitted him to fish in the waters in which he was fishing. They all accepted that the effect of the Fisheries Department's conduct and representations was to induce Mr Palmer into an erroneous belief that the documents he had been given governed Zone B and were complete and correct, that there was no regulation affecting the waters in which he was fishing and that he could legally fish in those waters.

Notwithstanding these findings, the High Court unanimously held that the mistake was one of law; that section 22 of the Criminal Code applied; that section 24 of the Criminal Code, which excuses if the mistake is one of fact, did not apply; and re-instated the conviction.

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8. *Fisheries Department v Palmer* (unreported) Carnarvon Court of Petty Sessions, 1 Mar 2000, No 1460 of 99.
9. The magistrate's decision was overturned by the Full Court of the Supreme Court of Western Australia.

STATUTORY PROVISIONS

The relevant provisions of the Criminal Code of Western Australia are in the following terms:

> **Ignorance of law: Bona fide claim of right**
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> **22.** Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by an offender is expressly declared to be an element of the offence.
>
> **Mistake of fact**
>
> **24.** A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.
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> The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

THE HIGH COURT'S REASONING

The High Court held that as a matter of construction and as a matter of public policy section 24 required that the mistakes of the accused had to be factual mistakes about the elements of the offence. Gleeson CJ and Kirby J stated:

> Section 24 is not concerned with mistakes at large. In particular, it is not concerned with mistakes about whether there is a law against conduct of a certain kind. Section 24 requires that attention be directed to the elements of the offence charged, and to the facts relevant to those elements, understood in the wider sense explained at the commencement of these reasons. It requires identification of the act or acts alleged to constitute the offence, and consideration of the extent to which the accused would have been criminally responsible for such act or acts 'if the real state of things had been such as he believed to exist'. Section 24 applies to mistakes about the elements of the offence, not mistakes about the existence of the law creating the offence.[10]

The High Court rejected the argument that a mistake as to the existence of a statute or a regulation (as opposed to its legal effect) was a mistake of fact on which section 24 could operate.

The Court also rejected the proposition that section 24 operated upon a mistaken conclusion of law where the conclusion could not logically be disassociated from the factual events which gave rise to it.[11] McHugh J observed:

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10. *Palmer* above n 1, 426.
11. *Palmer v Ostrowski* (2002) 26 WAR 289, Olsson J 302; *Griffin v Marsh* (1994) 34 NSWLR 104, Smart J 118, 122.

> Mr Palmer relies on the suggestion by Smart J in *Griffin v Marsh*[12] that a mistake of law based on an earlier mistaken belief as to a relevant and important fact should be treated as a mistake of fact. Such a general proposition cannot be accepted. It is true, as Smart J noted, that such a principle is more consistent with the principle that the law only punishes those with a guilty mind. However, this is not the determinative principle in this area. The very existence of the strict liability offence in the present case indicates that, to adopt the words of Dixon J in *Proudman v Dayman*,[13] the legislature was also concerned to 'cast on the individual the responsibility of so conducting his affairs that the general welfare will not be prejudiced.' In other words, an intention to commit the offence is not one of the elements which constitutes that offence; rather, the offence is made out if the prosecution establishes that the defendant knew all the elements constituting the offence. Indeed, the suggestion of Smart J effectively introduces a new rule of law: a mistake of law is a defence to a criminal charge if it was the consequence of a relevant mistake of fact. Such a rule cannot stand with the terms of section 22 of the Criminal Code, particularly in the context of strict liability offences.[14]

The High Court was also not prepared to construe the section, and in particular the words 'any state of things' in section 24, as having a meaning different from the equivalent common law principle, which applies in relation to a belief 'in the existence of a state of facts'.[15] The words in the section refer to a 'state of things' rather than 'state of facts', the former phrase implying a concept somewhat wider and different from a mere mistaken belief in a fact or a fact exclusively. Such a construction had some support from the dissenting judgment of Isaacs and Powers JJ in *Duncan v Theodore*[16] and in the opinion of the Privy Council on appeal.[17] The High Court held that section 24 had to be read in context and was subject to section 22, which made ignorance of the law no excuse.[18]

Each member of the High Court held that, as a matter of construction, it was irrelevant to the question of guilt that the accused was not aware that the elements of the offence constituted a crime. It was irrelevant how the accused's mistake had been brought about. Gleeson CJ and Kirby J said that how the mistake was brought about was 'beside the point'.[19] McHugh J was more specific. He stated that for the purposes of section 24 of the Criminal Code, it was –

> irrelevant whether the mistake of law is induced by incorrect information obtained from an official government body or from any other third party or is induced by any other form of mistaken factual understanding.... To find otherwise would

12. Ibid, 118.
13. (1941) 67 CLR 536, 540.
14. *Palmer* above n 1, McHugh J 435-436.
15. *Proudman v Dayman* (1941) 67 CLR 536, Dixon J 541.
16. (1917) 23 CLR 510.
17. *Theodore and Beal v Duncan* (1919) 26 CLR 276.
18. *Palmer* above n 1, Gleeson CJ & Kirby J 426, Callinan & Heydon JJ 443-444.
19. Ibid, 426.

