The Tensions Surrounding Judicial Independence and the Separation of Powers in Queensland

By Ryan Behrendorff for CMN228: The Writer and the Law

The rejection of law reforms by the Liberal National Party and the Australian Labor Party regarding independent judicial appointments in Queensland has sparked tension among judicial and political figures as well as the media. In contrast to the Australian Constitution, the *Constitution of Queensland 2001* does not enforce a rigid 'separation of powers' in government. In fact, the Queensland Parliament may enact law which would alter the judicial role of the State's courts (Queensland Parliament 2011). Speaking at the Australian Judicial Conference, former Chief Justice Sir Gerard Brennan discussed the importance of judicial independence:

> The reason why judicial independence is of such public importance is that a free society exists only so long as it is governed by the rule of law—he rule which binds the governors and the governed, administered impartially and treating equally all those who seek its remedies or against whom its remedies are sought. However vaguely it may be perceived, however unarticulated may be the thought, there is an aspiration in the hearts of all men and women for the rule of law (Brennan 1996, np).

Brennan states the significance of the rule of law in ensuring a free society, as well as implying judicial independence is key to the successful implementation of the rule of law. Therefore, judicial independence has a vital role in maintaining societal freedom for citizens.

Legal appointments of particular judges have prompted calls from the Queensland Law Society and the Council for Civil Liberties to create an independent judicial commission in the state of Queensland (Robertson 2015). One of the most controversial was that of current Chief Justice Tim Carmody. The former chief magistrate was elevated to the role in June 2014 replacing current Governor of Queensland Paul de Jersey (Robertson 2015). The appointment caused an immediate uproar among the legal community, notably due to Carmody's perceived closeness to parliament and inexperience in judicial leadership (Keim 2014; Sofronoff 2014). Media reports in early January 2015 revealed that Carmody's work rate in the first six months of his tenure was far below that of predecessor de Jersey in his final six months in the role; Carmody delivered three considered judgments compared to 20 by de Jersey (Robertson 2015). About three weeks later, justice advocates were reported to have called for an independent body to select judges following ongoing criticism of the Chief Justice (Robertson 2015). The elevation of Tim Carmody as Chief Justice may be perceived as detrimental to the separation of powers in Queensland. Although it is common practice for the executive to appoint judges, this particular selection has been seen as being compromised by the government or as Walter Sofronoff (2014, np) described it, 'as a reward for

apparent political loyalty'. Case in point, it is in fact the executive which is most at risk of abusing the power it seemingly has over the other two branches (Alvey 2006).

Despite the widespread condemnation of Tim Carmody, little can be done to force a premature end to his tenure. The Queensland Constitution (2001, s.59) states that 'the Governor in Council ... may appoint a barrister or solicitor of the Supreme Court of at least 5 years standing as a judge', a prerequisite the Chief Justice meets having become a barrister in 1982 (Sofronoff 2014). The Constitution further specifies that a judge may only be removed from an office on the basis of 'proved misbehaviour justifying removal from the office; or proved incapacity to perform the duties of the office' (2001, s.61), conduct which Carmody has not yet explicitly engaged in. With these factors considered, Tim Carmody appears set to remain in office as Chief Justice.

The most significant threat to the efficiency of the doctrine of the separation of powers is branches 'exceeding' their roles and responsibilities, in a way that encroaches upon the separate interests of another branch (Hammond 1991, cited in McHugh 2002). From a governance perspective, tension between the executive and the judiciary is inevitable (McHugh 2002). There are a number of attitudes and beliefs held by the respective branches in relation to each other. The executive believes that the judiciary is not fully aware of its requirements as a branch of government. It also believes it is not the role of the judiciary to manage the allocation or expenditure of resources. Additionally, the executive has a perception that the judiciary has a tendency to interfere with government policy decisions, as well as having an inflexible approach in following procedures (McHugh 2002). At the Australian Bar Association Conference in Paris, France in 2002, the Honourary Justice McHugh AC spoke about the potential conflict between the executive and judiciary. This was part of her introduction:

> In theory, the doctrine constructs a system that avoids concentrating too much power in any one body of government—the three powers are separated from one another and 'none is supposed to trespass into the other's province'. Furthermore, no arm of government is supposed to abdicate power to another arm. The premise of this construct is not a harmonious relationship but a checking and balancing of power. Inevitably, the checking provides the blueprint for, and generates, tension between the three arms of government (McHugh 2002, np).

