An interview with Attorney-General Robert McClelland

An interview by Andrew Bell SC, Arthur Moses, Jenny Chambers

Attorney-General Robert McClelland. Photo: Gary Ramage / Newspix

The Honourable Robert McClelland MP is the attorney-general of Australia and the Member for Barton, NSW. He was elected to parliament in 1996 and was shadow attorney-general for five years from 1998 to 2003. While the Labor Party was in Opposition, he served in a number of other shadow ministerial portfolios, including workplace relations, homeland security and defence.

Born in 1958, the attorney-general grew up in his current electorate in the St George area of Sydney. He completed his HSC at Blakehurst High School, where he was school captain, before going on to study at the University of New South Wales where he graduated with a Bachelor of Arts and Bachelor of Law. He later obtained a Master of Laws at the University of Sydney. From 1980 to 1982 he was an associate to the Hon Justice Philip Evatt of the Federal Court of Australia. He practised as a lawyer for 14 years and was a partner at Turner Freeman Lawyers. His principal areas of practice were industrial law and sporting law.

Since being appointed to the office, the attorney-general has identified the following policy objectives as key priorities for his department:

- Improving national security through the better coordination of counter-terrorism investigations and prosecutions;
- The development of counter-radicalisation strategies to build the capacity of minority communities to resist extremism and prevent the radicalisation of vulnerable individuals;
- Improving access to justice by increasing funding to legal aid and community legal services;
- Simplifying the native title system to provide indigenous people with an avenue of economic development as well as delivering certainty to business and land-holders;
- Instituting a more transparent and consultative process for making appointments to the federal courts;
- Working with the states and territories to reinvigorate the harmonisation agenda;
- Promoting the rule of law throughout the Asia-Pacific region and also at a global level by re-engaging with the United Nations and becoming a party to a number of key international instruments, such as the Optional Protocol to the Convention Against Torture.

On 7 May 2008, the attorney-general spoke to *Bar News* at the Commonwealth Parliamentary offices in Sydney.

Bar News: Mr Attorney, you assumed the office of attorney-general on 3 December 2007. What has been your biggest challenge in your first six months of office?

A-G: There have been many significant challenges, but if had to nominate only one, it would be confronting the challenge of access to justice at the Commonwealth level, after 11 ½ years of neglect by the former government of services such as legal aid and community legal centres. I recently announced a one-off injection of $10 million for Commonwealth-funded community legal centres – the largest ever injection into the program – and a one-off $7 million boost for Legal Aid to address the most immediate pressures on the system.

I also took the lead in placing the issue of legal aid on the agenda of the Standing Committee of Attorneys-General and have committed to working with the states and territories to develop a paper for the next meeting on ways we can improve the administration of the legal aid system in the interests of disadvantaged Australians.

I believe legal aid and community legal services often stand at a critical point on the road towards social exclusion on which a person facing a family breakdown, or the loss of a home or a job, can find themselves. I want to do all I can to improve access to justice through these critical services.

Bar News: One initiative of yours that has sparked quite a lot of interest at the Bar is the recent call for expressions of interest for appointments to the Federal Court and the Federal Magistrates Court. Obviously calling for expressions of interest is a new initiative and, from the Bar's point of view, people are genuinely interested in the process and there seem to be different views about whether it's a good thing, whether it's a bad thing and indeed how it will work.

A-G: I'm convinced it's a good thing. We've sought applications and also nominations if someone doesn't want to self-nominate. It will also be the case that if the interview panel thinks that there is a more desirable candidate out there who hasn't been nominated or applied, that the panel will have the ability to approach and invite that person to submit their name. So we're covering all options off by the belt and braces. But what I specifically want to do is to remove any perception that political patronage is involved. That neither personal friendship,

association with me, nor indeed support for political parties, is a criterion. I also think it's worth mentioning that Sir Gerard Brennan has agreed to participate on the Federal Court panel. Sir Gerard would only participate if he was assured it was going to be a serious process and we would have regard to the recommendations of the panel.

