

Judgment based in legislation is fundamental to democracy

- PHILIP MCMURDO
- THE AUSTRALIAN
- November 15, 2013

RECENT events in Queensland make it necessary for many to be reminded of the proper role of Australian courts.

A few weeks ago, the Queensland parliament passed legislation that, in broad terms, affects two distinct parts of the criminal law. The first relates to criminal organisations or associations and is directed at, but not limited to, motorcycle gangs. The second relates to the continuing imprisonment of a sex offender after he has served the whole of his sentence.

Each of these laws has been controversial from a policy perspective. And some commentators have said that each is legally flawed, as being beyond the constitutional competence of the Queensland parliament. It will be for the particular courts before which those questions of legal validity are raised to provide the answers to them.

Similarly, the policy merits of these laws are not something on which serving judges will comment. Most judges will have their own views and those views will not be uniform.

But a judge's view about the policy merits of a law, if it is valid, is irrelevant to the performance of their work. Judges must apply the law strictly according to its terms: no more or no less. If they think it is a bad law in policy, still they must give it its full effect. If they think it is a good law in policy, they must give it only its effect, without seeking to extend or modify it to produce an outcome they believe the government or someone else would welcome.

These things should be known and understood by all Australians because they are fundamental to the operation of the rule of law. But occasionally they are overlooked or misunderstood in the heat of a political debate. The result can then be a misconceived criticism of the judiciary and, on occasions, of an individual judicial officer.

Courts should not be immune from criticism. As former chief justice Murray Gleeson has written, public confidence in the judiciary "is not maintained by stifling legitimate criticism of courts or of their decisions".

But it is necessary that any criticism does not misunderstand the proper role of courts and mis-state what judges should or should not do in the exercise of judicial power. Unfortunately, some recent criticism by Queensland Premier Campbell Newman indicates such a misunderstanding.

The Premier's comments were made on the day following a widely reported case, where a magistrate had decided not to imprison a man who had breached a condition of his bail. The prosecution said that this man was a member of a notorious motorcycle gang. If that was correct, then a consequence of the new legislation was that it would be more difficult for him to have his bail continued.

The prosecution had to prove that he was a member of such a gang. The magistrate had to decide whether that was proved, and she decided that it was not proved.

If her decision was incorrect, it was able to be corrected on an appeal. But the application of the law to this case, and in particular the newly enacted "bikie law", required a decision by the court on that question, which is what occurred.

This event coincided with a deal of public criticism by professional associations, individual members of the legal profession and some retired judges, of the merits of the new laws.

In that context, the Premier said that the government was determined to protect the community and that what he was "asking the judiciary to do and those insiders in the system (to do) is to realise the only reason that we have put in place these new tough laws is because they collectively seem to be unable to protect us".

The Premier continued: "I am just simply calling for them to realise that the only reason these laws have happened is because people are saying the system is failing us. And Queenslanders are sick of these people who get appointed into these jobs who then are totally unaccountable: I mean judges and magistrates don't actually have to go for re-election. They're there, appointed, they have tenure, they are there until a retiring age and I can't influence them, and I don't try to influence them. What I am saying to them though collectively, and some of them get it and some of them don't - please listen to Queenslanders."

Judges and magistrates do live in the real world and are under no illusion about the prevalence and seriousness of organised crime or sexual offending. After all, judges and magistrates in criminal courts hear and see much more of the occurrence and consequences of crime than do most people. And they are well aware of risks of offending or re-offending. But courts must provide protection against those risks only by the application of the laws that the parliament has enacted and on the facts as they find them to be.

Their duty is not to achieve the outcome that the government, parts of the media, pressure groups or current public opinion would immediately endorse. If courts did that, they would be acting beyond and above the law.

There is, therefore, a practical inevitability that some decisions of courts will be characterised as failing to contribute to a collaborative effort to the achievement of some worthy objective.

This occurs most frequently in relation to the sentencing of offenders. But, again, courts must impose a sentence in accordance with the principles that are contained within the various statutes that are made by commonwealth and state parliaments,

which require courts to balance many competing considerations.

These laws do not require a court to impose the sentence that would be immediately popular with the government or would conform to what is asserted to be the unanimous opinion of the public.

And it is incorrect to say that judges and magistrates are unaccountable. The work of courts is performed in public and the decisions of courts are made for reasons that are published, so that the public can know whether justice is being done according to law. If a judge fails to do that, then they can be fairly criticised.

The executive government is the most frequent litigant in almost every Australian court, so there will always be tensions between the executive and the judiciary because the executive will not always win the case.

But as Lord Bingham, formerly the most senior judge in Britain, wrote in 2010, "there are countries in the world where all judicial decisions find favour with the powers that be, but they are probably not places where any of us would wish to live".

Philip McMurdo is president of the Judicial Conference of Australia.

- See more at: <http://www.theaustralian.com.au/national-affairs/opinion/judgment-based-in-legislation-is-fundamental-to-democracy/story-e6frgd0x-1226760159857#sthash.6ngnedgI.dpuf>