COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE

Reference: Australia's judicial system and the role of judges

THURSDAY, 11 JUNE 2009

SYDNEY

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SENATE LEGAL AND CONSTITUTIONAL AFFAIRS

REFERENCES COMMITTEE

Thursday, 11 June 2009

Members: Senator Barnett *(Chair)*, Senator Crossin *(Deputy Chair)*, Senators Feeney, Fisher, Ludlam and Trood

Participating members: Senators Abetz, Adams, Back, Bernardi, Birmingham, Bilyk, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Eggleston, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, Mason, McEwen, McGauran, McLucas, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Williams, Wortley and Xenophon

Senators in attendance: Senators Barnett, Brandis, Feeney, Fisher, Heffernan

Terms of reference for the inquiry:

To inquire into and report on:

Australia's judicial system and the role of judges, with particular reference to:

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

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

(c jurisdictional issues, for example, the interface between the federal and state judicial system; and

(d) the judicial complaints handling system.

WITNESSES

Committee met at 9.02 am

CHAIR (Senator Barnett)—I welcome witnesses to this public hearing of the Senate References Committee on Legal and Constitutional Affairs inquiry into Australia's judicial system and the role of judges. This inquiry was referred to the committee by the Senate on 16 March. In conducting the inquiry the committee is required 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, and the merit of full-time, part-time or other arrangements; (c) jurisdictional issues, for example, the interface between the federal and state judicial system; and (d) the judicial complaints handling system.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege; that it is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee; and that such action may be treated by the Senate as contempt. It is also contempt to give false or misleading evidence to a committee.

The committee prefers all evidence to be given in public but under the Senate's resolutions witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask or give evidence in camera. If a witness objects to answering a question, the witness should state the grounds upon which the objection is taken, and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may of course also be made at any other time.

[9.04 am]

McCOLL, the Hon. Justice Ruth, AO, President, Judicial Conference of Australia

CHAIR—I now welcome to our hearing Her Honour Justice McColl, who is appearing on behalf of the Judicial Conference of Australia. Would your colleague like to introduce himself if he intends to speak?

Justice McColl—I am accompanied by Chris Roper, who is the Secretary of the Judicial Conference of Australia, to assist me.

CHAIR—Thank you. I now invite you to make a brief opening statement, at the conclusion of which I invite members of the committee to ask questions.

Justice McColl—Thank you, Senator, and I thank the committee for the opportunity to appear today. I have an opening statement. I have copies for the senators who are members of the committee if that would assist.

CHAIR—Thank you.

Justice McColl—The Judicial Conference of Australia was established in 1993. Its objects relate to the public interest in maintaining a strong and independent judiciary within a democratic society that adheres to the rule of law. Its membership comprises judges and magistrates drawn from all jurisdictions and levels of the Australian court system. Membership is open to all serving and retired judges and magistrates in Australia and to masters and judicial registrars. The membership now stands at over 600, which is more than half the judicial officers in Australia.

The objects of the Judicial Conference are: firstly, in the public interest, to ensure the maintenance of a strong and independent judiciary as the third arm of government in Australia; secondly, to promote, foster and develop within the executive and legislative arms of government and within the general community an understanding and appreciation that a strong and independent judiciary is indispensable to the rule of law and to the continuation of a democratic society in Australia; thirdly, to achieve a better public understanding and appreciation of the role of the judiciary in the administration of justice; fourthly, without diminishing in any way the independence of the judiciary, to improve the relationship between the judicial and executive arms of government; fifthly, to maintain, promote and improve the quality of the judicial system in Australia; sixthly, to seek to ensure that access to the courts is open to all members of the community; and, finally, to promote research to assist in the achievement of these objects.

The Judicial Conference is happy to assist this inquiry. However, members of the committee should appreciate that, in a body with such a wide membership base, not all members will necessarily be of one mind about the issues the committee is considering. The Judicial Conference's remarks today are made on a general basis—that is to say, not specifically by reference to constitutional issues which may influence their implementation in respect of the

federal judiciary. Section 72 of the Constitution is clearly a provision the committee would have at the forefront of its considerations in this respect. The Judicial Conference assumes that the committee will take advice on such issues and that constitutional limitations will be reflected in its final report.

I turn then to the terms of reference of the committee. As to the matter of procedures for appointment and method of termination, the Judicial Conference does not have a formal position on procedures for appointment of judges. It is an issue which is as capable of dividing the judiciary as of dividing the public. However, the Judicial Conference is of the view that the traditional system of appointing judges—through the Attorney-General putting forward a name to cabinet after consultation with a wide range of persons with familiarity with the legal system, the role of a judge and the skill and ability of members of the legal profession—has produced a strong, independent judiciary in Australia in which the community has, and is entitled to have, great confidence.

At the risk of speaking at too high a level of generalisation, it is clearly essential that all judges be selected on merit. However, as debate in recent years has highlighted, the concept of merit has a different meaning to different people. In the federal sphere, with which this inquiry is concerned, the system the Attorney-General has adopted—of advertising for appointments to the federal judiciary and identifying the core attributes for application—has well defined in a neutral manner what the Judicial Conference believes would be accepted by its members as indicative of the merits a judicial officer requires—namely, 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. Although it does not have a formal position on the merits of the system the Commonwealth and various state attorneys-general have adopted of advertising for judicial officers, as far as the Judicial Conference is aware there has been no criticism of those appointed through that process.

As to termination and on the assumption that this is referring to termination for other than a conduct issue, the Judicial Conference is of the view that a judge's role should only terminate upon that judicial officer qualifying for retirement in the ordinary course. Any power which enabled the government to terminate a judge's position other than on misconduct grounds would undermine the independence of the judiciary.

I turn to issue B, terms of appointment, including the desirability of a compulsory retirement age and the merit of full time, part time or other arrangements. These are some issues which the Judicial Conference has not discussed in recent times at least but about which one can be confident that its members are reasonably united. Few would have any difficulty with a compulsory retirement age. All Australian judges are subject to one and the only complaint from some has been that it is too low.

As to acting judges, the Judicial Conference has in the past opposed the use of acting judges. It took that position in 2004 when the Victorian Attorney-General, the Hon. Rob Hulls MP, proposed legislation which would provide for the appointment of acting judges for a term up to five years, so as to create a pool of judges from which selections may be made from time to time to hear and determine cases. At the time the then Chair of the Judicial Conference, the

honourable Justice Ronald Sackville, wrote to Mr Hulls pointing out that there is a substantial body of opinion among Australian judges that the use of acting judges is inconsistent with a principle of the independence of the judiciary, except in very limited circumstances. The Judicial Conference understands that the Victorian judges and magistrates hold that view and have expressed their opposition to the proposed legislation. The Judicial Conference understands that the Victorian judges and magistrates continue to hold the view Justice Sackville attributed to them.

The Judicial Conference acknowledges that the legislation of the states and territories makes provision for the appointment of acting judges; however, at the time, it was concerned that the proposed Victorian legislation appeared to go well beyond the practice in other Australian jurisdictions. I tender, for the assistance of the committee, a copy of Justice Sackville's letter which clearly sets out the system of acting judges in other states and territories of Australia.

CHAIR—Thank you very much.

