

THE UNIVERSITY OF
NEW SOUTH WALES



FACULTY OF LAW

GILBERT + TOBIN CENTRE
OF PUBLIC LAW

27 March 2009

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Committee Secretary,

Inquiry into Australia's Judicial System, the Role of Judges and Access to Justice

Thank you for the opportunity to make a submission to this major inquiry into Australia's judicial system, the role of judges and access to justice. We are writing this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law, and staff at the Faculty of Law, University of New South Wales. We are solely responsible for the views and content in this submission.

A The Procedure for Appointment and Method of Termination of Judicial Officers

1 Judicial Appointment

There is consensus that Australian judges should be appointed based on merit and also that the public should have faith in the independence and impartiality of the judiciary. There is also broad support, in addition to those two objectives, for the diversification of professional and life experience amongst those who sit on the bench. Although Australia has been very well-served by its judicial officers, recognition of these priorities has rendered untenable the continuation of pure executive discretion as the means by which judges are appointed.

In apparent recognition of this, the current Attorney-General has already made significant reforms in this area by the introduction, for the Federal Court, Federal Magistrates Court and Family Court, of new processes including:

SYDNEY 2052 AUSTRALIA
Telephone: +61 (2) 9385 9654
Facsimile: +61 (2) 9385 1175
www.gtcentre.unsw.edu.au

- broad consultation to identify persons who are suitable for appointment;
- notices in national and regional media seeking expressions of interest and nominations;
- notification of appointment criteria; and
- the creation of advisory panels to assess expressions of interest and nominations against the appointment criteria and to develop a shortlist of highly suitable candidates.

These new arrangements appear to have worked well to date and are a distinct improvement on the secretive and informal processes which previously determined federal judicial appointments. In particular, the criteria which has been used is commendable for its detail and relevance to the nature of judicial work. Beyond a professional practice requirement to establish bare eligibility, the Attorney-General's Department has promulgated nine carefully specified criteria (about which, please see Part C below).

However, reform should not stop here. In particular, we would make two recommendations.

First, these new processes need to be secured through creation of a Judicial Appointments Commission (JAC), independent of the Attorney-General's Department. The establishment of a JAC would bring Australia into line with many other nations (including United Kingdom, Canada, South Africa) that have formal committees involved in recommending to the executive those individuals suitable for appointment to vacant judicial posts. This is the natural evolution of the advisory panels established by the Attorney-General in 2008 in respect of the federal courts. We submit that a move to this more formal structure is warranted for the following reasons:

- to protect the enhancements made to judicial appointments by the Commonwealth in recent times; and
- to improve the public transparency of the appointment process. At present, only very brief information is available on the Attorney-General's Department website about the process when applications are not being sought for a position. In order to ensure strong community confidence in the judiciary, it seems preferable that members of the public are able to access *at any time* information about how judicial officers are appointed. This would necessarily include the extent of consultation, the composition of any advisory body and, most importantly, the criteria which underpins selection.

The specific considerations which may be taken into account in the design of a JAC have been canvassed in detail in recent academic studies to which we would refer the Committee.¹ But on the essential function of a JAC we wish to be expressly clear that it should be advisory only. Apart from the legal requirement under s 72 of the Commonwealth Constitution that the executive alone formally appoints members of the federal judiciary, it remains desirable that the elected government makes the final decision and is held accountable for its selection by the Parliament. An Australian JAC should ideally provide the Attorney-General with a shortlist of (say, three) potential appointees from amongst whom she or he may make a selection. This would contrast with arrangements in the United Kingdom, where only one name is

¹ S Evans and J Williams, 'Appointing Australian Judges: A New Model' (2008) 30 *Sydney Law Review* 295; and G Williams, 'High Court Appointments: The Need for Reform' (2008) 30 *Sydney Law Review* 163.

forwarded to the Lord Chancellor, who then has only two chances to reject the recommended candidate and call for another name. This seems an unnecessarily restrictive approach to the executive's power of appointment. An Australian JAC should be able to be requested by the Attorney-General for a further short list if she or he is dissatisfied with the names put forward, and the government should retain the power to appoint a person not on a commission short list. However, where the government does so, it should be required to disclose this in a statement to Parliament.

