



University of Notre Dame Australia, School of Law

The David Malcolm Memorial Lecture

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***The Rule of Law and the Independence of the Judiciary:
Values Lost or Conveniently Forgotten?***

I begin by acknowledging the traditional owners of the land on which we meet, the Wadjuk people of the greater Noongar clan and by paying my respects to their elders past, present and emerging. I also acknowledge and pay respect to all the other Aboriginal people of our country.

I am honoured to have been invited to deliver the fourth David Malcolm Memorial Lecture, shortly before the anniversary of David's passing four years ago. I especially acknowledge the presence tonight of Mrs Kaaren Malcolm, Chief Justice Peter Quinlan and many other distinguished guests, colleagues and members of the faculty of Notre Dame University.

This university is the place where David spent many happy and rewarding and, I am sure, more tranquil times after his retirement as the 12th and longest serving Chief Justice of Western Australia. It is fitting therefore that people gather here each year to remember one of the greatest citizens and certainly one of the greatest jurists this State has ever produced.

The judges who have previously given this lecture were, in order of appearance, Neville Owen, Robert French and Michael Barker of the Supreme Court, High Court and Federal Court respectively. Apart from their high offices and their brilliance, those three judges all had something in common with David Malcolm: integrity and independence – the essential attributes of any judge, most especially a head of jurisdiction.

The three previous lecturers also had another thing in common – they all had the privilege of knowing David much better than I did. As a very young lawyer, I worked for a firm of solicitors at 524 Hay Street, the modest building which then housed the tiny Western Australian Bar. David joined the Independent Bar in 1980, and I moved out of 524 Hay Street in the following year, by which time David had already taken silk and become President of the Bar! The closest I ever came to him in those days was when I trekked upstairs to Bar Chambers, clutching the \$1.50 fee required to have an affidavit witnessed.

Winding the clock forward a quarter of a century, the Family Court of Western Australia was honoured when David, by then Chief Justice, sat on the bench at the ceremony at which I was welcomed as a judge. He bounded into our chambers that morning with that towering presence, that sense of energy and that never-ending smile which were his trademarks. I was grateful for his presence, but I will always be indebted for the letter he sent to my Chief Judge afterwards, which for me characterised the generosity of his spirit. This being my last public speech before my farewell ceremony, I hope you will forgive me for thinking it appropriate that it is given in honour of a great man who took the time to be there at the start of my judicial career.

As I come to the end of my time as a Chief Judge, we have a new Chief Justice of Western Australia who is starting his journey in David's footsteps. At the same time, the Family Court of Australia, of which, until tomorrow, I am the senior Appeal Judge, prepares to farewell a Chief Justice for the second time in 12 months. This concurrence of events leads me to reflect on the nature of judicial leadership, and on David's example and legacy in that role, since judicial leadership is inextricably intertwined with my main theme, judicial independence.

An obvious, and regrettably current, circumstance in which the role of a Chief Justice as leader assumes prime importance arises when a court or some of its judges are under attack, whether from politicians, interest groups, or in the media. The leadership needed from a head of jurisdiction is now even more critical than it was in the past, when it was an accepted role of Attorneys-General to **defend** judges from attack, including attack by fellow politicians. As many here know, the judges of the Family Court of Australia, both in its appeal and trial divisions, have this year experienced public criticism that is ill-informed, inaccurate and unfair.

David Malcolm recognised the role Chief Justices should play in such circumstances. In an article in the Southern Cross Law Review, he pointed out:

It is necessary to remind the public and the other arms of government that the judiciary is an equal and independent arm of the government. The Chief Justice must be ready to speak for the judiciary of the nation, or of a State or Territory, on issues such as those that affect judicial independence and attacks on the judiciary.

Recognising the reciprocal nature of the obligation, he went on immediately to add:

The Chief Justice has a responsibility to ensure that relations with the legislative and executive arms of the government are appropriate, mutually respectful and cordial.

David accepted that the formal powers of a Chief Justice “*are in fact, quite limited*”. But he recognised the influential role a Chief Justice can and should perform in maintaining the delicate balance between the three arms of government, and also the importance of including the community we serve in this important discourse. Thus he wrote:

The role of a Chief Justice is one of leadership. The Chief Justice is expected to be the spokesperson and representative of the judiciary ... in its dealings with the executive government and the community.