Justice McColl—Few would support any but the most carefully designed system of acting judges and most would very strongly oppose arrangements that allow acting appointments to be made from the profession on the basis that the appointee would return to practice after his or her term as an acting judge had come to an end. As to part-time arrangements, again, the Judicial Conference does not have a formal view; however, it recognises this is a good option of keeping skilled practitioners unable to undertake full-time judicial duties. It would be necessary, however, to devise a system of appointing permanent but part-time judicial officers which does not impose excess burdens on the other judicial officers in the relevant court. The Judicial Conference is aware that the system of part-time magistrates in the New South Wales Local Court appears to work well. Both the issues of acting and part-time judges clearly raise constitutional issues in the federal sphere. Section 72 of the Constitution would appear to preclude acting appointments at least—see Re: Goulburn, ex parte, Eastman 2000 Commonwealth Law Reports 322.

As to the third issue, for example, the interface between the federal and state judicial systems, the Judicial Conference has supported the establishment of a judicial exchange system which would permit—subject to constitutional issues—both horizontal and vertical judicial exchange between judges of state courts and judges of federal courts. The model protocol between heads of jurisdiction for short-term judicial exchange, which would give effect to such a system, was developed following the delivery of a paper to the 2005 Judicial Conference annual conference on judicial exchange by Justice Robert French, then a judge of the Federal Court of Australia. The model was approved by the Judicial Conference and the Council of Chief Justices. I understand it was distributed to the members of the Standing Committee of Attorneys-General in May 2009 and some but not all states and territories have approved it. It is still a current matter with the standing committee. I also tender, for the assistance of the committee, a copy of Justice French's paper, 'Judicial exchange: debalkanising the courts', and a copy of the model protocol to which I have referred.

On the final term of reference, the judicial complaints handling system, the Judicial Conference has a report, considering the issue of procedures for determining complaints against judicial officers, on the agenda of its governing council meeting this Saturday, 13 June. It is inappropriate, therefore, to pre-empt the outcome of that meeting by stating a formal position at

this stage; if appropriate, the judicial conference will advise the committee of the outcome of that meeting.

CHAIR—Thank you very much.

Senator HEFFERNAN—Could I raise a procedural matter, Chair. I take it that the only person taking questions is the judge?

Justice McColl—That is correct.

CHAIR—Justice McColl, thank you very much for your opening statement. I would like to start with the first term of reference and ask you about the appointment process and the method of termination for judges. Regarding the appointment process, you have referred to the current arrangements and the recent changes to the appointment of the federal judiciary. Can you advise the committee of your views with respect to the High Court, because it would appear that those arrangements at this stage are not applying to High Court appointments, and whether you have a view of the merit or otherwise of the process applying to the High Court?

Justice McColl—If I were to express a view on that, it would be a personal view. The Judicial Conference has not, as I have said, considered the position formally. In any event it certainly has not considered it vis a vis the High Court. The High Court is a very small court; the pool of candidates who might be considered for appointment to the High Court would be a very small one. There is a sentiment within the legal profession that systems of advertising, while they have been so far successful, do contain an inherent limitation in the sense that the culture of the legal profession is more suited to what I might term the 'Attorney-General approach method' rather than the 'self-nomination method'. I suspect that those who are in that pool from which appointment at the High Court might be considered would be very much in the former category and would not expect to have to self nominate. I could not see, again this is my personal view, that it would be necessary to adopt any special different system for appointments to that very small body.

CHAIR—All right. You say you do not have a formal position on the merits of the recent changes and the establishment of a panel which advertises, receives nominations from the various nominees, considers them and prepares what is described as a short list which then goes to the Attorney for consideration and a decision. In terms of the appointment of that panel, do you have views as to the make-up of the panel and the appropriateness of the constitution of the panel?

Justice McColl—Again this is my view. My understanding is that the composition of the panel at the federal level has been a former chief justice of the High Court, a former and continuing acting judge of the court on which I sit, the Supreme Court of New South Wales, and a member of the Commonwealth Attorney-General's Department. There may be one other but that appears to be a panel which one would expect would reflect a knowledge of the duties required of a judge and of the capacities of those who might make an application in terms of considering their suitability for those positions.

CHAIR—Essentially, you do not have issues regarding the composition of the panel?

Justice McColl—No. And as I have said in my opening statement and as I read having looked at the submissions which have been received from the Federal Court, the Family Court and the Federal Magistrates Court those courts also appear to be happy with the current system.

CHAIR—You referred to the various state attorneys-general and the system there. Of course, it is not entirely the same across the country.

Justice McColl—No. My understanding is that the states which now advertise are New South Wales and that is only up to the level of the supreme court. In Victoria, I think they take advertisements at all levels. In South Australia, again I think it is up to the level of the supreme court and in Tasmania I understand it is across the board. I do not understand that any of the other states advertise for judges.

CHAIR—Of course in Tasmania recently there have been some what could be called controversial media interest in the recent appointment of a judge but I am not going to go there now unless you wish to respond—

Justice McColl—I am not across that issue, Senator.

CHAIR—One of the areas of special interest for us, which crosses over this termination issue and the complaints-handling system, is the issue of discipline or counselling that may occur with respect to judges. We have your views on the termination process; we have your views regarding the judicial complaints-handling system. Could you describe and outline to the committee the best method of dealing with indiscretions or with behaviour or ability issues? In your opening statement you indicated the merits of the judicial officers. What if those merits do not meet the standards which you believe are appropriate to a judge? How is this best handled, in your view? How is it currently handled and how is it best handled?

Justice McColl—Again, this would be my personal view. As I have said, we are considering this issue on Saturday and we will let the committee know the outcome, if appropriate. In New South Wales, a judicial commission has been established for some two decades or so. It was originally the subject of opposition by then members of the judiciary. It has worked very well in practice.

The system there, in short, is that there is a preliminary consideration of complaints. There is a categorisation of complaints into conduct which might require an address to both houses of parliament to remove a judicial officer on the traditional basis. Then there is a category of complaints of a lesser character—I do not know if they call them minor complaints—which do not fit that heading. The judicial commission culls those which are seen as frivolous and vexatious. The complaints which remain after that process are the subject, or can be the subject, of a hearing and, if necessary—and, to date, it has only been the case in one instance, that of Justice Bruce—a referral to both houses of parliament. That fits in with the traditional model. That fits in with the way it provides a model for dealing with complaints which might warrant a judge's removal. There is a system of that nature in place in Queensland, Victoria and the Australian Capital Territory. Each of those states and the territory has established a system where, if there is a complaint which would warrant removal, there is a procedure involving a tribunal or some sort of appointed body to consider it.

The issue of minor complaints, with which you were particularly concerned, is obviously one which needs to be seriously addressed. Regarding the way it is addressed in the Judicial Commission of New South Wales, at least, is, if the complaint is made good, it is—this is my understanding—referred back to the head of the jurisdiction who can take steps to counsel the particular judge concerned, and I assume the complainant is advised of the outcome. I am not familiar with the detail of how such complaints are dealt with in other states where there is no statutory model for dealing with them, but anecdotally I would be sure that complaints of that nature would be considered by the head of the jurisdiction, who may take steps in relation to the conduct of the judge if thought appropriate.

CHAIR—We are hearing from the Judicial Commission of New South Wales this afternoon. Just for your interest, we had an informal meeting with them yesterday and a tour of their facility, which was most informative. Could you describe the current arrangements in the federal jurisdictions for which this inquiry is directly relevant and then give any views as to the preferred or possible options that we would have to consider as a committee.

