GCDLA
GOLD COAST DISTRICT LAW ASSOCIATION

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23 November 2018

Senate Legal and Constitutional Affairs Committee | Brisbane Sittings of Inquiry into the Federal Circuit and Family Court of Australia Bill 2018

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DOCUMENTS TENDERED AT HEARING

1. Copy of GCDLA Submission to Committee ..... P 1 – 9

2. Copy Section 22 Family Law Act 1975 ..... P 10 – 12

3. Copy Section 123 Family Law Act 1975 ..... P 13 – 17

4. Copy Section 124 Family Law Act 1975 ..... P 18

5. Copy The Honourable Stephen Thrackray's Speech, entitled ..... P 19 – 36
"*The Rule of Law and the Indepdendence of the Judiciary: Values Lost or Conveniently Forgotten?*" delivered as The David Malcolm Memorial Lecture, University of Notre Dame, Western Australia on 2nd September, 2018

President: Mia Behlau **Vice President**: Dean Evans **Treasurer**: Erin Mitchell **Secretary**: Paul Brake
Committee: Kathy Atkins, Caralee Caldwell, Alice Drummond, Lauren Hicks, Elisha Hodgson, Ross Lee, Anna Morgan, Joelene Nel, Lynne Weathered

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23 November 2018

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee,

RE: SUBMISSION ON BEHALF OF GOLD COAST DISTRICT LAW ASSOCIATION INC.

Federal Circuit and Family Court of Australia Bill 2018, Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018

Please accept the following submission from the Gold Coast District Law Association Inc.

Introduction to Submission
The Gold Coast District Law Association Inc. (hereafter "GCDLA") is a representative body for admitted solicitors practising in the Gold Coast district of Queensland.

Many of its members practice family law and have related quite difficult and concerning experiences and issues which arise in the administration of justice in family law.

Against that background, the GCDLA wishes to advance a submission with the intention that the Committee considering proposed changes to the family law legal system takes on board the experiences and views of its membership as representative of the views of family lawyers in South East Queensland.

The majority of GCDLA members are conducting family law work and their experiences are consequentially linked with the Brisbane registry of the Federal Circuit Court of Australia and the Family Court of Australia (hereafter "the Family Law Courts").

Alarming Observations
The most alarming observations coming to the attention of the GCDLA and which require urgent attention and action are:-

1. A chronic shortage of funding available to the Family Law Courts which has seen a diminution of Judicial and linked services;

2. Systemic unreasonable delay in the hearing of cases and thereafter the delivery of just, equitable and child focused outcomes;

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3. Over listing of cases, meaning cases are fully prepared yet not heard on days scheduled for interlocutory or final hearings;

4. The "rolling in" of new issues into the jurisdiction of the Family Law Courts without a corresponding increase in funding or resources sufficient to handle the resulting case load;

5. The appointment of "generalist" lawyers as opposed to "specialist" family lawyers to Judicial positions in the Family Law Courts;

6. As a result of "generalist" appointments, a significant loss of confidence in Judicial decision-making leading to increased appeal filings and ongoing litigation; and

7. That "tinkering" with family law after "efficiency modelling" studies is likely to lead to a disconnected approach to resolving the issues presenting to families.

Why We Must Get This Right
The Family Law Courts are the "Courts most likely" to be visited by Australia's citizens. Similarly, the *Family Law Act 1975* is the law most likely to be in play in the resolution of issues arising for citizens.

Post-separation, the subject matter for citizens becomes and each proceeding matter involves, the most precious of things to all citizens, being their children and their accumulated assets or wealth, with the proceedings often determining their ongoing means of support and their standard of living.

Social science links family law outcomes as triggers or factors in:-

- Children reaching or failing to reach their full potential;
- Mental health;
- The occurrence and prevalence of family violence;
- Financial hardship;
- Reliance upon Government benefits; and
- Productivity (all facets of life).

As a result, this submission identifies the very wide reach and deep impact of a working or failing system of family law in Australia.

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What Government Needs to Consider

Community Confidence

Pause for a moment and imagine a scenario where you or someone you love (perhaps an adult child) was involved in a family law proceeding.

Immediately, you will realise that as you cannot garner Court supervision without major delays, there is a scope for parties to adopt a position in either a parenting case or a property case which is intractable and unreasonable, simply because the Family Law Courts cannot promptly determine cases.

You will also realise that Family Dispute Resolution Counselling is used in some parenting cases as a tool for delay and obfuscation and results in an added a layer of dispute and an unhealthy multiplier of ill-will and increased issues in parenting matters.

If you do require a Court determination, whether for interim financial support (spousal maintenance), a parenting case or an injunction, your case will often be listed amongst about forty others. Practitioners report that routinely, on those dates, Judicial Officers inform at callovers shortly after commencement of the Court day, that interim hearings cannot be accommodated.

If waiting for a trial, it will be a long wait.

Often, a case fully prepared for trial, including incurring the major expense of solicitor and counsel for both parties, will be turned away on the day it is listed for hearing, because a Judge is not available. You can imagine the costs thrown away by preparing a case for trial yet it cannot be heard for another several months. Members report that this has happened three times in one instance.

Members report that clients wait inordinate periods of time following a hearing for the delivery of Reserved Judgments. This includes litigants waiting years for decisions whilst a parent is limited to supervised time or whilst asset pools or parts of the asset pool are frozen unable to be used.

In addition to delay, the community suffers from a crisis of confidence in relation to Judicial appointments.

Members report an example of litigants waiting to go inside a Court room accompanied by their lawyers (Senior Counsel, Junior and Solicitors) and both litigants hearing a senior lawyer walk past them and loudly remarking, "Good luck in there! That Judge makes up the entire Full Court [Appeal] sittings next sittings."

Members report a major difference between receipt of a well-reasoned decision from an experienced family lawyer who has been elevated to the Family Law Courts' bench when compared with a decision from a generalist appointee Judge who was not known to have appeared in or argued cases before the Family Law Courts and garnered the respect of peers and the Bench for their knowledge, skills and expertise in all things family law.

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Members relate the comparison of Government expecting someone with a serious health problem being funded to see a General Practitioner (GP) and hoping for the best.

A perusal of the Bill proposed by Government and commentary from Government sees an intention communicated to cease making any appointments of Judges pursuant to Section 22(1) of the *Family Law Act* 1975 and simply making appointments of Judges by "captain's call" made by the prevailing Attorney-General.

Members are concerned that the doctrine of separation of powers, and the independence of the Judiciary, should be the guiding principle in appointments, with merit-based, highly skilled individuals appointed to the Bench. If this was supported, greater confidence in appointees and their decisions would be the result.

Members directly correlate inexperienced Judges being appointed to the Court with:-

- Dissatisfaction with decisions;
- Increased percentage of appeals;
- Increased appeal work consuming Judicial resources;
- Dissatisfaction leading to ongoing non-resolution of cases;
- Dissatisfaction leading to entrenched disputes and further Court proceedings extending for years;
- Increased expense and resources (including time and emotional investment in litigation);
- Reduced productivity in all aspects of life;
- Frustration;
- Stress; and
- Resulting impacts on the family unit and children.