> expand the scope of the defence in section 24 to an unacceptable extent. It would also undermine the principle that ignorance of the law is no excuse.[20]

However, the result in *Palmer* did not sit comfortably with at least some members of the High Court. Callinan and Heydon JJ said:

> It is impossible not to sympathize with [Mr Palmer]. On any fair and objective view he was not culpable in any way. To the contrary he was most diligent. He went to the office of the administering authority twice in order to ascertain what his obligations were. Entirely openly and strictly in accordance with his licence he sought to comply with his understanding of what he could do based on official information personally provided by officials.[21]

ALTERNATIVE SOLUTIONS

Those comments raise the question whether there are any legal alternatives which, conformably with the decision in *Palmer*, might be considered in future cases involving a diligent innocent, to overcome what clearly was an unsatisfactory result.

THE NORTH AMERICAN SOLUTION

In North America, the courts have developed a solution to the problem of prosecutions against 'diligent innocents', commonly referred to as a defence of 'officially induced error of law'.[22]

Officially induced error of law (as a basis of either a complete defence or as an excusing principle) is well established in US law where government advice is relied upon.[23]

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20. Ibid, 437-438.
21. Ibid, Callinan & Heydon JJ 444.
22. See *Raley v State of Ohio* 360 US 423, 440 (1959) where there was 'active misleading' of the defendants by 'positive assurances' by a State Commission that the defendants had a right to rely on the privilege against self-incrimination; *Cox v Louisiana* 379 US 559, 572 (1965) where there was an 'official grant of permission' to conduct a demonstration in a particular location; *United States v Pennsylvania Industrial Chemical Corporation* 411 US 655, 674 (1973) where the defendant contended that it was 'affirmatively misled' by an administrative agency's actions in consistently applying a limited construction of a legislative provision; *Miller v Commonwealth of Virginia* 492 SE2d 482, 488 (1997) where Annunziata J emphasised that the defence operates where the information relied upon by the defendant is 'an affirmative assurance that the conduct giving rise to the conviction is lawful', ie, where the defendant was told that he could possess a muzzle loading rifle; *United States v Aquino-Chacon* 109 F3d 936, 939 (1997) where it was held that the defendant must show that there was an 'active misleading' in the sense that the government actually told him that the proscribed conduct was permissible. See also *United States v Laub* 385 US 475, 487 (1967); *United States v Clark* 986 F2d 65, 69 (1993); S Connolly 'Bad Advice: The Entrapment by Estoppel Doctrine in Criminal Law' (1994) 48 Uni Miami L Rev 627, 633.
23. See the observations in *R v Jorgensen* [1995] 4 SCR 55, Lamer CJ 69-70.

The starting point in Canada was the decision in *R v Maclean,*[24] where O'Hearn J sought to develop the realm of defences available in Canada by relying on the United States decision in *Long v State.*[25] In *Long*, a man who had obtained a divorce in Arkansas returned to his native Delaware, married for a second time, and was convicted of bigamy. He presented evidence that he had consulted a reputable attorney before going to Arkansas to obtain the divorce, and again upon his return to Delaware, regarding the legal effect in Delaware of his divorce. The Minister who performed the second marriage sought and obtained the same advice, and the lawyer who had advised them both signed the marriage application. The Supreme Court of Delaware ordered a new trial where the jury would be instructed to consider this evidence based on a defence that:

> before engaging in the [prohibited] conduct, the defendant made a bona fide, diligent effort, adopting a course and resorting to sources and means at least as appropriate as any afforded under our legal system, to ascertain and abide by the law, and where he acted in good faith reliance upon the results of such effort.[26]

The Court stated:

> We are not impressed with the suggestion that a mistake under such circumstances should aid the defendant only in inducing more lenient punishment by a court, or executive clemency after conviction. The circumstances seem so directly related to the defendant's behaviour upon which the criminal charge is based as to constitute an integral part of that behaviour, for purposes of evaluating it. No excuse appears for dealing with it piecemeal. We think such circumstances should entitle a defendant to full exoneration as a matter of right, rather than to something less, as a matter of grace. Unless there be aspects of the particular crime involved which give rise to considerations impelling a contrary holding, — some special, cogent reasons why 'justice to the individual is rightly outweighed by the larger interests on the other side of the scales' — a mistake of the third classification should be recognized as a defense.[27]