Justice McColl—The Federal Court has attached to its submission a copy of its current complaints procedure and that is the extent of my familiarity with that. I am not a federal judge, and that would be the only understanding I have about that. I think the Family Court and the Federal Magistrates Court have briefly touched on that issue in their submission as well. I think, at this stage, I would prefer not to express a view about any particular model because that is a matter being considered on Saturday. I think it would be better if the committee were informed of—

CHAIR—What exactly are you considering? Are you looking at a complaints-handling mechanism on Saturday?

Justice McColl—Yes, we are looking at whether a complaints-handling mechanism should be adopted, whether at a national or each state and territory level and which would be the preferred model.

CHAIR—Whether it is a New South Wales Judicial Commission model or some other similar—

Justice McColl—Or an intermediate model like those adopted in Queensland, Victoria and the Australian Capital Territory to which I have referred. So it is slightly unfortunate timing that we are here two days before that.

CHAIR—All right. In terms of your understanding of the federal jurisdiction, you do not have any other views other than what you are aware of in the submission from the Federal Court?

Justice McColl—That is correct.

CHAIR—You do not have an understanding of the Federal Magistrates Court or the High Court—

Justice McColl—I have no understanding of the High Court, there is no submission from them but again my understanding—

CHAIR—I just though you might be aware, from your relationships and understanding, of the system to deal with complaints or issues regarding ability, capability or behaviour.

Justice McColl—We know from what happened when Justice Murphy was in difficulty many years ago that there was a great controversy about how, if at all, his conduct could be investigated. There is no certainty about how a matter like that could be dealt with in the federal sphere.

CHAIR—All right.

Senator HEFFERNAN—Is it fair to say that nothing has changed since that time?

Justice McColl—Nothing has changed. There is no legislation as far as I am aware, Senator.

CHAIR—You have talked about the judicial exchange system. I must say I have not read Justice French's paper 'Judicial exchange—debalkanising the courts', so I am looking forward to reading it. Is this a system where there is an exchange of judge from court to court?

Justice McColl—Yes. It has already been done on an informal basis in some cases. For example, when Justice Owen of the Western Australian court was in New South Wales conducting the HIH royal commission, I think the legislation of the Supreme Court of Western Australia was amended to allow interstate judges to, in effect, fill the gap caused by his absence and various judges from the New South Wales Court of Appeal sat there. Some judges sat there at a trial level. So it is designed to facilitate judges being able to move from one jurisdiction to the other to sit to fill short-term vacancies or just in the interests of judicial education. In New South Wales prior to 1998 we had a judge of the Supreme Court of the Northern Territory sit on the Court of Appeal and judges from the Court of Appeal of New South Wales sat on the Northern Territory court. It would be a form of acting judge except you would have an existing judge as opposed to, for example, a retired judge moving around the country and hopefully, again subject to constitutional issues, being able to sit on the Federal Court. There is not a problem with a Federal Court judge sitting on a state court but, because of the Constitution, there would be issues about whether a state judge could sit on the Federal Court without relevant amendments to legislation. It is designed to, as I say, facilitate the workflow in various states and federally if possible, and to improve judicial education and assist in the sense of a national judiciary.

CHAIR—So you have not seen any legislative or regulatory impediments or impediments with respect to terms and conditions that apply to judges in one court who then transfer to another?

Justice McColl—The model protocol which I have tendered proposes that the judge's home state conditions would govern while they were in the other state. It is not proposed that these exchanges would be long term. They may not last more than a couple of weeks in various cases. Subject to the state visited picking up expenses such as accommodation and the like, their remuneration should not change and it would not change the fact that they were still a serving judge of the court to which they had been appointed.

CHAIR—All right. Thank you very much for that.

Senator HEFFERNAN—Thank you very much for your submission. In terms of the Victorian model of appointing—what do you call—

Justice McColl—A pool.

Senator FEENEY—Acting judges.

Senator HEFFERNAN—I agree with the Victorian position, I do not think they should if they are going to go back to law or be a judge, but could that lead to shopping for judges?

Justice McColl—In what sense?

Senator HEFFERNAN—Wanting a particular judge to hear a particular case?

Justice McColl—No, because there is no suggestion, as I understand the Victorian legislation, of appointing an acting judge to hear a particular case. The concern of the Judicial Conference at the time was the length of the appointment and the fact that, when not acting—assuming the people appointed were members of the profession—they would go back into the profession. This was a problem which affected the perception of acting judges in New South Wales a couple of decades ago when they were members of the profession. Even some members of the profession who were selected on that basis were concerned about the appearance of impartiality to the extent that they themselves might aspire ultimately to judicial appointment. So that was the basis of the concern in relation to Victoria: because of the contrast between the 'pool of judges' approach which the Attorney-General was proposing and the fact that—when you get a chance to read Justice Sackville's letter, you will see that—in other states and territories acting judges tend only to be appointed in extremis, when there is pressure on the courts to clear backlogs and the like.

Senator HEFFERNAN—Okay, so what is your view?

Justice McColl—There is a role for acting judges. But, as in our present situation in the Supreme Court, retired judges come back to the court and assist at those times when there is a shortage of other judges or when there is great pressure of work. It can be very useful in those circumstances.

Senator HEFFERNAN—Do resolutions come out of the Judicial Conference?

Justice McColl—Yes.

Senator HEFFERNAN—What would be the view of the Judicial Conference upon the arrest of a judge? Should that judge stand aside? Recently, in New South Wales, there was a judge who was arrested.

Justice McColl—I am not aware of that. It would depend on the circumstances.

Senator HEFFERNAN—You are not aware?

Justice McColl—It was a former judge who was in trouble, not a practising or acting judge.

Senator HEFFERNAN—No, this guy was in New South Wales and he was not acting.

Justice McColl—I am not aware of that.

Senator HEFFERNAN—I would not be prepared, I do not think, to put it on the record. So what would your view be? This particular judge was in a series of police intelligence reports. He has recently retired from the bench in New South Wales and he was arrested. In fact—

Senator FEENEY—A retired judge?

Senator HEFFERNAN—He is now retired.

CHAIR—Senator, can I just draw your attention to not dealing with hypothetical matters—

Senator HEFFERNAN—I want to ask the question in a hypothetical sense.

CHAIR—or matters that might be highly sensitive? I would counsel you to consider your choice of words. Please bear that in mind when you are putting questions to the judge.

Senator HEFFERNAN—I will take that counsel. If there were a circumstance—and there is—of a judge being arrested, would it be reasonable to expect that judge to stand down from the bench while the matter was determined?

Justice McColl—I think it would depend on the circumstances. I could only offer a personal opinion and I would prefer not to do it unless I knew the facts.

Senator HEFFERNAN—Would it be of a concern to the Judicial Conference of Australia if it were known that a particular person who happened to be on a bench somewhere was under police surveillance for possible criminal activity?

Justice McColl—I think it would be a matter of concern to the community generally.

Senator HEFFERNAN—Thank you. That is all I wanted you to say. And the Judicial Conference?

Justice McColl—We are part of the community.

Senator HEFFERNAN—So would you agree that if there were a judge who was under surveillance for possible criminal activity and if it were not known to the judicial organisation, because it is a police matter, that would raise the possibility of entrapment?

Justice McColl—I do not know. I think this is at the level of such generality that I find it impossible to comment.

Senator HEFFERNAN—Because of the sensitivity, I think I will leave it.

Senator BRANDIS—Justice McColl, I am sorry; I was a little late in arriving. You may have already touched on this, so please indulge me. I wanted to go back to the issue of the mode of selection of judges and the method adopted by the Commonwealth Attorney-General of a panel that would chose names to put before the Attorney-General. Without commenting on whether that is a good or a bad system, I was wondering what your view was of the exclusion from that system of appointments to the High Court.

