

OPINION

COMMENT - THE ROLE OF THE ATTORNEY-GENERAL

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The role of the Attorney-General in Australia has recently been the subject of public debate in at least two respects. At the Commonwealth level, the issue has been whether the Commonwealth Attorney-General should defend the judiciary from political attacks. The Attorney-General, Mr Daryl Williams QC, has denied that this is an appropriate role for a member of the Executive in view of the separation of judicial power required under the Constitution.¹ On the other hand, the Chief Justice of Australia, Sir Gerard Brennan, has emphasised the importance of the Attorney's role in protecting public confidence in the judiciary and the rule of law.²

A different focus on the role of the State Attorney-General arose in Queensland from the successful challenge in the Queensland Supreme Court to the Commission of Inquiry³ conducted by Mr P D Connolly QC and Dr K W Ryan QC into the Criminal Justice Commission of Queensland.⁴ The admission made in the course of those proceedings⁵ by the Queensland Attorney-General, Mr Denver Beanland, that he believed that the Commission was probably exceeding its terms of reference by investigating a CJC inquiry conducted by Mr K J Carruthers ('Carruthers Inquiry'), sparked demands from the Opposition and other commentators for his resignation as Attorney-General for not intervening to prevent the Commission exceeding its power. In the face of firm government support for Mr Beanland, the Opposition moved in the Queensland Parliament a motion of no confidence in the Government over the Connolly-Ryan Commission of Inquiry which was defeated by one vote with the assistance of the independent Member for Gladstone, Ms Cunningham. However, a further no confidence motion this time in the Attorney-General was passed with Ms Cunningham's vote. Calls for the resignation of the Attorney-General became vociferous but were resisted.

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1 Hon Daryl Williams, 'Who speaks for the Courts?' in *Courts in a Representative Democracy*, AIIA, 1994, at 192 and 'Who will defend the Courts?' - in course of publication in the *Australian Bar Review*.

2 'The State of the Judicature' Address to the 30th Australian Legal Convention, Melbourne, 19 September 1997 at 27-31.

3 Established under the *Commissions of Inquiry Act 1950 (Q)* by Order in Council published in the *Government Gazette* on 7 October 1996 pp 475-476.

4 *Carruthers v Connolly* (unreported decision of Thomas J, 5 August 1997) - on the ground of bias.

5 *Ibid* at 2. This issue was considered by Thomas J at 72-76 but it was unnecessary for the decision.

This comment examines the duties and responsibilities of the Attorney-General in relation to the two specific issues of defending the judiciary and intervening in the conduct of a commission of inquiry. It is not proposed to comment here on the passing of the no confidence motion in the Attorney-General.

The Office of Attorney-General

The Attorney-General⁶ at the Commonwealth and State level occupies in effect two offices: a common law office of Attorney-General and a ministerial office. The incumbent is therefore subject to at least three potentially conflicting responsibilities: as Attorney-General, as a Minister of the Crown⁷ and as a Member of Parliament. The duties and responsibilities of the two latter positions are well known. Less clearly understood are the duties and responsibilities of the common law office of Attorney-General.

The duties and responsibilities of the Attorney-General derive from both the executive prerogative power at common law and from statute. The most significant prerogative powers include⁸ the power to initiate and terminate criminal prosecutions, advise on the grant of a pardon, grant immunities from prosecution, issue a fiat in relator actions, appear as *amicus curiae* or *contradictor*, institute proceedings for contempt of court, apply for judicial review⁹, intervene in any proceedings involving the interpretation of the Commonwealth Constitution,¹⁰ represent the Crown in any legal proceedings,¹¹ and provide legal advice to the Parliament, Cabinet and the Executive Council.¹² Hence, the Attorney is often described as the 'Chief Law Officer of the Crown'. Other law officers assist the Attorney in the performance of these duties: principally, the Solicitor-General, the Director of Prosecutions and the Crown Solicitor. Additionally, the Attorney-General is the nominal head of the Bar¹³ having precedence over all Queen's Counsel and Senior Counsel, advises on judicial appointments and has defended the judiciary from political attacks.

Although a ministerial position in both countries, the position of the Attorney-General in Australia differs in a number of respects from that in the

6 According to J Edwards, *The Law Officers of the Crown*, Sweet and Maxwell, 1964 at 3, the title of Attorney-General first appeared in 1461 and that of Solicitor-General in 1515.

