ADDRESS TO THE TJ RYAN FOUNDATION

PETER J DAVIS QC[1]

Thank you for inviting me to speak at this forum. My short address concerns accountability of Executive Government in the process of judicial appointments.

The Newman Government came into power in March 2012. The Attorney-General appointed in 2012 continues to hold his position. Over that period, there have been a number of controversies involving issues within the scope of the Attorney-General's Department. However, it is the case that some of these controversies, while they have involved matters traditionally within the purview of the Attorney-General, have also involved the Premier. The Premier has made various *"ivory tower"* comments directed at the judiciary. The Premier has labelled lawyers who practise in criminal law as part of the *"criminal gang machine"*.

Of course, there was the breach of confidence by the Attorney-General over communications with the President of the Court of Appeal concerning the replacement in the Court of Appeal of Justice White; and there was leaking of private communications that I had with the Attorney-General while I was President of the Bar Association when the issue at hand was the appointment of the new Chief Justice.

It is, though, the appointment of the current Chief Justice which has raised issues as to accountability. As we know, the Chief Justice has accepted the appointment, assumed office and is presently sitting. It is therefore not appropriate to further discuss his Honour's credentials for the office that he has assumed.

[1] Paper presented to the TJRyan Foundation 'Perspectives on Accountability' Forum, Parliament House, Brisbane, 2014. On 13 June 2014 Mr Peter Davis QC resigned as President of the Queensland Bar Association following the appointment of Tim Carmody as the new Chief Justice of the Supreme Court.

There is, though, a broader issue which emerges from the incredible and unprecedented public discussion and backlash concerning the appropriateness of the appointment.

In times past, there have been appointments which some people have liked and other people have not liked; some appointments have had broad approval, some limited approval and public discussion about the appointments has occurred; although nothing compared to what occurred upon the announcement of the appointment of the present Chief Justice.

Again, in times past, mumblings and complaints about appointments generally were confined to legal circles and largely within the ranks of the Bar, known of course as notorious gossips. The process which led to the appointment of the Chief Justice sparked headlines, both before and after the appointment was announced. There was open debate before the appointment as to who were the front-runners, and articles in the Courier-Mail advocated the pros and cons of candidates and speculated as to the outcome.

On Monday 9 June 2014, the front page of the Courier-Mail was headed *"Carmody Capers"*. The Courier-Mail reported that his Honour had become a front-runner for the position, and for the first time we saw emerging the notion that his Honour had a less than privileged childhood . . . although it has also now emerged that he went to Nudgee College . . . and that he was a man of the people.

The problem with any notion of the appointment of his Honour as Chief Justice was always going to be the perception, be it true or otherwise, that he was biased in favour of the Government. There had been a series of actions taken by his Honour while Chief Magistrate and a number of statements made which at least, on their face, had suggested an uncomfortable connection with the Government. Those incidents had received significant media attention.

On Tuesday 10 June 2014, a letter from former Solicitor-General Walter Sofronoff QC was published in the Courier-Mail. Mr Sofronoff openly called for the Chief Magistrate, as his Honour then was, to pull out of the running. That

didn't happen and on Thursday 12 June, the Government announced the appointment of Chief Magistrate Carmody as Queensland's new Chief Justice.

There are, I think, a few reasons why this all became so contentious. The first of course was the perception that the Chief Magistrate was too close to the Government. The second though was that the appointment process had simply gone on too long. The Government had allowed too much time for speculation and controversy had grown even before the appointment had been made.

What happened next was, to say the least, unsettling.

In the ordinary course of things, when a judicial appointment is made, there is simply an announcement. In due course, arrangements are then made for a swearing in. The appointment of the Chief Magistrate to the office of Chief Justice occurred differently. The announcement was made at what was called a *"launch"*. That occurred on the afternoon of Thursday 12 June and it occurred at the Supreme Court Building. The launch consisted of the Premier, the Attorney-General, the Chief Justice designate and the present Governor, His Excellency Paul de Jersey who, at that stage, was Chief Justice of Queensland.

The launch was clearly inappropriate and it was a breach of protocol and an error by the Government. The Chief Magistrate was announced to the crowd as the new Chief Justice. Therefore, there was the spectacle of the Chief Justice designate standing with two senior politicians namely the Premier and the Attorney-General, while those two politicians effectively sold the appointment to the crowd. The theme was that the Chief Magistrate was a man of the people and would be able to take the court forward.

Horrifyingly, the time came during the launch for the Chief Justice designate to speak and even more worryingly, he was to field questions.

Of course, the first question that he was asked was as to his independence. We then had the situation where the Chief Justice designate of Queensland is standing at a rostrum with the Premier and the Attorney-General, defending his own appointment by asserting his independence from a government, two senior members of which are standing with him. The launch was a huge mistake.

But, unfortunately, things got worse.

The Chief Magistrate then appeared on ABC radio and 4BC radio. The question has to be asked . . . why? Why would a person who has just been appointed Chief Justice of Queensland be going on the radio to speak about his appointment?

The worrying aspect of all this is the connection between some of the things that were said by the then Chief Magistrate on the radio and things that had appeared in the Courier-Mail early in the week on which the appointment was made. The theme of the radio interviews was again *"man of the people"*.