Justice McColl—That was, in fact, the first question Senator Barnett asked me.

Senator BRANDIS—I am sorry; I missed it.

Justice McColl—That is okay, because I can probably capture what I said again. In essence, because the membership of the High Court is so small and the pool of capable candidates correspondingly small and that those persons will not expect to be, in effect, self-identifying, one would not think it necessary. This was a personal view because, as I have said, the Judicial Conference does not have a formal attitude to it or a formal position on it, but I said that one would not think it was necessary to employ that system for appointments to the High Court.

Senator BRANDIS—Now, pausing there, does the Judicial Conference not have an attitude to the issue of the exclusion of consideration of appointees to the High Court by a panel, or does it not have an attitude to the panel system for the appointment of other federal judges?

Justice McColl—It does not have a formal position on either. Senator, did you receive a copy of my opening statement?

Senator BRANDIS—I have not read through it yet, no.

Justice McColl—Would you like a copy of it?

Senator BRANDIS—I think the secretariat has just put a copy before me. Justice McColl, whenever a High Court judge is appointed, there are a range of candidates under consideration. We know that from anecdotal evidence; I know it from personal experience in government. I know I am just debating a personal view with you now, but perhaps it might be a little useful to draw this out. I am struggling to see what the logical difference is between making a selection to a judicial vacancy in one court, the High Court, where there are a range of potential suitable candidates from whom to chose, and making an appointment to a vacancy on another court—for argument's sake, the Federal Court of Australia, where, presumably, also, there are a range of suitable candidates from whom to chose. Is it the constitutional uniqueness of the High Court? Is it the potentially larger size of the pool of arguably suitable appointees to the Federal Court or a court below the High Court in the judicial hierarchy? Is it a mixture of those considerations or other considerations?

Justice McColl—I think you are proceeding on the premise that I think the system which is now being used for advertising for the Federal Court is necessary. I did not say that; I said, 'It is working well.' I did not say it was necessary.

Senator BRANDIS—So you are not necessarily supporting it?

Justice McColl—I am saying that it is working well, but I am not saying that it is essential.

Senator BRANDIS—Well, what is your view? If you want to refrain from expressing your view, that is perfectly appropriate, but do you personally, or does the Judicial Conference, support or not support the current system for federal judicial appointments to courts other than the High Court?

Justice McColl—As I have said, the Judicial Conference does not have a formal position on methods of appointment. Having said that, the Judicial Conference is aware that the system of advertising which has been implemented appears to be working well. My personal view is that none of the appointments to the Federal Court prior to the advertising system would have been very much different from those who have been appointed under the new system.

Senator BRANDIS—Okay. I think that is clear enough. Justice McColl, you mentioned a national judiciary. Does the Judicial Conference have a view on the desirability of the consequences for the Australian judiciary, at both Commonwealth and state level, of the Wakim decision? Other than accepting that it settles the law, do you regard the High Court's decision as regrettable, or are you not comfortable to say?

Justice McColl—You would not be surprised to know that the Judicial Conference has not sat down and formed a particular view on that. It was a decision which led, to a certain extent, to the dismantling of the system of cross-vesting cases. Again, personally—

Senator BRANDIS—It would just seem to me, if I can prompt you with a view of my own, that the cross-vesting scheme worked very well. It had problems, but it was the most practically useful development towards—to use your phrase—a 'national judiciary' that, in a federal system, we were likely to find. Without passing on the legal merits of the decision of the High Court, I thought it was a shame, in a functional sense, that the cross-vesting scheme was largely struck down. Does the Judicial Conference have an opinion about whether it was a shame that cross-vesting was struck down? Has the Judicial Conference turned its mind collectively to ways in which, consistent with what the High Court decided in Wakim, one can move into a closer integration of the national judiciary between Commonwealth and state benches?

Justice McColl—We have not formally considered that. To the extent that the judicial exchange system might move, it would move in terms of exchanging judges but not cases. The real, practical effect of the cross-vesting system was to facilitate the ease of transfer of cases both horizontally and vertically. Unfortunately, there were constitutional obstacles identified in Wakim which prevented that, at least insofar as cross-vesting matters from state to federal courts was concerned. At least vis-a-vis the Corporations Law, that was substantially resolved with the subsequent legislation.

Senator BRANDIS—If that is as far as you want to go in commenting on that, that is fine.

CHAIR—I want to ask a follow-up question. This model protocol on the short-term judicial exchange, where is that at? What is its status?

Justice McColl—Its status, as I have said in the paper, is that it has been approved by this conference and by the Council of Chief Justices. It is now before the Standing Committee of

Attorneys-General, presumably to work out if it will be adopted Australia wide. You will see on page 4 of my opening statement that it is still a current matter before the standing committee.

CHAIR—Have they considered it at this stage?

Justice McColl—As I understand it, and as you see, it has been distributed and some but not all states and territories have approved it and it would—

CHAIR—Do you know which states and territories have approved it?

Justice McColl—No.

CHAIR—How do you know that some have?

Justice McColl—I think the Australian Capital Territory has and one other state, apparently.

CHAIR—Who has advised you of that?

Justice McColl—The secretary of the standing committee advised Mr Roper yesterday to that effect.

CHAIR—Is it on their agenda? It says 'May 2009'. It is now June. Do you know what has happened since that meeting?

Justice McColl—No, that is the extent of it. I assume it would be on their agenda because, in part, the idea of a national judiciary is on the SCAG agenda and it would be consistent with the development of that concept.

CHAIR—That is what I am trying to find out because a key part of our terms of reference is this interlinking, or the interface, between the federal and state judiciary and whether we are heading to a national judiciary or not. Can you provide further and better particulars on the likelihood of that occurring?

Justice McColl—It is really in the hands of the state and Commonwealth attorneys-general.

CHAIR—Let me put it this way: what are the major impediments to it occurring and what is your view, if you can share one, as to the likelihood of it occurring?

Justice McColl—Constitutionally again, there are probably difficulties with the federal system because, as I say in the opening statement, section 72 of the Constitution would appear to prevent the appointment of acting judges and, consistent with that, one may well see a difficulty in a judge of a state court sitting in the Federal Court. Referring back to what Senator Brandis referred to, consistent with that, it may be possible for federal judges to sit on state courts but, as I say, not vice versa and that would have to be addressed. But legislatively the New South Wales Supreme Court Act was amended so that it permits judges from other jurisdictions to sit in New South Wales already and, as I have already mentioned, that has occurred in the past. It does then require legislation in each state and territory, assuming it was adopted or approved by SCAG,

which took part in the arrangement, to enable judges from other jurisdictions to sit in other states and obviously follow up on administrative arrangements.

CHAIR—Do you think they are more interested in an exchange from state to state or state to territory rather than a vertical move to the federal and state?

Justice McColl—Who are 'they'?

CHAIR—The state attorneys-general.

Justice McColl—I do not know. I have not discussed it with the state attorneys-general. The model we put forward proposed both but, subject to constitutional issues, consistent with the idea of a national judiciary, one would expect that they would be interested in both forms of movement, horizontal and vertical. Whether that can be achieved constitutionally might be the difficulty.

CHAIR—Are you more interested in a horizontal movement?

Justice McColl—We are interested in the whole thing. We are interested in both, because for the reasons expressed in Justice French's paper which we have approved and which have been reflected in the model protocol it is desirable that people have as much opportunity to sit and to bring their ideas to those courts and to have as much of a cross-fertilization of judicial experience as possible.