Second, the recent reforms do not apply to the High Court of Australia. This seems entirely illogical given the meritorious justifications given for a more transparent and formalised approach to appointments in other federal courts. Excluding the highest court from any enhanced appointment system may be said to risk actively undermining public confidence in that institution and the quality and independence of its members. The arrangements should be uniform amongst all federal courts.

We accept the view of Evans and Williams² that creation of a single national JAC is not feasible and that State and Territory governments should be encouraged to establish complementary bodies applying much the same standards and fulfilling the same function. While recognising some scope for 'different criteria for appointment to different types of courts',³ it would seem highly desirable for public confidence in the Australian judiciary as a whole that appointment processes pertaining in each jurisdiction are as closely aligned as possible.

2 Termination of Appointment

Section 72 of the Constitution provides that judges "shall not be removed except by the Governor-General in Council, on an address from both Houses of Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity".

Two limitations arise from this constitutional provision. First, the power of removal is conferred upon the Legislature exclusively. Second the grounds are, of course, not at large but are restricted to 'misbehaviour or incapacity'. Both constraints reflect one of the major components of the English constitutional settlement after the Glorious Revolution of 1688 by operating to protect the independence of the judicial arm from political interference.

However, while s 72 has secured the integrity of the federal judiciary, its apparent simplicity is nevertheless troubling. Parliament is able to remove a judge only for 'proved misbehaviour or incapacity'. The most ambiguous word in that phrase is 'proved' which clearly suggests both a standard and a process. But on these the Constitution is unhelpfully silent.

The three separate inquiries into allegations of misbehaviour against Justice Lionel Murphy in the early 1980s illustrated the uncertainties over the extent to which parliament may delegate an investigative function to some other body as a preliminary step before exercising its power under s 72. That affair demonstrated that striking the balance between some manageable and fair approach without transgressing upon the legislature's constitutional role as sole arbiter of the matter is no easy task – particularly once a controversy has already emerged. We endorse the submission of the Hon Duncan Kerr SC MP to this inquiry that it is

² Ibid.

³ E Handsley, 'Appointment of Judicial Officers in Australia' in K Malleson & P Russell (eds), *Appointing Judges in an Age of Judicial Power* (2006), 141.

crucial to establish a clear mechanism for the operation of s 72 *in advance* of it being needed due to the likelihood that:

...any *ad hoc* procedure put in place after a specific allegation of judicial misconduct or incapacity has been brought to light can, and almost certainly will, be criticised as lacking at least some of the institutional attributes appropriate for a fair hearing and respect for the rule of law.

Greater attention should also be given to the particular problems of proving ‘incapacity’, which has traditionally been obscured by a focus on the controversial ground of ‘misbehaviour’. This is odd since uncertainties over standards, rights and procedures must be even greater in a case of incapacity given that the criminal justice process would not provide a suitably analogous model for resolution of the problem. Additionally, with over 150 members of the federal judiciary, it seems that physical or mental impairment is far more likely to arise than inappropriate behaviour. In light of recent incidents involving State judges, the incidence of mental or psychological incapacity, far less immediately detectable than a physical impairment and yet likely to be a much greater impediment to fulfilment of judicial duties, demands particular attention and care.

At present it appears there are only two alternatives when a member of the federal judiciary becomes incapacitated by mental illness. There is the constitutional response – removal by both houses – which is likely to encompass some kind of *ad hoc* investigatory body attended by many of the doubts which Mr Kerr has highlighted. Or there is the possibility of an informal approach made by the individual’s colleagues.