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24. (1974) 17 CCC (2d) 84 (NS Co Ct). The development of the law in Canada is traced by Lamer CJ in *R v Jorgensen* ibid. Since then the principles enunciated by Lamer CJ have been applied in *CMHC v Elbabar* (1996) SKQB QB9623; *R v Robinson* (2001) BCSC 204 (although the defence did not succeed in either case on the facts); *R v Starosielski* (2001) ABPC 208; *R v Taylor* (2002) BCPC 321, para 98 where the court held that 'it is clear that a defence of officially induced error is available both for regulatory and purely criminal offences'; *Maitland Valley Conservation Authority v Cranbrook Swine Inc* (2003) ONCA C37250, C37262, a decision of the Court of Appeal for Ontario. In New Zealand, there have been two first instance decisions: *Department of Internal Affairs v Nicholls* (unreported) 20 May 1986, CR 500 40 34 002-025 NL, Bradford DCJ, in which the principle was upheld, and *Tipple v Police* [1994] 2 NZLR 362 in which the principle was accepted at least where 'there was no other way of achieving justice'.
25. 65 A 2d 489.
26. Ibid, 498.
27. Ibid.

A similar result was reached by the Nova Scotia Court of Appeal in *R v MacDougall,*[28] where Macdonald JA observed that:

> The defence of officially induced error has not been sanctioned, to my knowledge, by any appellate court in this country. The law, however, is ever-changing and ideally adapts to meet the changing mores and needs of society. In this day of intense involvement in a complex society by all levels of government with a corresponding reliance by people on officials of such governments, there is, in my opinion, a place and need for the defence of officially induced error, at least so long as mistake of law, regardless of how reasonable, cannot be raised as a defence to a criminal charge.[29]

Officially induced error of law was recognised as a proper basis for a stay of proceedings by Lamer CJ of the Supreme Court of Canada in 1995 in *Jorgensen v R.*[30] Jorgensen was the sole officer of the co-accused company which owned and operated an adult video store. Undercover police agents purchased eight videotapes from that store. Despite the fact that the Ontario Film Review Board (OFRB) had approved all of them, Jorgensen and his company were charged with eight counts of 'knowingly' selling obscene material 'without lawful justification or excuse' contrary to section 163(2)(a) of the Canadian Criminal Code. The trial judge found three of the eight videos to be obscene within the meaning of section 163(8) of the Code because some of their scenes portrayed explicit sex coupled with violence. She also found that, with respect to the mens rea for a section 163(2) offence, the Crown must prove beyond a reasonable doubt that the accused is aware of the presence or nature of the matter that constituted the subject of the charge in a general sense. It was not necessary that the Crown prove the accused was aware of the specific factual contents of the forbidden material at issue. The trial judge rejected the arguments made by the accused that the OFRB approval negated any possibility that he had acted knowingly or that it constituted a lawful justification or excuse. The accused was convicted on the three counts relating to the obscene videos. The Court of Appeal upheld the convictions. In his minority judgment, Lamer CJ undertook a detailed analysis of the defence of officially induced error of law. The starting point of his analysis was section 19 of the Canadian Criminal Code, the almost identical equivalent of section 22 of the Criminal Code (WA), which codified the common law rule that 'ignorance of the law is no defence'.

Section 19 the Canadian Criminal Code provides:

> Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.

28. (1981) 60 CCC (2d) 137. The Supreme Court of Canada reversed this decision on other grounds [1982] 2 SCR 605. See also *R v Ross* [1985] Sask D 5845-02.
29. *R v MacDougall* ibid, 160.
30. Above n 23.

The Chief Justice commented:

> This principle is a significant barrier to the appellants here because the question of whether or not a film is obscene is a question of law, specifically a question of the interpretation and application of the definition of obscenity contained in section 163(8) of the Criminal Code.[31]

After discussing the relevant policy issues, Lamer CJ considered that an exception should be recognised which did not result in the principle being rejected in its entirety:

> In summary, officially induced error of law functions as an excuse rather than a full defence. It can only be raised after the Crown has proven all elements of the offence. In order for an accused to rely on this excuse, she must show, after establishing she made an error of law, that she considered her legal position, consulted an appropriate official, obtained reasonable advice and relied on that advice in her actions.[32]

The Chief Justice then set out the circumstances in which the principle would operate:

> Accordingly, none of the four justifications for the rule that ignorance of the law does not excuse which Stuart outlined is undermined by this defence. There is no evidentiary problem. The accused, who is the only one capable of bringing this evidence, is solely responsible for it. Ignorance of the law is not encouraged because informing oneself about the law is a necessary element of the excuse. Each person is not a law unto himself because this excuse does not affect culpability. Ignorance of the law remains blameworthy in and of itself.[33]

OFFICIALLY INDUCED ERROR AS A DEFENCE IN AUSTRALIA

Section 19 of the Canadian Criminal Code has not stood in the way of the introduction of the defence of officially induced error because the Canadian Courts have been prepared to interpret the section purposively.