Delays

As was touched upon earlier in this submission, delays are seen by members as:-

1. Promoting a party taking unreasonable positions because there is no judicial determination within sight which might otherwise trigger the adoption of positions in line with decided cases. In other words, people try to win or gain advantage by the impact of the Court's delays. A recent comment by His Honour Judge Harman on Sydney lawyer warfare, could quite easily be recast by the consideration of how delays in the Court system permits that behaviour by a lack of Judicial supervision/availability;

2. Undermining confidence in the Family Law Courts' processes, with examples of member experiences being:-

    a. Clients asking how a Judge could possibly remember my matter after such a long time between hearing and decision;

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b. Clients reporting that by the time they can get a case on before the Court the practical impacts of behaviour and circumstances in their matter will have decided it;
c. Clients reporting frustration at preparing cases which can't be heard because Judges are not available;
d. Clients reporting that the hearing of their case was so truncated by overlisting that their significant issues were the subject of directions to contain the disputes to 20 minutes when the case being fully considered would take at least 2 hours. The result is that they feel their case (and its very important, often life changing subject matter) was not properly considered; and
e. Clients waiting years for decisions.

Increased Subject Matter and Reduced Services

The GCDLA membership promotes the fact that the Family Law Courts have been tasked with ever-increasing subject matter, without appropriate funding increases. In particular, the Committee is asked to consider the following matters as having come into the Court's purview:-

1. De Facto property/financial cases ceased being State matters and commenced being Family Law Court matters;

2. The inclusion of De Facto cases includes the very arduous consideration and minutiae of declaratory proceedings to determine whether or not a De Facto relationship existed and if so, the length of relationship;

3. Changes in parenting proceedings and their complexity, including rules relating to interim determinations, prevalence of relocation matters (international and domestic – linked to an ease of travel and more portable society) prevalence of drugs and violence and mental health issues as factors requiring deeper consideration;

4. Changes in jurisdiction in property proceedings, including superannuation splitting and the ability to bind super fund trustees;

5. Commencement of extended jurisdiction via accrued jurisdiction matters, including bankruptcy, third party claims and claims by creditors;

6. (Binding) Financial Agreement determinations (validity, setting aside, interpretation and enforcement);

7. Surrogacy issues;

8. Medical procedure determinations including gender reassignment in children which has increased in prevalence;

9. Child support determinations (departure, appeals from tribunals etc);

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10. (Binding and Limited) Child Support Agreement litigation;

11. Same sex marriage (divorce); and

12. Perhaps one of the most overwhelming yet under-appreciated impacts, being the increase of self-represented litigants whose appearance:-
    a. Sees the Court directed by Full Court authority to deal with self-represented litigants in a way which takes aboard their presentation, their lack of knowledge and their lack of legal skills;
    b. Is often in two categories:-
        i. The compliant underfunded individual, who has the best of intentions but nevertheless slows cases down; or
        ii. The problematic individual, who brings conflict and uncontrolled emotions to the case generally as well as to the bar table, requiring management by the Court and resulting in a major allocation of resources over other cases.

Specific Gold Coast Experience/Issues

Overwhelmingly, the GCDLA members identify that resources have disappeared from the Court without being replenished, including the availability of Court counselling services by very experienced family counsellors for anyone who sought it, including services which were available on the day of parenting cases.

Routinely, those services assisted in having parties' matters either resolve or the issues being limited by the good work of counsellors seeking to have parties consider their children's best interests and giving information about likely outcomes which would promote children's interests rather than their own – a key driver for litigants.

The GCDLA members ask that the Committee recalls that the Gold Coast did have a Family Court sub-registry presence at Bundall. The GCDLA notes the loss of the centre and the services to litigants and practitioners. The Gold Coast is the largest non-State capital city in Australia.

The Gold Coast's population, would, the GCDLA submits, account for more than 25 – 30% of the business before the Family Law Courts' Brisbane registries and therefore its case load.

The GCDLA advocates for resources to have a sitting, permanent Family Court Justice and Federal Circuit Court Judge allocated here. Members and their clients report travelling more than 2 hours to reach the Brisbane registry in the morning and similar times for the return journey.

Whilst not within the GCDLA area, the northern NSW districts, could also be serviced by a Gold Coast sitting Justice and Judge, given they too are limited to periodically-held circuit sittings at the Lismore Registry of the Court.

The Gold Coast City Council has made known to the GCDLA that it wishes to enter discussions with the Government, to try to establish a Judicial precinct, so as the Gold Coast

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is serviced by an increased Judicial presence across all Courts. The GCDLA understands that the Council wants to ensure proper services for its residents. Funding negotiations are proposed.

It would be of great shame that a forward thinking Council prepared to offer financial support for Judicial services being established here, was ignored or summarily dismissed.

The GCDLA invites meaningful steps to be taken to set in train the establishment of ongoing Judicial and registry services here and notes the invitation appears to have been ignored to date.

The GCDLA is reminded of a quotation of the Honourable Justice Michael Baumann who was a Gold Coast solicitor, first appointed as a Federal Magistrate. In 2008, Justice Baumann addressed the National Access to Justice and Pro Bono Conference and said, "Allowing people to attend a local Court is immensely important for those of limited means; parents with young children and persons with disabilities. It reduces obstacles to seeking the Court's assistance. It reduces costs for them. It allows the Court to better understand the local environment. It allows better use of community services and support. It simply makes sense."

Proposed Re-Merger of Family Law Courts

The proposed re-merger of the Family Law Courts is seen by GCDLA members as being, unless the Bill is fundamentally recrafted, an unpublicised attack on the specialist nature of the Family Court of Australia and family law in Australia.

The Re-Merger of the Court, properly managed, is not the main issue.

The GCDLA identifies the risk of loss of specialisation of the Court in favour of some other model, as the key issue.

The GCDLA advocates for the retention of a specialised Family Court with properly appointed specialised Judges.

To do otherwise will critically undermine any confidence in decisions from the Court and create further appellate work and further litigation from those unhappy with decisions – and a lack of confidence is a significant factor in parties accepting decisions from a Court.

For the Government to adopt a position that the merger can happen ahead of the finalisation of its own brief to review by the Australian Law Reform Commission (ALRC) is a step which does not enjoy the confidence of the profession, and, if it were properly informed to the public, would similarly be the subject of outcry.

The most significant example of how out of step the Government's proposed Bill is, with objective thought, that whereas the Government intends abolishing the appointment of specialist Judges pursuant to Section 22(1) of the *Family Law Act 1975,* the ALRC interim report suggests that not only should specialist Judges remain, but the requirement for specialisation should be further entrenched by ensuring that proposed Judges have experience in relation to the issue of domestic violence.

Similarly, the notion of specialist Judges in a specialist jurisdiction is undermined by the

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proposal in the Bill, to pass the responsibility to make decisions on Appeal in family law cases, to Justices of the Federal Court.

The GCDLA is concerned that the data that the Government is publicising, comes from an accounting firm, PWC. The data is said to rely upon the success of the Federal Circuit Court in disposing of cases, yet, the GCDLA understands that the data includes as a KPI comparison, that the Federal Circuit Court resolved divorces (which are by and large dealt with administratively by a Registrar – and previously Registrars within the Family Court determined same before de-merger of the Courts).

The data appears to ignore that the Family Court handles the more complex and lengthier cases, usually transferred there by the Federal Circuit Court Judges because of complexity.

Members of the GCDLA advocate for one set of Rules applicable to family law across both Courts for consistency of application and ease of understanding/ implementation/ enforcement.

