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THE INTERNATIONAL COMMISSION OF JURISTS -VICTORIA-

INQUIRY INTO AUSTRALIA'S JUDICIAL SYSTEM AND THE ROLE OF JUDGES

Inquiry into Australia's Judicial System, The Role of Judges and Access to Justice
Written Submission of the International Commission of Jurists – Victoria

Introduction

1. We present in summary form the views of the International Commission of Jurists – Victoria ("ICJ–Victoria") on the terms of reference for the Senate Committee's inquiry. We do so recognising that "dissatisfaction with the administration of justice is as old as law"[1] The ICJ–Victoria is anxious that a representative be given the opportunity to make oral submissions before the Committee in relation to this inquiry. We think that an oral presentation and exchange of views with the Committee would be useful.

A. The procedure for appointment and the method of termination

2. The procedure for appointment and the method of termination of judges goes to the heart of the constitutional principle of judicial independence. Former Chief Justice Gleeson has captured the true value of this principle in the following statement:

> What is at stake is not some personal or corporate privilege of judicial officers; it is the right of citizens to have their potential criminal liability, or their civil disputes, judged by an independent tribunal. The distinction is vital. Independence is not a prerequisite of judicial office; the independence of judicial officers is a right of the citizens over whom they exercise control.[2]

3. The ICJ–Victoria adopts this description of judicial independence.

4. The entrenchment of an independent and impartial judiciary as part of the common law of Australia has been affirmed by the High Court in *Ebner v Official Trustee in Bankruptcy*[3]:

> Fundamental to the common law system of adversarial trial is that it is conducted by an independent and impartial tribunal. Perhaps the deepest historical roots of this principle can be traced to *Magna Carta* (with its declaration that right and justice shall not be sold) and the *Act of Settlement 1700* (UK) (with its provisions for the better securing in England of judicial independence). [4]

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[1] Roscoe Pound *The Causes of Popular Dissatisfaction with the Administration of Justice* (1906) 29 ABA Rep 395.
[2] Murray Gleeson, *Embracing Independence* (Local Courts of New South Wales Annual Conference, Sydney, 2 July 2008) at 3.
[3] (2000) 205 CLR 337
[4] At [3] (footnotes omitted)

5. While it is difficult to identify strict criteria for ensuring the maintenance of judicial independence, there are, of course, minimum conditions, such as judicial tenure. However, it has been recognized that the manner in which the essential conditions of independence may be satisfied varies in accordance with the nature of the court or tribunal.[5] The principle of judicial independence does not require that all courts must have their independence protected in the same way. There is no single ideal model of judicial independence and there is, therefore, room for legislative choice consistent with constitutional principle.

6. The ICJ–Victoria takes the view that considerations of merit must remain the essential criteria for appointment to judicial office. Further, judges must not be subject to arbitrary removal, individually or collectively, by the executive, legislative or judicial branches of government. Removal of judges from office must be limited to fair and transparent proceedings for serious misconduct within judicial office, criminal offence, or such incapacity that renders a judge unable to discharge his or her functions. The system prevalent throughout Australia of removal being made by the Governor-General or the Governor following an address of parliament should continue. No lesser system is appropriate; nor could it guarantee the same independence from political interference which the Australian judiciary presently enjoys.

7. Appropriate terms of tenure, protection and remuneration of judges must be ensured and the judiciary must be provided with sufficient resources to discharge its functions in a manner responsive to the community.

8. Independence of the judiciary must be delivered both at an institutional level and at an individual level. If individual judges are not guaranteed freedom from unwarranted interferences in deciding particular cases, the individual's right to receive a fair trial will be rendered illusory. Individual independence involves the manner of appointment of judges, the term of office, the provision of safeguards against pressures and the denial to the executive of the ability to remove judges. This will then leave judges in the position to decide cases according to the law.

9. In Australia the institutional independence of the judiciary is provided for by Chapter III of the Constitution. Funding of the High Court and courts established pursuant to Chapter III is provided for in s 81 of the Constitution:

> All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the

[5] *Ell v Alberta* [2003] 1 SCR 857.

purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution. (emphasis added)

The federal courts, including the High Court fall within the words "charges and liabilities imposed by this Constitution" found in s 81 of the Constitution. The federal courts are a charge and a liability imposed by the Constitution.

10. In Australia judges are appointed by the executive branch of Federal and State governments. It is widely accepted that the principle of separation of powers is properly to be described as the cornerstone or foundation of an independent and impartial justice system.

11. That system is appropriate and there is no pressing need for the executive to assign this role to an authority which would utilise in its title the term "independent".

12. The system of inviting or permitting people to apply for appointment to judicial office does not adversely impact upon the achievement of independence. If the pursuit of judicial appointment was permitted to become a competitive process, with a choice to be made between two or more competing applicants, the requisite appearance of independence may be lost.