In *Flemming*,[34] O'Hearn J started from the position that section 19 is not absolute but is to be interpreted 'in the light of its reason for existence'.[35] The desirability of avoiding radical injustice could be taken into account, provided that the result was not a construction of section 19 which subverted the policy on which it was based. No such subversion was threatened if section 19 was construed subject to the

31. *Jorgensen* above n 23, 63.
32. Ibid, 81.
33. Ibid.
34. (1980) 43 NSR (2d) 249.
35. Ibid.

limitation represented by the defence of officially induced error. The policy of promoting universal conformity to the law would not be violated by the acquittal of the defendant who did his best to conform his conduct to the law but was frustrated in that attempt by an official charged with the law's administration.[36]

Several academic writers have endorsed this approach.[37] Ward comments:

> This reasoning demonstrates an ingenious use of the techniques of purposive construction, but it is in large measure convincing.... In the result, the reasoning of O'Hearn J in *Flemming* offers the most satisfactory means of reconciling section 19 and the defence of officially induced error. That some reconciliation is desirable cannot be doubted.[38]

Palmer invited the High Court to consider a defence based upon officially induced error of law. Although the High Court did not consider the merits of the defence,[39] it is likely that the decision in *Palmer* has foreclosed its introduction in Australia because the defence is dependent upon a court adopting a purposive construction of sections 22 and 24 of the Criminal Code. The High Court in *Palmer* has made it plain that the approach it requires with respect to those sections is one which is consistent with the equivalent, well established common law principles.

AN ALTERNATIVE SOLUTION - A DEFENCE BASED ON AN EXTENSION OF THE *RIDGEWAY* PRINCIPLES

Apart from considerations of injustice, there is at least one other reason why the search for an alternative solution should continue. As the law presently stands, a person who acts on erroneous official advice can be punished under the criminal law yet can be compensated under the civil law for any loss and damage that person suffers as a result of acting in reliance upon that advice. In the present case, as a result of acting on erroneous official advice, Mr Palmer was convicted of a criminal offence and fined, but at the same time was able to pursue an action against the State for damages under the civil law, which he eventually settled for $500 000. To most ordinary observers this paradox would seem absurd and would undoubtedly bring to mind the oft-quoted statement that 'the law is an ass'.

An alternative solution which might be available in a case like *Palmer* (which would not require a court to ignore the ratio decidendi of that case or subvert the policy which underlies it) is one based upon an extension of the principles enunciated by

36. Ibid, 272.
37. See eg R Ward 'Officially Induced Error of Law' (1988) 52 Sask L Rev 89.
38. Ibid, 102-103.
39. The invitation was not taken up principally upon the grounds that the defence had not been raised before the Magistrate at first instance and it might therefore be prejudicial to the prosecution to allow Palmer to raise it upon appeal.

the High Court of Australia in *Ridgeway v R.*[40] This situation, it is submitted, could be effected 'by analogical reasoning, or by incremental growth or a rational extension of existing rules to new instances not foreseen when the existing rule was first developed'.[41] In essence, such an extension would provide a procedural defence based upon abuse of process in circumstances where an appropriate official had given negligent advice to the accused and the accused had acted reasonably in reliance on that advice. A number of commentators, both in Australia and in other Commonwealth jurisdictions, have advocated such a defence, although there has not been common agreement as to its essential elements.[42] Simester and Sullivan,[43] for example, advocate a procedural 'abuse of process' defence but limited to circumstances where the accused had received official assurances that particular conduct would not be prosecuted. They contend that:

> [S]omething akin to estoppel should be seen to arise where the assurance has been given by an official of sufficient authority and has been relied upon by the person subsequently prosecuted. The distinction is best observed, perhaps, not by a defence of reasonable mistake of law but by reference to notions of due process and fair trial. In *R v Croydon Justices, ex parte Dean*[44] it was found to be an abuse of process to instigate criminal proceedings against a person who had agreed to give evidence in return for an assurance that he would not be prosecuted. The same reasoning would apply to a person assured that her planned conduct conforms with law, should the assurance be given by an official of appropriate standing. Any trial ... would constitute an abuse of process.[45]

