Law Council
OF AUSTRALIA

Why a separation of power in government? Its importance to constitutionalism

Speech delivered by Arthur Moses SC, President of the Law Council of Australia at the LAWASIA Constitutional & Rule of Law Conference, Malaysia.

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Thank you Commissioner Dato Ambiga and thank you to LAWASIA for the kind invitation to participate in this important conference.

It is an honour to speak with you today, and appear alongside my esteemed colleagues:

a. Professor Kevin Tan, Adjunct Professor, National University of Singapore

b. Mr Shyam Divan, Vice President, LAWASIA

c. Mr Philip Dykes SC, Chairman, Hong Kong Bar Association

d. Justice Paul Howard, Judge of the Federal Circuit Court

Our legal professions across Asia enjoy strong friendships, anchored in mutual respect for the rule of law and a shared commitment to promoting justice within and across our borders. Our professions have fought hard to instil central principles of democracy, dignity and accountability in our respective political and judicial systems. The challenges we faced have each been different.

But what we have in common is a deep commitment to natural justice and the rule of law. It seems inconceivable that a concept so important as the rule of law can be so little understood, and its meaning so little agreed upon. Yet all too often we see the term used, with little thought as to what it actually means.

There is widespread agreement that the rule of law means the law applies with equal measure to us all, regardless of fear or favour. That all are as entitled to its protection and to procedural fairness, as to the force of its rebuke.

Institutional independence is therefore a natural requirement: not only independence of the parliament, but the executive and Judiciary, as well as the legal profession and the media.

In Australia, this is enshrined in our constitution through the separation of powers. There is, however, another facet of the rule of law that is equally important.

That is, the principle that maintaining the appearance of institutional independence is just as important as maintaining actual independence. The appearance of institutional independence is critical to maintaining public confidence in the judiciary.

For today's session on the separation of powers in government, I would like to raise two questions.

First, why does judicial independence matter?

Second, how do we maintain public confidence in the separation of powers?

Australia's Constitution draws on the British Westminster System and the federalist model of the United States to establish three arms of government: the executive, legislature and judicature.

It is not a strict separation of powers though.

Under the principle of responsible government, section 64 of the constitution requires executive Ministers to be democratically elected members of parliament.

Judges are appointed by the executive under section 72, and cannot be removed except by the legislature on the grounds of serious misbehaviour or incapacity.

If a parliament does not like a court's decision, the parliament may legislate to produce a different outcome. The judiciary rely on the executive for funding, and the executive rely on the legislature to pass appropriation bills to authorise particular types of expenditure.

For these reasons, Chief Justice of NSW, the Honourable Tom Bathurst, has observed that:[1]

the reality of separation of powers in Australia is not and has never been that the courts operate entirely independently of the executive and parliament…

This in one sense makes the independence of the judiciary all the more important. It is up to the courts to independently and objectively determine the intention of parliament, rather than simply agreeing with what a particular minister thinks, or perhaps more accurately hopes, the relevant statute means at a particular time.

Former Chief Justice of Australia, the Hon Sir Gerard Brennan, said that:[2]

Judicial independence does not exist to serve the judiciary; nor … the other two branches of government. It exists to serve and protect not the governors but the governed.

Public confidence, he said, is the "power base" of the judiciary. Unlike other arms of government, Sir Brennan said the Judiciary:2

has not got, nor does it need, the power of the purse or the power of the sword to make the rule of law effective, provided the people whom we serve have confidence in the exercise of the power of judgment.

Rights and freedoms cannot be protected if people cannot access an independent legal profession and an independent judiciary that can undertake their roles without fear of reprisal.

Laws made by the legislature and executive actions must be supported by a head of constitutional power. The judiciary is therefore an important check on power.

Another function of Australia's High Court is to interpret the constitution.

These roles are illustrated by the Court's decisions in the 2017-18 Constitutional Crisis and the Williams cases.

Constitutional Crisis

Section 44 of the constitution lists the grounds for who may be disqualified from becoming a candidate for election to the parliament. These include "any acknowledgement of allegiance, obedience, or adherence to a foreign power" or being "a subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power".

Until 2017, there had been little guidance from the High Court on this provision. 15 sitting members of parliament were ruled ineligible by the High Court – or resigned pre-emptively – including then Deputy Prime Minister Barnaby Joyce.

The then Prime Minister Malcolm Turnbull controversially declared in parliament that Mr Joyce was "qualified to sit in the house and the High Court will so hold", before the case had even been heard.

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[1] http://classic.austlii.edu.au/au/journals/NSWJSchol/2013/39.pdf [11].
[2] http://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_ajc.htm

Shadow Attorney-General Mark Dreyfus condemned the comments at the time as "perilously close to directing the High Court".

The High Court subsequently ruled Mr Joyce ineligible to sit as his father was born in New Zealand, automatically making him a citizen of the country.