7 A position in the cabinet depends on the personal status of the incumbent Attorney within the Government. Note the recent promotion to Cabinet of the Commonwealth Attorney-General, Daryl Williams QC, by Prime Minister Howard in the Cabinet reshuffle of October 1997.

8 See the *Report on Review of Independence of the Attorney-General*, Electoral and Administrative Review Commission, July 1993, at 5-9.

9 By s 51 of the *Judicial Review Act 1991 (Q)* the State Attorney-General may, on behalf of the State, intervene in proceedings under that Act.

10 *Judiciary Act 1903 (Cth)* s 78A(1).

11 *Kidman v The Commonwealth* (1925) 37 CLR 233 at 240 and 243.

12 Acknowledged as 'the legal advisor of the Crown' by Knox CJ in *Kidman v The Commonwealth* (1925) 37 CLR 233 at 240.

13 According to J Edwards, *The Law Officers of the Crown*, Sweet and Maxwell, 1964 at 3, this has been the position in the United Kingdom since 1814. See *R v Comptroller-General of Patents; Ex parte Tomlinson* [1899] 1 QB 909 at 913 (CA).

United Kingdom. According to Renfree¹⁴, the Attorney in Australia is first a politician, heads a government department and is vested with numerous statutory powers. He or she may be a lawyer. Whereas in the United Kingdom, the Attorney is usually a leading counsel whose advice is confined to the most important legal matters and who is spared any administrative responsibility by a deliberate policy of separating the Attorney from daily politics.

Independence

It is an acknowledged principle in the United Kingdom and Canada¹⁵ that the Attorney-General in exercising most discretionary prerogative powers should not be subject to the direction of the cabinet. In Australia, the position is not so clear although there is sufficient recognition given to the principle for it to be considered at least a custom¹⁶ if not a convention.¹⁷ This independence of the Attorney-General arises from the fact that the Attorney must exercise the various powers and discretions *in the public interest*. As quasi-judicial powers¹⁸, they are not to be exercised according to the political wishes of the cabinet or the party although their views are entitled to be taken into account in appropriate cases. Political acceptance of this independence appears to be only relatively recent in the United Kingdom following criticism of the *Campbell* affair in 1924 when the Attorney-General was directed by cabinet to withdraw a criminal prosecution against Campbell as editor of the communist newspaper, *Workers Weekly*. More recently, Lord Morris of Borth-y-Gest in *Attorney-General v Times Newspapers Ltd*¹⁹ observed that the Attorney-General in deciding whether to institute proceedings for contempt of court in the United Kingdom would ‘with *complete impartiality* solely be considering the public interest of maintaining the due administration of justice in all its integrity’ (emphasis added).

In Australia, the resignation of the Commonwealth Attorney-General, Mr Robert Ellicott QC, in 1977 over pressure from cabinet for him to intervene to terminate a private prosecution against former Prime Minister Gough Whitlam and others, raised the importance of the independence of the Attorney-General at least in criminal matters.²⁰ However, that function has in practice been transferred to a Director of Prosecutions with the Attorney retaining at least a power, not often used, to issue directions.²¹

14 H E Renfree, *The Executive Power of the Commonwealth of Australia*, 1984 at 205.

15 See Hon Ian Scott, ‘Law, policy, and the Role of the Attorney-General: Constancy and Change in the 1980s’ (1989) 39 *University of Toronto Law Journal* 109 at 119.

16 See R Plehwe, ‘The Attorney-General and Cabinet: Some Australian Precedents’ (1980) 11 *Fed LR* 1.

17 See G Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability*, 1986 reprint, at 112 and *Report on Review of Independence of the Attorney-General*, Electoral and Administrative Review Commission, July 1993, at par 3.7.

18 In *R v Comptroller-General of Patents; Ex parte Tomlinson* (1899) 1 *QB* 909 at 913 A L Smith LJ noted: ‘[the Attorney-General] has had from the earliest times to perform high judicial functions which are left to his discretion to decide.’

19 [1974] *AC* 273 at 306.