13. It is important to ensure that patronage does not inveigle the appointment process. The Australian community is entitled to expect that the "best" (however that be assessed), not the most loyal are approached by the executive to accept judicial appointment.

14. At present the pursuit of excellence is sought to be achieved by imposing responsibility for judicial appointments upon the elected government. As with all aspects of a democracy, preventing patronage is the duty of both a responsible and principled government together with a strong opposition. There is no evidence that the appointment system is problematic.

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

15. The ICJ–Victoria is of the opinion that the term of a judicial appointment should never be fixed other than requiring a compulsory retirement age. Anything less than those arrangements has the effect of compromising judicial independence. Compulsory retiring ages are appropriate and 70 is, in the opinion of the ICJ–Victoria, an appropriate age. The ICJ–Victoria is also of the view that turnover in judicial office and the introduction of younger judges (albeit at least of the age of 50) is desirable.

16. The ICJ–Victoria is opposed to part-time appointments on the basis that they have a similar consequence of compromising judicial independence. Part II of the *High Court of Australia Act* 1979 (Cth) prevents this possibility in that it states that a Justice of the High Court is not capable

of accepting or holding any other office of profit within Australia. There has been a lengthy debate in Victoria over a number of years about the appropriateness of acting judges. The ICJ perceives the Victorian Government to be in favour of such arrangements but the legal profession and the Courts themselves are opposed. There is simply no question in our opinion that to appoint judges in an 'acting' capacity either actually,. or in perception, compromises that judge's independence particularly where the State appoints judges and is also a regular litigant in the Courts to which an acting judge might be appointed. Cost is not a justification and, indeed, we suspect that if all the evidence were assembled it would be discovered that the actual cost of appointing full-time judges, bearing in mind their workload, is highly cost effective.

17. Tenure for life provides a safeguard for judicial independence. The appointment of temporary judges challenges both the fact of and perception of independence of the judiciary. This is particularly so where judges appointed on a temporary basis are in fact provisional judges not enjoying security of tenure in their position and able to be freely removed or suspended.

C. Appropriate qualifications

18. This has never been an issue in practice, although previous judicial experience is generally regarded as a qualification for higher office in the judicial system.

19. The introduction of ongoing judicial education programs is a recent phenomenon in this respect, with the National Judicial College, the Australian Institute of Judicial Administration and the Judicial Conference of Australia representing just a sample of the organizations which support this endeavour. It is the view of the ICJ–Victoria that with the current acceptance that judicial information and education ought to be regarded as part of the responsibility of a judge, such recognition should lead to improvement in such programs.

20. The ICJ–Victoria also notes that with recent attempts to widen the recruitment base for judicial officers, such programs are becoming more crucial to ensuring that candidates for judicial appointment are able to perform their role as a judge.

E. The cost of delivery of justice

21. In the opinion of the ICJ–Victoria, the cost of delivering justice is a global cost, encompassing (in the criminal jurisdiction) the cost to the community of law enforcement, investigation, prosecution and defence. To the extent that judges contribute to the costs of delivering justice there is a clear connection between that cost and the cost of conducting the cases which are heard before them.

22. At present at least the appearance of an indirect influence on the independence of the judiciary results from the economic rationalist funding regimes which have been adopted at both a State and federal level in Australia.[6]

23. There is, perhaps, a legitimate concern about the capacity of courts to manage their own administrative affairs. Part of the response has been the development of a class of specialist court administrators, with management skills related to the particular needs of courts, who operate within the judicial branch of government and who work with judicial leaders in a relationship that reflects constitutional principles of independence of the judiciary. As former Chief Justice Gleeson observes,

> It is now established that judicial independence requires judicial control of administrative functions that bear directly on decision-making. These functions include the assignment of business within a court, fixing of times and places of sitting, and the arrangement of court lists. Without doubt, managers in the executive government may be better than judges at exercising organisational skills; and they may be right. But it is unacceptable that the executive government should assign judicial officers to particular cases, or control court listing procedures because so many cases involve the government itself… [P]ractical arrangements that respect judicial independence and at the same time allow for managerial realities are necessary. [7]

24. His Honour also commented that:

> It is one thing to say that courts should control their own essential activities, but in practice such control requires funding. In the result, whatever independence of control the courts have, they need to cooperate with the executive government which provides their funding and is democratically accountable for the use of those resources. [8]

25. Issues of efficiency and the costs of delivering justice have also given rise to questions of performance review. The established forms of judicial accountability are well known: public and open court proceedings; appellate jurisdiction; provision of reasons for decisions.[9]

26. The ICJ–Victoria agrees that this most extensive form of judicial performance review is appropriate and sufficient. Issues of delay, inadequacy of reasons and abuse of process are already

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[6] See, eg, 2007-2008 Annual Report of the High Court

[7] Murray Gleeson, *Embracing Independence* op cit pp 13-14

[8] Ibid p 13

[9] Ibid p 14

implicit in the law that applies to judicial decision-makers, and are enforced through this scheme of judicial performance review.

