INTERNATIONAL
COMMISSION
OF JURISTS

ICJ AUSTRALIA

GPO Box 173
Sydney NSW 2001
Australia
' +61 (0)2 9266 0950
7 +61 (0)2 9266 0742
e * info@ICJ-Aust.org.au

WWW.ICJ-AUST.ORG.AU

Submission to the Standing Committee on Legal and Constitutional Affairs on its Inquiry into Australia's Judicial System and the Role of Judges

1. Background

1.1 The establishment of terms of reference for the inquiry into Australia's Judicial System andthe Role of Judges requires the standing committee to have particular reference to:

(a) procedures for appointment and method of termination of judges;

(b) term of appointment, including the desirability of a compulsory retirement age, andthe merit of full-time, part-time or other arrangements;

(c) jurisdictional issues, for example, the interface between the federal and state judicialsystem; and

(d) the judicial complaints handling system.

1.2 The International Commission of Jurists Australia presents the following arguments and,ultimately, its recommendations.

2. Procedures for appointment and method of termination of judges

2.1 It is submitted that the best judicial appointment turns on how it contributes to the make-upof the judicature in terms of impartiality and a reflection of society, as well as the suitability of the candidate themselves. The first premise impacts on the second becausethe strength of the bench as a whole can be as important as the competency of the individual justices sitting on it, and will determine who is selected to 'balance it out'. While it is submitted that appointments should always be based on who is

best at the time and should not be based on race or gender, it is acknowledged that appointments have generally been selected from a homogenous group of people who have a shared viewpoint and experience. So that the law is not applied and interpreted in

a narrow way and with an arbitrary bias, it is important that other perspectives, such as that of a female judge, populate the bench.

2.2 As Roach Anleu and Mack have observed, "there is no reason to think that merit resides predominantly in the narrow group that has historically dominated the Australian judiciary." [1] As Justice McHugh put it, 'when a court is socially and culturally homogeneous, it is less likely to command public confidence in the impartiality of the institution.'[2]

2.3 Baroness Prashar, Chair of the Judicial Appointments Commission in the UK, identified the benefit of seeking a broader candidature, an observation quite relevant for our purposes: "The benefit of widening the range of applicants has a powerful simplicity. If more, well-qualified people apply to be judges, the merit of those selected will either remain the same as now or be enhanced. And if the appointments process excludes consideration of irrelevant factors then we might also expect appointed judges to come from a very wide range of backgrounds."[3]

2.4 Attracting a broad range of potential from the outset would positively impact the quality and integrity of the ultimate decision. A detailed discussion about the mechanism for achieving this goal is beyond the scope of this submission. Other authors such as Evans and Williams have written more extensively about concerted outreach programs which would serve to widen the pool of candidates, and make the idea of judicial participation accessible to a broader section of the community.

2.5 It is not however, necessary for the bench to be completely representative of the

1 Sharyn Roach Anleu & Kathy Mack 'Judicial Appointment and the Skills for Judicial Office' (2005) 15(1) *Journal of Judicial Administration* 37 at 39.
2 Michael McHugh, 'Women Justices for the High Court' (Speech delivered at the High Court dinner hosted by the West Australian Law Society, 27 October 2004).
3 Baroness Usha Prashar, 'Speech at the Annual ILEX Luncheon' at [10].

community.The Court is dealing with law and, it is hoped, common sense and factual issues. Forinstance, it is undesirable to simply reflect the gender balance of the community sincethe gender balance of practitioners is of greater relevance but more so at a senior level,the gender balance of the profession is even less reflective of the gender balance of thecommunity.

2.6 It must be remembered that each appointment is individual and should be the best personsuited for that particular Court at that particular time. It is necessary, however, that in allCourts, whether collegiate Courts such as a Court of Appeal or in large single judgeCourts, that there be a significant number of female appointments to reflect theirproportion at senior levels of the profession but also to reflect the different perspectivethat a female judge will give to discussions within the Court itself.

