

An interview with George Brandis QC

On 16 October 2013 Arthur Moses SC and Victoria Brigden interviewed the Hon George Brandis QC, the recently appointed attorney-general of the Commonwealth of Australia

Bar News: Many former attorneys general have been barristers, more so than solicitors. How has your career at the bar prepared you for this role?

Attorney-General: It's a very appropriate preparation for the role. The attorney is the first law officer and I can't think of a more appropriate background. I was practising as a barrister for approximately 14 years and before that a litigation solicitor for two years. It is a natural preparation for the role. I also tended to concentrate on law and justice issues in my career in the Senate. I recently delivered a lecture on the role of the attorney-general to the University of Queensland.

Bar News: In that lecture (the annual Minter Ellison Sir Harry Gibbs lecture at the TC Beirne School of Law at the University of Queensland), you informed the audience that you viewed your role as more than a politician, and more than a senior cabinet minister, and you would undertake the role with a view to defending the judiciary.

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Attorney-General: I did take that view. The attorney-general is not above politics, but there are aspects that are beyond politics. I do think the attorney-general should be a senior cabinet minister. I am a member of the inner cabinet group, which in the Coalition is called the leadership group. There are certain aspects of the role of attorney-general that go with the role of being a senior cabinet minister. There are certain dimensions of the role that go beyond politics. There are certain dimensions of the role which have to be exercised in a non-political manner, for example, under the national security legislation, the issue of search warrants. The attorney-general has to stand apart from politics on occasion in order to uphold the rule of law. I was very critical of my predecessor, Mark Dreyfus, for diminishing the caretaker conventions during the recent federal election. The attorney-general ought to be the custodian of the conventions, and Mr Dreyfus said that they were 'nothing more than political practice'. It was an advertent and deleterious devaluation of an

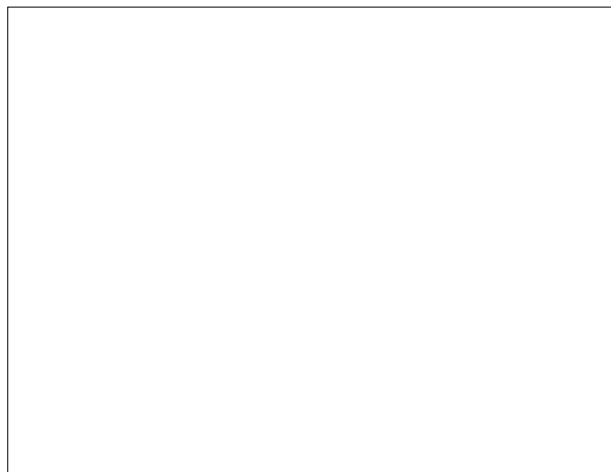


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important set of constitutional principles. Under the Fraser government, Bob Ellicott resigned over the funding of the *Sankey v Whitlam* litigation because he did not consider it appropriate. An attorney-general may come into circumstances where

political actions of the government may come into conflict with the role of his office. It's an office in its own right carrying its own obligations, unlike, say the relationship between the health minister and politics.

Bar News: We note that Sir Anthony Mason once said:

No-one expects an attorney to respond to every criticism of the judges. Indeed, he may have justification for voicing criticism himself. But an attorney has a responsibility to uphold the rule of law as administered by an independent judiciary. That means that there will be occasions when he should respond to irresponsible criticisms which threaten to undermine public confidence in the judiciary my belief is that nothing short of a defence by the attorney will attract prominent media attention and counter-balance the adverse publicity.

Do you agree with this view? If so, do you accept that from time to time you may need to remind members of your own government of this?

AG: I agree with the quote, I have quoted it myself in

my speech and in the book *Justice Under the Law*. I don't anticipate needing to remind Cabinet of that. It must be remembered that this prime minister is a constitutional conservative, and he has a strong innate sense of what is proper and what is not. This issue shows why the attorney-general as office-holder versus attorney-general as politician is a false dichotomy, because the more senior he is, the more able he is to ensure his colleagues understand the limits with the judiciary and uphold the rule of law.