There were many things wrong with the radio interviews. The then Chief Magistrate said:

> He wasn't sure whether he could do the job of Chief Justice, but he should be given a go;
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> That he had not been congratulated by any of the Supreme Court judges;
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> That he wasn't the smartest lawyer in the room;
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> That he didn't possess the intellectual rigour of the other judges.

A concerning aspect of all this is that over the two years prior to the appointment, the Premier in particular had launched a series of attacks upon the judiciary, accusing the judges of being out of touch, living in *"ivory towers"* etc. Those comments were usually made after a decision was made by the court which did not accord with the Government's view of the world.

We will probably never know what occurred behind closed doors. However, perceptions are everything. What did these radio interviews look like? What they looked like was that the Government had a view about the judiciary. It wanted to appoint the Chief Magistrate as Chief Justice. It had a basis upon which it wanted to sell the appointment and then it enlisted the appointee himself to sell the Government's line as to why the Chief Magistrate ought to be appointed Chief Justice of Queensland.

Friday 13 June 2014 is a day I won't forget in a hurry. By that stage, my position as President of the Queensland Bar Association had become completely untenable.

In the week leading up to the appointment, it was abundantly obvious that the Government wished to appoint the Chief Magistrate and it was also abundantly obvious that they wanted to have stakeholder support for the appointment. In a series of communications late in the week before the appointment, a person close to the Government threatened the Bar Association with retribution if the appointment of the Chief Magistrate was not supported by the Bar. Those threats were removal of the Bar Association's statutory regulatory function and also threats of likelihood that future judicial appointments would come from the ranks of solicitors, not from the ranks of barristers. Egos being egos, and barristers being barristers, that last threat really hit home.

On Tuesday 10 June 2014, I had a conversation with the then Chief Magistrate, during which it became obvious that confidential communications that I had with the Attorney-General in my capacity as President of the Queensland Bar Association about possible appointees to the position of Chief Justice had been communicated to the Chief Magistrate.

The breach of confidence came as a shock, although given the experience of the President of the Court of Appeal only a couple of months earlier, it should have come as no surprise.

By Friday 13 June 2014, it had become evident to me that my position as President of the Queensland Bar Association was impossible, as I was in a position where I could no longer communicate with the Attorney-General.

Late on the afternoon of Friday the 13th I resigned by sending a mass email to members.

My resignation probably wasn't the spark that lit the fire. The fire was already alight. My resignation was fuel to it.

What then followed was vehement courageous public objection to the appointment and to the Government's handling of it by a group of people who can

be described as the who's who of the Queensland legal profession. Those who came forward to voice their disapproval included Tony Fitzgerald QC, amongst other things a former President of the Court of Appeal of Queensland, Walter Sofronoff QC, a former Solicitor-General of Queensland, James Thomas QC, a former judge of the Supreme Court of Queensland, Doug Drummond QC, a former judge of the Federal Court of Australia,, George Fryberg QC, recently retired judge of the Supreme Court and importantly, Justice John Muir.

I say *"importantly Justice Muir"* because Justice Muir is a sitting judge of the Court of Appeal. He commands universal respect. His entry into the public debate was very significant.

What then occurred was a very open and public discussion about the appointment with constant calls for the Chief Magistrate not to take it up.

Ultimately, the Chief Magistrate was sworn in as Chief Justice of Queensland. That did not quell the controversy. There was a welcoming ceremony on 1 August 2014 for the new Chief Justice and Justice Flanagan and that welcoming ceremony was boycotted by all the Supreme Court judges.

I should say immediately that there has never been any question as to the suitability of Peter Flanagan QC as he then was for judicial office and there never will be. His Honour was just unfortunately caught up in it all.

The controversy is still with us. The court is very unsettled, but of course, the character of our judges is such that they will simply do what they always do, and that's turn up to court every day and fulfil their oaths of office.

There is no doubt I think that putting aside all things personal to the present Chief Justice, the Government's handling of the appointment has been woeful. In particular:

> The process took too long. It was that factor which enabled speculation to mount;
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> The appointment was controversial. Surely the appointment of a Chief Justice is not a matter for controversy, especially so when it had been some 16 years since there had been an appointment of a Chief Justice.

The court had been under a steady hand for over a decade and a half, and the aim of the exercise must surely to have been a seamless transition;

The process of consultation was badly flawed. As I understand it, no stakeholder, apart from the Queensland Police Union, supported the appointment. That announcement of support for the appointment surprised me in that I didn't think that they were a stakeholder in such a process. Of course, the consultations with stakeholders should have occurred confidentially, but the whole process leaked like a sieve;

The processes after the announcement of the appointment were, as I have already suggested, totally inappropriate.

How then is the Government held to account?

There are two schools of thought.

The first is that there ought to be no criticism of the Government in the appointment process because to do so, so it is said, may damage the court.