20 See the *Report on Review of Independence of the Attorney-General*, Electoral and Administrative Review Commission, July 1993, at par 3.12 which cites the Prime Minister’s letter of 6 September 1977 acknowledging the Attorney-General’s sole responsibility but denying any interference occurred.

21 See eg *Director of Prosecutions Act* 1984 (Q) s 10 and *Director of Public Prosecutions Act* 1983 (Cth) s 8.

The Director of Prosecutions and the Solicitor-General are equally entitled to some degree of independence.²² In Queensland, after the Fitzgerald Report²³ emphasised the importance of the Attorney's independence, the Electoral and Administrative Review Commission (EARC) recommended²⁴ an Attorney-General Act to provide for the powers, functions and responsibilities of the Attorney-General.²⁵ Although cl 5(1) provided that 'the Attorney-General has power to do all things necessary or convenient to be done in connection with the Attorney-General's functions.', cls 5(2) and 6 spelt out an extensive list of powers and functions including in cl 6(k) power to 'apply for judicial review to correct errors by courts and tribunals'. EARC further recommended that all directions given by the Attorney to the Solicitor-General and the Director of Prosecutions be in writing and be reported to Parliament both by the Attorney and by the law officers.²⁶ Neither of these recommendations has been implemented.

Prior to becoming the Commonwealth Attorney-General, Mr Daryl Williams QC, cast doubt on the convention that the Attorney acts independently of politics by referring to the fact that many functions are now performed by other officers or have declined in importance.²⁷ He referred specifically to the role of the Director of Prosecutions in criminal matters and contempt of court, the decline in the need to grant fiats in relator actions with the expansion in the rules of locus standi, that legal advice is usually that of the Solicitor-General or other legal advisor and concluded:

In the light of these circumstances, it ought to be concluded that the perception that the Attorney-General exercises important functions independently of politics and in the public interest is either erroneous or at least eroded.²⁸

Although as Mr Williams has indicated, the opportunities for the independent exercise of discretionary prerogative powers by an Attorney-General may have declined, there remain occasions when an exercise of discretionary power is required. On those occasions, the convention of independence should be observed and valued.

The Guardian of the Public Interest?

22 Each have their own statute: *Solicitor-General Act* 1985 (Q) and *Director of Prosecutions Act* 1984 (Q). Neither Act expressly guarantees independence from executive direction (although see s 10(2) of the latter) but their removal from office is only on prescribed grounds. Unlike the Attorney-General, they are not appointed during the pleasure of the Crown. Note s 38 *Constitution Act* 1902 (NSW) which prevents the appointment of a minister to act in place of an Attorney.

23 *Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, 1989, at 138 and 371.

24 *Report on Review of Independence of the Attorney-General*, Electoral and Administrative Review Commission, July 1993 at par 3.87.

25 *Ibid*, draft Bill in Appendix A.

26 *Ibid* at pars 3.58-3.61.

27 Hon Daryl Williams, 'Who speaks for the Courts?' in *Courts in a Representative Democracy*, AIJA, 1994, at 191-192

28 *Ibid* at 192.

The recent controversy in Queensland over the Attorney-General's admission that he believed the Connolly-Ryan Commission of Inquiry had acted beyond its terms of reference in investigating the Carruthers Inquiry raised the issue whether he had a duty to intervene to prevent this occurring. Allegations were made that his inaction was motivated for political reasons and that he had failed in his clear legal duty as Attorney-General to prevent an abuse of the law or failed in his 'duty to the rule of law'.²⁹ These claims of a legal duty to intervene appear to have been based on the view that the Attorney-General is 'the guardian of the public interest'.

The original source of this designation of the Attorney as the guardian of the public interest is obscure. The earliest reference to it is found in the relatively recent texts of Professor J Edwards.³⁰ Only two functions were listed under this title in his first book in 1964³¹: (i) the enforcement of public legal rights, usually by relator actions; and (ii) representation of the public interest before public tribunals.³² In his subsequent book in 1984³³ three other powers are listed: initiation of proceedings for contempt of court and the ability to appear as *amicus curiae* and as *intervenor*.³⁴

Edwards asserts that there is no positive evidence until the commencement of the twentieth century of the second of these functions, that is, the representation of the public interest before tribunals. In his view, writing in 1964, there were two developments which contributed to this new role for the Attorney. The first was the Cabinet ruling in 1892 prohibiting the right of the Attorney to engage in private practice. The second was the *Tribunals of Inquiry (Evidence) Act 1921* (UK) which provided for the establishment of tribunals to inquire into 'definite matters of urgent public importance'. A tribunal would be appointed by the Crown following a resolution of both Houses that a matter be inquired into. The Attorney often appeared before these tribunals to assist the tribunal in ascertaining the facts even in matters which were damaging to the Attorney's party. For example, Lord Shawcross appeared as Attorney-General before the Lysley Tribunal in 1948 which was established to inquire into allegations of corruption against the Atlee Government.