In my experience, Chief Justices agonise over the choices they must make as spokesperson. After all, as Chief Justice French emphasised, they are “*but one amongst equals*” and should therefore speak – or remain silent – not for themselves but for the body of judges. It is essential therefore that a Chief Justice develops a mechanism by which he or she can share information about matters of policy with all the judges and gather their views on matters of importance to the court. The mechanism should ensure there is room for a range of views, and a culture where judges are able to express opposing views in a proper forum. In this way, Executive Government can be confident that any representations made are indeed the views of the judges.

Representations to government are usually best made privately, but there are times when a Chief Justice needs to speak publicly, especially when views critical of the judges have been aired publicly by representatives of the government. The propriety of doing so is recognised

by guidelines adopted in 2014 by the Council of Chief Justices of Australia and New Zealand. Those guidelines contemplate comment where, for example, proposed laws relate “*to the abolition of existing courts and the creation of new courts*” and in respect of laws which affect “*the jurisdiction and powers of the courts*”. Unsurprisingly, the guidelines contemplate such comments being made by the head of jurisdiction, no doubt after consultation with the judges.

Of course one contribution a Chief Justice can always make to any debate is to ensure that the public has an accurate appreciation of the work of his or her judges. Chief Justices will have an understanding of the day-to-day work of the judges because they share in that work and have long experience of it from the other side of the bar table. As Chief Justice Malcolm said:

So far as I am aware, all Chief Justices in Australia regularly sit in Court. It is inconceivable that a Chief Justice would act entirely as an administrator and never sit as a judge. A Chief Justice is chosen and appointed to be a judge and is expected to demonstrate leadership in that capacity.

There can be no doubt David Malcolm lived up to this expectation. Apart from running an efficient court, being the face of the judiciary to the West Australian community, and making many speeches in Australia and overseas, he also sat regularly both at first instance and on appeal. His reputation spread well beyond the borders of our own State, and it was therefore no surprise when he was asked to preside over a specially constituted bench of the New South Wales Court of Appeal to hear a case involving a member of that court.

It was said at his farewell that David “*led from the front, never shirking the difficult cases*”. The importance of a Chief Justice leading his or her judges by example in deciding cases cannot be overstated. While each individual judge enjoys complete independence, a group of judges in my experience is no different to any other group in a workplace. *The tone is always set from the top* is an adage well worth remembering, and fundamental to all forms of leadership.

David Malcolm had amongst his many talents those of an outstanding sportsman. He would therefore forgive me for quoting from Australian cricket captain Ian Chappell who played his last test match in the same summer that David joined the Independent Bar. Chappell said this in a speech to the Wanderers Cricket Club, which was simply entitled *Captaincy*:

Respect is vital to a captain. He must earn it in three categories: as a player, as a human being and finally as a leader.

Chappell went on to stress the importance of the skipper of the team being good enough to hold his place as a player, and criticised what he perceived to be the English method of selection which he felt did not always achieve this result, leading to the team playing “*virtually one man short.*” I am sure the judges of the Supreme Court of Western Australia never felt they were playing one man short under the captaincy of David Malcolm.

I will return shortly to the topic of team selection, as it is vital to a consideration of the title I have chosen for this talk – *The Rule of Law and the Independence of the Judiciary: Values Lost or Conveniently Forgotten?* The rule of law and the independence of the judiciary were recurring themes in David’s writing and work. In fact, I contend that the most enduring of his legacies is the contribution he made internationally to these twin pillars of our democracy.

Amongst his many roles, David was Chair of the Judicial Section of LAWASIA and organised the Conferences of Chief Justices of Asia and the Pacific, of which he also served as Chair. The assemblies of those groups were arranged to coincide, so when they met in Japan in 2003, David gave not one, but two speeches, each dealing with aspects of judicial independence.

He commenced his address to the 10th Conference of Chief Justices in Tokyo with these words:

It is almost universally acknowledged that one of the hallmarks of a democracy is the independence of the Judiciary. A Judiciary which exists merely to do a Government’s bidding or to implement Government policy provides no guarantee of liberty.