2.7 Judicial suitability will inevitably depend on experience in the law and experience inparticipating in trials. This is not as relevant for appellate Courts, where the conduct ofan appeal requires less advocacy skill and does not require the experience of, forinstance, a complex criminal trial or civil jury matter. The conduct of trials is based onprocedure and evidence, experience of which is acquired over a period of practice in theCourts.

2.8 Advocate solicitors as well as practising barristers are more likely to have higher levels ofskill in the conduct of trials than non-advocate solicitors, civil service lawyers oracademics.

2.9 If we are proceeding with the aspiration that the best person at the time be selected, it is important to objectively approach the concept of merit. Evans and Williams have argued for the 'disaggregating' of merit into its constituent parts:

> The concept of merit in judicial appointments *can* be disaggregated into sub-criteria…encompass[ing] legal skills and personal qualities. The legal skills relate to knowledge of the law, intellectual capacity and experience; the capacity to 'stage manage' proceedings in the courtroom; facility with complex fact situations and arguments; and the ability to write judgments. The personal qualities listed include integrity, impartiality, industry, a strong sense of fairness, decisiveness, understanding and a sound temperament. Certain other desirable skills may differ between courts. For example, forensic experience may be highly valuable for appointment to a criminal trial court but less important for appointment to an

> appellate court; equally, the intellectual skills required for appointment to an appellate court may be of less significance in evaluating candidates for appointment to high volume jurisdictions. One further implication of[4] disaggregating merit in this way is to recognise that there is no necessary correlation between successful practice at the bar and the skills required for judicial office.

2.10 This would support the idea that appointments should generally not be drawn from academia. This is because academics do not tend to fulfil the sub-criteria of being able to handle a courtroom, as they usually do not have the insight and experience of a trial lawyer.

3. Establishment of Judicial Commission

3.1 One of the difficulties of appointment to Federal courts is that it is not possible for federalauthorities to have the knowledge of trial advocates and the legal profession generally ascan be obtained within a particular state or territory. There is therefore a need for theestablishment of a vetting procedure which cannot be carried out by a Federal AttorneyGeneral and his or her staff.

3.2 We recommend the establishment of a judicial commission along the lines of the NSWJudicial Commission to assist in the training and continuing assistance in carrying outjudicial functions and to deal with complaints against particular judges. This judicialcommission could carry out the function of the examination and vetting of personssuitable for appointment to the bench.

3.3 A suitable composition of the judicial commission could be the Chief Justice or a nominatedjudge of the High Court of Australia, the Chief Judge of the Federal Court of Australia,the Chief Justice of the Family Court of Australia, the Chief Magistrate of the FederalMagistracy and the Chief Judge of the Industrial Relations Court of Australia. Therecould also be a small number of community representatives or both from the communityand the legal profession itself.

3.4 The powers of a judicial commission should also include calling for self-nomination

4 Evans and Williams,

andthird party nominations of persons for appointment to the bench and should carry outinvestigations and if appropriate interview such persons. There would need to beconsultation with state and Australian law societies and bar associations whereappropriate, as well as input from Solicitors-General and Crown Solicitors from theCommonwealth and States.

3.5 There should be no appointment to any court without the approval, or at least there shouldbe no opposition, by the Chief Judge of that court to any such appointment.

3.6 The executive must, in terms of its constitutional responsibilities, retain the power ofappointment notwithstanding recommendations made by the judicial commission. Itshould however, impose protocols for consultation with heads of jurisdiction andprofessional bodies. Whatever federal court is the subject of the appointment, there willalways be some practitioners or judges from other state and federal courts who will notself-nominate or be nominated. These should comprise the pool from which,particularly, more senior judges are appointed.

3.7 It must be remembered that for appointment to the High Court, there is a process ofconsultation with state Attorneys-General.

3.8 It would be inappropriate for a serving state or federal judge to self-nominate for any federaljudicial appointment.

3.9 In the process of appointment and training of judges, the procedures of the NSW Judicial Commission should be adapted and applied.