It is apparent that the role of the Attorney as the guardian of the public interest is not as far reaching as that noble title might suggest. The functions outlined by Edwards in both his texts are quite specific and there is no acknowledgement of some all encompassing responsibility to take positive steps to protect the public interest whenever it is threatened. Certainly, as the title to

29 See p 5 of *The Courier Mail* of 24 July 1997. See also p 1 of *The Courier Mail* of 23 July 1997.

30 J Edwards, *The Law Officers of the Crown*, Sweet and Maxwell, 1964 and *The Attorney General, Politics and the Public Interest*, Sweet and Maxwell, 1984

31 J Edwards, *The Law Officers of the Crown*, Sweet and Maxwell, 1964 at 286.

32 See also J Edwards, *The Attorney General, Politics and the Public Interest*, Sweet and Maxwell, 1984; J P Casey, *The Office of the Attorney General in Ireland*, Institute of Public Administration, Dublin, 1980, ch 10.

33 J Edwards, *The Attorney General, Politics and the Public Interest*, Sweet and Maxwell, 1984 Ch 6 at 138-176.

34 See *Attorney-General v Times Newspaper Ltd (Thalidomide Case)* [1974] AC 273 at 311 per Lord Diplock and at 326 per Lord Cross. Also acknowledged by the *Report on Review of Independence of the Attorney-General*, Electoral and Administrative Review Commission, July 1993, at par 3.75.

chapter six in Edwards' 1984 text states, the Attorney has a: 'Leading role but no monopoly as guardian of the public interest.'³⁵ Indeed, the personal appearance of the Attorney before public tribunals has declined in the United Kingdom following criticism of the Attorney for assuming the 'hostile role of inquisitor'. Understandably, differences may arise between the Attorney and the tribunal as to what is in the public interest. The Salmon Commission concluded:

[I]t is the Tribunal which is the guardian of the public interest and which alone is charged by Parliament to investigate and report in the interest of the public.³⁶

There is no doubt that an Attorney-General in Australia performs all of the functions referred to by Edwards other than that under the *Tribunals of Inquiry (Evidence) Act 1921* (UK) of which there is no comparable legislation in Australia. In performing these various functions, the Attorney does act as a guardian of the public interest. But that title is merely descriptive of those functions; it cannot be used to derive a further general responsibility of protecting the public interest in any matter. No such power has ever been vested in the Attorney at common law or by statute. Therefore to describe the Attorney-General as the guardian of the public interest is potentially misleading. In relation to those functions just mentioned, it would be more accurate to describe the Attorney as a guardian of the *administration of justice*. The administration of justice is of course an important aspect of protecting the public interest and it reflects the extent to which the Attorney does protect that interest. This was recognised by Lord Diplock in *Attorney-General v Times Newspaper Ltd*³⁷, in describing the Attorney-General as 'the appropriate public officer to represent the public interest in the administration of justice'.

Accordingly, the description 'guardian of the public interest' should not be cited to justify the imposition on Attorneys of a legal duty which would be dangerously vague and onerous. They are not *the* guardians of the public interest. That responsibility is shared by all who are vested, directly or indirectly, with the sovereign power of the people: parliament, the executive and the judiciary. The guardianship role of Attorneys-General is simply the sum of their legal duties and responsibilities. Hence, those duties and responsibilities need to be carefully defined and understood when it is claimed that the Attorney has been derelict in that role.