The Members of the GCDLA remind the committee that:-

1. The 1975 establishment of the Family Court of Australia occurred because of the need for a specialised Court with a specialised jurisdiction to handle litigation impacting families;

2. The unique nature of litigation conducted for families and by families is not the same as generally conducted litigation;

3. The litigation carries with it, deeply emotional and personal factors, unlike almost any other litigation conducted by generalist Courts; and

4. The funding of the Court needs to be generous and should not only meet every need, but also fund pilot projects to clear backlogs of work.

<u>Suggested Methodologies</u>

The GCDLA highlights the following suggested methodologies which could be of favourable impact:-

1. Increase funding for the Family Law Courts in a disproportionately higher amount than other Courts given that commercial disputes involve litigants who can more easily afford to maintain a case before a Court and as consumers of Court services than a family can;

2. Maintain specialisation in order to maintain confidence in the Family Law Courts;

3. Integral in maintaining confidence is maintaining specialised appointments of Judges to the Court;

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4. In order to appoint specialised Judges who will promote confidence, adopt an independent and wide consultative process in the appointments and refrain from captain's call appointments in favour of a "best candidate" approach;

5. Await the finalisation of the ALRC report and consider/debate its recommendations – particularly as a proper brief was made to the ALRC and good people and resources are tasked with reporting on what is required to overhaul the system;

6. Refrain from referring Appeals to the Federal Court of Australia – a step which would create uncertainty and another crisis of confidence in outcomes;

7. Implement strategies to minimise delay, which focus on the availability of more Judicial officers to hear cases, given that delayed justice is justice denied. (i.e. Where delays in family law permit disputes to fester without Court supervision and permits parties to avoid bargaining "in the shadow of the law" and instead invites, "I'll do what I want because you can't get a hearing in Court").

Closing Remarks

The GCDLA appreciates the opportunity to make a submission and would appreciate the opportunity for further dialogue and input in the consultative process underway.

Yours faithfully,
Gold Coast District Law Association Inc.

Dean Evans

Per Dean Evans, Vice President

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Australasian Legal Information Institute

Commonwealth Consolidated Acts

FAMILY LAW ACT 1975 - SECT 22 Appointment, removal and resignation of Judges

FAMILY LAW ACT 1975 - SECT 22

Appointment, removal and resignation of Judges

Appointment of Judges

(1) A Judge:

(a) shall be appointed by the Governor-General; and

(b) shall not be removed except by the Governor-General, on an address from both Houses of the Parliament in the same session praying for the Judge's removal on the grounds of proved misbehaviour or incapacity.

(2) A person shall not be appointed as a Judge unless:

(a) the person is or has been a Judge of another court created by the Parliament or of a court of a State or has been enrolled as a legal practitioner of the High Court or of the Supreme Court of a State or Territory for not less than 5 years; and

(b) by reason of training, experience and personality, the person is a suitable person to deal with matters of family law.

Judges to be assigned to particular location

(2AAA) The commission of appointment of a Judge must assign the Judge to a particular location. The Judge:

(a) must not sit at another location on a permanent basis unless the Attorney-General and the Chief Justice consent; and

(b) cannot be required to sit at another location on a permanent basis unless the Judge consents (in addition to the consents required by paragraph (a)); and

(c) may sit at another location on a temporary basis.

(2AAB) In deciding whether to consent as mentioned in paragraph (2AAA)(a), the Chief Justice has the same protection and immunity as if he or she were making that decision as, or as a member of, the Court.

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(2AAC) Despite section 39B of the *Judiciary Act 1903* , the Federal Court of Australia does not have jurisdiction with respect to a matter relating to the exercise by the Attorney-General or the Chief Justice of the power to consent as mentioned in paragraph (2AAA)(a).

Appeal Division

(2AA) The members of the Appeal Division of the Court are the Chief Justice, the Deputy Chief Justice and such other Judges as are assigned to the Appeal Division under this section.

(2AB) The Governor-General may, in the commission of appointment of a Judge or, with the consent of the Judge but not otherwise, at a later time assign a Judge to the Appeal Division.

(2AC) The Governor-General shall not assign a Judge to the Appeal Division under subsection (2AB) if, as a result of that assignment, the number of members of the Appeal Division assigned under that subsection would exceed the ⇦ **prescribed number** ⇨.

General Division

(2AF) A Judge (other than the Chief Justice or the Deputy Chief Justice) who is not assigned to the Appeal Division shall be deemed to be assigned to the General Division.

Appointment of Deputy Chief Justice

(2AFA) If a person holding office as a Senior Judge or Judge of the Court is appointed Deputy Chief Justice, the person retains that office as Senior Judge or Judge, as the case may be, and may resign the office of Deputy Chief Justice without resigning that first-mentioned office.

Judge of 2 or more courts

(2AG) Notwithstanding anything contained in any other Act, a person may hold office at the one time as a Judge of the Court and as a Judge of a prescribed court or of 2 or more prescribed courts.

(2AH) In subsection (2AG), ***prescribed court*** means:

(a) a court (other than the Court) created by the Parliament; or

(b) the Supreme Court of the Northern Territory.

(2A) A person may be appointed to the office of Judge of the Family Court of Australia notwithstanding that he or she holds an office of Judge of a Family Court of a State and may serve in that office of Judge of the Family Court of Australia notwithstanding that he or she continues to hold, and serve in, the office of Judge of the Family Court of that State.

(2B) If a person who holds office as a Judge of the Family Court of Australia is appointed or serves as a Judge of a Family Court of a State, the appointment or service shall not affect his or her tenure of that office of Judge of the Family Court of Australia or his or her rank, title, status, precedence, salary or annual allowance or other rights or privileges as the

holder of that office of Judge of the Family Court of Australia and, for all purposes, his or her service as a Judge of the Family Court of that State shall be taken to be service as the holder of that office of Judge of the Family Court of Australia.

Resignation

(3) A Judge may resign office by writing under his or her hand addressed to the Governor-General.

(3A) The resignation takes effect on:

(a) the day on which it is received by the Governor-General; or

(b) a later day specified in the resignation document.

Style

(4) A Judge or former Judge is entitled to be styled "The Honourable".

Australasian Legal Information Institute

Commonwealth Consolidated Acts

FAMILY LAW ACT 1975 - SECT 123 Rules of Court

FAMILY LAW ACT 1975 - SECT 123

Rules of Court

(1) The Judges, or a majority of them, may make Rules of Court not inconsistent with this Act, providing for or in relation to the practice and procedure to be followed in the Family Court and, subject to subsection 69GA(3), any other courts exercising jurisdiction under this Act, and for and in relation to all matters and things incidental to any such practice and procedure, or necessary or convenient to be prescribed for the conduct of any business in those courts and, in particular:

(a) providing for and in relation to the attendance of witnesses; and

(b) providing for and in relation to the manner of service of process of the Family Court or another court exercising jurisdiction under this Act, and for and in relation to dispensing with such service; and

(ba) providing for and in relation to trial management; and

(bb) providing for and in relation to proceedings transferred to the Family Court under section 35A of the *Bankruptcy Act 1966* ; and

(c) providing for and in relation to the time and manner of institution of appeals in and to the Family Court; and

(d) prescribing the duties of officers of the Family Court; and

(e) providing for and in relation to the prevention or termination of vexatious proceedings; and

(f) prescribing the seals and stamps to be used in the Family Court and in any other court exercising jurisdiction under this Act; and

(g) prescribing matters relating to the costs of proceedings (including solicitor and client costs and party and party costs) and the assessment or taxation of those costs; and