Denver Beanland, commenting as an historian as well as a former coalition Attorney-General, made a series of comment in late June and early July about the appointment. It is fair to say that Mr Beanland has not suggested that there ought be no public debate about judicial appointments, but has emphasised the prerogative of the Executive to make any judicial appointment it sees fit. In a letter to the Courier-Mail of 2 July 2014, Mr Beanland criticised critics of the appointment of Chief Justice Carmody and then said of those persons:

> *Those involved apparently need to be advised that the appointment of judges is done by the Executive arm of Government of the day on the recommendation of the Attorney-General to Cabinet and upon approval, to the Executive Council*.

As a matter of fact, that's not strictly correct. While often appointments of judges are approved by Cabinet, that is not necessarily so. Indeed, in the case of the Chief Magistrate being appointed to Chief Justice, I understand that did not occur and the appointment ultimately was simply made on recommendation of the Attorney-General to Executive Council.

Interestingly, while suggesting that the public debate is unhelpful, Mr Beanland then weighed into the public debate in his letter, saying of the new Chief Justice:

> *However, there has been some attempt by his opponents to link him to the State Government for carrying out his duties in the administration of justice in relation to the so-called 'bikie laws'. But Carmody has an obligation to administer this legislation in accordance with his oath of office, or resign. The attack by the Bar can only be described as offensive and reprehensible.*

As I have said, Mr Beanland has not said that there can be no public comment about an appointment. However, in this letter and in other publications, the flavour seems to be that criticism of an appointment damages the court.

Of course, the appointment is made by the Executive, so scrutiny of the Executive decision to make a particular appointment potentially leads to criticism of the Government.

Putting aside the particular instance of the appointment of the current Chief Justice, it simply can't be that if the Government makes a bad appointment, criticism of that appointment is quelled or muted because the criticism may cast doubt over the appointment. If the appointment was a bad one, such as to damage the court, do the stakeholders simply sit back and not protest the appointment so that the court is damaged by the appointment itself, not the publicity attendant upon the criticism?

Despite the Government's assertions that the current Chief Justice came from humble beginnings and is therefore a *"man of the people"*, the fact is that he attended Nudgee College, a prestigious Catholic boys' school in the northern suburbs of Brisbane. Ironically, one of the Chief Justice's most open critics, Justice of Appeal Muir, is also an old boy of Nudgee College.

Justice Muir learnt that the Nudgee College Old Boys' Association was inviting the new Chief Justice to a function at which he, the new Chief Justice, was to make an address. Justice Muir wrote a letter to the Nudgee College Old Boys' Association on 29 July 2014. After making some observations as to the current political leanings of the Courier-Mail, his Honour said:

> *One line that has been trotted out from time to time is that the appointment of judges is the constitutional prerogative of the Executive. For reasons unexplained, it is suggested or implied that, this being the case, judicial appointments are beyond criticism.*
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> *That the power of appointment rests in the Executive under our Constitution can't be and isn't questioned. That power, however, like any other such power, must be exercised bona fide and for the purpose for which it is bestowed. Can anyone seriously doubt that the Executive Government has an obligation to approach the appointment of a Chief Justice, which has such serious long term consequences for a fundamental institution, with due care and with a view to maintaining, if not enhancing, such institution, standing and integrity? Of course, decisions to appoint Chief Justices are able to be scrutinised, debated, applauded or criticised like any other decisions of the Executive Government.*

After the Government's landslide defeat in the Stafford by-election, the Premier issued a statement which was described as an apology to Queenslanders. When one looks carefully at the terms of the statement, it can hardly be described as an apology. But in any event, it provoked comment from Tony Fitzgerald QC. In a letter to the Courier-Mail published on 25 July 2014, Mr Fitzgerald made a number of comments about the Government's time in office. The letter then turned to matters concerning the judiciary and in particular, the appointment of the current Chief Justice. Of the apology, Mr Fitzgerald said:

> *The Government's proposal to reverse some of its errors is welcomed. However, its politically motivated expressions of regret for its behaviour can't possibly be regarded as sincere.*
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> *It has made no changes to the ministry or explained why it acted as it did or why it persisted in its objectionable conduct for so long. Its pretence not to notice that there's an elephant in the room named Tim is absurd.*

Unless the Government offers a credible explanation, speculation about Carmody's relationships and the reasons for his appointment as Chief Justice will raise doubts about judicial independence which will blight Queensland's legal system for years to come.

Underpinning the Westminster system is the doctrine of separation of powers, although that doctrine is not so strictly entrenched in Queensland as it is under the Commonwealth's constitutional arrangement. One of the inevitable conflicts within the system is that the Executive Government must appoint the judges. That frankly will be so whether the present system of judicial appointment prevails or whether there is a move to a system of judicial commission.

However, the fact is that one arm of Government, the Executive, which appoints the members of another arm of government, the judiciary, is but one of many reasons why it is imperative that judicial appointments are seen to be made at arm's length and are not bedevilled by controversy.

It cannot be though, that where a controversial appointment is made, there is some sort of embargo upon criticism of the appointment under the pretence that criticism may injure the court. Strong democratic traditions encourage open debate on all matters of public interest and it cannot possibly be the case that an exception to that tradition exists so a government can avoid bona fide enquiry into, and criticism of, the processes which lead to any particular judicial appointment.