Both approaches are unsophisticated and neither guarantees a swift and satisfactory outcome. They also do not possess much flexibility. Two former Chief Justices, Sir Anthony Mason and Murray Gleeson, have cited the lack of a process for complaints based upon conduct falling short of that which would warrant removal as a very real difficulty with present arrangements. One way this may manifest itself in respect of an instance of incapacity is that the medical condition may only be of a temporary nature and that some option other than forced retirement might actually be possible and appropriate. Establishment of a judicial commission presents the opportunity to ensure a respectful and flexible means of addressing issues of incapacity, particularly caused by mental strain and illness, amongst federal judges.

We submit that the Committee should closely examine the approach to incapacity enabled by the powers and procedures of Judicial Commission of New South Wales. One of the Commission’s chief functions is to hear complaints against judges in that state (about which we say more below). However in 2006, amendments were made to the *Judicial Officers Act 1986* (NSW) so as to introduce a means by which health and capacity matters may be investigated without having to wait until litigants bring forward a formal complaint against a judge’s behaviour. This is clearly an important improvement upon leaving these issues simply to an informal approach by the judge’s peers. The latter might provide a resolution, but where it does not or the judge disputes suggestions as to his or her capacity, these changes now provide a path forward which the judiciary can pursue proactively. The amendments also responded to the problems demonstrated by the attempt in the late 1990s to remove Justice Vince Bruce from the NSW judiciary after his battle with clinical depression delayed judgment delivery. The couching of the whole Bruce affair within the framework of a complaint where the conduct was pursued on either ground of removal was not helpful to the

process of investigation (the parliamentary motion to remove Bruce ended in defeat in the upper house) and certainly not sensitive to the judge concerned.

Part 6A of the *Judicial Officers Act* is titled 'Suspected impairment of judicial officers'. They enable a judge's Head of Jurisdiction to formally request the Commission to investigate whether a judicial officer has an impairment affecting their performance of judicial or official duties. The Act states expressly that this is not a complaint.

The Commission then undertakes a preliminary investigation and this must, as far as practicable, take place in private. The Commission can require the judge to undergo such medical or psychological examination as it specifies. If the judge refuses to do so, then the Commission may proceed to deal with the matter as if it arose by complaint.

Where a psychological or medical report does not indicate a problem, the Commission may summarily dismiss the matter. If the report reveals that the judicial officer has an impairment the Commission will either report back to the relevant Head of Jurisdiction or refer the matter to its Conduct Division for further examination, depending upon the level of seriousness.

The Conduct Division may conduct a further examination. The Division will also have the power to dismiss the matter, report to the Head of Jurisdiction, or present a report to the Governor setting out their findings and opinion that the judicial officer's impairment may warrant parliamentary consideration of his or her removal from office.

In referring a matter to the Head of Jurisdiction, the Judicial Commission or the Conduct Division may make recommendations regarding steps that might be taken to manage the judicial officer's impairment. As occurs with complaints, the Head of Jurisdiction may either counsel the judicial officer or take such steps as are deemed appropriate regarding the administration of the court for which he or she is responsible.

These changes to the Judicial Commission of New South Wales were welcome developments. They freed the investigation of concerns about judicial capacity from the need for a complaint. They also removed the earlier rigidity which followed from the need to classify those complaints as either minor or serious. In that sense, the judge's individual situation is *responded to* rather than him or her being simply threatened with parliamentary removal. These provisions enable the judiciary to pre-empt problems which may flow from the health of one of their colleagues but give some structure to how the topic might be pursued after it is first broached. They also, helpfully, suggest that some level of accommodation might be possible.

In summary, while we support the creation of a federal judicial commission, we believe that the design of such a body should be sufficiently sophisticated as to allow meaningful distinctions to processes to be made depending on whether the issue is the individual's misbehaviour or incapacity. We submit that the model of the Judicial Commission of New South Wales provides a suitably helpful exemplar in this respect.

B The term of appointment, including the desirability of a compulsory retirement age, and the merit of full-time, part-time or other arrangements;

The effect of the 1977 constitutional referendum was to impose a retirement age of 70 years upon Justices of the High Court and any other federal court. In retrospect, and looking at the capacities of many former judges after retirement, this age seems too young. The result has been the forced departure from federal courts of some powerful intellects at their peak.