(h) authorising a court to refer to an officer of the court for investigation, report and recommendation claims or applications for or relating to any matters before the court;

and

(j) authorising an officer making an investigation mentioned in paragraph (h) to:

(i) take evidence on oath or affirmation; and

(ii) receive in evidence a report from a family consultant under section 55A or 62G; and

(iii) receive in evidence a report from a person who has had dealings with a party to the matter under investigation under section 65F, 65L, 65LA, 70NEB or 70NEG; and

(ja) enabling the summoning of witnesses before an officer making an investigation mentioned in paragraph (h) for the purposes of giving evidence or producing books or documents; and

(k) regulating the procedure of a court upon receiving a report of an officer who has made an investigation referred to in paragraph (h); and

(m) providing for and in relation to the procedure of a court exercising its powers under section 112AP to deal with a person for contempt of the court; and

(ma) for the purposes of Divisions 2 and 3 of Part XI, providing for the conditions relating to the use of video links, audio links and other appropriate means of communication; and

(n) providing for and in relation to the making of an application for a divorce order in relation to a marriage jointly by both parties to the marriage; and

(o) providing for and in relation to the appointment, by the Attorney-General, of a guardian *ad litem* for a party to proceedings under this Act; and

(q) providing for and in relation to:

(i) the forfeiture of bonds and recognisances entered into in pursuance of requirements made under this Act; and

(ii) the recovery of any money that may be due to the Commonwealth under such bonds and recognisances or from any person who has become a surety under this Act; and

(r) providing for and in relation to the attachment of moneys payable by the Commonwealth, a State, a Territory or the Administration of a Territory, or by an authority of the Commonwealth, of a State or of a Territory (other than moneys as to which it is provided by any law of the Commonwealth, of a State or of a Territory that they are not liable to attachment); and

(s) providing for and in relation to:

(i) the attendance at family counselling by parties to proceedings under this Act; and

(ii) the attendance at family dispute resolution by parties to proceedings under this Act; and

(iii) the giving of advice and assistance by family consultants to people involved in proceedings under this Act; and

(iv) the participation by parties to proceedings under this Act in courses, programs and other services (other than those mentioned in subparagraph (i), (ii) or (iii)) that the parties are ordered by the court to participate in; and

(v) the use, for the purposes of proceedings under this Act, by courts exercising jurisdiction under this Act and officers of such courts, of reports about the future conduct of the proceedings that have been prepared by persons who dealt with the parties in accordance with Rules of Court made under subparagraphs (i), (ii), (iii) or (iv); and

(sa) prescribing the functions and duties of assessors and of family consultants and arbitrators; and

(sb) providing for and in relation to the making of applications under this Act for arbitration and for orders under sections 13E and 13F; and

(sc) prescribing the disputes, proceedings or matters that may or may not be arbitrated under this Act; and

(sca) prescribing the disputes, proceedings or matters in relation to which family consultants may, or must not, perform their functions; and

(sd) providing for and in relation to:

(i) the functions to be performed by family consultants; and

(ii) the procedures to be followed in performing those functions; and

(iii) the procedures to be followed by persons involved in proceedings in relation to which a family consultant is performing functions; and

(iv) the procedures to be followed when a family consultant ceases performing functions in relation to a dispute, proceeding or matter; and

(sda) providing for and in relation to:

(i) the procedures to be followed by a family counsellor authorised under subsection 38BD(1) of this Act or engaged under subsection 18ZI(2) of the *Federal Court of Australia Act 1976* ; and

(ii) the procedures to be followed by persons attending family counselling with such a counsellor; and

(iii) the procedures to be followed when family counselling with such a counsellor ends; and

(sdb) providing for and in relation to:

(i) the procedures to be followed by a family dispute resolution practitioner authorised under subsection 38BD(2) of this Act or engaged under subsection 18ZI(2) of the *Federal Court of Australia Act 1976* ; and

(ii) the procedures to be followed by persons attending family dispute resolution with such a practitioner; and

(iii) the procedures to be followed when family dispute resolution with such a practitioner ends; and

(sdc) providing for and in relation to:

(i) the procedures to be followed by an arbitrator in relation to a dispute, proceeding or matter under this Act; and

(ii) the attendance by persons at conferences conducted by arbitrators for the purpose of arbitrating a dispute, proceeding or matter under this Act; and

(iii) the procedure to be followed when arbitration ends, both where it has resulted in an agreement or award and where it has not; and

(se) prescribing matters relating to the costs of arbitration by arbitrators, and the assessment or taxation of those costs; and

(sea) prescribing matters relating to the costs of family counselling by family counsellors authorised under subsection 38BD(1) of this Act or engaged under subsection 18ZI(2) of the *Federal Court of Australia Act 1976* ; and

(seb) prescribing matters relating to the costs of family dispute resolution by family dispute resolution practitioners authorised under subsection 38BD(2) of this Act or engaged under subsection 18ZI(2) of the *Federal Court of Australia Act 1976* ; and

(sf) providing for and in relation to:

(i) the registration of awards under section 13H; and

(ii) the time and manner of making applications for review of registered awards under section 13J or for orders setting aside registered awards under section 13K; and

(sg) providing for and in relation to conciliation conferences; and

(t) prescribing matters incidental to the matters specified in the preceding paragraphs; and

(u) prescribing penalties not exceeding 50 penalty units for offences against the standard Rules of Court.

(1A) A reference in subsection (1) to a ***court exercising jurisdiction under this Act*** does not include a reference to the Federal Circuit Court of Australia.

(2) The *Legislation Act 2003* (other than sections 8, 9, 10 and 16 and Part 4 of Chapter 3 of that Act) applies in relation to rules of court made by Judges under this section or any other Act:

(a) as if a reference to a legislative instrument (other than in subparagraph 14(1)(a)(ii) and subsection 14(3) of that Act) were a reference to a rule of court; and

(b) as if a reference to a rule-maker were a reference to the Chief Justice acting on behalf of the Judges; and

(c) subject to such further modifications or adaptations as are provided for in regulations made under paragraph 125(1)(baa) of this Act.

(2A) Despite the fact that section 16 of the *Legislation Act 2003* does not apply in relation to rules of court made by Judges under this or any other Act, the Office of Parliamentary Counsel (established by subsection 2(1) of the *Parliamentary Counsel Act 1970*) may provide assistance in the drafting of any of those Rules if the Chief Justice so desires.

(3) In this section, ***Judge*** means:

(a) a Judge of the Family Court of Australia; or

(b) where the Governor-General has made an arrangement with the Governor of a State under section 112 in relation to the performance, by a Judge of the Family Court of that State, of functions under this section--that Judge.

Note: The power to make Rules of Court conferred by this section is extended by section 109A and subsection 111C(7A). Powers to make Rules of Court are also contained in sections 26B and 37A.

Australasian Legal Information Institute

Commonwealth Consolidated Acts

FAMILY LAW ACT 1975 - SECT 124 Rules Advisory Committee

FAMILY LAW ACT 1975 - SECT 124

Rules Advisory Committee

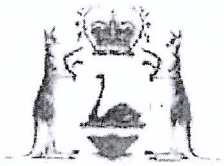
(1) There shall be a Rules Advisory Committee consisting of such Judges of the Family Court of Australia, such Judges of Family Courts of States and such other persons as are appointed by the Chief Justice of the Family Court of Australia.

