Executive Supremacy? Are Governments now more powerful than Parliaments?

By Kylie Pearce

Tuesday 14th August 2012 marked the commencement of hearings in the Supreme Court of the landmark state constitutional case of Barber v State of Victoria. Greg Barber MP, parliamentary leader of the Victorian Greens party and plaintiff in this case, said his motive was to address the need for Parliament to stand in the shoes of the Australian people and hold the government accountable for its decisions. On 9 August, Greg Barber, Dr Greg Taylor, Associate Professor at Monash University's Faculty of law and author of The Constitution of Victoria, and Dr Rosemary Laing, Clerk of the Senate in the Australian Parliament, addressed the hot topic of parliamentary powers and considered whether the executive was indeed usurping the supreme power of the parliament.

Mr Barber launched a case against the State Government of Victoria when it refused to table a copy of the independent consultant report it had commissioned into *myki*, the new electronic ticketing system in Victoria. The Treasurer refused Parliament's request for the document, claiming that the Legislative Council did not have the power to request this document as it had been prepared for the purpose of submission to cabinet. Mr Barber emphasised that this case is relevant to matters such as smart metres, desalination plants and all other matters of public interest where the information should be accessible within the public domain.

Dr Rosemary Laing's key message was that, while parliament was the supreme organ and should certainly take the supreme position in our polity, political influence can significantly impact upon the supremacy of powers. Dr Liang explained two essential powers of the Legislature: the power of enquiry and the power to punish contempt, and said that the *Barber v State of Victoria* case represents one aspect of this enquiry power, which is the century old power to audit documents. She recounted historical examples of this power's application and concluded that the solution to such power struggles is invariably political and that courts have rarely been viewed as the solution. She also described how the size of parliament and the balance of the parties' representation could influence these powers. For example, during the AWB royal commission, the Federal Government declared that ministers would not answer any questions. Dr Laing noted how the Federal Government of the time had a majority in the Senate and had felt confident enough to stand up against the Senate's request in this situation. This case was an example of how governments can believe it is their right to determine what information goes to the Parliament.

Dr Greg Taylor addressed three key concepts in his speech: the supremacy of parliament, strict laws and how to avoid extreme applications of these laws. First and foremost, Dr Taylor explained that one of the most basic principles of our Constitution is that supreme power is vested in the Parliament, comprised of the Lower and Upper Houses and the Crown. Dr Taylor highlighted that, by using phrases such as "the government is going to legislate", the media reinforce the illusion that the executive has supreme power, when in fact the government proposes legislation which can then be accepted or rejected by the parliament. Since the Victorian Constitution first came into force in 1855, Parliament has had the powers of the English House of Commons as they existed in 1855. Accordingly, the Victorian Parliament is the grand inquest of the State and has the right not only to legislate but also to enquire into any matters of the State which it feels necessary. Despite this supreme parliamentary power, Dr Taylor emphasised that its exercise to an extreme, without consideration of other relevant factors, would be to the detriment of society and could destroy democratic government. He acknowledged the legitimate claim of the executive government for some operations to be privileged, and proposed that in the interests of operating the constitution in a sensible manner, parliament should appoint an independent arbiter (a retired judge or Queens Counsel) to determine whether or not a claim by the government to secrecy of a particular document is legitimate or not. And in keeping with this prudent practice, the government should submit its claims to this arbiter in preference to making submissions to opposition members. Similarly, the decision whether or not to release the *myki* report into the public domain should ideally be determined by an independent arbiter instead of the court.

Greg Barber, parliamentary leader of the Victorian Greens party speaks to the audience.