However, we submit that alteration of this rule should not be pursued. A reversion to granting federal judges tenure for life is undesirable, for many of the reasons which applied in 1977 when compulsory retirement was introduced. Apart from seeking to minimise problems of infirmity and poor capacity, a compulsory retirement age is valuable for ensuring timely renewal of the ranks of the judiciary. This contributes positively to the law's development and the ability of judges to appreciate changes in social mores and technology.

If we understand the issue as one simply of raising rather than removing, the 70 year limit, a number of practical considerations apply. It would be difficult to establish community consensus on what age retirement should be mandated beyond the existing limit and frankly there are far more pressing areas of constitutional change demanding attention than mounting a referendum to revisit this issue. This is especially so since even if successful, any such referendum must only amount to extending the period of judicial service by just a few more years.

On the other question of allowing for appointments to the judiciary on a part-time basis, this may be seen as a means of diversifying the pool of potential judges but there are inevitable limitations to such a move. Specifically, part-time judicial work would seem a possibility only for lower level courts given the speed with which they may deal with many of the matters which come before them. In some Australian states magistrates are able to work part-time, but it would be difficult to see how at any higher level a part-time judiciary would not impede the progress of litigation and inconvenience the parties. In the United Kingdom, the Lord Chancellor's policy is that part-time work should be available for judicial posts below the High Court (above which are the Court of Appeal and the House of Lords in the hierarchy) (JAC Annual Report, 2007-08, 34). Essentially, for the purpose of this inquiry, the question of part-time appointments should be seen as having relevance only to the Federal Magistrates Court.

Even then, the important issue of safeguarding judicial independence remains. In Victoria, the *Magistrates' Court Act 1989*, s 9(8) provides that unless approved by the Attorney-General, 'an acting magistrate must not engage in legal practice, undertake paid employment or conduct a business, trade or profession of any kind while undertaking the duties of a magistrate. In other words, the Magistrate is prohibited from 'moonlighting'. By contrast, the UK system of Recorders allows barristers or solicitors of 10 years experience to sit part-time in the Crown or County courts and also maintain their private legal practice. This approach seems both undesirable and, in respect of Australia's federal judiciary, constitutionally dubious.

C Appropriate Qualifications

The traditional stance that appointments should be made on ‘merit’ only has been described by the current Commonwealth Solicitor-General, Mr Stephen Gageler, as ‘naïve’.⁴ Various academic studies have offered an articulation of specific criteria by which meaning may be given to the term ‘merit’.⁵

Perhaps the most meaningful reform introduced by the Commonwealth Attorney-General to the appointments process has been the stipulation of criteria when advertising judicial positions. For example, in the February 2009 advertisement for a vacancy on the Federal Court of Australia the ‘requisite qualities for appointment’, after meeting an eligibility requirement of five years legal practice, were stated as follows:

- legal expertise;
- conceptual, analytical and organisational skills;
- decision-making skills;
- the ability (or the capacity quickly to develop the ability) to deliver clear and concise judgments;
- the capacity to work effectively under pressure;
- a commitment to professional development;
- interpersonal and communication skills;
- integrity, impartiality, tact and courtesy; and
- the capacity to inspire respect and confidence.

These approximate the qualities identified by academic studies and professional bodies as relevant to judicial work. It is not surprising that the use by the Attorney-General of advisory panels to consider applicants for judicial posts has supported the development of express criteria. The latter are integral to the successful operation of any advisory group.

It should be noted that no formal recognition is given to a policy of diversification of the judiciary in the criteria used to date by the Attorney-General’s Department. ‘Diversity’ remains a controversial consideration in the appointment of judges but it is not clear why this is so. Diversity is not inconsistent with merit, and is in fact an intended attribute of appellate courts. It should be noted that while it is to make selections ‘solely on merit’, the United Kingdom’s Judicial Appointments Commission, is also under a statutory duty to ‘have regard to the need to encourage diversity in the range of persons available for selection for appointments’ (Constitutional Reform Act (c.4), s 64(1)).