There is no precedent of which I am aware where the Attorney-General has been regarded as under a legal duty to intervene in the conduct of a commission of inquiry in circumstances where the commission may be exceeding its terms of reference. Any intervention, certainly of a covert nature, would be viewed as a threat to the independence and integrity of the commission. The suggestion that a letter or phone call from the Attorney to the members of the Connolly-Ryan Commission of Inquiry should have been made is antithetical to that independence. If the Attorney wished to intervene, the only appropriate course to adopt would have been to seek leave to intervene before the public

35 J Edwards, *The Attorney General, Politics and the Public Interest*, Sweet and Maxwell, 1984 at 138.

36 Report of the UK *Royal Commission on Tribunals of Inquiry* (1966) Cmnd 3121, at par 96.

37 [1974] AC 273 at 311.

proceedings of the Commission. The possibility that the Commission would reject the Attorney's view, the consequent embarrassment for both the Commission and the Attorney from such a publicly aired conflict of opinion and the consequent erosion of public confidence in the Commission, strongly suggest both the absence of any duty on the Attorney to intervene and the caution required in deciding whether to intervene.

The Attorney no doubt had a discretion whether to seek leave to intervene and how best to do so, but should not be regarded as having a duty to intervene. The same view was expressed by Lord Reid in *Attorney-General v Times Newspaper Ltd*³⁸ in relation to the initiation of proceedings for contempt of court: 'the Attorney-General is not obliged to bring before the court every prima facie case of contempt reported to him. It is entirely for him to judge whether it is in the public interest that he should act'. In exercising such a discretion, the Attorney needs to tread warily in view of the difficulty, acknowledged by Thomas J in *Carruthers v Connolly*, of deciding whether a commission has acted outside its terms of reference:

Indeed, the point at which any commission of inquiry is bound to stop in relation to a particular term of reference will often be a point upon which different minds will reach different conclusions. It is a point upon which a court would need to see a very clear line of demarcation.³⁹

In any event, the appropriate parties to challenge any alleged excess of power by a commission of inquiry are those who are directly affected by the inquiry. This ground was raised in addition to that of bias in the proceedings brought by Mr Carruthers and the Criminal Justice Commission in *Carruthers v Connolly* but it is surprising that those proceedings were not brought earlier if the Commission was clearly acting outside its terms of reference.

Defender of the judiciary

The Attorney-General has traditionally defended the judiciary by instituting proceedings for contempt of court. Lord Diplock explained in *Attorney-General v Times Newspaper Ltd*⁴⁰ that in instituting contempt proceedings the Attorney acts on behalf of the Crown as 'the fountain of justice' and not in the exercise of its executive functions.' Further, it has been said that in Australia the Attorney-General by convention defends the judiciary from unjustified political attacks.⁴¹ This role of defending the judiciary stems from the importance of the independence of the judiciary and the need to maintain public confidence in the rule of law. These concerns are even reflected in the rules regulating

38 [1974] AC 273 at 293.

39 Unreported decision of the Queensland Supreme Court of 5 August 1997 at 76. See also *Ross v Costigan* (1982) 41 ALR 319 per Ellicott J at 335; affirmed in *Ross v Costigan (No 2)* (1982) 41 ALR 337.

40 [1974] AC 273 at 311 per Lord Diplock and at 326 per Lord Cross.

41 Sir Anthony Mason, 'The Role of the Courts at the Turn of the Century' (1993) 3 *Journal of Judicial Administration* 156 at 158; Hon Daryl Williams, 'Who speaks for the Courts?' in *Courts in a Representative Democracy*, AIJA, 1994, at 182 - although he considers at 190 that this duty has never been clearly articulated in Australia nor has it been often exercised in recent times.

parliamentary debate both in Australia and in the United Kingdom. Restrictions apply which prevent the use of offensive words against a judge and except upon a substantive⁴² motion no reflections can be cast on the conduct or personal character of a judge.⁴³ No doubt built at least in part on these rules are the complementary conventions that politicians refrain from political attacks on the judiciary, and that judges refrain from making political statements.⁴⁴

The present Commonwealth Attorney-General has argued that given the separation of judicial power and the maintenance of an independent judiciary under Ch III of the Constitution, it is inappropriate for the Attorney-General as a member of the executive to defend the judiciary from political criticism. This is especially so when there is no longer any public expectation of an independent Attorney-General. In his view, the role of defending the judiciary must be performed by the judiciary itself through, for example, the Australian Judicial Conference.

