Minister Dutton and the 'lily-livered judges'

by Anthony Cheshire SC

I have previously written about criticisms of the judiciary: by President Trump in the United States (*Bar News*, Autumn 2017); and by Federal ministers in Victoria (*Bar News*, Summer 2017).

In January 2018, Federal Home Affairs Minister Peter Dutton returned to this theme in the context of an attack on the Victorian government for its failure to control 'African gang violence', which he contended had left Victorians 'scared to go out to restaurants'.

Mr Dutton suggested that Victorians were 'bemused' when they looked 'at the jokes of sentences being handed down' due to 'political correctness that's taken hold' and complained that there was 'no deterrence there at the moment'. When Justice Lex Lasry issued a light-hearted tweet that there were citizens in Mansfield who were dining without being worried, Mr Dutton described him as 'a left-wing ideologue'.

In a succession of media interviews around Australia, Mr Dutton outlined the problems as he perceived them:

> Where we've got lily-livered judges and magistrates going weak at the knees, it doesn't reflect community standards.
>
> There is a problem with some of the judges and magistrates [Premier] Daniel Andrews has appointed and some of the bail decisions that have been made, been criticised even by Daniel Andrews' own ministers.
>
> …some of the decisions you see I think are pathetically weak ... If you've got people let out on bail from serious offences ... it's no wonder police are left scratching their heads.
>
> So if you're appointing civil libertarians to the Magistrates' Court over a long period of time then you will get soft sentences.

When three Federal ministers made comments about 'hard-left activist judges' who were 'divorced from reality' in the context of an appeal on sentence before the Victorian Court of Appeal in which judgment had been reserved (see *Director of Public Prosecutions (Cth) v Besim* [2017]

VSCA 165), Warren CJ held that there was *'a strong prima facie case'* of contempt of court. Her Honour commented:

> On the one hand, if we don't allow the appeal then we will be accused of engaging in an ideological experiment of being hard-left activist judges. On the other hand, if we increase the sentences, the respondents would be concerned that we were responding to the concerns raised by three senior Commonwealth ministers.

Although those comments were made in the context of a specific appeal, they would seem equally applicable to comments to similar effect directed generally at magistrates in Victoria making decisions on bail or sentence.

As Warren CJ made clear:

> …the legal notions of contempt of court do not exist to protect judges or their personal reputations. These laws exist to protect the independence of the judiciary in making decisions that bind governments and citizens alike. These laws further exist to protect public confidence in the judiciary.

Comments attacking a judge or the judiciary generally can constitute an offence of scandalising the court, which was described by *Rich J in R v Dunbabin*; *Ex parte Williams* [1935] 53 CLR 434 at 442 as including:

> …interferences…from publications which tend to detract from the authority and influence of judicial determinations, publications calculated to impair the confidence of the people in the court's judgments because the matter published aims at lowering the authority of the court as a whole or that of its Judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office.

Mr Dutton's comments were strongly criticised by, amongst others, the Judicial Conference of Australia, the Australian Bar Association, the Law Council of Australia and the Law Institute of Victoria.

Mr Dutton, however, had a solution:

> I think there should be greater scrutiny around some of the appointments being made to the Magistrates' Courts.
>
> The solution, in part, is to make sure that the appointments that you're making to the Magistrates' Court are people who will impose sentences and will provide some deterrence to people repeatedly coming before the courts.
>
> Frankly, the state governments should be putting out publicly the names of people that they're believing they should appoint to the Magistrates Court and let there be public reflection on that, because there are big consequences and we've seen that on the Gold Coast with the one-punch incident that you speak about.

The suggestion of public involvement in the process was a clear move towards judicial election. This was not a new solution. In 2010, then Federal Opposition Leader Tony Abbott said:

> I never want lightly to change our existing systems but I've got to say if we don't get a better sense of the punishment fitting the crime, this is almost inevitable.
>
> If judges don't treat this kind of thing appropriately, sooner or later we'll do something that we've never done in this country: we will elect judges and we will elect judges that will better reflect our sense of anger at this kind of thing.

It is, however, a solution not without problems of its own. Studies in the United States suggest that sentences are harsher in election years and in particular when there are a large number of campaign advertisements being run. Contributors to judicial political campaigns may expect preferential treatment and lawyers are not immune from being approached for donations.

The prospect of judges copying the example of one banjo-playing successful candidate's song is an entertaining one, although perhaps not one that encourages respect for the solemnity of the process and the system in general:

> There's a judge they call Paul Newby, he's got criminals on the run. Paul's steely stare's got them running scared and he'll take them down one by one. Paul Newby, he's a tough old judge respected everywhere. Paul Newby - justice tough but fair. Paul Newby – criminals best beware.

Attack advertisements are, however, more concerning, although perhaps reflective of some of Mr Dutton's comments, with judges often being criticised for having sided with 'felons' or 'molesters' over 'law enforcement' or 'victims'.

Requests for donations extend from the upfront traffic court candidate's request for 'twenty dollars cause you all gonna need me in traffic court' because 'I got some stuff I gotta go do'; to the sinister successful candidate's email to a lawyer who had donated to his opponent:

> I trust that you will see your way clear to contribute to my campaign in an amount reflective of the $2,000 contribution you made towards my defeat ;-)

The current system for judicial appointments in Australia is the subject of robust discussion from time to time, such as occurred recently following the appointment of Tim Carmody as the chief justice of Queensland. Speaking *In Praise of Unelected Judges* in 2009, then Chief Justice Robert French said:

George Brandis, Malcolm Turnbull and Peter Dutton at the announcement of a new home affairs portfolio, 18 July 2017.

Photo: Department of Immigration and Border Protection / https://creativecommons.org/licenses/by/3.0/au/deed.en

> Having said all that, there is a powerfully entrenched tradition of an appointed, rather than an elected judiciary in Australia. It is closely related to what I venture to say is wide acceptance of the proposition that judges should be independent of influences from governments and political parties and the ebb and flow of public opinion, in deciding cases before them. This is not to say that there is not room for improvement in the processes of judicial appointment in terms of consultation and transparency. There has been considerable discussion of this in recent years and steps have been taken in relation to the appointment of judges to strengthen the application of the merit principle and to widen the range of persons who may be considered for appointment by calling for expressions of interest or nominations.

Professor George Williams, dean of law at the University of New South Wales, writing in the *Sydney Morning Herald* in 2016 about the secrecy of appointments to the High Court in Australia, put the position thus:

> We must not politicise the appointment of judges, but nonetheless should change the process to bring about more transparency and accountability.

Professor Williams had previously noted improvements in the appointment process for judges in terms of advertising for expressions of interest, advisory panels for shortlists, interview processes and explicit appointment criteria; and he recommended the setting up of a judicial appointments commission similar to that adopted in the United Kingdom in 2006.

There is no doubt that reform of the appointment process for judges, including replacing it with direct election, is a valid topic for debate. Presenting it as a choice between soft decisions on bail and sentencing on the one hand and popular election on the other is, however, unlikely to be helpful to such a debate and indeed is likely to do little other than undermine public confidence in the judiciary and the legal system.

Whilst individual comments may well constitute a contempt of court, the system should be robust enough to engage in the debate and rebut superficial and intemperate comment. As individual barristers, we form part of that system and must be prepared to put our heads above the parapet, even at the risk of Mr Dutton describing us (along with pro bono lawyers acting for asylum seekers) as 'un-Australian'.