Chief Justice's Chambers
Supreme Court
Melbourne 3000

30 April 2009

Peter Hallahan
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Mr Hallahan

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

A number of the issues raised in the current inquiries before the Senate Standing Committee on Legal and Constitutional Affairs are matters with which Victorian Courts have been concerned in recent years. The Committee may therefore be assisted by the following information regarding the Victorian experience.

Governance

Judicial independence, community confidence in the justice system and efficient, effective court administration are clear themes in this inquiry as issues of national importance. Court governance arrangements have a significant role in maintaining these values.

Among Australian courts there are three principal models of court governance. The most prevalent model is described as the "executive" model under which executive government, through the Justice or Attorney-General's department controls the administration of the courts

providing administrative support to the judiciary who have limited formal control of staff and resources.
South Australian courts operate under a State Courts Administrative Council comprised of judicial officers. The Council oversees the Courts Administration Authority. In Federal courts the primary administrative decision making power rests with the chief judicial officer. [1]

Research by the Australasian Institute of Judicial Administration[2] has demonstrated that the "executive" model of court governance raises significant concerns from a managerial perspective as it splits authority and responsibility. Judges with operational responsibility lack clear authority over the resources to carry out that responsibility producing sub-optimal outcomes in terms of efficiency.

The Judicial Conference of Australia has identified the significant issues of principle involved in court governance arrangements. [3] The degree of executive control of court infrastructure and resources under the executive model presents a challenge to the community's expectations of an independent and impartial judiciary to try issues between the citizen and the State.

Australian courts, while the creatures of their own jurisdictions, administer the law as a whole: the common law and State and Federal statute law. The independence and efficiency with which Australian courts operate is therefore a significant national issue. Developing the most appropriate and effective court governance arrangements through a national discussion would strengthen our system of government and the administration of the law at every level. I would encourage the Committee in this inquiry to contribute to this national discussion.

Procedures for appointment and method of termination

Provisions for the termination of judicial appointments in Victoria were the subject of a report by Crown Counsel, Professor Peter Sallmann in 2003.[4] In 2005 this report resulted in the enactment of a new Part IIIAA of the *Constitution Act 1975* which sets out a process for independent

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[1] See further J Alford et al, *The Governance of Australia's Courts: A Managerialist Perspective* (2004)
[2] J Alford et al, *The Governance of Australia's Courts: A Managerialist Perspective* (2004)
[3] See papers from the 2006 Colloquium at www.jca.asn.au
[4] Professor Peter Sallmann, *The Judicial Conduct and Complaints System in Victoria: A Report* (2003)

investigation of allegations of misbehaviour or incapacity and the procedure for removal.
While the test for removal remains consistent with other Australian jurisdictions, the procedure provides transparency and certainty should there be a need to invoke it, rather than relying on an ad hoc arrangement.

Term of appointment, including the desirability of a compulsory retirement age, and the merit of fulltime, part-time or other arrangements

A national approach to issues of judicial terms of appointment, retirement and conditions is a matter which the Supreme Court has pursued for some time. The current discrepancies between jurisdictions are unwarranted and inconsistent with the trend towards greater integration of Australia's legal system.

For example, in all jurisdictions apart from Victoria and Tasmania the qualifying conditions to receive a judicial pension are 10 years of service and reaching the age of 60. In Victoria, for judge appointed after 1995, the requirement is 10 years of service and reaching the age of 65.

The increase in the qualifying age has, in practice, given a predominance to age over years of service in the operation of the judicial pension provisions creating significant inequities on the basis of age, with some judges serving 10 and others 20 years to qualify for the same pension.

Last year it was calculated that 80% of those required to serve 15 years or more before reaching the qualifying age were women. The provisions create a disincentive to accepting appointment at a younger age and have a detrimental impact on equal access to judicial office. The provisions are currently subject to an exemption under the *Equal Opportunity Act 1995* (Vic).

The existence of a compulsory retirement age has been accepted for a number of years as the means for determining the outer limit of the judicial career. What that outer limit should be has been the subject of further consideration in recent times. This is in part a result of broader social trends of increased life expectancy and later retirement. In Victoria it has also been prompted by the experience in the Supreme Court which is facing the loss of a number experienced judges in a short period of time, posing challenges at an organisational level. When it

became clear a number of judges reaching retirement age would happily continue, the Court was prompted to consider whether reinstatement of the 72 age of compulsory retirement would be appropriate given the organisational benefits and financial savings.

