Three ministers and a court

By Anthony Cheshire SC

Photo: courtesy of the Supreme Court of Victoria

For the Autumn 2017 edition of *Bar News*, I wrote an article about criticisms of the judiciary by President Trump in the United States and by the press in the United Kingdom that would be likely to amount to contempt of court under Australian law. I expressed the following view:

> Honest and robust criticism of judicial decisions is a healthy part of our system and helps shape the development of the common law, but we all have a duty to be vigilant to ensure that personal insults and criticisms that are the meat and drink of the political process do not encroach into the legal arena.

Perhaps sooner than I had anticipated, the Victorian Court of Appeal was tested in September 2017 on this issue by comments of three federal ministers about the sentencing of terrorist offences in Victoria.

On Friday 9 June 2017 the Victorian Court of Appeal heard a prosecution appeal brought on the basis that the sentences against two men charged with terrorism offences were manifestly inadequate. During the course of argument, Warren CJ observed that there was an 'enormous gap' in the sentencing of terrorism offences between Victoria and New South Wales, which she described as being due to New South Wales placing less weight on the personal circumstances of the offender than Victoria and generally taking a more tough-on-crime approach. Justice Weinberg described that gap as 'extremely worrying'.

On 13 June, while judgment in the appeal was reserved, *The Australian* newspaper published extracts from unsolicited statements sent to it by three federal ministers concerning the hearing before the court. These included an allegation that the judges had made comments during the appeal 'endorsing and embracing shorter terrorist offences', which were 'deeply concerning'; descriptions of the judges as 'divorced from reality' and 'hard-left activist judges', who had 'eroded any trust that remained in our legal system'; and the court as being a place for 'ideological experiments'.

The judicial registrar of the Court of Appeal then wrote to the three ministers and the newspaper parties responsible for *The Australian* publication, requiring them to appear before the court on 16 June 2017 'to make submissions as to why you should not be referred for prosecution for contempt' in terms that included the following:

> The attributed statements appear to intend to bring the court into disrepute to assert the judges have and will apply an ideologically based predisposition in deciding the case or cases and that the judges will not apply the law.
>
> The attributed statements, on their face, also appear to be calculated to influence the court in its decision or decisions, and to interfere with the due administration of justice in this state.

Coincidentally, that week Tony Abbott said, in the context of the announcement of the settlement of the Manus Island class action against the Commonwealth:

> We've got a judiciary that takes the side of the so-called victim rather than the side of common sense.

During the week, other federal colleagues (including the industry minister, Arthur Sinodinos; the attorney general, George Brandis; the education minister, Simon Birmingham; and the prime minister, Malcolm Turnbull) expressed their support for the three ministers, stressing freedom of speech and the right of democratically elected representatives to raise legitimate community concerns, including criticism of the judiciary, and indeed an expectation that they would do so.

On Friday 16 June, the three ministers did not attend court, although they were represented, at the taxpayers' expense, by the solicitor-general. The court begun the hearing by stressing that the outcome of the appeal would not be affected by the comments, but Warren CJ noted that they had placed the court in the 'invidious position' that no matter what the result, the integrity of the appeal judgment would be questioned:

> On the one hand, if we don't allow the appeal then we will be accused of engaging in an ideological experiment of being hard-left activist judges. On the other hand, if we increase the sentences, the respondents would be concerned that we were responding to the concerns raised by three senior commonwealth ministers.

The solicitor-general said that the comments had been made 'in good faith' and that the ministers 'expressed deepest regret' if their comments had caused concern. When asked if he was instructed to provide an apology, he responded:

> My instructions are to read what I've read.

Some time into the hearing, the solicitor-general said his instructions had 'evolved somewhat in the time before this court' and certain of the comments would be withdrawn. *The Australian* parties offered 'a full and sincere apology', but still the ministers refused to do so. The court reserved its decision.