27. As Gleeson CJ has stated:

> 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.[10]

F. Timeliness of judicial decisions

28. The ICJ–Victoria is of the opinion that the timeliness of judicial decisions is always an issue for litigants. However, the work of the superior courts is very substantial with increasing case loads and increasing pressures on judges. In addition, in many of the jurisdictions the complexity of the litigation is developing. An example and indicator of this is the substantial increase in statutory law produced by Parliaments. The timeliness of judicial decision making has several issues which we will refer to. First, workload. Will the appointment of more judges means more efficient case disposal or will it encourage an increase in volume? Does the workload of the Court permit time for judges to consider issues and write judgments or must they do that work out of court hours? If time is provided, is that time being well used? What resources are available to judges to enable their judgment writing time to be well-managed and efficient? What training is available to judges to encourage the delivery of *ex tempore* judgments in appropriate cases? How should delays in the production of judgments be managed within the Court? There are many other issues to raise but the fact is that there are Judicial College courses designed to assist judges in the more efficient disposition of their case load as well as developing the skill of *ex tempore* judgments. These resources need to be expanded. Some judges, it must be acknowledged, are simply slow in decision making and judgment writing. They need to be assisted. Likewise, some cases are very complex and require time for consideration and assembly of the reasoning which takes account of all the relevant evidence. Finally, and most importantly in this brief overview, the legal profession must be encouraged to be helpful in the manner in which both evidentiary material and legal authorities are presented, concentrating on relevance and the issues rather than ensuring that every single piece of evidentiary material however remote is presented and every case bearing on the issue is cited. These are complex issues.

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[10] Murray Gleeson, *The State of the Judicature* (35th Australian Legal Convention, Sydney, 25 March 2007) at 14.

H. The interface between the federal and State judicial system

29. There is already a degree of movement in Australia between State and federal courts. Many of the Justices of the High Court are recruited from the State Supreme Courts, and Federal Court judges are also known to move to State Supreme Courts. Gleeson CJ expressed an opinion that the interchanging of judges between State and federal courts "is to be encouraged … Properly done, it could become a routine method of creating more interaction between different judiciaries to the benefit of the court system generally."[11]

30. The ICJ–Victoria takes the view that a national judiciary is desirable. However, such a step would not be straightforward. The history of each of the Australian States has resulted in the development of six or more similar but separate systems. In some cases those systems have been tailored to cope with the particular needs or requirements of particular jurisdictions. Ultimately, however, the ICJ supports a national judicial system and supports a trend in that direction.

31. The ICJ–Victoria would note, however, that the principle of separation of legislative, executive and judicial powers reflected in the Australian Constitution has not been taken to apply with the same strictness at the State level.

I/J. The ability of people to access legal representation and the adequacy of legal aid

32. The ICJ–Victoria is of the opinion that legal aid is disgracefully under-funded. In practical terms legal aid is available only for serious crimes and even in those circumstances the level of fees for both the conduct of the case as well as the preparation is inadequate. A separate problem is that no legal aid is available for civil matters or minor criminal matters and funding is very limited for family matters. The ICJ notes that Neighbourhood Justice Centres being trialled in Victoria are a partial solution.

33. The ICJ would support a conference at a State or national level on the state of the criminal justice system. It is not realistic to analyse the role of trial judges in the criminal jurisdiction, for example, isolated from the problems and pressures confronting those who participate in the process. A lack of resources, particularly for those who defend in serious criminal trials, will inevitably have a consequence on the duration and the smooth running of any criminal case.

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[11] Ibid at 7.

K. Measures to reduce the length and complexity of litigation

34. Courts presently engage in a number of methods to reduce the length and complexity of litigation. In some cases those efforts have actually increased the complexity. For example, the desire to have legal submissions and reference to authority reduced to writing has had the effect on occasions of producing lengthy and complex written submissions accompanied by volumes of authorities which it is then left to the judge to read and analyse. Similarly, the desire in civil jurisdictions to have as much evidence as possible on affidavit has, whilst intending to have the opposite effect, often increased the complexity of the evidence and in particular increased the primary work that is required to be done by the judge.

L. Alternative means of delivering justice

35. Bearing in mind the workload of the courts, apart from the obvious benefits to the parties of alternative dispute resolution (such as reduced costs, speedy resolution of disputes, avoiding confrontation), alternative dispute resolution in all its forms, including mediation, has gone from being a luxury to a necessity. Without it, the courts would struggle to keep up with the work. To the extent that mediation under the supervision of the trial judge would be feasible, the ICJ-Victoria would be in favour of it.

28 April 2009

The Honourable Justice Lasry
Justice of the Supreme Court of Victoria

Michael D. Wyles
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