Flexible work arrangements for judicial officers are also a matter of interest to Victorian Courts. In 2004 provisions were introduced to allow Magistrates to work on a part time basis.[5] Other courts have been considering the means by which more flexible working arrangements could be provided with the aim of:

- retaining experienced judges for longer;
- removing provisions which may act as barriers to aspiring to, or accepting, judicial appointment for sections of the community including women; and
- creating a simple, effective and flexible system of additional judicial resources.

The nature of work in the higher courts requires a different approach to traditional part time work, but is an option which Victorian Courts consider it is important to pursue.

The interface between the federal and state judicial systems

Australia is fortunate to have a system in which federal jurisdiction is vested in State courts avoiding the difficulties experienced in federations with entirely separate State and Federal jurisdictions and court systems. The efficiencies involved in being able to determine civil claims based on federal and State law involving the same facts in a single proceeding are significant. Equally, the determination of criminal charges under State and Federal law in a single forum allows the system to draw on centralised resources such as jury management, custodial arrangements and judicial expertise.

Both State and Federal courts play a significant role, and co-operative arrangements such as the recent transfer of de facto financial disputes to the federal sphere[6] have been able to overcome undesirable splits in jurisdiction to better serve the community through specialist courts.

The ability of people to access legal representation

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[5] *Magistrates Court Act 1989* s 7(1A) and s 13(3)

[6] See *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) and *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic).

Access to legal representation is a matter of significant concern to Victorian Courts as they deal with cases in which one or more parties are self-represented. While some litigants chose to represent themselves, others are forced to do so and find themselves at a disadvantage as a result. Judicial officers can only do so much to guide self-represented parties through court processes. The Supreme Court of Victoria introduced a position of self-represented litigant's co-ordinator to provide information and referrals to self-represented litigants in a attempt to maximise their access to legal advice and/or representation and otherwise to assist them in navigating the court process.

The Courts are grateful for the various pro bono schemes provided through the Victorian Bar and Law Institute as well as the individual pro bono contributions of practitioners. Nevertheless, there remain a significant number of parties without access to representation. The number of people who do not access the courts because of representation is not known, but is likely to be significant.

Measures to reduce the length and complexity of litigation

These are issues of daily concern to Victorian Courts which have been working internally and with other agencies to develop and implement strategies to reduce delay. Courts' ability to reduce the complexity of litigation is limited by the complexity of the law which they must apply. None the less Victorian courts are encouraging parties to focus on the real issues in a case.

All courts participated in the recent Victorian Law Reform Commission Civil Justice Review[7] and continue to work towards implementation of its recommendations.

Victorian courts are actively engaged in reform in the criminal sphere. The Victorian Government in engaged in a significant legislative reform exercise and Courts have introduced their own initiatives aimed at reducing delays at all stages of the criminal process including improved case management techniques.

Alternative means of delivering justice

Victorian Courts are strongly committed to supporting and encouraging the use of alternative or appropriate dispute resolution

[7] Victorian Law Reform Commission, *Civil Justice Review: Report* (2008)

mechanisms. While maintaining access to courts as the ultimate means of enforcing rights is important, timely resolution through negotiation is preferable in reducing costs both financial and emotional and in producing outcomes which can be more beneficial to parties in the long run.

In the higher courts orders for mediation are made in the majority of civil matters.[8] ADR is also offered within the courts. In the Supreme Court the Prothonotary and Deputy Prothonotary conduct pre-trial conferences in asbestos related disease cases. Since October 2005 the Supreme Court has been referring selected matters to mediation by Associate Judges in a limited range of cases. The Court of Appeal introduced referral to mediation in civil appeals in 2007. In the County Court certain matters are referred to a case conference conducted by a judicial officer in open court. In the Magistrates' Court pre-hearing conferences and mediations are conducted by registrars.

General

In 2007 I delivered an address 'The State of the Victorian Judicature'.[9] It may be of interest to you. I anticipate delivering my next address shortly and will forward a copy to you.

I wish the Committee well in its deliberations and if I might assist I would be pleased to do so.

Yours sincerely

MARILYN WARREN
Chief Justice

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[8] Sourdin, *Mediation in the Supreme and County Courts of Victoria* (2009) see also The Honourable Justice Kellam's speech on the launch of this report available at www.supremecourt.vic.gov.au under publications.
[9] Available at www.supremecourt.vic.gov.au under publications.