Disappointments and appointments

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CLANT is delighted to announce that the 15th biennial Bali Conference, on the theme "Curing Injustice", will be held at the Prama Sanur Beach Hotel, commencing with a Cocktail Party on Saturday 20 June 2015 and concluding with a Gala Dinner on Friday 26 June 2015. Solusi Business Solutions, our conference organisers, are holding confirmed accommodation with great rates for all room categories. Registration and hotel bookings will commence in November. If you would like to be added to the mailing list please contact Solusi.[1] If you are interested in being a presenter, please let a CLANT Committee Member know.

On a Friday after work, there is nothing better we Northern Territory criminal lawyers like to do as we kick back and sip on our glasses of Château Lafite Rothschild Pauillac 2009 than to get stuck into the beak of the week. The particulars vary. We whinge about the smiling assassins and the limp dishrags, the cynics and the pushovers, the over-polite silvertails and the over-the-top bullies, the slowcoaches and the express trains. But one of the magistrates we tended not to whinge about was Peter Maley SM. It was generally considered that on the bench he was able, astute, affable, efficient, sensitive and fair.

Mr. Maley, however, became the centre of a legal and political storm, largely if not entirely of his own making, arising from his apparent failure or refusal to unequivocally disassociate himself from party politics after taking judicial office, and leading to his resignation from the bench on 25 August 2014.

Prior to Mr. Maley's resignation, CLANT members were divided on this issue. On the one hand, it was argued, it was a storm in a teacup, and no useful purpose was served by picking a fight over a well-regarded and competent judicial officer. Attractive as this standpoint was, I for one was unable to accept it. I considered that fundamental matters of principle had been raised, and had to be addressed. Accordingly, on 16 August 2014 I posted an earlier version of this article on the CLANT website, supporting the call by the Northern Territory Bar Association for an inquiry into the matter.[2]

In order to uphold confidence in the administration of justice, enhance respect for the institution of the judiciary and protect the reputation of judicial officers, three basic principles are said to govern the conduct of judicial officers: impartiality, judicial independence and integrity.[3] For a judicial officer to publicly continue an association with a political party is inconsistent with the principle of both impartiality and judicial independence. As I have previously written, judicial independence is constitutionally fundamental, but also peculiarly fragile.[4] There is of course nothing unusual, let alone improper, about judicial officers being actively involved in politics before their elevation to (or, for that matter, after their descent from[5]) the bench: former Chief Justice Brian Frank Martin was once the mayor of Alice Springs, and Additional Judge John Reeves served as the Federal MHR for the Northern Territory. However, it is a "well established principle" that:

> it is expected that, on appointment, a judge will sever all ties with political parties. An appearance of continuing ties, such as might occur by attendance at political gatherings, political fund raising events or through contributions to a political party, should be avoided.[6]

Exacting standards of fitness and propriety to practice law in the Northern Territory are required by the *Legal Profession Act 2006* (NT) as construed and applied by the Supreme Court.[7] It is trite to observe that the standards expected of judicial officers are even more stringent.

In any event, out of this embarrassing and unpleasant imbroglio, a most welcome and potentially very significant development emerged: on 29 August 2014, Chief Minister Giles announced a review into the process for appointing Northern Territory judicial officers, and the establishment of a judicial code of conduct.[8]

We now have a golden opportunity to address a problem which affects not just the Northern Territory, but all Australian jurisdictions. In the words of former Queensland Court of Appeal judge Geoffrey Davies:

> There is a risk that justice may not be or be seen to be done in cases where a judge, deciding between a citizen and the government, or a government minister, officer or public body, is a person appointed under our present system, in which the criteria which the Cabinet applied in selecting that person remain hidden. That risk is much increased where the judge is someone reasonably perceived to have been appointed because of a close association with the government or a person in the government or the party in power. The reality and the perception of justice being done can be achieved only if the judge deciding any of those cases is and is seen to be independent of government and the politicians who form it; and that can be assured only where the appointment of the judge is made in a way which is transparently free of political patronage.[9]