Once upon a time, most politicians accepted that truth. One in this mould was Winston Churchill – a great hero of mine. Churchill spent a lifetime opposing tyranny in all its forms, some of which we now see re-emerging in precisely the same insidious ways that occurred in his lifetime. Whilst never a lawyer or judge, Winston Churchill had a clear understanding of the role the judiciary performs in preserving our freedom from tyranny. He maintained that:

The independence of the courts is, to all of us, the guarantee of freedom and the equal rule of law. It must, therefore, be the first concern of the citizens of a free country to

preserve and maintain the independence of the courts of justice, however inconvenient that independence may be, on occasion, to the government of the day.

As our Chief Justice, David Malcolm was similarly unwavering in his commitment to judicial independence. He spoke in defence not only of his court but of all courts and all judges. In my humble opinion he was the very model of a good Chief Justice who tries to work in harmony with the Executive Government, but never becomes its servant or mouthpiece.

David knew that judicial independence is indispensable to public confidence in the administration of justice. He knew also that it is not an end, but a means to an end. One of his contemporaries, Chief Justice Sir Gerard Brennan, had been at pains to point this out when addressing the Australian Judicial Conference in 1996:

Judicial independence does not exist to serve the judiciary; nor to serve the interests of the other two branches of government. It exists to serve and protect not the governors but the governed.

David Malcolm did more than just talk about judicial independence. He was instrumental in the formal adoption by the Conference of Chief Justices of the Asia Pacific of what is known as the “*Beijing Statement of Principles of the Independence of the Judiciary*”. Under his leadership, ours was the first region in the world where such a set of principles was adopted. His role in this regard was acknowledged by Chief Justice Wayne Martin in his valedictory oration at the sitting of the Supreme Court convened after David’s death.

I will return to the articles of the Beijing Statement in a moment. But first, I want to develop the topic of team selection, since it is central to any consideration of judicial independence.

Winston Churchill certainly understood its importance and he understood, in particular, how important it is to avoid the appearance of the process of selection of judges being associated with political considerations. After his visit to Italy in August 1944 following the fall of Mussolini, Churchill sent a message to the Italian people in which he emphasised, not for the first time, that “*the price of freedom is eternal vigilance*”. In answering the question of “*what is freedom*”, Churchill said that there are one or two simple tests by which the freedom of a

country can be measured in the modern world. One of the tests he posed for any country was whether “*their courts of justice [are] free of all association with political parties*”.

The same point was made by the Right Honourable Beverley McLachlin, the former Chief Justice of Canada, who coincidentally was appointed Chief Justice of British Columbia in 1988, the same year David Malcolm became the Chief Justice of Western Australia. Mrs Malcolm tells me that their paths crossed over the years, and their thinking about judicial independence certainly coincided. In a speech called “*The Decline of Democracy and the Rule of Law*”, Chief Justice McLachlin gave some tips about what judges and heads of jurisdiction can do to preserve and promote judicial independence. She started off by saying that, as judges:

We can educate the public and the politicians about what judicial independence means and why it is vital to our democracy and our social well-being.

Getting down to the specifics of team selection, her Honour went on to say:

We should support an appointment process that appoints judges on merit, and not political affiliation.

And she immediately added:

We must never allow ourselves to be co-opted by governments.

Delivering much the same message, Brennan CJ said to the 1997 Australian Legal Convention:

Treating Courts as political players will lead politicians to make political appointments, to offer personal or institutional rewards for judicial conduct that is politically desirable and to impose penalties for decisions that are politically unacceptable. Mutual understanding of and respect for the functions of each branch of government is essential to rebuild and preserve an appropriate relationship between the judicial and the political branches.

Through the agency of David Malcolm and others, these sentiments now find formal expression in the Beijing Principles which I mentioned earlier. Articles 11 and 12 provide as follows:

11. *To enable the judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence.*

12. *The mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed.*

David provided valuable commentary on the Beijing Principles in the 2003 Western Australian Law Review, where he wrote, echoing sentiments he had expressed in Tokyo a little earlier:

It is necessary that the influence of the executive should be kept to a minimum in order to reduce potential for improper considerations. In the interests of public confidence in the impartiality of appointees, the selection process should be open and formal.