(2) The function of the Rules Advisory Committee is to provide to the Judges referred to in section 123 such advice in relation to the making of standard Rules of Court as is requested from time to time by those Judges.

(4) A Judge of a Family Court of a State shall not be appointed as a member of the Rules Advisory Committee unless the Governor-General has made an arrangement under section 122B in relation to the performance, by that Judge, of functions as a member of the Rules Advisory Committee.

(5) The members of the Rules Advisory Committee shall be paid such allowances in respect of expenses in connection with their duties as are prescribed.

(6) A member of the Rules Advisory Committee may resign by writing signed and delivered to the Chief Justice of the Family Court of Australia.



University of Notre Dame Australia, School of Law

The David Malcolm Memorial Lecture

Justice Stephen Thackray

Chief Judge, Family Court of Western Australia

27 September 2018

The Rule of Law and the Independence of the Judiciary: Values Lost or Conveniently Forgotten?

I begin by acknowledging the traditional owners of the land on which we meet, the Wadjuk people of the greater Noongar clan and by paying my respects to their elders past, present and emerging. I also acknowledge and pay respect to all the other Aboriginal people of our country.

I am honoured to have been invited to deliver the fourth David Malcolm Memorial Lecture, shortly before the anniversary of David's passing four years ago. I especially acknowledge the presence tonight of Mrs Kaaren Malcolm, Chief Justice Peter Quinlan and many other distinguished guests, colleagues and members of the faculty of Notre Dame University.

This university is the place where David spent many happy and rewarding and, I am sure, more tranquil times after his retirement as the 12th and longest serving Chief Justice of Western Australia. It is fitting therefore that people gather here each year to remember one of the greatest citizens and certainly one of the greatest jurists this State has ever produced.

The judges who have previously given this lecture were, in order of appearance, Neville Owen, Robert French and Michael Barker of the Supreme Court, High Court and Federal Court respectively. Apart from their high offices and their brilliance, those three judges all

had something in common with David Malcolm: integrity and independence – the essential attributes of any judge, most especially a head of jurisdiction.

The three previous lecturers also had another thing in common – they all had the privilege of knowing David much better than I did. As a very young lawyer, I worked for a firm of solicitors at 524 Hay Street, the modest building which then housed the tiny Western Australian Bar. David joined the Independent Bar in 1980, and I moved out of 524 Hay Street in the following year, by which time David had already taken silk and become President of the Bar! The closest I ever came to him in those days was when I trekked upstairs to Bar Chambers, clutching the $1.50 fee required to have an affidavit witnessed.

Winding the clock forward a quarter of a century, the Family Court of Western Australia was honoured when David, by then Chief Justice, sat on the bench at the ceremony at which I was welcomed as a judge. He bounded into our chambers that morning with that towering presence, that sense of energy and that never-ending smile which were his trademarks. I was grateful for his presence, but I will always be indebted for the letter he sent to my Chief Judge afterwards, which for me characterised the generosity of his spirit. This being my last public speech before my farewell ceremony, I hope you will forgive me for thinking it appropriate that it is given in honour of a great man who took the time to be there at the start of my judicial career.

As I come to the end of my time as a Chief Judge, we have a new Chief Justice of Western Australia who is starting his journey in David's footsteps. At the same time, the Family Court of Australia, of which, until tomorrow, I am the senior Appeal Judge, prepares to farewell a Chief Justice for the second time in 12 months. This concurrence of events leads me to reflect on the nature of judicial leadership, and on David's example and legacy in that role, since judicial leadership is inextricably intertwined with my main theme, judicial independence.

An obvious, and regrettably current, circumstance in which the role of a Chief Justice as leader assumes prime importance arises when a court or some of its judges are under attack, whether from politicians, interest groups, or in the media. The leadership needed from a head of jurisdiction is now even more critical than it was in the past, when it was an accepted role of Attorneys-General to defend judges from attack, including attack by fellow politicians.

As many here know, the judges of the Family Court of Australia, both in its appeal and trial divisions, have this year experienced public criticism that is ill-informed, inaccurate and unfair.

David Malcolm recognised the role Chief Justices should play in such circumstances. In an article in the Southern Cross Law Review, he pointed out:

> *It is necessary to remind the public and the other arms of government that the judiciary is an equal and independent arm of the government. The Chief Justice must be ready to speak for the judiciary of the nation, or of a State or Territory, on issues such as those that affect judicial independence and attacks on the judiciary.*

Recognising the reciprocal nature of the obligation, he went on immediately to add:

> *The Chief Justice has a responsibility to ensure that relations with the legislative and executive arms of the government are appropriate, mutually respectful and cordial.*

David accepted that the formal powers of a Chief Justice "*are in fact, quite limited*". But he recognised the influential role a Chief Justice can and should perform in maintaining the delicate balance between the three arms of government, and also the importance of including the community we serve in this important discourse. Thus he wrote:

> *The role of a Chief Justice is one of leadership. The Chief Justice is expected to be the spokesperson and representative of the judiciary ... in its dealings with the executive government and the community.*

In my experience, Chief Justices agonise over the choices they must make as spokesperson. After all, as Chief Justice French emphasised, they are "*but one amongst equals*" and should therefore speak – or remain silent – not for themselves but for the body of judges. It is essential therefore that a Chief Justice develops a mechanism by which he or she can share information about matters of policy with all the judges and gather their views on matters of importance to the court. The mechanism should ensure there is room for a range of views, and a culture where judges are able to express opposing views in a proper forum. In this way,

Executive Government can be confident that any representations made are indeed the views of the judges.

Representations to government are usually best made privately, but there are times when a Chief Justice needs to speak publicly, especially when views critical of the judges have been aired publicly by representatives of the government. The propriety of doing so is recognised by guidelines adopted in 2014 by the Council of Chief Justices of Australia and New Zealand. Those guidelines contemplate comment where, for example, proposed laws relate "*to the abolition of existing courts and the creation of new courts*" and in respect of laws which affect "*the jurisdiction and powers of the courts*". Unsurprisingly, the guidelines contemplate such comments being made by the head of jurisdiction, no doubt after consultation with the judges.

Of course one contribution a Chief Justice can always make to any debate is to ensure that the public has an accurate appreciation of the work of his or her judges. Chief Justices will have an understanding of the day-to-day work of the judges because they share in that work and have long experience of it from the other side of the bar table. As Chief Justice Malcolm said:

> *So far as I am aware, all Chief Justices in Australia regularly sit in Court. It is inconceivable that a Chief Justice would act entirely as an administrator and never sit as a judge. A Chief Justice is chosen and appointed to be a judge and is expected to demonstrate leadership in that capacity.*

There can be no doubt David Malcolm lived up to this expectation. Apart from running an efficient court, being the face of the judiciary to the West Australian community, and making many speeches in Australia and overseas, he also sat regularly both at first instance and on appeal. His reputation spread well beyond the borders of our own State, and it was therefore no surprise when he was asked to preside over a specially constituted bench of the New South Wales Court of Appeal to hear a case involving a member of that court.

It was said at his farewell that David "*led from the front, never shirking the difficult cases*". The importance of a Chief Justice leading his or her judges by example in deciding cases cannot be overstated. While each individual judge enjoys complete independence, a group of

judges in my experience is no different to any other group in a workplace. *The tone is always set from the top* is an adage well worth remembering, and fundamental to all forms of leadership.