Gageler has acknowledged that ‘at any time there would be fifty people in Australia quite capable of performing the role of a High Court justice’. Obviously some will meet the essential attributes more strongly than others, but *beyond that point* the Solicitor-General argues that ‘wider considerations can, and ought legitimately to be, brought to bear.

⁴ S Gageler, ‘Judicial Appointment’ (2008) 30 *Sydney Law Review* 159.

⁵ See, for example, R Davis & G Williams, ‘Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia’ (2003) 27 *Melbourne University Law Review* 819, 830-47; S Roach Anleu & K Mack, ‘Judicial appointment and the skills for judicial office’ (2005) 15 *Journal of Judicial Administration* 37.

Considerations of geography, gender and ethnicity all can, and should, legitimately weigh in the balance'.⁶

There are two specific arguments in favour of recognising diversity as a desirable factor in judicial appointments. First, a judiciary which is broadly representative of the make-up of the Australian community has been found to enhance public confidence in the courts and respect for their decisions.⁷ Second, the whole point of multi-member benches is to expose legal arguments to a number of decision-makers able to bring differing perspectives on the issues in question. Homogeneity is certainly *not* an objective of judicial appointment, and so an appointments process should explicitly recognise that, all other things being equal, candidates for selection may be prioritised according to a variety of other considerations which distinguish meaningfully between them as individuals.

D The judicial complaints handling system

Further to our remarks at Part A(2) above, we submit that the creation of a federal judicial commission should incorporate a system for the hearing and making of complaints about judges. Two reasons have traditionally been given against the establishment of a body with such powers. The first is that there is a hesitancy to create mechanisms which might diminish judicial independence. The second is that the appeal process already provides litigants with an avenue to overturn a judicial decision with which they are dissatisfied.

Neither of these objections stands up to much scrutiny. We reject that a federal judicial commission cannot be designed in such a way that it both preserves the Parliament's constitutional power of removal under s 72 of the Constitution and also protects the courts from political interference. Fears that this is not possible seem to be an overstatement. As Sir Anthony Mason has said, the constitutional objection:

...certainly seems to read a lot into the Australian Constitution. It also places very considerable emphasis on judicial independence despite the fact that neither the NSW model nor the Canadian model appears to have constituted a threat to judicial independence. The argument is consistent with the tendency of judges to treat judicial independence as a shield for themselves rather than as a protection for the people. Indeed, there is a lot to be said for the view that judges have devalued judicial independence in the public estimation by relying upon it in order to protect their own position and privileges.⁸

As for the existence of avenues of appeal, this should be understood as quite distinct from a judicial complaints process. Only occasionally will litigants appeal against the result of a case due to the conduct of the presiding judge during the hearing: though the recent 'sleeping judge' litigation (*Cesan v Director of Public Prosecutions* [2007] NSWCCA 273; [2008] HCA 52) is a prominent example. While this may correct any disadvantage suffered by the litigants, it certainly puts them to a great deal of trouble and inconvenience and, crucially, does not directly address the existence of the misconduct or incapacity. Indeed, to reiterate

⁶ Gageler, above n 4.

⁷ Davis & Williams, above n 6, 846.

⁸ Sir Anthony Mason, 'Judicial Accountability' quoted in PA Sallmann, 'Judicial Conduct: Still a Live Issue?', Judicial Conference of Australia, 2005 Colloquium Papers, 3 September 2005, 15.

our concerns about the inadequacy of current mechanisms to address mental illness and incapacity, the great advantage of a more sophisticated process is that it should enable early resolution of these problems before giving rise to appeals against an individual judge's rulings.

Again, we think the Judicial Commission of New South Wales, and also examples from overseas, should be examined by the Commonwealth so as to formulate a specific proposal to establish a federal judicial commission.