Bar News: When you talk about the panel, earlier in your answer you described it as the 'interview panel', is it intended that there will be interviews of nominees?

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A-G: No, not in the Federal Court. The Federal Magistrates Court, yes, they'll shortlist and then conduct interviews. There are 500 who have applied for the federal magistrate's positions. That's really amazing. I'm not sure how many have applied for the Federal Court positions. But it's not anticipated, and it's probably unlikely, that there will be interviews for the Federal Court, although the panel may decide to do that. I personally won't be participating in any interviews.

Bar News: Does the panel have a process or a procedure which it will follow or is that evolving?

A-G: It's evolving, is the short answer.

Bar News: Do you anticipate that once the decision-making process does evolve, whether that process would be made public consistent with a push towards transparency?

A-G: To be frank, I'd have to discuss that with the panel.

Bar News: Is the constitution of the panel public information? You mentioned Sir Gerard Brennan in relation to the Federal Court panel.

A-G: The panel is comprised of the chief justice of the Federal Court, Michael Black, Sir Gerard Brennan, former Federal Court Justice Jane Matthews, and a representative from the Attorney-General's Department, either the secretary or the deputy-secretary, Ian Govey.

Bar News: The call for expressions of interest and the appointment of a panel et cetera has some hallmarks of a judicial appointments commission but it's perhaps not an independent judicial appointments commission in the fully-fledged form. Does the Rudd government intend to establish a judicial appointments commission?

A-G: We haven't closed our minds to that. When I was in the United Kingdom recently, I met with Lord Chancellor Jack Straw. He wasn't overly impressed with the way the United Kingdom's judicial commission had functioned. He found considerable delay. He found that it hadn't necessarily broadened the scope of traditional appointments from middle-aged white Anglo-Saxon males. So he was reviewing their appointment process. So we'll look at these things incrementally but I think this broader consultation and broader input is something that I'm personally going to appreciate. If I can say here, it's been a very happy position for me – where I have been able to say to friends, associates, colleagues who give me CVs for a wish list of appointments to the Federal Magistrates Court, the Federal Court, the Family Court – 'thanks very much but we've got a process'.

Bar News: Do you regard the process of appointments to the High Court as being in a different category to the Federal Court and the Federal Magistrates Court?

A-G: Yes it is. We've brought in extensive consultation. We've written extensively to not only the attorneys-general which we're obliged to do, but also to the Bar associations and law societies, the deans of universities, the community legal sector and legal aid commissions to receive their input, but there won't be any interview panel or a panel recommending an appointment. That will be done at the traditional political level, albeit supported by this process of broad consultation.

Bar News: Does that involve consultation with the shadow attorney-general, George Brandis?

A-G: I was shadow attorney-general for five years and on not one occasion was I consulted. I'm not sure that's something that's appropriate.

Bar News: Regarding appointments to the High Court, is it of concern to the Rudd government that the members of the High Court represent an even geographical spread of Australia's states and territories? Is a candidate's state or territory of origin a matter that will be taken into account in the decision-making process?

A-G: First and foremost, the issue of ability is the guiding principle. If it was to be the case that there were equally qualified, equally experienced people and it was a line ball, then you'd be looking at the issue of geographical balance but it would only be when it came down to such a fine line that such a consideration would become relevant. First and foremost, we'll be after ability.

Bar News: The work of the High Court seems to have grown enormously over recent years, in part because of the former government's approach to judicial review and privative clauses but, more generally, the High Court has been constituted by seven judges for many, many years. Do you see any possibility of expanding the court, say to nine?

A-G: No that's not on the agenda. There have been submissions put forward to that effect but it's not on the agenda.

Bar News: Are you in a position to say anything about the future of the Federal Magistrates Court. In particular, whether that court will be absorbed into the Federal Court?

A-G: Well we have a review of Australia's federal courts underway now. That was one concerning thing when I came into the role of attorney-general that there are a lot of problems. I have to be honest here, as

almost primary school conflicts were occurring. I just spoke to a few people and said this can't continue. I'm not picking sides in it but it just should not have been happening.