David Malcolm had amongst his many talents those of an outstanding sportsman. He would therefore forgive me for quoting from Australian cricket captain Ian Chappell who played his last test match in the same summer that David joined the Independent Bar. Chappell said this in a speech to the Wanderers Cricket Club, which was simply entitled *Captaincy*:

> *Respect is vital to a captain. He must earn it in three categories: as a player, as a human being and finally as a leader.*

Chappell went on to stress the importance of the skipper of the team being good enough to hold his place as a player, and criticised what he perceived to be the English method of selection which he felt did not always achieve this result, leading to the team playing "*virtually one man short.*" I am sure the judges of the Supreme Court of Western Australia never felt they were playing one man short under the captaincy of David Malcolm.

I will return shortly to the topic of team selection, as it is vital to a consideration of the title I have chosen for this talk – *The Rule of Law and the Independence of the Judiciary: Values Lost or Conveniently Forgotten?* The rule of law and the independence of the judiciary were recurring themes in David's writing and work. In fact, I contend that the most enduring of his legacies is the contribution he made internationally to these twin pillars of our democracy.

Amongst his many roles, David was Chair of the Judicial Section of LAWASIA and organised the Conferences of Chief Justices of Asia and the Pacific, of which he also served as Chair. The assemblies of those groups were arranged to coincide, so when they met in Japan in 2003, David gave not one, but two speeches, each dealing with aspects of judicial independence.

He commenced his address to the 10th Conference of Chief Justices in Tokyo with these words:

> *It is almost universally acknowledged that one of the hallmarks of a democracy is the independence of the Judiciary. A Judiciary which exists merely to do a Government's bidding or to implement Government policy provides no guarantee of liberty.*

Once upon a time, most politicians accepted that truth. One in this mould was Winston Churchill – a great hero of mine. Churchill spent a lifetime opposing tyranny in all its forms, some of which we now see re-emerging in precisely the same insidious ways that occurred in his lifetime. Whilst never a lawyer or judge, Winston Churchill had a clear understanding of the role the judiciary performs in preserving our freedom from tyranny. He maintained that:

> *The independence of the courts is, to all of us, the guarantee of freedom and the equal rule of law. It must, therefore, be the first concern of the citizens of a free country to preserve and maintain the independence of the courts of justice, however inconvenient that independence may be, on occasion, to the government of the day.*

As our Chief Justice, David Malcolm was similarly unwavering in his commitment to judicial independence. He spoke in defence not only of his court but of all courts and all judges. In my humble opinion he was the very model of a good Chief Justice who tries to work in harmony with the Executive Government, but never becomes its servant or mouthpiece.

David knew that judicial independence is indispensable to public confidence in the administration of justice. He knew also that it is not an end, but a means to an end. One of his contemporaries, Chief Justice Sir Gerard Brennan, had been at pains to point this out when addressing the Australian Judicial Conference in 1996:

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

David Malcolm did more than just talk about judicial independence. He was instrumental in the formal adoption by the Conference of Chief Justices of the Asia Pacific of what is known as the "*Beijing Statement of Principles of the Independence of the Judiciary*". Under his leadership, ours was the first region in the world where such a set of principles was adopted.

His role in this regard was acknowledged by Chief Justice Wayne Martin in his valedictory oration at the sitting of the Supreme Court convened after David's death.

I will return to the articles of the Beijing Statement in a moment. But first, I want to develop the topic of team selection, since it is central to any consideration of judicial independence.

Winston Churchill certainly understood its importance and he understood, in particular, how important it is to avoid the appearance of the process of selection of judges being associated with political considerations. After his visit to Italy in August 1944 following the fall of Mussolini, Churchill sent a message to the Italian people in which he emphasised, not for the first time, that "*the price of freedom is eternal vigilance*". In answering the question of "*what is freedom*", Churchill said that there are one or two simple tests by which the freedom of a country can be measured in the modern world. One of the tests he posed for any country was whether "*their courts of justice [are] free of all association with political parties*".

The same point was made by the Right Honourable Beverley McLachlin, the former Chief Justice of Canada, who coincidentally was appointed Chief Justice of British Columbia in 1988, the same year David Malcolm became the Chief Justice of Western Australia. Mrs Malcolm tells me that their paths crossed over the years, and their thinking about judicial independence certainly coincided. In a speech called "*The Decline of Democracy and the Rule of Law*", Chief Justice McLachlin gave some tips about what judges and heads of jurisdiction can do to preserve and promote judicial independence. She started off by saying that, as judges:

> *We can educate the public and the politicians about what judicial independence means and why it is vital to our democracy and our social well-being.*

Getting down to the specifics of team selection, her Honour went on to say:

> *We should support an appointment process that appoints judges on merit, and not political affiliation.*

And she immediately added:

> *We must never allow ourselves to be co-opted by governments.*

Delivering much the same message, Brennan CJ said to the 1997 Australian Legal Convention:

> *Treating Courts as political players will lead politicians to make political appointments, to offer personal or institutional rewards for judicial conduct that is politically desirable and to impose penalties for decisions that are politically unacceptable. Mutual understanding of and respect for the functions of each branch of government is essential to rebuild and preserve an appropriate relationship between the judicial and the political branches.*

Through the agency of David Malcolm and others, these sentiments now find formal expression in the Beijing Principles which I mentioned earlier. Articles 11 and 12 provide as follows:

> *11. To enable the judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence.*
>
> *12. The mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed.*

David provided valuable commentary on the Beijing Principles in the 2003 Western Australian Law Review, where he wrote, echoing sentiments he had expressed in Tokyo a little earlier:

> *It is necessary that the influence of the executive should be kept to a minimum in order to reduce potential for improper considerations. In the interests of public confidence in the impartiality of appointees, the selection process should be open and formal.*

This brings me to the critical question – "*how is Australia measuring up in 2018 to the Beijing Principles?*" Is the appointment process "*open and formal*"? Are appointments

being made solely on the basis of competence and merit as we should not only hope but expect and demand? Or are some being made on the basis of political affiliation or personal connection or what the Executive expects those appointed will do to further some policy agenda?

After the unfortunate events that unfolded elsewhere in Australia a couple of years back, we might have had cause for optimism that governments would appreciate the potential for backlash if a perception arose that any person had been chosen for office for reasons other than suitability. It is therefore troubling that statements are now being made openly in the media questioning whether some appointments **have** been made on grounds other than merit.

For those who work in the area, it is particularly concerning that these complaints appear primarily focused on appointments to courts and tribunals that deal with family law disputes. Unfortunately, they bring to mind the story told of Lord Halsbury, the former Lord Chancellor of Great Britain, who was asked whether "*ceteris paribus*" (i.e. all other things being equal), the best man would be appointed to a vacant judicial position. His Lordship apparently responded "*ceteris paribus be damned, I'm going to appoint my nephew*".

I have in mind here especially the comments made by Professor Patrick Parkinson on ABC Radio National on 2 June 2018 when asked about the constitution of the new court the federal government has announced will be created to deal with family law matters. He said:

> *What happens between now ... and January 1st when this new court is meant to occur is very, very important, and we have to have a dialogue about the right model for this new court and ensure that we have expert specialist people, who are not just friends of the Prime Minister or the Attorney-General, not just Liberal Party members, but people who know what they are doing who will be appointed to the new bench.*

What was it that moved Professor Parkinson to make that statement? To give some context, it must be understood that Professor Parkinson, who is now Dean of Law at the University of Queensland, is perceived to be one of the more conservative commentators on family law. He has often been consulted by government, and was described in the *Sydney Morning Herald* of 26 March 2018 as "*arguably Australia's most distinguished scholar in family law*". Why is it that a person with his background feels the need to insist publicly upon

appointments being made on grounds of suitability rather than the other considerations he mentioned?