This brings me to the critical question – “*how is Australia measuring up in 2018 to the Beijing Principles?*” Is the appointment process “*open and formal?*” Are appointments being made solely on the basis of competence and merit as we should not only hope but expect and demand? Or are some being made on the basis of political affiliation or personal connection or what the Executive expects those appointed will do to further some policy agenda?

After the unfortunate events that unfolded elsewhere in Australia a couple of years back, we might have had cause for optimism that governments would appreciate the potential for backlash if a perception arose that any person had been chosen for office for reasons other than suitability. It is therefore troubling that statements are now being made openly in the media questioning whether some appointments **have** been made on grounds other than merit.

For those who work in the area, it is particularly concerning that these complaints appear primarily focused on appointments to courts and tribunals that deal with family law disputes. Unfortunately, they bring to mind the story told of Lord Halsbury, the former Lord Chancellor of Great Britain, who was asked whether “*ceteris paribus*” (i.e. all other things being equal), the best man would be appointed to a vacant judicial position. His Lordship apparently responded “*ceteris paribus be damned, I’m going to appoint my nephew*”.

I have in mind here especially the comments made by Professor Patrick Parkinson on ABC Radio National on 2 June 2018 when asked about the constitution of the new court the federal government has announced will be created to deal with family law matters. He said:

What happens between now ... and January 1st when this new court is meant to occur is very, very important, and we have to have a dialogue about the right model for this new court and ensure that we have expert specialist people, who are not just friends of the Prime Minister or the Attorney-General, not just Liberal Party members, but people who know what they are doing who will be appointed to the new bench.

What was it that moved Professor Parkinson to make that statement? To give some context, it must be understood that Professor Parkinson, who is now Dean of Law at the University of Queensland, is perceived to be one of the more conservative commentators on family law. He has often been consulted by government, and was described in the *Sydney Morning Herald* of 26 March 2018 as “*arguably Australia’s most distinguished scholar in family law*”. Why is it that a person with his background feels the need to insist publicly upon appointments being made on grounds of suitability rather than the other considerations he mentioned?

Professor Parkinson is not alone in drawing attention to concerns relating to the basis upon which at least some appointments have been made. After outlining her own concerns, Professor Margaret Thornton of the Australian National University wrote on 19 April 2017:

As courts are the bulwark of a democratic society, we should not unquestioningly accept the absence of transparency. We must put pressure on the [Attorney General] and the ... Government to reinstate formal criteria in deciding appointments to all federal courts.

Another academic and newspaper columnist writing in the *Melbourne Age* on 8 June 2018 said this about what she described as “*some highly unsuitable appointments*”.

They were made as grace and favour appointments. Now those grace and favour appointments will be presiding over the most serious family law cases in the country. Cases where there are incidents of sexual abuse, of child abuse, and of family violence.

In the same article, Professor Parkinson was again quoted as being “*desperately troubled*” by some of the appointments that have been made. The quote continued:

I say this with all seriousness, the government and the opposition ... need to come together to devise an independent, merit-based and non-political appointment process for all judges in federal courts or tribunals.

The first point to make and which must be made very strongly is that the concerns that have been expressed are not directed at all, or even most, judges hearing family law cases. Of course, the same would not be able to be said in future if we moved away from a merit based system of appointment. It is not enough, though, for litigants to be confident that they have a good chance of coming before a competent judge – that confidence should be absolute.

The second point is that none of the concerns expressed are related to judges or magistrates of our State Family Court. In fact, it is fair to say that our Court is looked upon around the nation as the model of a good family law system, not only because of its unique structure but also because there can be no perception that appointments have been made other than on merit.

Returning then to the calls for changes to the appointment process, it should be appreciated that family law cases are dealt with not only by two separate courts in the Eastern States and by our unified State court here, but also by the Administrative Appeals Tribunal, which deals inter alia with the contentious issue of child support. Family lawyers and academics therefore also take an interest in the way in which appointments are made to that Tribunal, and I doubt it was by accident that Professor Parkinson included tribunals in his call for reform.