I have appointed Des Semple of KPMG to conduct a review of the federal courts structure. Two or three things that I would like to come out of the review are the more efficient and effective use of resources. Both the Family Court and the Federal Magistrates Court are losing a lot of money in circumstances where there is duplication occurring. That's a straight out budgetary matter. But I also want to ensure that the resources, and in particular, the family consultants are moved to the front door of the Family Court where they can assist in resolving matters early in the piece. And I want to ensure that there is the ability for greater interchange of caseloads between the magistrates and the judges. For instance the Family Court judges are putting aside several days at a time to hear complex matters. If their case settles in the first day, generally speaking, they are not currently requesting matters to be referred from the Federal Magistrates Court. I want to create that culture to break down the divide between the two courts.

Bar News: Another question we wanted to ask you concerns the superannuation surcharge introduced by the former government in 1996 which applies to the pensions of some Federal Court judges (and which was found to not apply to state or territory judicial officers in *Austin v Commonwealth*[1]). Some people see the superannuation surcharge as first, an anomaly and secondly, possibly creating a structural problem, that is, an incentive for very capable, very well-respected Federal Court judges caught by the timing of that surcharge to leave the Bench early and in so doing, either return to private practice at the Bar or migrate to a Supreme Court. It would seem that it could be very bad for the morale of the Federal Court as very high quality judges leave. Does the government have a policy on this?

A-G: No, save insofar as we have invited a submission from the Federal Court on the matter. That's the short answer. The long answer is that it was an issue that was considered by the former government, and it's an issue that is before this government as well. We have to bear in mind community standards here too. From the community's point of view, Federal Court judges are well remunerated. Additionally, they receive a car, plus a 60 per cent pension of that very high salary until the day they die or it passes to their spouse. We have to have regard to community standards in formulating any response. Members of Parliaments are hit by the surcharge as well. Having said that, the reality is we're in an environment where the Bar, particularly the Sydney Bar and the Melbourne Bar, are doing exceptionally well and we have to bear that reality in mind. There's some balancing involved there.

Bar News: On a different topic, will Australians be asked to vote as to whether Australia ought to become a republic in the Rudd government's first term of office?

A-G: We must not forget we lost the last referendum we had ten years ago. We don't want to lose the next one. We must build a consensus and get it right.

But our immediate priority remains implementing our election commitments that tackle the immediate problems facing working families. From the government's point of view, there are priorities in the global economy, the domestic economy, challenges in education, health, climate change and water that should be seen to first.

These are occupying the full attentions of government right now.

Bar News: At the Australia 2020 Summit held in April 2008, a majority of the Australian Governance stream expressed strong support for a statutory charter or Bill of Rights. You have also expressed a commitment towards the enactment of a Charter of Rights on a number of occasions. Does the Rudd government intend on enacting a national Charter of Rights and if so, what can you tell us about it? In particular, would the charter include a mechanism which would empower a court to make a declaration of incompatibility in respect of any law the court construes as inconsistent with the human rights enshrined in the charter, thereby referring the law back to parliament for reconsideration, such as exists in Britain, the ACT and Victoria?

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A-G: The government believes the recognition and protection of human rights and responsibilities is a question of national importance for all Australians. That's why we're committed to consulting with the Australian community to determine how best to recognise and protect human rights. The consultation will provide an opportunity for all Australians to have their say on this issue. It's important to note that the government does not presuppose the outcome of these consultations.

A legislative Charter of Rights is just one of many options that might emerge from this process. What the government has indicated is that it would not support the inclusion of a Bill of Rights in the Constitution. I'm also adamant that any proposal must preserve the sovereignty of parliament to pass laws in the national interest. The government is currently considering how the consultation will be conducted.

