Chief-justice controversy sounds an important warning

ANDREW LYNCH  THE AUSTRALIAN  JUNE 20, 2014 12:00AM

WHAT broader lessons lie in the firestorm of controversy that has engulfed Queensland over the appointment of Tim Carmody as chief justice of the Supreme Court?

The appointment has been roundly condemned — and in the strongest of terms. There are doubts as to whether Carmody has the necessary experience and skills for the job. But most of the criticism has focused upon his apparent closeness to the government of Premier Campbell Newman and his support for some of its more contentious law-and-order policies.

Additionally, the president of the Queensland Bar Association, Peter Davis QC, resigned his post, objecting to the lack of integrity in the consultation process conducted by Attorney-General Jarrod Bleijie. Davis has been robustly supported by the Australian Bar Association.

Whether the Newman government or Carmody himself will yield to their critics remains to be seen.

But is this sorry episode simply the result of idiosyncratic Queensland politics?

More specifically, is it just the latest and most spectacular in a rolling series of controversies generated by an Attorney-General out of his depth?

While local factors are undoubtedly significant, the affair sounds an important warning more generally.

This is that the informal and opaque approach to selecting individuals for judicial office is profoundly unsatisfactory.

There is an irony in the Carmody affair arising right now, given the recent abandonment by the commonwealth Attorney-General George Brandis of reforms made a few years ago to how federal judges were chosen.

Those changes were instigated by Robert McClelland, who was attorney-general in the Rudd Labor government.

McClelland said reform was desirable to provide “greater transparency, so that the public can have confidence that the government is making the best possible judicial appointments … based on merit”.

An additional objective was to ensure “that everyone who has the qualities for appointment as a judge or magistrate is fairly and properly considered”.

The three pillars of McClelland’s reforms were:

● The articulation of publicly available criteria;

● The advertising of vacancies and call for nominations, along with a wide-ranging consultation process; and

● The use of an advisory panel to assess potential candidates, possibly through interviewing them.

The panel then made a report to the attorney-general listing those persons it found to be “highly suitable for appointment”.

The advisory panel consisted of the head of the relevant court or their nominee, a retired judge or senior member of the federal or state judiciary, and a senior member of the Attorney-General’s Department.

This system was modest by international standards but a giant leap from the traditional approach, which was secret and ad hoc.

For example, in his recent biography of former chief justice Murray Gleeson, Michael Pelly has revealed that former Liberal attorney-general Daryl Williams interviewed candidates about High Court vacancies on two occasions.

A private conversation between a member of the executive and a potential candidate for judicial office is hardly typical practice and raises worries about what is driving the selection and the appointee’s independence.

Importantly, under McClelland’s reforms, the final say remained with the attorney-general. But that power was now prefaced — and subtly constrained — by the advisory panel’s provision of a short list of names for the purpose.

This made overtly political, or simply unsuitable, appointments to the bench much less likely to occur than when the executive discretion was at large.

The basic features of the new system received the bipartisan endorsement of the Senate’s legal and constitutional affairs committee in 2009.

Brandis participated in that particular committee inquiry. However, in office, he now appears to have favoured a reversion to the traditional approach.

All trace of the processes initiated by McClelland have been expunged from the departmental website.

On the topic of court appointments, readers are now advised simply that: “As the nation’s first law officer, the Attorney-General is responsible for recommending judicial appointments to the Australian government.”

The detailed criteria that was previously available has been replaced simply with the bare eligibility requirements for appointment to the various federal courts.

Since April, the Attorney-General has made two appointments to the Federal Court. In neither instance was the vacancy on the bench advertised beforehand on the website.

Nor was there anything in the Attorney-General’s announcement of either appointment that indicated the process he followed in making his selection.

This is not to criticise in any way those specific appointments. Similarly, it is no insult to past and present generations of Australian judges to say that the separation of powers and judicial independence would be strengthened by use of a more transparent process that conditions bare executive discretion to some degree.

Sometimes, as events in Queensland show, things can go awry. But even when they do not, the public is entitled to know that their judges are chosen for qualities recognised by the best of the profession.

The McClelland reforms were a step towards providing that assurance. Their abandonment is regrettable.

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