Examination of the public record will demonstrate why so many judges, lawyers and academics agree with Professor Parkinson that the time is ripe for a careful, bipartisan examination of the appointment process. I make no apology for saying so in a public forum, and I cite no less authority for doing so than the man whom we honour tonight. While David recognised that “*consistently with the need for judicial independence there is a general restraint on judges expressing views on matters of current political controversy*”, he was also very clear in stating:

It is my firm belief that a judge should be fully entitled to speak out on a matter related to the administration of justice, even a matter of public controversy, so long as he or

she does not give people cause for suspecting bias or partiality in the cases to be heard in the Court. A judge must also refrain from comment on matters of political controversy. There are however, matters that involve the administration of justice on which members of the judiciary may have not only a right but a duty to speak out.

I am further fortified in drawing attention to this topic by quoting Chief Justice McLachlin:

Judicial independence, as its history attests, has not been won by fiat or by accident. It has been won by the vigilance and courage of lawyers and judges over the centuries. And it is by that same vigilance and courage that it is sustained...

And no less a person than Sir Gerard Brennan spoke out publicly on the same topic in 2008 when he drew attention to “*an increase in the number of anecdotal reports of unmeritorious appointments*”, leading to him to argue that “*the time has passed when it is possible to have any confidence in the system to discover and evaluate the abilities and the character of prospective appointees to Commonwealth courts*”.

There is much more that could now be said about the background to the current calls for all appointments to Commonwealth courts and tribunals to be made on the basis only of merit, but this is neither the time nor the place. Examination of freely available material, including past editions of *The Australian* and interstate daily newspapers going back to at least 2008, would suffice to give at least some indication of the extent of the problem. What troubles me is that some people associated with the process seem not to understand there is a problem at all.

It is not often that we get an insider’s view of how the process sometimes works. One exception appeared in *The Canberra Times* in an interview with a former Senator who had been appointed to a very senior, and highly remunerated, role in a tribunal. Having noted that the Senator had lost pre-selection after many years in politics, the article went on to say that “*some of [the Senator’s] colleagues in the [Government] felt badly about his involuntary departure*”.

I pick up the story with the former Senator’s own words:

“My colleagues had been knocking on my door throughout 2014 with offers of various sorts, they felt some sort of sense of responsibility to see I was looked after so I did have a number of offers made...

"Initially I said no – I'd been working for governments one way or the other for close on 30 years and wanted to get off that treadmill for a while and see how I would go working in the private sector.

The *Canberra Times* article continued:

Was he offered an overseas post? "Yes ... that's all I can say, sorry."

So the offer of the tribunal did not come out of the blue but had the added attraction of being part of the legal system.

He was due to go on holiday in Europe with his wife, as the appointment was about to be announced.

"I realised I would have to spend some of that holiday brushing up on the law so I took a couple of text books with me and ploughed through them on the trains."

Having thus explained how he had prepared himself for this senior role, after his long absence from the law, the former Senator said this:

"I wouldn't have predicted [this appointment] at all ... I wouldn't have said I was an outstanding lawyer because I never wanted to make it my career.

"I had always seen it as a vehicle towards getting into politics, never as an end in itself. So coming back all these years later and suddenly finding myself back in the law, is a funny type of feeling."

Perhaps it is best that I allow that story to speak for itself and merely ask how many similar stories remain untold. Unless the concerns expressed by Professor Parkinson and others are entirely misplaced, the answer is that there are enough to give cause for disquiet. This is not to suggest that past political office, or political associations or friendships with politicians, should be a disqualification to holding judicial office. However, the public needs confidence that those appointed to judicial office owe fidelity to the law, not to those who appointed them.

We pride ourselves on having inherited the best of the English legal traditions and I suggest the time may have come to look to that country for modern guidance about how to ensure the public retains confidence that those appointed to sit in judgment on them are the very best we have to offer and that their appointment can stand up to scrutiny against the Beijing Principles.

In speaking of fluctuations in the English approach to judicial appointments, Sir Harry Gibbs, another of our former Chief Justices, explained back in 1987 that:

Political influence continued to play too great a part in the making of judicial appointments in England until the time of the Second World War. However, from 1946 onwards both Conservative and Labour governments in England have endeavoured to select only the best person available for any judicial position and to exclude entirely any consideration of personal or political influence. The policy ... is a bipartisan policy, formulated by Lord Chancellors who put the public good before party interests; it is supported only by tradition, and has no constitutional or legal foundation.

