Committee: Legal and Constitutional Affairs Legislation
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Inquiry: Budget Estimates
Date: 18 August 2017
Witness: Senator Brandis
Organisation:

PARLIAMENT *of* AUSTRALIA
HOUSE *of* REPRESENTATIVES

STANDING COMMITTEE ON SOCIAL POLICY AND LEGAL AFFAIRS

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23 June 2017

Senator the Hon. George Brandis QC
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney-General,

PARLIAMENTARY INQUIRY INTO A BETTER FAMILY LAW SYSTEM TO SUPPORT AND PROTECT THOSE AFFECTED BY FAMILY VIOLENCE ("Inquiry")

I write on behalf of the House of Representatives Standing Committee on Social Policy and Legal Affairs ("Committee") to seek your advice on the appropriateness of heads of federal jurisdiction appearing for questioning by Members of Parliament at the Inquiry.

On Monday 19 June 2017, the Committee passed a resolution postponing appearances by Chief Justice Diana Bryant AO of the Family Court of Australia and Chief Judge John Pascoe AC of the Federal Circuit Court of Australia. It did so in order to allow time to seek advice from you as the Minister with portfolio responsibility for the federal courts.

I also seek your advice in relation to the appropriateness of heads of state jurisdiction such as the Chief Magistrate of the Magistrates' Court of Victoria being questioned by Members of Parliament at the Inquiry.

The family law system is contentious by its nature, and processes to reform it are equally contested.

Recent proceedings in the Supreme Court of Victoria are a reminder that there are acute sensitivities in interactions between members of the legislature and judiciary. In this context, I am concerned that it may not be appropriate for senior members of the judiciary to be questioned by Members of Parliament, particularly in relation to sensitive or contentious decisions made by the judges' respective courts.

More broadly, it raises issues about the separation of powers and the independence of the judiciary if judges are subjected to examination by members of the legislature.

Thank you for your consideration of these matters and I look forward to your advice.

Yours sincerely

Ms Sarah Henderson MP
Chair

ATTORNEY-GENERAL

CANBERRA

3 August 2017

Ms Sarah Henderson MP
Chair
Standing Committee on Social Policy and Legal Affairs
Parliament House
Canberra ACT 2600

Dear Chair, Sarah,

On behalf of the House of Representatives Standing Committee on Social Policy and Legal Affairs ('Committee'), you have requested my advice on the appropriateness of heads of federal and state jurisdiction appearing for questioning by Members of Parliament at the Committee's Inquiry into a Better Family Law System to Support and Protect Those Affected by Family Violence.

For reasons going to the heart of the separation of powers, I am of the view that the appearance of judges before parliamentary inquiries about contested policy areas is rarely, if ever, appropriate.

The separation of powers is fundamental to our system of government, under which political controversies are resolved by the legislature and, when the legislature authorises it to do so, the Executive. The judiciary is a separate but equal branch of government. With limited exceptions, judges are not answerable to Parliament, just as, under the doctrine of parliamentary privilege, parliamentarians' debates and proceedings are not subject to question or impeachment in the courts.

However pure may be the intentions of committee members and witnesses alike, the appearance of judges before parliamentary inquiries risks infringing these principles, or creating the perception of such infringement. For one thing, the subjection of judges to questioning by parliamentarians gives the impression that the judiciary is somehow subordinate to the legislature (even if a judge appears voluntarily). More importantly, members' questioning inevitably runs the risk of drawing witnesses into matters of political controversy from which the judiciary should remain separate.

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It might be observed that judicial witnesses need not be compelled to answer controversial questions, but this is of scant reassurance: how is one to predict which questions and which answers will embroil a judge in controversy? Even with firm guidance from the Chair, there remains an unacceptable risk of the judiciary being seen as a participant in political controversy. We are fortunate that the Australian judiciary has been relatively free from politicisation. I would not wish to see any threat to that state of affairs.

In December 1955, the British Lord Chancellor, Viscount Kilmuir, issued what became colloquially known as "the Kilmuir Rules", concerning the question of extrajudicial commentary by judges. Those Rules stressed "the importance of keeping the Judiciary ... insulated from the controversies of the day." According to Viscount Kilmuir: "So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public, except in the course of the actual performance of his judicial duties, must necessarily bring him within the focus of criticism."[1]

In a 2012 speech, Lord Neuberger of the Supreme Court of the United Kingdom reaffirmed the importance of extreme caution before involving judges in matters of political controversy: "a judge should think carefully about how any statement about politically controversial issues, or matters of public policy, might affect, or be affected by, the separation of powers, and comity between the three branches of the State." Lord Neuberger also expressed reservations about the practice of calling members of the judiciary before parliamentary committees.

I share those reservations. As I wrote in a 2006 article, "Viscount Kilmuir's fundamental insight remains true: ... prudence as well as wisdom suggest that controversy is best left to those who choose to be the protagonists of society's disputes, not those whose role it is to sit in judgment upon them."[2]

I acknowledge that members of the judiciary have sometimes appeared before committees of the Commonwealth Parliament. However, this has ordinarily been in a non-judicial capacity. For instance, the Hon Justice Iain Ross, a judge of the Federal Court of Australia, has appeared before the Education and Employment Legislation Committee in Senate Estimates.[3] Justice Ross appeared in his capacity as President of the Fair Work Commission, which is an Executive agency.

Again, on 4 February 2016, during an inquiry into surrogacy by the Committee of which you are Chair, the Chief Judge of the Federal Circuit Court appeared as a witness, but he did so in his private capacity.[4]

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[1] Letter from Lord Chancellor Kilmuir to Sir Ian Jacob, 12 December 1955 in AW Bradley, 'Judges and the Media — the Kilmuir Rules' [1986] *Public Law* 383, 385.

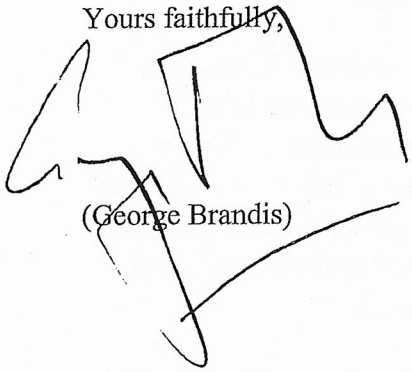
[2] George Brandis, 'The Kilmuir Rules: A Parliamentary Perspective' in Aladin Rahemtula (ed), *Justice According to Law: A Festschrift for the Honourable Mr Justice BH McPherson CBE* (Supreme Court of Queensland Library, 2006), 355.

[3] http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/82455e77-6b6c-4281-b15c-6182a250b6cd/toc_pdf/Education%20and%20Employment%20Legislation%20Committee_2017_03_30_4931_Official.pdf;fileType=application%2Fpdf

[4] http://parlinfo.aph.gov.au/parlInfo/download/committees/commrep/8bfd36da-a5ca-4462-bbad-82db412c4d7a/toc_pdf/Standing%20Committee%20on%20Social%20Policy%20and%20Legal%20Affairs_2016_02_04_4108_Official.pdf;fileType=application%2Fpdf

As I understand it, however, you have requested my advice about heads of jurisdiction appearing in their judicial capacity. For the reasons set out above, I am of the view that appearances by judges in that capacity before parliamentary inquiries are best avoided.

Yours faithfully,



(George Brandis)