



Law Council
OF AUSTRALIA

Attacks on the judiciary by politicians weaken our democracy

Opinion Piece by Morry Bailes, President, Law Council of Australia.

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The separation of powers sounds like the stuffy, abstract domain of lawyers and academics. But it needn't be and it shouldn't be.

Because, the actual freedom of each and every one of us – in a very real and practical way – relies on the complete independence of the executive, the Parliament, and the judiciary.

Judges need to be respected for their role: exercising judgment. At its most basic level, the separation of powers simply means that if one of the powerful arms of our democracy starts hitting you unjustly, there's another powerful arm capable of stopping it. There is a check and a balance.

We tend to think of this crucial democratic foundation, if we think of it at all, as somehow naturally occurring and therefore unshakeable.

But we should pause to recognise more often just how delicate this whole balancing act is.

Look at the vast majority of human civilisations that have ever been and you will see the far more natural state is to have a single, subjective source of unimpeachable power.

So we should never lose sight of the fact that the Westminster-style separation of powers we have in Australia is both important and fragile.

It requires understanding, constant nurturing, and diligent respect.

This is why so many are deeply concerned about recent, strident criticisms directed by certain federal politicians at the judiciary.

The most recent example is the criticism of judges in Victoria for supposedly delivering ideologically driven lenient sentences in the wake of incidents of gang violence in Melbourne.

It's not hard to understand the populist appeal of these kind of attacks.

Increasing public fear about a given situation, and then attacking those who are allegedly doing too little to stop it, is hardly a novel move in history's political playbook.

But in Australia we have traditionally prided ourselves on being better than that.

That's why the Law Council of Australia, the peak body representing the national legal profession, has decided we have a responsibility to speak out against political attacks on the judiciary.

It's not that judges are precious or peculiarly sensitive. In fact, judges operate in a relatively unique environment in which all their major decisions are immediately open to appeal and potential overturning. This fail-safe avenue of appeal, that can go all the way to the High Court if needed, rightly exists because no judge is perfect, and errors of judgment can and do happen.

Informed public comment on judicial decisions is an important part of normal discourse.

But an established pattern of politicians attacking the motives and impartiality of the judiciary is dangerous, and should be actively resisted.

And this separation of power cuts both ways. Just as politicians should not call into question the motives of an independent and impartial judiciary, it is important that the judiciary, outside matters of law it is dealing with, does not commentate on parliamentarians.

Judges need to be respected for their role: exercising judgment. Their function is to interpret and apply the law. It is the function of the Parliament to make the law. Constantly questioning a judge's capacity to interpret law is akin to constantly questioning the legitimacy of politicians to even make any law in the first place.

Of course these thin-edge-of-the-wedge type matters are always difficult to explain and defend.

If a politician decides in the summer of 2018 to take a few politically opportunistic potshots at a group of judges, will our whole Westminster system come crashing down in an instant? Of course not.

But it does remove a brick from our democratic foundation, weakening the separation of powers and the rule of law.

It is also worth noting that attempts to paint judges as too lenient are particularly cynical, because they don't actually tally with the evidence.

While it's always possible to whip worried people up into saying sentences should be harsher in a given area, scratch a little deeper and the research suggests the average Australian is actually more lenient than the average judge when it comes to sentencing.

Kate Warner, formerly the director of the Tasmanian Law Reform Institute, conducted some fascinating research that shows that when presented with the same information as judges, members of the public will recommend lighter sentences.

The research took 987 jurors from 124 criminal trials from the County Court of Victoria between 2013 and 2015. It built on an earlier study from Tasmania.

In 62 per cent of cases, the jurors came up with a sentence which was more lenient than the judge's sentence.

It's easy to paint a sentence as too light when you only have the headline facts. But the real world is always more complex.

It is the role of judges to plough expertly through the grey areas. Their work has served, and will continue to serve, our community well.

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