4. Term of appointment, including the desirability of a compulsory retirement age.

4.1 For appointment to judicial office, such terms should never be for a fixed term other thanterminated by a uniform retiring age. Independence of the judiciary is a fundamentalcornerstone of our society and provides stability in a context such as an Australia that isremarkably better than more short-term appointments in some other

jurisdictions. Thesuggested retiring age for judges and magistrates should be 72. Many judges are fullycapable of carrying out functions to more advanced years and there is a danger of a lossof valuable experience. However, an arbitrary age must ultimately be established whichshould now reflect the increasing age of the community and practitioners generally.Pension schemes and the like may create incentives for earlier retirement but ultimatelyan arbitrary retiring age is required.

4.2 Although a number of judges being in their 60s and early 70s creates the problem that theymay reflect societal attitudes of a past era, it must be remembered that experienceenables judges to determine changes in societal attitude from the practitioners, litigantsand experts that appear before them. It must be remembered that the judicial arm is aspecialised arm of government, dealing with knowledge of the law and experience atdetermining truth as well as community attitudes and values. However, judges are notappointed to make decisions on community attitudes. That is for parliamentarians andpoliticians.

5. Part-time appointments

5.1 Acting judges should not be appointed from the practising profession. This leads to a loss of confidence on the part of the public and creates problems when acting judges return to the profession in terms of part-heard cases. Therefore, the appointment of acting judges should not occur, except in the case of retired judges, but it is desirable that this only be for particular problems of inordinate delays in case lists and for a short period only.

5.2 There should be no use of the English recorder system. For judicial independence a judge should be permanently appointed except as set out above.

6. Method of termination

6.1 Judges should only be removed for just cause or incapacity. Procedures for this can first bethrough the judicial commission to deal with complaints and matters of

discipline suchas counselling, but, ultimately, the removal of judges should be carried out by an addressto both parliaments. Almost inevitably, judges will resign during the course of anycomplaints procedure and the passing of a resolution by both houses of parliament willonly occur in the most extreme cases. It is ultimately the parliament that must bear theresponsibility and that is where it should remain.

6.2 The procedures now in place in New South Wales cover these procedures.

7. Jurisdictional issues, for example, the interface between the federal and state judicialsystem

7.1 We do not wish to make submissions in relation to the transfer of matters from state tofederal jurisdiction as there is not, in this submission, time to examine those somewhatmore complex issues, except to say that the more easily matters can be transferred fromone jurisdiction to another by Court decision with appeal rights, the better that is for thesystem.

8. The judicial complaints handling system

8.1 Inevitably, complaints against judges which may berate personal conduct or complaints byunhappy litigants sometimes justified and sometimes not justified or for any form ofjudicial misconduct will initially be determined by the complaining party. There is noway to prevent someone writing to an Attorney General or a judicial commission ifestablished or to a head of jurisdiction.

8.2 We believe that the correct procedure whichever of those courses is taken is that all mattersdealing with handling of judgments such as delays, go to the head of jurisdiction todetermine the cause of the delay and to deal with any disciplinary or counselling issues.

8.3 Where a Chief Judge or Chief Justice fails to deal with a delay, the complainant should thengo to the judicial commission itself, including complaints against that Chief Justice. Ifthere is a complaint against a particular judge which the Chief Judge of the jurisdictioncannot resolve then that matter should be referred to the Judicial Commission itself.

8.4 There should be a procedure for determining each complaint allowing the right of dismissalof frivolous or unreasonable complaints, but, ultimately, the matter should be referred toa conduct division established by the judicial commission. That conduct division shouldhave the power to counsel a judge or if necessary to have a hearing presided over by anappropriately appointed judge to examine the matter and if

necessary make arecommendation for referral to the parliament.

9. Further Assistance

9.1 In the event of any further submissions being required to clarify any matter above or for a representative of the International Commission of Jurists Australia to come before the Committee to do with any of these matters, then contact should be made with the writer of the covering letter of this submission.

9.2 It is suggested that the committee should hear evidence from the offices of the Judicial Commission of NSW as to training selection and discipline of judges. That body trains judges for most Australian jurisdictions as well as Asia and the Pacific and has considerable experience in dealing with judicial education.

Yours faithfully,

The Hon John Dowd AO QC
President
INTERNATIONAL COMMISSION OF JURISTS AUSTRALIA

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