The assumption on which this view is based, that the Attorney is no longer perceived to be independent, has been shown above to be too wide. As the Ellicott resignation demonstrates, there remains the need for the Attorney to act independently at times. Is public perception of the political nature of the position to abrogate not only the role of defending the judiciary but also those other functions which the Attorney at times may be required to perform independently? Nor is the Attorney asked to assume an obvious political role in defending the judiciary. The Attorney is not asked to defend the decisions or reasoning of the judiciary but only the institution, its reputation and hence, the rule of law. This was emphasised by the Chief Justice of Australia, Sir Gerard Brennan, in his 1997 *State of the Judicature* Address:

The Courts do not need an Attorney-General to attempt to justify their reasons for decision. That is not the function of an Attorney-General. But why should an Attorney not defend the reputation of the judiciary, explain the nature of the judicial process and repel attacks based on grounds irrelevant to the application of the rule of law?⁴⁵

Central to the Chief Justice's position is that 'if the attack is from a political source, the response must be from a political identity.'⁴⁶ This must be so in order for the judiciary to remain aloof from the political arena. That its decisions at times have political repercussions and attract political criticism does not mean that the judiciary is entering the political foray. Those consequences are merely the inevitable outcome at times of the exercise of the rule of law. Critically, the impartiality of the judiciary upon which the rule of law is built, precludes direct

42 A substantive motion is one made for the purpose of obtaining a decision of the House and in this context it would be made only on notice: L M Barlin (ed), *House of Representatives Practice*, 3rd ed, 1997 at 297.

43 See eg House of Representatives SO 75, 77, 78. See also L M Barlin (ed), *House of Representatives Practice*, 3rd ed, 1997 at 479-480; C J Boulton (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 21st ed, 1989 at 379-380.

44 L M Barlin (ed), *House of Representatives Practice*, 3rd ed, 1997 at 480.

45 'The State of the Judicature' Address, 30th Australian Legal Convention, Melbourne, 19 September 1997 at 30.

46 Ibid.

political involvement by judges or by any association of judges. The legal professional bodies such as the Law Council of Australia and the Australian Bar Association and their State organisations are the only other bodies which might be in a position to assume the role of defending the judiciary. Yet they are not as well placed as the Attorney-General to respond appropriately and swiftly to political criticism. Moreover, a denial of this responsibility by the Attorney increases the likelihood of political attacks on the judiciary. It would therefore spell the end of the convention that politicians refrain from political attacks on the judiciary.

Of significant importance in this debate is that the defence which is sought from the Attorney-General is not of judges personally or of the reasons expressed in their judgments. It is the institution of the judiciary, the courts and the process by which cases are decided, which requires protection from unjustified political criticism. Such criticism usually fails to appreciate that the decisions of the courts are not decided simply according to the judges' perception of the public interest. Judges and their courts are not alternatives to politicians and parliaments. Their role is fundamentally different. Judges decide cases according to law, not according to what in their view is in the best interests of society. At times incremental developments in the law occur through judicial decisions either because the law has been shown to be wrong in principle or because a case raises a legal issue not previously decided.

Judicial decisions may have significant ramifications for a community and although judges will be aware of all or some of these, their primary focus is on the application of legal principle. It is the community which assesses the practical ramifications of these decisions and considers whether the law needs to be changed by Act of Parliament. But criticism of court decisions decided according to the rule of law cannot be based on those political ramifications. Rather it must be based on the court committing an error in the determination of the facts of the case or in the application of the law to the facts. Such errors can be challenged on appeal which allows for this technical review of judges' decisions.

Unfortunately, the narrow parameters and complexity of decision-making by the courts is often not appreciated. Political criticism which fails to appreciate the judicial method cannot go uncorrected lest it undermine public confidence in the judicial system. This is where the Attorney-General who straddles both the worlds of politics and law is in a *unique* position to arrest any undermining of that public confidence.

Conclusion

Evident from the fragments of history outlined above is that the role and functions of the Attorney-General have evolved even during this century. The recent rejection by the Commonwealth Attorney-General of the role of defending the institution of the judiciary might in the future be viewed as a seminal stage of this continuing evolution. It is still too early to determine its actual impact. What is clear is that the role of the judiciary needs to be better understood especially by politicians and journalists. In this, the judiciary along with the legal profession and legal academics can play a role without jeopardising its impartiality.

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