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40. *R v Ridgeway* (1994) 185 CLR 19.
41. D Heydon 'Judicial Activism and the Death of the Rule of Law (2003) 23 ABR 1010.
42. G Williams *Criminal Law: The General Part* 2nd edn (London: Stevens & Sons, 1961) 102: Williams observes that since the 1930s there has been produced a notable body of literature arguing for recognition of the defence of non-culpable ignorance of law and advocates adoption of principles from German jurisprudence where a limited defence of ignorance of law should be available to a citizen who conscientiously searches the law out. See also D O'Connor & P Fairall *Criminal Defences* 3rd edn (Sydney: Butterworths, 1988): the authors argue that 'it is disturbing that the availability of a criminal defence should turn upon a distinction that cannot be clearly delineated'. They suggest that the test to reveal the distinction between the two difficult rules is a 'closely guarded secret'. WJ Brookbanks 'Officially Induced Error as a Defence to Crime' (1993) 17 Crim LJ 381, 384: 'Where the authority is not simply conversant with the law, but is charged with administering it, any person relying upon advice given by such an authority should not be convicted'. See also K Amirthalingam 'Mistake of Law: A Criminal Offence or a Reasonable Defence?' 18 Crim LJ 273, 273; J Hall *General Principles of Criminal Law* 2nd edn (Indianapolis: Bobbs-Merrill, 1960) 388; P Brett 'Mistake of Law as a Criminal Defence' (1966) 5 MULR 179; AJ Ashworth 'Excusable Mistake of Law' [1974] Crim Law Review 652; E Garret 'Mistaken Mistakes' [1989] NZLR 355; M Briggs 'Officially Induced Error of Law' (1995) 16 NZUL Rev 403; K Dawkins 'Criminal Law' [1995] NZL Rev 34.
43. AP Simester & GR Sullivan *Criminal Law Theory and Doctrine* 2nd edn (Oxford: Hart, 2003).
44. [1993] Crim LR 758.
45. Simester & Sullivan above n 43, 558.

In *Ridgeway,* the accused was charged with being in possession of not less than the trafficable quantity of heroin which had been imported into Australia in contravention of the Customs Act 1901 (Cth). He had been apprehended in possession of the heroin and there was no assertion that he had a reasonable excuse.

The heroin had been imported into Australia as a 'controlled delivery' by a member of the Royal Malaysian Police Force, as part of an undercover operation organised between the Australian Federal Police and the Royal Malaysian Police with the specific aim of apprehending Ridgeway. He had initiated arrangements for the importation of the heroin through Lee, with whom he had served a prison sentence from 1985 until 1987. Lee had since become an informer to the Royal Malaysian Police Force and was subsequently paid by the Australian Federal Police for his participation in the importation of the heroin in this case.

There was a pre-trial application by the defence that the proceedings be permanently stayed on the ground that they were an abuse of process. The District Court judge did not address the merits of the application but ruled that it was out of time. Ridgeway was convicted and appealed to the Court of Criminal Appeal of the Supreme Court of South Australia on the ground that the judge had erred in not granting a permanent stay of the proceedings, either because the prosecution was an abuse of process or because all evidence relating to the importation of the heroin should have been excluded in the exercise of his discretion on the grounds of public policy. The Court of Criminal Appeal dismissed the appeal.

On appeal to the High Court of Australia, the High Court stayed the prosecution on the basis that it constituted an abuse of process. The stay was granted in the context of deliberate illegal or improper conduct by law enforcement officials aimed at causing, and which in fact caused, an accused to commit a crime. The Court accepted that such circumstances may enliven the Court's discretion. The Court divided between those members who favoured a stay consequent upon the exercise of judicial discretion which excluded essential evidence (Mason CJ, Deane and Dawson JJ, Brennan J, Toohey J) and those members who favoured a stay if the administration of justice would be brought into disrepute by the continuation of the proceedings (Gaudron and McHugh JJ).[46] The approach of McHugh J differed from that of Gaudron J in that McHugh J considered that the effect of the impugned conduct on the accused or on the hypothetical ordinary citizen is crucial.[47]

In *Ridgeway,* the public policy reasons which provided support for the recognition of a discretion to exclude evidence of an offence or of an element of the offence were:

46. Toohey J accepted that a stay of proceedings was the appropriate remedy in a case of entrapment of an unwary innocent: *Ridgeway* above n 40, 56-58.
47. *Ridgeway* above n 40, 85.

(a) in the case of illegal conduct, the concern that the conviction of the offender is not bought at too high a price by reason of curial approval of illegal conduct on the part of the law enforcement agency;[48] and

(b) in the case of improper conduct, the concern that the conviction is brought about by conduct which exceeds the minimum standards expected and required by society of those entrusted with powers of law enforcement.[49]

There are sound policy reasons why one or other of the approaches could be applied in a case similar to *Palmer* even though the official conduct complained over is not deliberately illegal or deliberately improper, but is merely negligent. The amount of legislation regulating conduct and imposing criminal liability in Australia has grown significantly in the past 30 years. To assist citizens to know the law and conform their behaviour to it, both Commonwealth and State governments voluntarily dispense information to citizens about the laws and regulations which they administer, and actively and publicly encourage them to seek their advice about those laws and regulations.