Professor Parkinson is not alone in drawing attention to concerns relating to the basis upon which at least some appointments have been made. After outlining her own concerns, Professor Margaret Thornton of the Australian National University wrote on 19 April 2017:

> *As courts are the bulwark of a democratic society, we should not unquestioningly accept the absence of transparency. We must put pressure on the [Attorney General] and the ... Government to reinstate formal criteria in deciding appointments to all federal courts.*

Another academic and newspaper columnist writing in the Melbourne *Age* on 8 June 2018 said this about what she described as "*some highly unsuitable appointments*".

> *They were made as grace and favour appointments. Now those grace and favour appointments will be presiding over the most serious family law cases in the country. Cases where there are incidents of sexual abuse, of child abuse, and of family violence.*

In the same article, Professor Parkinson was again quoted as being "*desperately troubled*" by some of the appointments that have been made. The quote continued:

> *I say this with all seriousness, the government and the opposition ... need to come together to devise an independent, merit-based and non-political appointment process for all judges in federal courts or tribunals.*

The first point to make and which must be made very strongly is that the concerns that have been expressed are not directed at all, or even most, judges hearing family law cases. Of course, the same would not be able to be said in future if we moved away from a merit based system of appointment. It is not enough, though, for litigants to be confident that they have a good chance of coming before a competent judge – that confidence should be absolute.

The second point is that none of the concerns expressed are related to judges or magistrates of our State Family Court. In fact, it is fair to say that our Court is looked upon around the nation as the model of a good family law system, not only because of its unique structure but also because there can be no perception that appointments have been made other than on merit.

Returning then to the calls for changes to the appointment process, it should be appreciated that family law cases are dealt with not only by two separate courts in the Eastern States and by our unified State court here, but also by the Administrative Appeals Tribunal, which deals inter alia with the contentious issue of child support. Family lawyers and academics therefore also take an interest in the way in which appointments are made to that Tribunal, and I doubt it was by accident that Professor Parkinson included tribunals in his call for reform.

Examination of the public record will demonstrate why so many judges, lawyers and academics agree with Professor Parkinson that the time is ripe for a careful, bipartisan examination of the appointment process. I make no apology for saying so in a public forum, and I cite no less authority for doing so than the man whom we honour tonight. While David recognised that "*consistently with the need for judicial independence there is a general restraint on judges expressing views on matters of current political controversy*", he was also very clear in stating:

> *It is my firm belief that a judge should be fully entitled to speak out on a matter related to the administration of justice, even a matter of public controversy, so long as he or she does not give people cause for suspecting bias or partiality in the cases to be heard in the Court. A judge must also refrain from comment on matters of political controversy. There are however, matters that involve the administration of justice on which members of the judiciary may have not only a right but a duty to speak out.*

I am further fortified in drawing attention to this topic by quoting Chief Justice McLachlin:

> *Judicial independence, as its history attests, has not been won by fiat or by accident. It has been won by the vigilance and courage of lawyers and judges over the centuries. And it is by that same vigilance and courage that it is sustained...*

And no less a person than Sir Gerard Brennan spoke out publicly on the same topic in 2008 when he drew attention to "*an increase in the number of anecdotal reports of unmeritorious appointments*", leading to him to argue that "*the time has passed when it is possible to have any confidence in the system to discover and evaluate the abilities and the character of prospective appointees to Commonwealth courts*".

There is much more that could now be said about the background to the current calls for all appointments to Commonwealth courts and tribunals to be made on the basis only of merit, but this is neither the time nor the place. Examination of freely available material, including past editions of *The Australian* and interstate daily newspapers going back to at least 2008, would suffice to give at least some indication of the extent of the problem. What troubles me is that some people associated with the process seem not to understand there is a problem at all.

It is not often that we get an insider's view of how the process sometimes works. One exception appeared in *The Canberra Times* in an interview with a former Senator who had been appointed to a very senior, and highly remunerated, role in a tribunal. Having noted that the Senator had lost pre-selection after many years in politics, the article went on to say that "*some of [the Senator's] colleagues in the [Government] felt badly about his involuntary departure*".

I pick up the story with the former Senator's own words:

> *"My colleagues had been knocking on my door throughout 2014 with offers of various sorts, they felt some sort of sense of responsibility to see I was looked after so I did have a number of offers made...*
>
> *"Initially I said no – I'd been working for governments one way or the other for close on 30 years and wanted to get off that treadmill for a while and see how I would go working in the private sector.*

The *Canberra Times* article continued:

> *Was he offered an overseas post? "Yes ... that's all I can say, sorry."*

So the offer of the tribunal did not come out of the blue but had the added attraction of being part of the legal system.

He was due to go on holiday in Europe with his wife, as the appointment was about to be announced.

"I realised I would have to spend some of that holiday brushing up on the law so I took a couple of text books with me and ploughed through them on the trains."

Having thus explained how he had prepared himself for this senior role, after his long absence from the law, the former Senator said this:

"I wouldn't have predicted [this appointment] at all ... I wouldn't have said I was an outstanding lawyer because I never wanted to make it my career.

"I had always seen it as a vehicle towards getting into politics, never as an end in itself. So coming back all these years later and suddenly finding myself back in the law, is a funny type of feeling."

Perhaps it is best that I allow that story to speak for itself and merely ask how many similar stories remain untold. Unless the concerns expressed by Professor Parkinson and others are entirely misplaced, the answer is that there are enough to give cause for disquiet. This is not to suggest that past political office, or political associations or friendships with politicians, should be a disqualification to holding judicial office. However, the public needs confidence that those appointed to judicial office owe fidelity to the law, not to those who appointed them.

We pride ourselves on having inherited the best of the English legal traditions and I suggest the time may have come to look to that country for modern guidance about how to ensure the public retains confidence that those appointed to sit in judgment on them are the very best we have to offer and that their appointment can stand up to scrutiny against the Beijing Principles.

In speaking of fluctuations in the English approach to judicial appointments, Sir Harry Gibbs, another of our former Chief Justices, explained back in 1987 that:

> *Political influence continued to play too great a part in the making of judicial appointments in England until the time of the Second World War. However, from 1946 onwards both Conservative and Labour governments in England have endeavoured to select only the best person available for any judicial position and to exclude entirely any consideration of personal or political influence. The policy ... is a bipartisan policy, formulated by Lord Chancellors who put the public good before party interests; it is supported only by tradition, and has no constitutional or legal foundation.*

This bipartisan policy now has legal foundation in the UK, courtesy of the *Constitutional Reform Act 2005* and the independent Judicial Appointments Commission. The intent, quite simply, is to provide an open and formal procedure for appointments. There have been calls for something similar here at least as far back as 1977 when Sir Garfield Barwick argued that appointments should not be left to the Executive alone. From his great vantage point, as both a former Attorney-General and a Chief Justice, Barwick explained again in 1995 that:

> *Left to politicians, the appointments are not always made exclusively upon the professional standing, character and competence of the appointee. At times, political party affiliation ... form some of the criteria for choice. Sometimes party-political considerations are the dominant reason for it...*