CHAIR—I noticed in this model protocol you talked about the fostering and acceptance that all Australian judges, whether they be state, territory or federal, are part of a national Australian judiciary to make judicial appointment to any of Australia's courts more attractive to qualified candidates for appointment. I have not read this before, but it seems that you are looking at both horizontal and vertical. Can you describe for us the benefits of both the horizontal and vertical integration and the benefits that could flow to the national judiciary and hence the public.

Justice McColl—Just dealing with the substantive legal position, one's experience is always enhanced by the infusion of ideas from other jurisdictions, and so just the fact of sitting on various different courts would bring a benefit to the public in a form of indirect legal education. For the courts, the obvious advantage to which I referred earlier is the immediate filling of holes when there is a shortage of judges and the like and, if there was an objective of ultimately having a national judiciary that would work towards that object as well, providing a testing ground for that ultimate concept.

CHAIR—We will have a look at that. I suppose it is related to the rationalisation of our court system. You are obviously familiar with the Semple review and the government's response to it. Do you have a view? Does the Judicial Conference have a view as to the merit or otherwise of that decision?

Justice McColl—No.

CHAIR—So you do not have a formal view? Would you like to share a personal response?

Justice McColl—I do not have a personal view either.

CHAIR—You can see that there are a number of issues there that need to be dealt with and considered.

Senator BRANDIS—Do you think that this judicial exchange system works well?

Justice McColl—It has not been implemented yet. There has been some judicial exchange to date on a very ad hoc basis. In fact, one of the judges of your court sat on our court of appeal.

Senator BRANDIS—That was Justice McPherson in the Hayden litigation.

Justice McColl—That is right. So we had it there and we had it when Justice Owens was in New South Wales on a royal commission.

CHAIR—Do we have other examples apart from the two to which you are referring?

Justice McColl—I think there are some in Justice French's paper. I cannot bring them all to mind.

CHAIR—But there are several.

Justice McColl—The ones I mentioned earlier where judges in New South Wales and the Northern Territory sat on each other's courts.

Senator HEFFERNAN—There have been occasions where one or two judges have come in from another jurisdiction to deal with some sort of conflict, have there not?

Justice McColl—That was the Justice Hayden matter that Senator Brandis has just referred to.

CHAIR—But you are looking at extending it not just to deal with issues of potential conflict of interest but more broadly across the spectrum?

Justice McColl—That is right.

Senator BRANDIS—Since we are running a tiny bit ahead of time, I might raise another related matter. It has been remarked on by a number of judges in the past, including, as I recall, Sir Harry Gibbs, that increasingly governments are using judges not only for royal commissions and commissions of inquiry but as appointees to all manner of statutory offices. This is a great drain on the judiciary, so it is said. It is also said, a little more adventurously by others, that perhaps it brings judges dangerously close to the executive arm of government when they are the heads of agencies. Does the Judicial Conference have a view on the desirability or otherwise of governments seeing the judicial arm of government as, in effect, a resource from which to populate commissions of inquiry and agencies within the executive government? There may be different considerations for each of those two categories. Do you have a view on that?

Justice McColl—The short point is that we do not have a formal position on it. It has not been a subject of consideration for as long as I have been a member of the Judicial Conference. There are some states where that just does not happen at all. I am not sure when Sir Harry actually made those remarks.

Senator BRANDIS—It was some years ago, obviously.

Justice McColl—I am not sure about the idea of judges being appointed to head agencies because I cannot bring to mind at the moment, at least in New South Wales, an occasion recently where that has happened.

Senator BRANDIS—I will give you a few examples. Justice Einfeld was appointed the head of what was then called the Human Rights and Equal Opportunity Commission while he had a current commission as a judge of the Federal Court. I think Justice Woodward was the head of ASIO when he still had a current commission as a judge of, I think, the Federal Court—that is a long time ago now. Another judge, whose name momentarily escapes me, was the head of the Australian Electoral Commission in the late 1970s.

Justice McColl—Your knowledge is better than mine.

Senator BRANDIS—I have looked at this. But take the Einfeld case, for example—not because of the notoriety, or now infamy, of Mr Einfeld, but because it is the clearest case I can think of. He held a current commission as a judge of the Federal Court and he was appointed by, I think, the Hawke government to be the head of the Human Rights and Equal Opportunity Commission. Under its act, the president of the commission had a statutory obligation to promote human rights issues in Australia and raise public awareness of human rights issues in Australia—I do not criticise that. But Justice Einfeld, in fulfilling that statutory obligation as he saw it, gave a very large number of quite politically contentious speeches about human rights in which I think he descended into the political arena. There is the narrow point and the broad point. The narrow point is: given the limited resources of the judiciary anyway, and the demands on judicial time, is it not desirable that governments avoid harvesting people from the judicial arm of government to run agencies within the executive arm of government? The broader point is: is there not a risk, when they do, that there could be separation of powers issues there depending on the nature of the agency?

Justice McColl—As to the first point, one would hope that an Attorney-General mindful of wanting to appoint a serving judge to some other position would not take away resources from a court which would impede the court carrying out its functions properly. As to the second, it would depend upon the nature of the position to which the person was appointed.

Presumably, when Justice Einfeld—to use your example—was sitting as the Human Rights Commissioner, even though he retained his position as a Federal Court judge he was not sitting as a Federal Court judge; he was only acting as a Human Right Commissioner and his duties were those of the Human Rights Commissioner. Whether or not that raises separation of power issues would be a matter for the legislation but prima facie it would not appear to when he was not acting as a judge in that position.

Senator BRANDIS—I can suggest to you how it could. One of the principle doctrinal rationales for the separation of powers is the perception that judges be neutral and impartial. If a judge steps from that neutral and impartial role into a role which involves a degree of political contention for a period of time, while still holding a commission as a judge, and then steps back after that onto the bench then isn't this vaguely like your criticism of acting judges—that you cannot really step in and out of the judicial character without placing your reputation for impartiality, at least ex poste the politically contentious role you take up, in some jeopardy?

Justice McColl—Now you have added a new factor, which is what happens when such a person returns to the bench—

Senator BRANDIS—That is the main point.

Justice McColl—and then one has to take into consideration obviously issues of impartiality and how the reasonable observer would assess the position. That is an issue, clearly.

CHAIR—I just wanted to follow up on a couple of things on these New South Wales amendments with which you would be familiar. The New South Wales Judicial Officers Act 1986, which I understand was amended in 2006, introduced a means by which health and capacity matters may be investigated without having to wait until litigants brought forward their formal complaints against a judge's behaviour. Frankly, this is probably the point that Senator Heffernan indicated earlier. How have they worked in New South Wales? Have they been useful and of merit and do you support such legislation? I do have any detail of it.

Justice McColl—I do not have it in front of me but I think that amendment was made after the unfortunate incident of a judge with sleep apnoea. You would understand that the proceedings for the judicial commission are confidential. You are hearing from Mr Schmatt later today, I think, and he would be better able than I to answer that question. So I am not aware to what extent that division has had to be used yet but it is clearly of assistance in terms of people who are either physically or mentally—temporarily or possibly even permanently—incapacitated from discharging their duties and who, for example, cannot acknowledge the issue themselves.

CHAIR—But who undertakes the investigation in that regard? I am not familiar with those amendments, I will certainly look into them further and we can ask Mr Schmatt about them. But can you alert or—

Justice McColl—It would all be within the judicial commission. That is—

CHAIR—Would it?