The Fisheries Department of Western Australia is an example of just such an agency. In November 1998, shortly before Mr Palmer approached its Fremantle office for information, it published a pamphlet which was available at each of its offices throughout Western Australia (including Fremantle). It was entitled 'Customer Service Charter'. The following statements were made in the pamphlet under the heading 'Our Guarantee of Service':

> **Accurate and reliable advice**
> We will ensure that accurate information on fisheries management is accessible to customers.
>
> **Compliance with Legal Requirements**
> We will ensure that all transactions comply with fisheries legislation, and comply to standard policies and procedures.

In response to a question in the Legislative Assembly concerning the *Palmer* case, the Attorney-General, Mr JA McGinty, gave the following answer:

> I indicate that the Government accepts that it has a duty to provide correct information to citizens when they seek information, particularly on matters that are regulated by statute and regulation in this State. We accept that there is a responsibility to provide correct information, or at least to not provide incorrect information.[50]

48. *Ridgeway* above n 40, 32, 49, 64.
49. *Ridgeway* above n 40, 36.
50. *Hansard* (LA) 24 Jun 2004, 4339, 4340.

The answer begged the question: what are the consequences if the government fails in its duty to provide correct information? Is the only remedy a civil claim against the government for negligent misstatement? Many people would consider it unjust for the same government to prosecute an individual for an offence that it had already assured him was not an offence.[51] Such prosecutions run counter to the general expectation that the criminal law is based on 'an incontrovertible minimum of political decency'.[52] They undoubtedly bring the administration of justice into disrepute,[53] especially when the government department responsible for the administration and enforcement of the law has actively encouraged citizens to seek its advice about the relevant law before engaging in the conduct concerned. As Margaret Briggs has put it:

> Political decency demands that when the state chooses to advise its citizens about the law, it should do so accurately. Viewed practically, to deny responsibility for such pronouncements would also undermine social confidence in the authority of those whom the state has designated to speak for it, and whose pronouncements it must wish to be respected.[54]

A possible alternative, in cases where the government has failed in its duty to provide correct information to one of its citizens is by an extension of the *Ridgeway* principles. This would protect the diligent innocent and would not subvert the principle that ignorance of the law is no excuse or the policy considerations that support it.

ENLIVENING THE COURT'S DISCRETION

The High Court itself has said that principles which may enliven the Court's discretions are not static but develop to meet changes in an evolving society and the institutions which regulate it.[55] The High Court has also said on a number of occasions that the application of the principles depends upon the circumstance of the case.[56]

Those considerations include:

(a) the desirability of encouraging knowledge of the law rather than ignorance;[57]

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51. *R v Flemming* above n 34, 274; *Jorgensen* above n 23, 71; *Ridgeway* above n 40, 77; *He Kaw Teh v R* (1985) 157 CLR 523, Gibbs CJ 530.
52. A Ashworth *Principles of the Criminal Law* (Oxford: Clarendon Press, 1991) 59.
53. Brett above n 42, 184; O'Connor & Fairall above n 42, para 3.28.
54. Briggs above n 42, 406.
55. For example, the development of the common law rule that a judge may, in his discretion, refuse to admit statements made in certain circumstances to police officers is of fairly recent origin and was developed to meet 'the growth of a police force of the modern type': *R v Lee* (1950) 82 CLR 133, 148.
56. *Bunning v Cross* (1978) 141 CLR 54, Stephen & Aickin JJ 77; *Walton v Gardiner* (1993) 177 CLR 378, 393-394; *Ridgeway* above n 40, Gaudron J 75, McHugh J 92.
57. OW Holmes *The Common Law* (Boston: Little, Brown, 1881) 48.

(b) that any defence would involve the courts in insuperable evidentiary problems;[58]
(c) that if defendants were judged on their own conception of the law rather than the law as it is, the essential objectivity of the law would be infringed;[59] and
(d) that any defence would encourage deliberate ignorance of the law or would detract from the law's educative function.[60]

(a) Encouraging people to know the law

In 1881, Holmes, in his authoritative text, *The Common Law*, claimed that any defence which would encourage deliberate ignorance of the law or which would detract from the law's educative function should be rejected:

> Public policy sacrifices the individual to the general good.... It is no doubt true that there are many cases in which the criminal would not have known he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interest on the other side of the scales.[61]

However, if a person does his best to conform his conduct to the law but is misled by officials charged with the administration of the law, it is clear that he is not doing anything at odds with the purposes of the maxim in its application to the criminal law. The mischief that the justification claims to prevent has not occurred.[62]