McHugh describes a governmental system that is largely inflexible in terms of separation of responsibility. Each arm takes care of its own respective duties in office. As a result, it would be sensible to assume tension would not arise. However, although each arm has policies and decisions it applies on its own behalf, each clearly has views regarding those implemented by the other two, initiating governmental tension. This tension is heightened by branches making their usually conflicting views public. Despite this, tension between the branches can be perceived as a positive. Lord Woolfe expands on this:

> The tension … is acceptable because it demonstrates that the courts are performing their role of ensuring that the actions of the Government of the day are being taken in accordance with the law. The tension is a necessary consequence of maintaining the balance of power between the legislature, the executive and the judiciary …" (Woolfe 1998, cited in McHugh 2002, np).

Woolfe holds the belief that tension assists with keeping the branches apart from one another, hence sustaining the balance of power. In a hypothetical sense, if the legislature, executive and the judiciary were to mesh, political chaos would be an inevitable result. The judiciary has an important role in ensuring the Government is held legally accountable for its decisions. In turn, the purpose of the doctrine is met whereby power is separated evenly and no branch functions above the rule of law.

Media coverage on judicial independence and separation of powers in Queensland has been widespread and ongoing. The Guardian reporter Joshua Robertson followed the Carmody affair closely along with the ensuing calls for an independent judicial commission at the beginning of 2015. Alex McKean weighed in on the issue, writing for Independent Australia in a somewhat scathing article targeted at the former Newman government:

> Mr Newman and Mr Bleijie are not satisfied with the share of power usually allocated to the executive arm of government in a democratic society. They have taken radical steps to control any body which might have the ability to scrutinise their mode of exercising power, most notably, until these recent events, the Crime and Misconduct Commission. It is not good enough to say the people can pass judgment on this Government when the election is finally called. The checks and balances that are essential to our system of government are there because elections—every three years—are not, in themselves, a sufficient check upon rampant power (McKean 2014, np).

McKean portrays the former government as power-hungry and seeking to control entities which monitor government behaviour and misconduct. This reiterates the importance of judicial independence. Parliamentary action must be taken in accordance with what is reasonably considered democratic. Once the executive is allocated excessive power, their decisions cannot be as effectively scrutinised and therefore, a free, just society cannot be assured. In July 2013, *The Australian* reported on the intentions of former Attorney-General Jarrod Bleijie to scrap court-ordered parole and suspended jail sentences. Bleijie explained:

> The rights of offenders are coming before the rights of victims. I think offenders are thumbing their nose at the law because they know they're going to be released on a particular date because the court has ordered them to be released on that date (Agius 2013, np).

Leading Australian civil libertarian Terry O'Gorman claimed the move was an interference with judicial independence. Essentially, these reforms would limit the ability for judges to make their own informed decisions on cases.

Following calls that would put an end to the parliamentary influence on judicial appointments in Queensland, ongoing tension ensued among the various branches of government in addition to the press. The controversial elevation of Tim Carmody from chief magistrate to Chief Justice in 2014 was a focal point of much debate and was the driving argument behind the reforms proposed in 2015. Tension among the executive, legislature and judiciary is inevitable, but can be viewed as a positive. Much has been written and reported on these issues, notably disapproving opinion pieces on government action and decision making. The doctrine of the separation of powers and judicial independence in Queensland has strong support from the legal community as well as society itself. It has general acceptance within Parliament, even though it is clear this body has a desire for more power. Justice advocates have called for an independent body to select judges, but any significant reform, in the short term at least, is unlikely.

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