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Legal 'outsiders' rather than 'insiders' to head Royal Commission



Justice Brian Martin has been part of the legal tradition of appointing outsiders to hear controversial cases in small jurisdictions. ANDREW MEARES

by Rosalind Dixon

The replacement of former Northern Territory chief justice Brian Martin as head of the Royal Commission into juvenile detention is welcome news for many Territorians.

He will be replaced by former Queensland Supreme Court judge Margaret White and Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda.

The treatment of juvenile offenders in the Territory directly implicates a large number of Indigenous individuals and families.

It is thus only right that, in investigating potential illegality or misconduct in the juvenile detention system, we should have commissioners who enjoy the trust of both the non-Indigenous and Indigenous communities.

However, the controversy over Justice Martin was not simply about representation. It was also a product of another fundamental, less visible mistake; the appointment of

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a consummate legal "insider" in a situation that clearly called for the appointment of a legal "outsider".

This is also a mistake for which, as the federal government's chief legal officer, the Attorney-General George Brandis should take responsibility.

The NT is a small jurisdiction, where many of the legal and political elite are well known to each other. It is thus no surprise that the former chief justice's daughter worked for the NT's Attorney-General, or that Justice Martin himself might have presided over trials or appeals that led to the detention in question. This is the kind of overlap in legal and political circles, and cases, that is inevitable in a small jurisdiction of this kind.

But it also raises distinct challenges in ensuring appropriate trust in legal and political institutions. In large jurisdictions, such as NSW or Victoria, citizens can generally expect that there will be only limited professional crossover between judges, political leaders and their families.

Perception of impartiality

Judges will thus not only be impartial; they will in most cases appear to be impartial to ordinary citizens.

In small jurisdictions, in contrast, the inevitable overlap between lawyers, judges and politicians will mean that it is much harder to foster a perception among ordinary citizens of true impartiality and independence on the part of the judiciary. This is also one reason why many "micro-states" in the region have a long tradition of appointing judges from outside the jurisdiction to the nation's highest court.

This tradition has also served these countries well in cases involving sensitive issues of the kind at stake in the NT, where there is an allegation of potential misconduct on the part of senior governmental or political figures.

A good example in recent years is the role played by foreign judges on the courts of Vanuatu. In 2015, a foreign judge sitting in the Supreme Court convicted 14 sitting MPs, or just under half of the elected government, for bribery.

Australia also has its own history of this kind of tradition of appointing "outsider", or interstate, judges to deal with cases involving particularly close ties between the judiciary and parties before a court. Indeed, in previous instances Justice Martin himself has been part of this tradition. In 2012, he presided over the West Australian murder trial of Lloyd Rayney, a former WA prosecutor.

The reason: Mr Rayney was alleged to have killed, his wife, Corryn, who was a WA Supreme Court registrar, and thus well-known to almost all of the WA judges. In supporting the new leadership for the Royal Commission, there is thus little reason to criticise former chief justice Martin himself: indeed, he seems to be a person of integrity who was willing to assume an important public service role.

There is, however, good reason to criticise George Brandis and his government. Not

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only did he fail to respect to the fundamental principle of Indigenous involvement, he failed to apply a basic principle of institutional design.

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