E The interface between the federal and state judicial system;

The High Court held in 1999 in *Re Wakim; Ex parte McNally* ((1999) 198 CLR 511) that the Constitution establishes that disputes arising under State law can be determined only in the separate courts of each State and not in the Federal Court. As a result, some federal-State cooperative arrangements are now impossible, such as the scheme under the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth). That scheme saved significant time and cost by allowing matters to be heard interchangeably by federal and State courts. This avoided matters being split between courts and also the cost of occasionally having to re-start a matter in a new court. While there are other ways that such problems can sometimes be avoided, a cross vesting scheme is still desirable.

A second decision in 2000 in *R v Hughes* ((2000) 202 CLR 535) meant that a national enforcement agency, in that case the Commonwealth DPP, might only be able to enforce an offence arising under the Corporations Law where the offence could have been enacted independently by the Commonwealth under one of its constitutional heads power. Of course, if the Commonwealth already had the power to enact the scheme there would not have been the need for a cooperative arrangement underpinning the Law in the first place. This meant that aspects of such schemes would have to be enforced by separate State regulators.

Other than a change of approach by the High Court, the only solution is to remove the flaw in the Constitution. Amendment of the Constitution by referendum is costly and difficult. On the other hand, the cost of not adapting the Constitution to Australia's contemporary needs is potentially far higher, including wasted expenditure on courts because the cross-vesting of matters is not possible and the associated costs for parties. Less quantifiable costs can include a loss of confidence in the stability of a regulatory regime and an inability to achieve appropriate policy outcomes because cooperative schemes based upon a referral of power are not politically achievable.

The actual amendment to the Constitution would be straightforward. It would not grant the Commonwealth more power nor transfer power from the States to the Commonwealth. It would only ensure that the Constitution enables the Commonwealth and the States to work cooperatively with the legislative powers that they already possess. It need only fix the defect identified by the High Court in order to facilitate federal-state cooperation. The amendment would entrench two legal propositions:

- the States may consent to federal courts determining matters arising under their law; and
- the States may consent to federal agencies administering their law.

The first of these changes matches that which was recommended by the Constitutional Commission in 1988. Its concern that the cross-vesting of court matters between different courts might not be constitutionally possible led it to suggest that the following provision be inserted into the Constitution:

77A. The Parliament of a State or the legislature of a Territory may, with the consent of the Parliament of the Commonwealth, make laws conferring jurisdiction on a federal court in respect of matters arising under the law of a State or Territory, including the common law in force in that State or Territory.

Whatever the final text of the change, it could be placed in a new chapter to the Constitution, perhaps as a new 'Chapter VI.A – Cooperation between the Commonwealth and the States'.

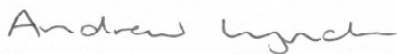
The issue remains on the agenda due to the inconvenience and extra cost caused by the limitation. For example, in its 12 point plan entitled *Reshaping Australia's Federation* released in November 2006, the Business Council of Australia listed as one of its action points:

ACTION 8 The Commonwealth and state governments should work together to initiate and support an amendment to the Constitution to include an express provision that the states may choose to allow Commonwealth courts to determine matters under state laws and to allow Commonwealth agencies to administer state laws.

The proposal has also gained the unanimous, cross-party support of the House of Representatives Standing Committee on Legal and Constitutional Affairs. The first recommendation in its report on *Harmonisation of Legal Systems: Within Australia and between Australia and New Zealand* (December 2006) states:

- The Australian Government seek bipartisan support for a constitutional amendment to resolve the limitations to cooperative legislative schemes identified by the High Court of Australia in the *Re Wakim* and *R v Hughes* decisions at the Standing Committee of Attorneys-General as expeditiously as possible ...
- Any referendum on the constitutional amendment should be held at the same time as a federal election.

Yours sincerely



Dr Andrew Lynch
Associate Professor
Centre Director



Professor George Williams
Anthony Mason Professor
Foundation Director