It is apparent that the ministers further reflected on the matter and, at their request, the matter was relisted on 22 June, when the solicitor-general (again in the absence of the ministers) offered an 'unconditional apology and unreservedly [withdrew] all comments made in relation to this matter'.

The court determined not to take the matter further (*Director of Public Prosecutions v Besim* [2017] VSCA 165), but Warren CJ noted:

> But for the apologies and retractions, we would have referred the groups, namely the Ministers and the Australian parties, to the prothonotary of the supreme court for prosecution for contempt of court.

Her Honour was extremely critical of the actions of the three ministers, noting that they had all trained as lawyers and that there was a significant delay in proffering the apology and retraction. Her Honour noted that they had:

> …failed to respect the doctrine of separation of powers, breached the principle of sub judice, and reflected a lack of proper understanding of the importance to our democracy of the independence of the judiciary from the political arms of government.

and concluded:

> The Court states in the strongest terms that it is expected there will be no repetition of this type of appalling behaviour. It was fundamentally wrong. It would be a grave matter for the administration of justice if it were to reoccur. This Court will not hesitate to uphold the rights of citizens who are protected by the sub judice rule.

This represented perhaps the best outcome for the judicial system. Although there is little doubt that the ministers' comments demanded action, full contempt proceedings could easily have been presented by the ministers as unacceptable attempts by unelected judges to silence valid criticisms made (or at least concerns raised) by democratically elected representatives of the people, reinforcing labelling of judges as out of touch, elitist and, perhaps worst of all, 'activist'.

In an era of unprecedented populism, as demonstrated by President Trump's election and the Brexit vote, a full-blown conflict between the judiciary and the executive could easily provoke a crisis and an excuse for politicians to seek to introduce curbs on judicial power, such as by introducing fixed judicial terms where renewal will depend upon the goodwill of the government of the day.

Although the comments of the ministers drew a storm of protest, it should be noted that this was largely from within the legal establishment. Similarly, it was largely the legal establishment that defended the judiciary from the press in the United Kingdom and from President Trump in the United States. Thus, the dissenting opinion of the 9th Circuit Court of Appeals, which would have upheld the president's travel ban, included the following:

> It does no credit to the arguments of the parties to impugn the motives or the competence of the members of this court; *ad hominem* attacks are not a substitute for effective advocacy. Such personal attacks treat the court as though it were merely a political forum in which bargaining, compromise and even intimidation are acceptable principles. The courts of law must be more than that, or we are not governed by law at all.

To similar effect, at his Senate confirmation hearing following his nomination by President Trump, Justice Gorsuch, responded to questioning on this issue:

> When anyone criticises the honesty, integrity, the motives of a federal judge, I find that disheartening, I find that demoralising, because I know the truth.

One could have no confidence, however, that the wider community would not have sided with the three ministers rather than the court.

In the context of the recent High Court decision on the disqualification of members of parliament for holding dual citizenship, the prime minister perhaps came rather close to the line when he said:

> The Leader of the National Party, the Deputy Prime Minister, is qualified to sit in this House and the High Court will so hold.

The prime minister subsequently described the result in entirely appropriate terms:

> The decision of the court today is clearly not the outcome we were hoping for, but the business of government goes on.

It was in 2004 that an application was made to refer the then premier of New South Wales, Bob Carr, to the Supreme Court for contempt proceedings. During an ICAC hearing, the premier noted that his then minister Craig Knowles had been the victim of attempts to blacken his reputation and that his behaviour had been vindicated, even though the minister had not yet given evidence and the hearing had not concluded. The premier escaped a referral by giving what was interpreted as an apology, although in fact it was in terms that he regretted any insult taken. Again, perhaps it was best there was an apology, avoiding a full-scale battle between the judiciary and the executive.

It must be hoped that it will be at least another thirteen years before this issue arises again in Australia, although whenever it does the court must be astute to determine whether any apology is genuine and remorseful or whether it is only given as a matter of expediency.