(b) Evidentiary problems

The argument that ascertaining a person's state of mind would cause insurmountable evidentiary difficulties for the court is unconvincing: a person's state of mind is no more difficult to investigate than many questions which courts frequently have to consider.[63] This was recognised by Dixon J in *Thomas v R*,[64] where he addressed the concern that offenders might too readily escape conviction by deposing to conditions of the mind and describing sources of information which can not be adequately tested and contradicted. His Honour held:

> A lack of confidence in the ability of a tribunal correctly to estimate states of mind and the like can never be sufficient ground for excluding from inquiry the most fundamental element in a rational and humane criminal code.[65]

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58. J Austin *Lectures on Jurisprudence: Or, the Philosophy of Positive Law* 4th edn (London: John Murray, 1873) 498.
59. Hall above n 42, 388.
60. Holmes above n 57, 48.
61. Ibid.
62. Kastner above n 37, 335.
63. See also *He Kaw Teh* above n 51, 581; Holmes above n 57, 48.
64. (1937) 59 CLR 279.
65. Ibid, 309.

Thus, concern regarding the evidential difficulties is not an appropriate basis on which to deny extending the principles in *Ridgeway*.

(c) Objectivity of the law

The concern that each person would become a law unto himself is not justified. The mere fact that an individual is not held to be legally accountable for a wrong act does not mean that the act is not condemned; it means only that the accused is not to be blamed for what he or she did.[66] As Fletcher has observed:

> Excusing a particular violation does not alter the legal prohibition. Recognising mistake of law does not change the law; if the excused were to leave the courthouse and commit the violation again, he or she would be clearly guilty.[67]

Ridgeway was an example where the Court prohibited the continuation of the prosecution not because of any doubt about the culpability of the accused or the evil of his act, but because of concerns about the misconduct of the law enforcement agencies.

Recognition of an extended *Ridgeway* principle would not encourage deliberate ignorance of the law,[68] since the very conditions of the excuse would include a diligent effort, in good faith by means as appropriate as any available under the legal system, to acquire knowledge of the relevant law. Professor Stuart has observed:

> It is difficult to see why the general arguments in favour of no liability without some form of fault do not apply. If the criminal sanction is being used as an educative device it should not be at the expense of a blameless accused.[69]

It is apparent from the foregoing analysis that the policy reasons underlying an absolute rejection of any excuse arising where there has been ignorance or a mistake of the law have little or no relevance where a defendant has, before engaging in conduct, made a genuine and diligent effort, by resorting to such means as are provided (and indeed encouraged) by the system administering the law and regulations, to ascertain and abide by them. Whilst it may be true that strict liability offences cast on individuals responsibilities of conducting their affairs so that the general welfare will not be prejudiced, it is difficult to conceive what more could be reasonably expected of a 'model citizen' than that he guide his conduct by the law ascertained in good faith, not merely by efforts which might seem adequate to a person in his situation, but by efforts as well designed to accomplish ascertainment as any available under our system.

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66. GP Fletcher *Rethinking Criminal Law* (Boston: Little, Brown, 1978) 734.
67. Ibid.
68. *Palmer* above n 1, Callinan & Heydon JJ 444.
69. D Stuart *Canadian Criminal Law: A Treatise* 3rd edn (Scarborough: Carswell, 1995) 264.

In *Ridgeway*, the High Court recognised the tension which exists in entrapment cases and other cases involving deliberately illegal or improper conduct by law enforcement officials between the public interest in convicting those who knowingly break the law in question and the public interest of ensuring that a conviction is not bought at too high a price by curial approval of illegal or improper conduct on the part of law enforcement officials.[70] That tension is absent in a case where the error is officially induced. In such a case there is no question of a knowing and deliberate breach of the law by the alleged offender.

Although no illegal conduct on the part of law enforcement officials is involved, conduct by government officials which may properly be characterised as inexcusable is involved.[71] It is 'unbearable and completely unacceptable' (to adopt the words of Barwick CJ)[72] not to have correct information about regulations available to citizens on demand. The reaction of the public and the media following the decision in *Palmer's* case suggests that such prosecutions appear unfair and may bring the administration of justice into disrepute.

It is submitted that it would be consistent with the community's expectations of justice and consonant with principles established in *Ridgeway* that where an accused has:

(a) made an error of law;
(b) considered his legal position;
(c) consulted an appropriate official;
(d) obtained reasonable advice;
(e) relied on that advice in his actions; and
(f) by those actions inadvertently committed an offence,

a court may, as a matter of discretion, either exclude the evidence of the offence or of the elements of the offence which resulted from reliance upon that advice or stay the prosecution on the grounds that it brings the administration of justice into disrepute.[73]

WHO IS AN 'APPROPRIATE OFFICIAL' AND WHAT CONSTITUTES 'REASONABLE ADVICE'?