Bar News: What do you envisage as the key challenges for you as attorney-general in your term?

Attorney-General: In Australia, the role is much more extensive than in the United Kingdom, the United States or even than in Australia in the past. The role is similar to the home secretary in the United Kingdom or secretary of homeland security in the United States. Phillip Ruddock said that the attorney-general is the minister for national security. I think that's right in terms of functionality. The attorney-general is the first legal officer, but in terms of functionality, national security is the biggest part of the job. The three biggest agencies in the portfolio are in intelligence or law enforcement. I have direct responsibility for ASIO, and indirect responsibility for the others.

In terms of the federal judicial system, the largest volume of work is in family law which will need to be carefully managed. For every government, there are one or more areas of black-letter law reform that stand out. Presently, that is intellectual property law. A review of the Copyright Act has been undertaken, and that is a very big area for law reform. In that respect, there is some synergy for me between being attorney-general and minister for the arts.

Access to justice is always important. A referendum for the constitutional recognition of Indigenous people is something that this government and this prime minister is very committed to, intellectually and emotionally. This prime minister is the best leader to carry that out because the people who need most assurance about it are conservative people. Alan Tudge, the prime minister's parliamentary secretary for Indigenous affairs and myself have been tasked to carry that out.

There is also the freedom agenda. It has been



suggested that the human rights debate has been distorted in a way that diminishes freedoms- speech, intellectual freedoms and the like by a number of leftist forms. Section 18C of the Racial Discrimination Act may be an embodiment of that problem. It may well have been well-intentioned. I have a strong commitment to freedom of speech. That freedom comes under attack from different places at different times. Often it comes from the right of politics, but at the moment, most of it comes from the left. This is something that we will need to examine to strike a right balance.

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Bar News: Do you intend to maintain the current selection committee process for candidates for appointment to the Federal Court or restore the appointments as part of the attorney general's fiat?

Attorney-General: I am sceptical of the arrangements implemented by former Attorney General McClelland in 2008 which will need to be examined. It has been suggested that at the time the system has been used as a mask rather than based on a meritocratic approach. The attorney-general needs to take responsibility for every appointment. The attorney-general's reputation and the government's reputation is on the line with each appointment. When recommendations are made, I am of the view

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that the person who ought mostly be consulted is the head of that jurisdiction.

Bar News: Are there particular qualities or types of experience that you would consider mandatory or desirable in recommending particular candidates for judicial office? For example, judges have traditionally been appointed from the bar, but more recently solicitors are being appointed at a greater rate. Do you think judges should generally come from the ranks of the bar, or is it something to be assessed on a case by case basis?

Attorney-General: I think it's a case by case question. In the first instance, the bar is the most obvious place from which to source appointees. For the High Court, the Federal Court or state courts of appeal are additional places. That is not to say that solicitors or indeed academics or others should be ruled out. When Phillip Ruddock was attorney-general, I thought that Andrew Greenwood, a partner of Minter Ellison in Brisbane would be a very good candidate for the Federal Court, and he was appointed and has been an excellent appointment. At Justice Greenwood's swearing in ceremony, I stated that judges should not just be drawn from the bar, but I am of the view that the bar should be the first port of call.

Bar News: You have announced that the Commonwealth will be challenging the ACT's same sex marriage laws, and you've said and the Assistant Treasurer Senator Sinodinos repeated on Q&A on Monday night that the rationale for the challenge was a determination to have national consistency on these laws, regardless of desirability or otherwise of the legislation. Do you have a personal position on it?

Attorney-General: I support the Abbott government's current position, but I stress that the reason for the High Court challenge is national consistency on marriage law rather than taking a position on same sex marriage. I have previously argued that all forms of discrimination ought to be removed from Commonwealth law. Dr Nelson when he was leader of the Opposition agreed with me. I collaborated

with him in removing all remaining discrimination from Commonwealth law for same-sex couples. It was a significant moment in the development of the Liberal Party's attitudes. Marriage is not easily accommodated into a simplistic anti-discriminator frame of reference.