Justice McColl—I assume so. It is in the Judicial Officers Act. I am aware generally that those amendments happened. I have never had to consider them either personally or in relation to a colleague, so I really have not considered it.

CHAIR—Sure. These are very important issues—if there is a matter of mental capacity or some sort of incapacity then perhaps it could be dealt with or nipped in the bud, so that you do not get to a position, for example, where a formal complaint is then made by a litigant.

Justice McColl—There is no doubt that they are very useful provisions.

CHAIR—We will get to the bottom of those later. The other question I had is on the compulsory retirement age, which is obviously set out in the Constitution, as per referendum many years ago, at 70 years. Since then, of course, life expectancy has increased markedly since 1977. There is no doubt about that. What is the view of the conference or your view with respect to an appropriate retirement age, and is 70 it?

Justice McColl—In New South Wales it is 72, as you may be aware, and I am not really sure what it is in other states. In New South Wales we have recently passed legislation which would enable an acting judge—so a retired judge—who served through to the compulsory retirement age of 72 to continue as an acting judge until 77.

CHAIR—Is that right? So, they retired at 72 and then was appointed an acting judge?

Justice McColl—No, I said 'able to be'.

CHAIR—Able to be?

Justice McColl—Yes. The facility is there if a judge has acted through to age 72 to continue to use that judge as an acting judge up to the age of 77.

CHAIR—And has that occurred?

Justice McColl—Yes.

CHAIR—Is that common or not uncommon?

Justice McColl—There is one judge at our court who is over 75 and who is continuing to perform duties as an acting judge.

CHAIR—Acting full time or part time?

Justice McColl—Part time.

CHAIR—A substantial effort?

Justice McColl—A substantial contributor to the court's work.

CHAIR—Is this happening in other states?

Justice McColl—Not as far as I am aware.

CHAIR—How long has it been happening in New South Wales?

Justice McColl—Just since this amendment came through at the end of last year.

CHAIR—Okay, so that was only an amendment at the end of last year?

Justice McColl—Yes. I can supply the secretariat with the details of that amendment in the next couple of days, if that would assist you.

CHAIR—All right—thanks for that. I am not across the Victorian situation with Robert Hulls back in 2004—what happened in that situation?

Justice McColl—The legislation went through in substantially the terms proposed, and one acting judge was appointed in the last couple of years—a Victorian magistrate was appointed to the County Court of Victoria to act for a position of five years. There was some controversy in Victoria about it.

CHAIR—That legislation was passed and those acting judges have been appointed?

Justice McColl—That is the only of which I am aware. As far as I am aware there has been only one appointment to date.

CHAIR—Is that term now concluded?

Justice McColl—No, the appointment was only made in the last couple of years.

CHAIR—Okay, for a five-year term?

Justice McColl—Yes.

CHAIR—We will follow that up in Victoria. Again, thank you very much for your evidence today. I would like to put on notice that we are very interested in your views on the judicial complaints handling system and whatever iteration comes out of your Saturday meeting.

Justice McColl—Certainly.

CHAIR—If you could advise, on notice, the secretariat as to the outcome—even if it is a nil outcome—we would be interested in that. We are interested in any views you have on that system.

Justice McColl—Certainly—we will make sure that you are informed.

Proceedings suspended from 10.02 am to 10.47 am

LYNCH, Dr Andrew, Director, Gilbert and Tobin Centre of Public Law, Faculty of Law, University of New South Wales

WILLIAMS, Professor George, Foundation Director, Gilbert and Tobin Centre of Public Law, Faculty of Law, University of New South Wales

CHAIR—Welcome. Do you wish to make any amendments or alterations to your submission?

Dr Lynch—No.

CHAIR—I now invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to ask questions.

Dr Lynch—We do not have much to say by way of an opening statement, other than to welcome the inquiry. Our submission was written in response to the single inquiry, as it was originally presented and which has since been broken into two. So it was never our intention to address all of the issues, but we have addressed some of them. We would also acknowledge that, even though there have been earlier studies looking at these kinds of questions—most notably by the Australian Law Reform Commission—there have been developments at the state level and developments overseas in comparable jurisdictions which we think means that these issues are still ongoing and interesting ones to explore. We think the inquiry is fulfilling a very valuable function in doing so.

Prof. Williams—I also welcome the inquiry on the basis that, when you look at the procedures being examined by this inquiry, when it comes to appointment, termination, complaints and the like, one striking characteristic of the federal judicial system is how it is very static in these areas; it has not kept up to date with developments in the states or overseas. In fact, many of the procedures are very much out of date and were drafted back in 1901, when more modern approaches to these matters had not been adopted. So I think there is a very important opportunity here to look at these matters, to look at best practice elsewhere and actually take the chance to consider updating processes to better suit developments in Australia since that time.

CHAIR—Thanks very much, Professor Williams. Are there any further opening statements before we go to questions? There being none, I will kick off with some questions. Firstly, thank you for your views. I am interested to know your thoughts about the appointment process, and the merit of establishing panels. Can you advise the committee on your views about that and, secondly, the fact that, under the current, reformed arrangements, the process for appointing High Court judges does not include the establishment of a panel and that process. So I was wondering if you would like to reflect on the current arrangements and whether you had any suggestions or recommendations to improve those arrangements.

Dr Lynch—We have addressed both of those issues in the submission. I will take the second one first because I think that is easier to deal with succinctly: it strikes us as odd to exclude the

High Court from the rest of the federal judiciary in reforms to appointment processes. If the process, which was in existence previously, needs to be enhanced through advertising for positions and the appointment of panels to advise the executive, then it seems strange to exclude those in relation to the highest court. It is obvious, though, when we talk about the High Court that there is a lot more scrutiny so far as who is going to be put upon it. There are only seven justices as opposed to the much larger number of Federal Court judges who are going to be appointed. We appreciate that there may well need to be modifications made to a process when you are talking about the highest court. But, at the same time, to simply say, 'That's not going to be reformed but here's what we are introducing for the Federal Court of Australia,' strikes us as rather strange.

On the issue of panels, we welcome the recent reforms and we think they are an improvement. We note the submission from, I think, the Federal Court registrar to this inquiry which says that they seem to have been working well. We think that there is a case to put those on a slightly more established footing through the creation of a judicial appointments commission, but not really working in any particularly different way. As we have made very clear, we believe that the final decision for appointments should be that of the government, and it should be free to reject the advice that it receives from any select panel or appointments commission.

CHAIR—Can you expand on that? You referred to the Judicial Appointments Commission in the UK, and Canada and South Africa. Can you expand on how it could be improved further? You referred to this being an evolutionary process where you would move from the panel appointment process and having advisory panels established by the Attorney-General. So how would it change under a judicial appointments commission that was independent of the Attorney-General?

Dr Lynch—One way in which I think the establishment of a commission would be an improvement upon the current system is that it would make it clear that this is going to be the way in which judicial appointments are made from this point forward, as opposed to it being a particular approach of the present government during its term. It would also, I think, provide a place at which this information can be readily accessed. I had great difficulty in preparing this submission in trying to establish what the criteria are which are being examined by the selection panels because there was not actually a position being advertised at the time at which we were writing this, early in March.

CHAIR—And that is not on the website or available permanently?

Dr Lynch—It was not on the Attorney-General's website. Someone on the department's staff did forward me the criteria for the most recent round that they had had, but it would seem to me to be advantageous to have a stand-alone commission where that information is recorded and is always available. George, did you have anything to add?