No defence would be available unless the accused showed that he had consulted an appropriate official. For example, if Palmer had obtained advice about fishing

70. *R v Cleland* (1982) 151 CLR 1, 20; *R v Pollard* (1992) 176 CLR 177, 203.
71. *Watson v Lee* (1979) 144 CLR 374, 380, 381, 395.
72. Ibid, Barwick CJ 380.
73. In *Jorgensen* above n 23, 81-82 where Lamer CJ considered that the principle should operate as an excuse rather than as a justification which, like entrapment, will lead to a judicial stay of proceedings rather than an acquittal.

boundaries from an officer employed by the Australian Taxation Office, it could not be suggested that such an official, albeit employed by the government and charged with giving advice, was appropriate or indeed that any reliance on the advice given by the official was reasonable. What then constitutes an 'appropriate official'?

In *Jorgensen*, Lamer CJ considered that, in general, government officials who are involved in the administration of the law in question will be considered appropriate officials. The official must be one who a reasonable person in the position of the accused would normally consider responsible for advice about the particular law in question.[74] Lamer CJ also expressed the view that, as an individual relying on advice has less knowledge of the law than the official in question, the individual must not be required to assess whether the advice was reasonable at a high threshold. If an appropriate official is consulted, the advice obtained will be presumed to be reasonable unless it appears on its face to be 'utterly unreasonable'.[75]

The test propounded by Lamer CJ may be compared with the test for civil liability in Australia for negligent misstatement. In such a case a defendant will be found to owe a duty of care to prevent economic loss by negligent misstatement where:

(a) the loss suffered was reasonably foreseeable;
(b) the imposition of a duty of care would not impose indeterminate liability;
(c) the plaintiff was vulnerable to loss;
(d) the imposition of a duty of care would not impose an unreasonable burden on the autonomy of the defendant;
(e) the defendant knew, or ought reasonably have known, its conduct could cause harm to the plaintiff.[76]

Establishing vulnerability has been held to be important in showing that the defendant owed the plaintiff a duty of care not to make negligent misstatements.[77] Specific circumstances which indicate the plaintiff's vulnerability are reliance (or dependence) and the assumption of responsibility.[78] Thus, the focus in the civil arena rests on the assumption of responsibility by the maker of the statement more so than the position and circumstances of the accused. However, reasonable reliance

74. Ibid, 79.
75. Ibid, 80.
76. *Perre v Apand Pty Ltd* (1999) 198 CLR 180, McHugh J 231.
77. Ibid, McHugh J 225-226; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, Gaudron J 24, McHugh J 40; *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1 Gleeson CJ, Gummow & Hayne JJ 17; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, Kirby J 625. Applied in other courts: *Dovuro Pty Ltd v Wilkins* (2000) 105 FCR 476, Branson J; *Reynolds v Katoomba RSL All Services Club Ltd* (2001) 53 NSWLR 43, Spigelman CJ 49.
78. *Perre v Apand* above n 76, McHugh J 228; *Crimmins v Stevedoring Industry Finance Committee* ibid, 40.

is a key element in both the test propounded by Lamer CJ and the test for negligent misstatement. While the tests are different, they are not fundamentally dissimilar. An Australian court could adopt the test put forward by Lamer CJ without being out of step with existing tests propounded by the High Court in the civil arena.

CONCLUSION

The issue of whether the prosecution of Palmer constituted an abuse of process was not raised before the magistrate who tried the case in Carnarvon. Given the very limited resources available to lawyers practising in the remote regions of Australia, it is hardly surprising that the point was not taken. On appeal to the Full Court of the Supreme Court, leave was sought to argue a defence based on the doctrine of officially induced error of law. Leave was not granted for a number of reasons including the court's concern as to the possibility that the prosecution might well have conducted its case differently if the issue had been identified at trial and would therefore be prejudiced by allowing the defence to be raised for the first time on appeal.[79] The High Court was invited to consider the defence based on the doctrine of officially induced error of law as well as a procedural 'abuse of process' defence based upon an extension of the *Ridgeway* principles. The High Court declined to do so because the defences had not been raised at first instance and had not been given consideration by any intermediate appellate court.

As noted above, it is likely that the decision in *Palmer* has foreclosed the introduction in Australia of a defence based on the doctrine of officially induced error of law. However, it is submitted that nothing in *Palmer* has foreclosed the possibility of a procedural 'abuse of process' defence. The merits of the defence were not considered by the High Court in *Palmer* and, so far as the authors are aware, have not been considered by the High Court or by any other court in Australia. The issue therefore awaits consideration by a court in the future.

79. *Palmer v Ostrowski* above n 11, Steytler J 296-297, Olsson AUJ 303-304.