Bar News: How important is national consistency of legislation generally? Are there other policy areas in particular in which you'd like to see national consistency?

Attorney-General: Legal profession reform is one example. A model of consistent and harmonious laws implemented at a state level. That's the model I've advocated for since I took office. States are becoming more and more different from one another than even twenty years ago, with the development of local state economies. I think the Whitlam-esque view of a unitary Australia is now obsolete.

Bar News: The Productivity Commission issues paper, *Access to Justice Arrangements*, was prepared following terms of reference prepared by David Bradbury, the then assistant treasurer, requesting the commission to undertake an inquiry into Australia's system of civil dispute resolution, with a focus on constraining costs and promoting access to justice and equality before the law. Do you or the government seek to amend the terms of reference of that present referral to the Productivity Commission?

Attorney-General: I am not proposing to do so.

Bar News: The issues paper raised the concern of litigation funding regulation in Australia in relation to conflict of interest issues, consumer protection in the event of default or misconduct, and whether litigation funders should hold Australian financial services licences. Do you share these concerns? Will you ask your department to examine legislative intervention in this matter?

Attorney-General: I have not made a decision to do that yet, although one of the basic themes of the

Abbott government is to reduce red tape. There are real issues of moral hazard and conflicts of interest associated with litigation funding and I will look at that very carefully.

Bar News: The legal profession has from time to time been criticised for adding to the cost of litigation. Is that a view you hold? If not, is it the government's intention of seeking to make justice accessible to promote greater efficiency?

Attorney-General: I do not share these views concerning the profession. I should note that everything the government does is affected by the fact that the government is in deeper debt than ever before. That affects what otherwise socially desirable policy can be engaged in. I would like to see access to justice focussed on case work. I have an unambiguous view on the debate between case work and advocacy. Where resources are constrained, and the need is greater than the resources available, the claims of needy persons should always outweigh the need for policy advocacy. Resources need to be invested so that needy people get as much investment in their case as they can have rather than organisations using that money for lobbyists or policy advocates.

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Bar News: There has been a concern raised by courts from time to time that unrepresented litigants do lead to more court time leading to increased court costs. Do you agree? What do you see as being the answer, apart from relying upon law professionals to provide greater amounts of pro bono assistance? Would the government consider increasing funding for legal aid in order to promote accessibility to the justice system for individuals?

Attorney-General: Undoubtedly unrepresented litigants lead to increased court costs, especially in family law. The Productivity Commission is looking at this. No system is incapable of improvement. There are three main avenues at present: funding, pro bono

assistance and courts' own devices to assist the public. There is no perfect model and we are working in a constrained environment. I am very grateful to the profession for being so much more involved in pro bono work than 20 to 30 years ago. Big firms take a lot of pride in their pro bono work, and it is a wonderful thing, to be concerned with it. The Bar Associations also carry a heavy workload. It must be considered that this is a profession. A profession is not an industry. A profession is not a sector of the economy. It is a walk of life in which those educated and trained in its skills, serve the public. If they do that well, they can look forward to a healthy financial reward. But it is a dimension which takes you beyond selling a product in a marketplace.

Bar News: *The Australian* published an opinion piece on 4 October that proposed privatising the Australian Government Solicitor. Is that a proposal that the Abbott government is considering?

Attorney-General: Not at the present time.

Bar News: You have in the past expressed a view that barristers be retained directly by government legal departments similar to the retention of barristers by in-house counsel of private corporations. Is that something you would be seeking to implement by way of a legal services directive? Do you see it as a means of reducing the cost of litigation?

Attorney-General: The government's legal spending is approaching \$1 billion a year, and we are looking at ways to rein that in. Appropriately governed, direct briefing by government legal departments is an attractive way to contain Commonwealth legal costs.

Bar News: Attorney-general thank you for your time. The NSW Bar Association wishes you well in your new role, although there will be occasions that we may not agree with your position on certain issues.

Attorney-General: Thank you. There are a number of challenges ahead. There will be days when some will suggest that I have got it wrong – but I will always do my best to get it right. I look forward to working with the New South Wales Bar Association.