Barwick's views were strongly supported in 2008 by Sir Gerard Brennan, who spoke of the particular importance of a "structured" process of appointment to what is now known as the Federal Circuit Court. Sir Gerard wrote that:

> *Appointments to that Court are likely to attract less attention than appointments to the higher Commonwealth courts even though appointees will be exercising the judicial power of the Commonwealth in diverse areas including family law, bankruptcy, migration and industrial matters—issues which affect the vital interests of individuals.*

Barwick was succeeded by Sir Harry Gibbs, who wrote in the 1987 Australian Law Journal about Australian departures from the high standards being set in the UK. He said:

> *The work of the judiciary is too important to entrust it to those of doubtful competence, and a bad judge may do irreparable damage, since there are some judicial errors which even the most elaborate system of appeals cannot remedy. The further conclusive reason why appointments should not be made on political grounds is ... that they are capable of shaking public confidence in the judiciary.*

There was a time, not that long ago, when an Australian federal government developed what appeared to be a successful mechanism, falling short of a formal Judicial Appointments Commission, to recommend appointments to the family courts. The approach was consistent with the bipartisan recommendation of the Senate Standing Committee on Legal and Constitutional Affairs in 1994. It is unclear why that mechanism has been scrapped. Perhaps whilst we consider something more formal, it might be worth giving it another try?

In the meantime, as Sir Harry Gibbs has pointed out, "*we must depend on the statesmanship of those in all political parties*". Inevitably, given the comments of Professor Parkinson and others, upcoming appointments to courts administering family law, in whatever shape those courts may take, will be scrutinised with more than usual interest for evidence of statesmanship.

I propose to conclude by making brief reference to the current debate about the future form of the family law system. On 30 May 2018, the Commonwealth Attorney-General announced his intention to create a combined court in the Eastern States which would improve the efficiency of the "*existing split family law system, [by] reducing the backlog of matters before the family law courts, and driving faster, cheaper and more consistent dispute resolution*".

Those of us who have been around for a while could not help but recall on hearing these remarks that the Attorney-General who created the current "*split family law system*" had, almost 19 years earlier, used eerily similar words when proclaiming that his new system would provide a "*quicker, cheaper option*" for family law dispute resolution. We could also not help recalling that the Honourable Alastair Nicholson, then Chief Justice of the Family Court of Australia, warned in 1999 that:

> *[the] fragmentation of [the Family Court's] closely integrated system … will result in a less satisfactory and more expensive service. The potential for public confusion, forum shopping and waste of resources on shuffling matters between courts is high. The funds proposed to be spent on the [new court] could be used far more effectively by providing Magistrates within the framework of the Family Court of Australia.*

The appointment of magistrates within the framework of "*one specialist family law court*" is what the Semple Review recommended in 2008 after wide consultation and examination of the coherent system in Western Australia. Plans to give effect to the Semple Report were successfully opposed by those who had introduced "*the split family law system*". The split system has therefore stumbled along until 2018 when we are now informed, on the basis it seems of a report from a firm of accountants, that the flaws in the system are not entirely the fault of the government that created it, but rather the inefficiency of the court whose Chief Justice accurately predicted the outcomes we now see.

As our Chief Justice, David Malcolm understood that consultation about change is always desirable. Indeed, it is essential if we are to avoid decisions about change being based on incomplete, inaccurate, or misunderstood information. For example, that firm of accountants could have consulted with experienced trial and appellate judges in both courts in the Eastern States about what their raw data actually meant. And they could have consulted with those of us in the West, who already have a fully unified system, to help explain how the stark differences in the data relating to judicial officers working at different levels bears no relationship to efficiency.

It would be fair to say there is unanimity in supporting some changes to the system in the East. It is the form the changes take that is important since, in the seeming anxiety to rush change, we would not want Parliament to throw out the baby with the bathwater. After all, with all its faults, our system is regarded internationally as one of the finest, if not the finest, in the world.

Those who understand the system; know its history; and participate in the day-to-day work need to be consulted, not just about the detail of the Bills before Parliament, but about the broader policy, including the unprecedented plan to make no new appointments to the superior division of the proposed new court. This plan to slowly abolish the Family Court of

Australia has profound implications for family law and deserves careful scrutiny, and proper consultation. Given David Malcolm's focus on eradicating all forms of gender bias in the law, I suggest he would have insisted that such consultation as has occurred to date ought to have included women – not just because we are dealing with families but because this is 2018.

It was, after all, the National Council of Women of Australia and its 620 affiliated organisations who, in two years of consultations leading up to the 1975 *Family Law Act,* strongly advocated for "*specialised Family Courts*" comprising **specialist** judges of superior status, working in one unified court alongside judicial officers at a lower level "***specially appointed** and trained*" for the work. This concept could have been achieved in the Eastern States, as it has been in Western Australia, had the Semple Report been implemented. The concept of a two-tiered specialised court has been abandoned in the plan now presented to the Federal Parliament. Ironically, the Semple Report is being heavily relied upon as evidence supporting that plan!

Now that the policy has been decided, and the Bills have been introduced, there is a consultation process underway. Notwithstanding the government has been unable to secure a majority in the Senate on the progress of its Bills, the Commonwealth Attorney announced last week that:

> *In the meantime, I will be discussing with the courts the need to advance the development of new processes, procedures and operational guidelines for the new court. There is no reason this important work which will be fundamental to establishing the new court cannot commence pending the final passage of the legislation.*

This announcement is cause for concern if the consultation is intended to be meaningful. The Family Court of WA and the Western Australian legal profession are taking a keen interest in the progress of the Bills. They affect us because we have been informed that the associated policy not to appoint any more judges of superior status will be applied to our Court, thus diminishing the status of family law. They affect us because the Bills contain provisions relating to appeals which diminish the status of our specialist Family Law Magistrates. And they potentially affect us as there are now indications that the proposed merger will lead to

changes in longstanding arrangements between our Court and the Family Court of Australia that have greatly benefitted Western Australian families.

Quite apart from the fundamental question of the structure of the new court and whether the Semple model would provide a better framework, one important issue for the consultation process is whether **all** judges who hear family law cases should satisfy the test of suitability now laid down for Family Court judges in section 22 of the *Family Law Act*. In the context of the argument I have made tonight for appointment on merit, this would have the distinct advantage that Australia's family lawyers not only support that requirement of suitability, but that they also have a very good collective understanding of who meets it.

Hopefully there is going to be sufficient time for wide community consultation on these issues just as there was prior to the 1975 *Family Law Act*. In the meantime, we should be wary of law reform being driven by statistics produced by firms of accountants in the guise of measuring or quantifying the productivity of the courts. As Chief Justice Murray Gleeson said:

> *Nobody has yet devised a satisfactory indicator of judicial productivity, probably because the concept of productivity of judges is no more amenable to measurement than the productivity of parliamentarians. It is possible to measure some aspects of the performance of a judge or a court; and this may have utility. Justice, however, is more a matter of quality than quantity, and the desired judicial product is not a decision, but a just decision according to law.*

David Malcolm understood that the true measure of a judicial system is not only its quality, but the faith the community has in the integrity and independence of its judges. I have been privileged to have held office under his influence, and that of his worthy successor. As I prepare to leave office, I have confidence that our new Chief Justice of Western Australia will preserve and build on the legacy of the man whose memory we honour this evening. A rich legacy that arises from David's powers of intellect, integrity and, above all else, independence.