Bar News: One issue that has sparked recent controversy among barristers in New South Wales is the proposed change to the *New South Wales Barristers' Rules* by way of the introduction of new Bar Rule 35A. Arguably, in some circumstances, the rule would place NSW barristers at a forensic disadvantage compared to interstate practitioners when appearing against each other as the NSW barristers would be subject to one set of ethical guidelines on a fairly fundamental topic of the

approach to cross-examination, which would not apply to interstate practitioners. This issue of comparative advantage or disadvantage would not arise if the profession was regulated at a national level. Do you have a view on the national regulation of the profession as opposed to the traditional state regulation?

A-G: We've really got an obligation, I think, to the country, but I think for the profession generally, to have nationally consistent regulation. If we want to really make Australia a commercial hub, a services hub of the region, it necessarily must be the case that businesses operating in our region can understand the Australian legal system. I mean you're starting off on the basis of the consequences of *Re Wakim*[2], which means businesses often require extensive advice before choosing the appropriate jurisdiction. To have a fractured profession is just not in the national interest and I don't think that's it's in the profession's interest. I think we've really got to redouble efforts to have a profession that is regulated in a uniform way. Now whether that's implemented by nationally consistent rules within the state and territory frameworks, or otherwise, I'm comfortable, but there really does need to be that national framework.

Bar News: Another quite interesting conceptual issue relates to the notion of a user-pays system. This suggestion was made after the *C7* litigation in particular which was a significant public event but not unique in terms of massive large scale corporate litigation. The judge in that case suggested that, perhaps for certain types of cases, there should be greater cost recovery from the participants in the process. The other view, a philosophical view, of course, is that the courts are open to everyone, people's taxes contribute to the courts and once you start introducing a system which suggests that your access to the courts is subject to a tariff other than a nominal tariff, then that's a fundamental change in our democratic system. Do you have a view?

A-G: I think, having regard to the comments of Justice Sackville in that case, that it's certainly an issue worth exploring. The Federal Court itself is doing some work having a look at the issue and, to cut a long story short, it's an issue that we are not hastening about but having a look at. I think there are some steps that can be taken. It's been put to me, and again I haven't formed a definite view on it, that it may be the case for instance, that while there is a presumption that costs follow the event in litigation, should that necessarily be the case if someone takes a range of fanciful points? Should they be entitled to recover the time as against the other party for taking those fanciful points? These are issues that, I think, in the context of what you're saying, warrant consideration.

Bar News: In 1999 while you were the shadow attorney-general, you authored a paper entitled 'In Defence of the Administration of Justice: Where is the attorney-general?' (1999) 1 *UTS Law Review* 118. In that article you referred to a paper delivered by the then attorney-general, the Hon Daryl Williams QC MP (which was presented in 1994, prior to Mr Williams becoming attorney-general)[3] in which Mr Williams expressed the view that 'there are good practical reasons why neither judges nor the public should look to the attorney-general to take up cudgels for judges in media debate'. You opined in that article that:[4]

> the judiciary should be vigorously defended by an objective and considered attorney-general. That is not to say that an attorney-general is obliged to defend judicial decisions per se. Rather, the attorney-general has a clear obligation, as chief law officer of this country, to defend the institution of the judiciary.

Do you still subscribe to that view?

A-G: I have long expressed the view that there remains a role for the attorney-general to defend the judiciary from politically-motivated attacks. That is not to say that an attorney-general is obliged to defend every judicial decision from criticism. It will require objective and considered judgment. But where I differ from my most recent predecessors is that I do believe the attorney-general has an obligation, as chief law officer of the country, to defend the institution of the judiciary from politically-motivated attacks.

Endnotes

1. (2003) 215 CLR 185.
2. *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.
3. Paper presented to the National Conference, 'Courts in a Representative Democracy', on 11 – 13 November 1994, cited at 118, 'In Defence of the Administration of Justice: Where is the Attorney-General?' (1999) 1 *UTS Law Review* 118.
4. 'In Defence of the Administration of Justice: Where is the Attorney-General?' (1999) *1 UTS Law Review* 118 at 126.