Prof. Williams—Yes, I could add some comments. My starting point is to recognise the very high level of judicial appointments made by all sides of politics in Australia and I think we do need to keep that firmly in mind. The system has produced some of the best judges not only from the Australian legal profession but also by international standards. I think we have got to recognise the quality of our judiciary is extremely high. But I agree with Andrew. And, as our

submission states, it is time to consider reform, because other systems that have also achieved high levels of judicial appointments, such as the UK, have recognised the need for reform.

I would adopt three principles for looking at how to move forward from here. The first is that any decision as to appointing judges should remain solely with the executive, as to the final decision. It is appropriate under our system of government that the executive makes those decisions and that the government of the day bears final responsibility for the selection of judges. That said, I think the second principle should be that we need to do much more to ensure that the process is more transparent. As Andrew has adverted to, it is very difficult even for academics such as us to know what the criteria are that are being applied. In the past, attorneys of both sides of politics have used the word 'merit'—which is useful only in a very broad rhetorical sense. It really does not give us a strong indication of how the process works or the criteria that are applied. In working on the *Oxford Companion to the High Court*, for example, we certainly found a number of cases on both sides of politics where matters such as friendships, political considerations and other matters that should not have been taken into account did play a role. So transparency needs to be improved. The third principle is we need to do more to improve community confidence in the process, particularly given that we now live in an age where there are often attacks on judges—often, I think, justified. They should be part of a robust debate, but nonetheless we are in a different world to where we were some decades ago, when it comes to attacks on judges. I think we do need to do more to improve community confidence that the process is a fair and appropriate one. Those three factors should guide how to move forward.

With that in mind, to answer the question of how we can improve from where are now—particularly looking at overseas models—the first thing is to actually have a clear process set down and agree on how the process should work in a way that people understand. Governments can do more to make those processes transparent and should extend them to the High Court. Another thing to do would be to build laypeople into the process to a far greater degree than currently occurs under the Attorney's new procedures. I am very firmly of the view that non-lawyers should play a leading role in the process of appointment of judges. I think it is too easy for lawyers and judges, generally, to get a bit caught up in a system that is meant to serve the community. It is not meant to be self-serving. An important way of avoiding that is to involve the community directly in the judicial appointments process. One of the strong arguments, I believe, for a judicial appointments commission is to provide a formalised way to ensure that the community is involved. I would even consider a majority on that body, perhaps, should be members of the community to emphasise the fact of who is being served.

CHAIR—Thank you for that. I want to drill down to the specifics. I have got your principles and I appreciate all that. Who would be the members of the commission? You said a majority perhaps of non-lawyers. Who would appoint? Would you like to just flesh that out a little bit for us. I assume you agree that the criteria should be publicly available and open to everybody to see.

Prof. Williams—Yes, I do. I think the criteria are not difficult given how they have been developed overseas. The only criterion that would be controversial would be whether a criterion of diversity should be there. I think it should be because, when you make judicial appointments, it is not simply a matter of appointing very good people but also a matter of how they fit within the larger body of people who are appointed. That means that you need a selection of men,

women and other people on the court—obviously on the basis that they have got the appropriate skills. Subject of diversity, I suspect the criteria are fairly straightforward.

A key issue that you have identified is how you actually appoint the body. The danger is that you simply appoint people who will do what you want and in the end you have a cipher for what you want to do anyway. I think one way to do that is that part of the body should be composed of people through an ex officio capacity—such as, selected from former chief justices of the High Court or justices of the Federal Court and the like. They might amount to around a quarter to a third of the body and would understand the issues that need to be taken into account. There also should be people more broadly from the legal profession—the users of the system, from a legal point of view. You might look at representatives of law societies, bar associations and the like—critically, including a group across the states to ensure it is not just dominated at the federal level. Finally, I think you would look at members of the community as a large group. I would also personally like to see the federal opposition and perhaps even minor parties have the capacity to make one or more appointments to that body. It would emphasise the fact that, even though the final decision is with the executive of the day, it is appropriate that other parties and people have a role to ensure that there is that confidence in the final people selected and that the short list that goes to the Attorney is a fair and representative one.

Dr Lynch—I just want to clarify because we have not addressed this issue in our written submission. I largely agree with Professor Williams's list. I do not share the view that there should be a hefty community representation on such a body and can also see that there might well be difficulties in the principle that the final decision is that of the executives of the day with representation also from other parties on the panel. That is probably an area on which we have internal disagreements.

Senator HEFFERNAN—Professor, your system of some sort of political process for appointments is a bit like popularly elected mayors versus mayors elected by the elected council. You can be good at cocktail parties—hail-fellow-well-met et cetera—and become a popular mayor but not be able to work with your council and deliver nothing. If you go to the extreme of having an abundance of people outside the system making the appointments, isn't that fraught with danger and doesn't it send a signal that we have lost confidence in the judiciary?

Prof. Williams—No, I do not think that it does. It is a fair question, but the international experience is that this process does work. The UK, where there are a number of lay people on these bodies and there is a fair process of selecting those people, is a good example. Also, when you make the point about people being outside the system, I see the community as being absolutely central to the system of justice. I think there is a greater danger that it becomes too insular and confined to judges, lawyers and the like. I think that is dangerous.

Senator HEFFERNAN—I accept that it can become club-like.

Prof. Williams—It can. I think that is a greater danger here. You do need a fair process to make sure that strong community representatives are there. There is room for debate as to how many, but my strong view is that they do need to be represented and that a weakness in the current attorney system is that there is not enough say for the community, who are the users of the system. Again, that emphasises the way that the system ought to work as a community based one.

Senator BRANDIS—Professor Williams, if you were not appointing a High Court judge but were, for instance, appointing a head of neurosurgery at a major metropolitan hospital, would you follow the same process of having non-expert people participate in the selection of that appointee?

Prof. Williams—No, in that case, I would not. I think the fundamental difference is that judicial officers have an entirely different role, a role that fits within the broader scheme of government as part of the separation of powers and for which an oath is taken to serve the community. They also have a key role in interpreting and, occasionally, in making law, as part of the common law. The experience overseas is helpful here because lay members of a body of this kind bring a critically important perspective on the role of law and on who it ultimately needs to serve. I recognise that there is room for debate, but I think if you appoint strong candidates from the community they will play a valuable role in helping to select the best judges.

Senator BRANDIS—You see, as you might expect, I have a very traditional view of the role of judges. I think the role of judges is impartially to adjudicate disputes and to do so bringing to bear upon that task the very highest degree of professional excellence which is available from within the profession. The subtext of what you say, really, is to make the judiciary more of a representative institution than it might currently be thought to be. I am at a loss to see how that aspiration is anything other than a subtle attack on the separation of powers, which, as I understand it, makes it very clear that the judicial arm of government is not a representative institution and should not be.

Prof. Williams—I agree very much with you that it cannot and should not be a representative institution. That is not the function of the court and it would be a very dangerous path to go down. I also agree with what underlines your comment about the need for judges of the highest calibre in terms of their legal skills. But I come at this issue differently in that I think when you look at appointments for the High Court and other federal courts there are a number of people who would be qualified to be appointed. As we note in our submission the current Solicitor-General, Stephen Gageler, I think refers to perhaps 50 people being accountable.

Senator BRANDIS—That is an approximate number but I think that is probably about right. There would certainly be dozens rather than hundreds but not fewer than dozens.