This bipartisan policy now **has** legal foundation in the UK, courtesy of the *Constitutional Reform Act 2005* and the independent Judicial Appointments Commission. The intent, quite simply, is to provide an open and formal procedure for appointments. There have been calls for something similar here at least as far back as 1977 when Sir Garfield Barwick argued that appointments should not be left to the Executive alone. From his great vantage point, as both a former Attorney-General and a Chief Justice, Barwick explained again in 1995 that:

Left to politicians, the appointments are not always made exclusively upon the professional standing, character and competence of the appointee. At times, political party affiliation ... form some of the criteria for choice. Sometimes party-political considerations are the dominant reason for it...

Barwick's views were strongly supported in 2008 by Sir Gerard Brennan, who spoke of the particular importance of a "structured" process of appointment to what is now known as the Federal Circuit Court. Sir Gerard wrote that:

Appointments to that Court are likely to attract less attention than appointments to the higher Commonwealth courts even though appointees will be exercising the judicial

power of the Commonwealth in diverse areas including family law, bankruptcy, migration and industrial matters—issues which affect the vital interests of individuals.

Barwick was succeeded by Sir Harry Gibbs, who wrote in the 1987 Australian Law Journal about Australian departures from the high standards being set in the UK. He said:

The work of the judiciary is too important to entrust it to those of doubtful competence, and a bad judge may do irreparable damage, since there are some judicial errors which even the most elaborate system of appeals cannot remedy. The further conclusive reason why appointments should not be made on political grounds is ... that they are capable of shaking public confidence in the judiciary.

There was a time, not that long ago, when an Australian federal government developed what appeared to be a successful mechanism, falling short of a formal Judicial Appointments Commission, to recommend appointments to the family courts. The approach was consistent with the bipartisan recommendation of the Senate Standing Committee on Legal and Constitutional Affairs in 1994. It is unclear why that mechanism has been scrapped. Perhaps whilst we consider something more formal, it might be worth giving it another try?

In the meantime, as Sir Harry Gibbs has pointed out, “*we must depend on the statesmanship of those in all political parties*”. Inevitably, given the comments of Professor Parkinson and others, upcoming appointments to courts administering family law, in whatever shape those courts may take, will be scrutinised with more than usual interest for evidence of statesmanship.

I propose to conclude by making brief reference to the current debate about the future form of the family law system. On 30 May 2018, the Commonwealth Attorney-General announced his intention to create a combined court in the Eastern States which would improve the efficiency of the “*existing split family law system, [by] reducing the backlog of matters before the family law courts, and driving faster, cheaper and more consistent dispute resolution*”.

Those of us who have been around for a while could not help but recall on hearing these remarks that the Attorney-General who created the current “*split family law system*” had, almost 19 years earlier, used eerily similar words when proclaiming that his new system would provide a “*quicker, cheaper option*” for family law dispute resolution. We could also not help

recalling that the Honourable Alastair Nicholson, then Chief Justice of the Family Court of Australia, warned in 1999 that:

[the] fragmentation of [the Family Court's] closely integrated system ... will result in a less satisfactory and more expensive service. The potential for public confusion, forum shopping and waste of resources on shuffling matters between courts is high. The funds proposed to be spent on the [new court] could be used far more effectively by providing Magistrates within the framework of the Family Court of Australia.

The appointment of magistrates within the framework of “*one specialist family law court*” is what the Semple Review recommended in 2008 after wide consultation and examination of the coherent system in Western Australia. Plans to give effect to the Semple Report were successfully opposed by those who had introduced “*the split family law system*”. The split system has therefore stumbled along until 2018 when we are now informed, on the basis it seems of a report from a firm of accountants, that the flaws in the system are not entirely the fault of the government that created it, but rather the inefficiency of the court whose Chief Justice accurately predicted the outcomes we now see.