This constitutional crisis found its genesis in a 1992 High Court ruling on Section 44, which determined that all reasonable steps should be taken to have dual citizenship removed.

The Court rejected the argument that it was necessary to have knowledge of one's foreign citizenship to be ineligible to run for election, stating that:

To accept that proof of knowledge of the foreign citizenship is a condition of the disqualifying effect of s 44(i) would be inimical to the stability of representative government. Stability requires certainty as to whether, as from the date of nomination, a candidate for election is indeed capable of being chosen to serve, and of serving, in the Commonwealth Parliament.

A parliamentary committee convened to investigate the crisis, found up to 50 per cent of Australians could be affected by Section 44 and, therefore, ineligible to stand for parliament.

The committee found a referendum would be necessary to overcome this issue, but suggested early mitigation measures to reduce the possibility of High Court referrals should be introduced first.

This issue will no doubt remain contentious. The question is whether a permanent constitutional reform process is required to bring clarity, although there is little political appetite for a referendum.

The Section 44 cases show how the High Court can determine constitutional issues that arise in relation to sitting members of the parliament and the executive – using its constitutionally enshrined powers.

The Williams Cases

The 2012 and 2014 High Court cases of *Williams v Commonwealth* are another example of the judiciary's role in holding to account other arms of government.

These judgments concerned the executive's power to expend public funds under section 61 of the constitution, in this case to fund a National School Chaplaincy Program.

The High Court ruled there must be limits to executive spending, which should be subject to parliamentary scrutiny. Without legislative authority, Section 61 did not empower the Commonwealth to enter into the funding agreement in question.

After the ruling, the parliament sought to legislate to retrospectively authorise the funding. In the second case of Williams, the High Court struck down this legislation on the basis there was no constitutional head of legislative power to support the expenditure.

A joint decision by five of the six High Court justices gave short shrift to Commonwealth's submission that the first *Williams* decision 'led to considerable inconvenience with no significant corresponding benefits', stating:

What was meant in this context by the references to "inconvenience" and "corresponding benefits" would require a deal of elaboration in order to reveal how they bear upon the resolution of an important question of constitutional law. Examination of the proposition reveals no greater content than that the Commonwealth parties wish that the decision in Williams [No 1] had been different and seek a further opportunity to persuade the Court to their view.

The *Williams* cases helped clarify the powers of the executive, the need for parliamentary scrutiny of executive spending and the need to legislate for certain spending.

These examples illustrate the importance of judicial independence, and the tensions that must exist to effectively check and balance each arm of government.

Maintaining Confidence in the Separation of Powers

If we accept that the separation of powers – and public confidence in that separation - is crucial, how then do we go about maintaining that confidence?

Maintaining the independence – and the appearance of independence – of our courts is as much an obligation on the executive, the legislature, the legal profession and all of us in this room, as for our judges.

The Law Council has advocated two improvements that would strengthen the separation of powers – or at least, the appearance of the separation of powers – in Australia.

The first is introducing a transparent, merit-based, appointments process for federal judges and tribunals.

The current process is shrouded in mystery, which fundamentally diminishes public confidence in both the judiciary and those entrusted to appoint judges.

The Law Council has long argued for a judicial appointment protocol, with transparent eligibility criteria and a clear selection process that requires the Attorney-General to personally consult a minimum number of identified office holders prior to the appointment.

The current appointments process lends itself to speculation and the perception of arbitrary or idiosyncratic decision-making which is unhelpful at best. At worst this unfairly leads to a narrow class of persons being appointed that may not reflect the community they serve, and casts a shadow over the reputations of those appointed, and those who appoint them. As US Supreme Court Justice Ruth Bader Ginsberg stated in 1998: *"A system of justice is the richer for diversity of background and experience. It is the poorer, in terms of appreciating what is at stake and the impact of its judgments, if its members – its lawyers, jurors, and judges – are all cast from the same mold."*

The Law Council also considers there is an urgent need to improve complaint handling, education and training within the judiciary, to enhance the integrity and independence of our courts.

While we welcomed a commitment by both the government and opposition at the May election to move forward with a Commonwealth Integrity Commission, we continue to call for a stand-alone Federal Judicial Commission to investigate complaints of misconduct and incompetence by judges that may warrant their removal from office and to report to parliament.

An independent legal profession is inextricably linked with the independence of the judiciary – a nexus acknowledged by many international bodies and law associations.

As lawyers, we owe duties to the courts, to promote the rule of law and the administration of justice. This compels our profession to speak out in defence of the rule of law and judicial independence.

I look forward to discussing these issues further with our panel. As lawyers and judges, we are all brothers and sisters. As Martin Luther King Jr, said in his letter from Birmingham Jail in 1963: *"Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly."*

Thank you.

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