The solution proposed by Davies (among others[10]), is to follow the lead of many other jurisdictions, including England and Wales, Scotland, Northern Ireland, Canada, South Africa, Israel, France, Germany, Italy, the Netherlands, Spain and many US states, and establish a politician-free judicial appointments commission, at arm's length from government, chaired by a lay person, to attract applicants for judicial office, assess them on merit, and submit a list of the best (say, three[11]) candidates to the Attorney-General for appointment. This model complies with what Evans and Williams have identified as:

> the four guiding principles and their implications for any judicial appointment process. These principles are matters of constitutional significance: appointments should be made solely on the basis of merit, properly understood; an appointments process should ensure judicial independence; an appointments process should ensure equality of opportunity, and hence diversity, in appointments in the interests of a judiciary that reflects the society from which it is drawn; and an appointments process should include appropriate accountability mechanisms.[12]

As to the qualities, or in human resource development parlance, the essential selection criteria, of candidates, Sir Anthony Mason has summed them up as follows:

> Professional legal skills of the kind required for judicial work… include knowledge of evidence, procedure and practice, knowledge of the law, analytical ability, a capacity to dispose of a case smoothly and efficiently and a capacity to give a well-reasoned decision with reasonable promptness…. Personal qualities are indispensable — integrity, impartiality, industry, a strong sense of fairness and a willingness to listen to and understand the viewpoint of others.[13]

To these, Evans and Williams have added "decisiveness, understanding and a sound temperament."[14]

No other Australian government has to date shown the mettle required to chuck out the nod nod wink wink behind closed doors old boys club model of judicial appointment, and act on this stern but sage advice of the Lord Chancellor of Britain given over 20 years ago:

> In a modern democratic society, it is no longer acceptable for judicial appointments to be left entirely in the hands of a Government Minister.[15]

Go on Mr. Attorney, carpe diem!

(Endnotes)

1. http://www.solusi.com.au/contact.html
2. http://www.clant.org.au/index.php/news/118-peter-maley-sm
3. Council of Chief Justices of Australia, *Guide to Judicial Conduct* (2nd Edition) (AIJA, 2007), 3
4. Russell Goldflam, "Franz Schlegelberger and the Concentration of Powers", *Balance* (Edition 4, 2013), 14
5. Herbert Vere Evatt was elected as a NSW MLA in 1925, appointed as a High Court judge in 1930, elected as a Federal MP in 1940, and returned to the bench as Chief Justice of the Supreme Court of NSW in 1960
6. Council of Chief Justices of Australia, *Guide to Judicial Conduct* (2nd Edition) (AIJA, 2007), 10
7. *In the matter of an application by Julian Valvo* [2014] NTSC 27; *In the matter of an application by Andrew Hewitt Giles* [2014] NTSC 30; *In the matter of an application by Gadd* [2013] NTSC 13; *In the matter of an application by Thomas John Saunders* [2011] NTSC 63
8. http://www.abc.net.au/news/2014-08-30/review-into-nt-legal-appointments-after-maley-affair/5707626
9. Geoffrey Davies, "Appointment of Judges", (Speech delivered at the QUT Faculty of Law, Brisbane, 31 August 2006) accessed 30 August 2014 at http://www.webcitation.org/5Xg5ok9jv
10. Including former High Court Chief Justices Anthony Mason and Garfield Barwick: see Simon Evans and John Williams, "Appointing Australian Judges: A New Model" (2008) 30 *Sydney Law Review* 295 at 310 (fn. 75)
11. As proposed by Simon Evans and John Williams, ibid at 307
12. Ibid, at 297
13. Sir Anthony Mason AC KBE, "The Appointment and Removal of Judges" in Helen Cunningham (ed), *Fragile Bastion: Judicial independence in the nineties and beyond* (1997, Judicial Commission of New South Wales)
14. Supra, n. 10 at 299
15. Lord Falconer of Thoroton, July 2003, cited in Davies, supra n. 9 at 1