As our Chief Justice, David Malcolm understood that consultation about change is always desirable. Indeed, it is essential if we are to avoid decisions about change being based on incomplete, inaccurate, or misunderstood information. For example, that firm of accountants could have consulted with experienced trial and appellate judges in both courts in the Eastern States about what their raw data actually meant. And they could have consulted with those of us in the West, who already have a fully unified system, to help explain how the stark differences in the data relating to judicial officers working at different levels bears no relationship to efficiency.

It would be fair to say there is unanimity in supporting some changes to the system in the East. It is the form the changes take that is important since, in the seeming anxiety to rush change, we would not want Parliament to throw out the baby with the bathwater. After all, with all its faults, our system is regarded internationally as one of the finest, if not the finest, in the world.

Those who understand the system; know its history; and participate in the day-to-day work need to be consulted, not just about the detail of the Bills before Parliament, but about the

broader policy, including the unprecedented plan to make no new appointments to the superior division of the proposed new court. This plan to slowly abolish the Family Court of Australia has profound implications for family law and deserves careful scrutiny, and proper consultation. Given David Malcolm's focus on eradicating all forms of gender bias in the law, I suggest he would have insisted that such consultation as has occurred to date ought to have included women – not just because we are dealing with families but because this is 2018.

It was, after all, the National Council of Women of Australia and its 620 affiliated organisations who, in two years of consultations leading up to the 1975 *Family Law Act*, strongly advocated for “*specialised Family Courts*” comprising **specialist** judges of superior status, working in one unified court alongside judicial officers at a lower level “*specially appointed and trained*” for the work. This concept could have been achieved in the Eastern States, as it has been in Western Australia, had the Semple Report been implemented. The concept of a two-tiered specialised court has been abandoned in the plan now presented to the Federal Parliament. Ironically, the Semple Report is being heavily relied upon as evidence supporting that plan!

Now that the policy has been decided, and the Bills have been introduced, there is a consultation process underway. Notwithstanding the government has been unable to secure a majority in the Senate on the progress of its Bills, the Commonwealth Attorney announced last week that:

In the meantime, I will be discussing with the courts the need to advance the development of new processes, procedures and operational guidelines for the new court. There is no reason this important work which will be fundamental to establishing the new court cannot commence pending the final passage of the legislation.

This announcement is cause for concern if the consultation is intended to be meaningful. The Family Court of WA and the Western Australian legal profession are taking a keen interest in the progress of the Bills. They affect us because we have been informed that the associated policy not to appoint any more judges of superior status will be applied to our Court, thus diminishing the status of family law. They affect us because the Bills contain provisions relating to appeals which diminish the status of our specialist Family Law Magistrates. And they potentially affect us as there are now indications that the proposed merger will lead to changes in longstanding arrangements between our Court and the Family Court of Australia that have greatly benefitted Western Australian families.

Quite apart from the fundamental question of the structure of the new court and whether the Semple model would provide a better framework, one important issue for the consultation process is whether **all** judges who hear family law cases should satisfy the test of suitability now laid down for Family Court judges in section 22 of the *Family Law Act*. In the context of the argument I have made tonight for appointment on merit, this would have the distinct advantage that Australia's family lawyers not only support that requirement of suitability, but that they also have a very good collective understanding of who meets it.

Hopefully there is going to be sufficient time for wide community consultation on these issues just as there was prior to the 1975 *Family Law Act*. In the meantime, we should be wary of law reform being driven by statistics produced by firms of accountants in the guise of measuring or quantifying the productivity of the courts. As Chief Justice Murray Gleeson said:

Nobody has yet devised a satisfactory indicator of judicial productivity, probably because the concept of productivity of judges is no more amenable to measurement than the productivity of parliamentarians. It is possible to measure some aspects of the performance of a judge or a court; and this may have utility. Justice, however, is more a matter of quality than quantity, and the desired judicial product is not a decision, but a just decision according to law.

David Malcolm understood that the true measure of a judicial system is not only its quality, but the faith the community has in the integrity and independence of its judges. I have been privileged to have held office under his influence, and that of his worthy successor. As I prepare to leave office, I have confidence that our new Chief Justice of Western Australia will preserve and build on the legacy of the man whose memory we honour this evening. A rich legacy that arises from David's powers of intellect, integrity and, above all else, independence.