Prof. Williams—My point is, once you have a group of people who are technically of the first order and are appointable, how should a government make decisions between those people? For me that often does come down to things such as their personal qualities as a judge and whether they bring other factors beyond their technical skills that will qualify them to the role. I personally would prefer to have clear criteria and the involvement of the community and others in the selection process rather than what from both sides of politics can be a range of factors which I think are less suited to producing the best and I think also a more diverse judiciary.

Senator BRANDIS—I hear what you say about diversity. I do not regard diversity as an important desideratum and, certainly to the extent to which it is relevant, it is in my view a much inferior criterion to skill and calibre. I do not mean to exclude you from this exchange, Dr Lynch, surely the test of this—and this goes back to something Senator Heffernan said a moment ago—is a pragmatic test whether the community has confidence in the judiciary? Take the High Court for example. In my life I can only remember one appointment to the High Court, that of

Lionel Murphy, attracting significant criticism. There was a little bit of criticism of Ian Callinan at the time as well I remember but not much. But let us take the last four appointments to the High Court. Two were made by a Labor government and two were made by a Liberal government. Each one of those four appointments to the High Court was applauded by both sides of politics and by the profession at large. The reason was that, demonstrably, the people appointed were suitable people for those offices. Do you not think, Professor Williams and Dr Lynch, that, when an attorney-general takes a recommendation to cabinet for an appointment of this public significance, one of the things that acutely weighs on his mind is the importance of making a good appointment? Part of the test of whether it is a good appointment is whether it will command the widespread support that the appointments I have used as examples demonstrably did. In other words, there is within the process as it currently operates a kind of self-correcting mechanism to avoid inappropriate appointments.

Dr Lynch—I would agree with that. I think in the recent rounds of appointments, if we are talking in generational senses, the generation of High Court judges that we have had have all been excellent appointments. But I think we can remember an earlier era. In addition to the Murphy example, there have been other controversial appointments earlier on in the High Court's history.

Senator BRANDIS—Only in the first couple of decades when the founding fathers were moving from active politics onto the High Court.

Dr Lynch—There are those two appointments to the chief justiceship of people who have left straight from federal politics to the High Court often with impeccable credentials, but still for that to occur today, I think, would be a fairly surprising development. It seems to me that, even though recent experience has been very positive, that in itself is not a total response to the issue of whether there is a case to be made for greater transparency in the way in which the government arrives at its decision. Again I would stress that our submission argues very strongly that this is a decision of the executive of the day. It is clearly a responsibility for it to fulfil and with which it is entrusted, which is why I differ from George on the degree of community representation. Effectively a government has been put in place and one of the crucial things that it has to do is to select the judicial arm. I do not see that as necessitating a huge amount of community involvement in a specific process, but I still do think there is a case for designing a clear and transparent process which feeds into the advice that the government receives.

Senator BRANDIS—We can come back to that. But what you are really doing, it seems to me, is proposing a carve-out for one particular category of appointment that governments make—that is, judicial appointments. You do not impose or recommend that the same process be applied to other important appointments, for example to the chiefs of the defence forces; to Australia's ambassadors and high commissioners; to, for argument's sake, the Chief Scientist or the head of the CSIRO; or to the secretaries of Commonwealth government departments. But you say that there is a particular reason why this one category of appointment should be the subject of a quasi-popular process that other important appointments which the Commonwealth makes—the Governor of the Reserve Bank is another example—are not subject to. I am just wondering why the usual tests of the credibility of the candidate, and the desire of the appointing minister or government to be seen to have appointed a suitable, credible and respected candidate to these high offices, does not work just as well for the judiciary as it does for every other important executive appointment.

Prof. Williams—I think that there are a number of differences about judicial appointments, as I have adverted to, which relate to the role. But one of the others, which I have not, is of course the length of tenure. If you appoint someone in their 40s, they may well be on the bench for a quarter of a century without the same possibilities of removal that all of those offices tend to have in one way or another. When you are appointing someone for a term that will go beyond the life of any one government, I think that does raise a different set of questions about the process and, as with other issues before this inquiry, without easy possibilities of termination and the like, I think you do need to bring other issues to bear. I would also note that the Rudd government has brought in a range of different appointment processes for a range of other statutory offices that were not subject to those, including human rights commissions and the like, where they are bringing greater transparency and making changes. I would support those. Generally, I think that, where the executive makes appointments, it should be with the benefit of the best possible advice. That will often include a formalised process of expert advice and community input, even though the final decision—

Senator BRANDIS—I am sorry to interrupt you, Professor Williams, but whoa! You have just slipped from one proposition to a completely different proposition without breaking your stride. You are saying 'the best possible advice' and that that means a formal process like a judicial appointments commission. Why don't you think, for example, that governments appointing judges to the High Court at the moment, albeit taking informal soundings, are getting the best possible advice? The best possible advice does not necessarily mean the formal process that you recommend, does it?

Prof. Williams—No, not necessarily—I agree with you that there are a number of ways of receiving advice. But I do believe that this is where the international research is particularly important—the work of Kate Malleson in the United Kingdom, for example, in demonstrating that a process based upon informal soundings tends to be defective in the way that it operates because it means that the widest possible range of views is not taken into account. It can particularly affect the appointment of women.

Senator BRANDIS—Pausing there, it may very well be that the widest possible range of views is not taken into account. That, I would suggest to you, Professor Williams, is probably a very good thing. The widest possible range of views would include the views of Alan Jones and it would include the views of populist commentators. My point is that we do not want those people treated into the process.

Prof. Williams—I would qualify that by the condition that they have got to be relevant to the process. What I would say is that informal soundings run the risk of leaving out the possibility of hearing the comments of people who are relevant to that process. I think, indeed, our own process has demonstrated that in the past. I think another good change that the current Attorney has brought in is hearing from a range of groups and consulting with those groups that had not been talked to in the past.

I advert to an earlier point about criticisms of appointments. I agree with your comments about those appointments being welcome, but I do note that it was only a couple of years ago that we had no women on the High Court and that it was an issue that was commented on very broadly in the media. Even though we had appointed excellent men, the fact that we had seven men on

the High Court did raise questions about community confidence and the like, particularly given the nature of cases that the High Court was then deciding.

Senator BRANDIS—But what appointment to the High Court in living memory do you say was the appointment of an unsuitable person?

Prof. Williams—I would not suggest any of them, but that is not the point. The point is—

Senator BRANDIS—No, I think that is the point, with respect. You say there is nothing wrong with the system, but with all due respect—and I am not making a pun here—your criticism seems to be an academic one, that one can, a priori, dream up a formalised process which merely gives a more rigid form to what is an already existing albeit informal process. One can do that if thinking, as I said before, a priori about the way in which these things should work, but we are dealing with an existing system that has a very good track record. With respect, it seems to me that this is a solution to a non-existent problem.

Dr Lynch—I think that is why our submission is really so modest, and it is very similar to the others that you have received. We are not proposing anything radically different. We acknowledge the very strong record of appointments that the executive has made. We wish the executive to retain that power and, if anything, rather than copying the Judicial Appointments Commission of the UK, we have said in effect that in our view its approach has imposed too much of a restriction upon government. I think it only actually forwards one name and we have said the selection process should forward three to the government and then they could say, 'We're not interested in any of these three—can we have another?' So to simply say that the outcome of the existing process has not been problematic does not really present a response, I think, to a call for clarifying and making very transparent what that process is.

Senator BRANDIS—Dr Lynch, the problem I have there is that your submission, with all due respect, almost argues against itself. You quote with approval Mr Gageler's opinion that at any given time there might be roughly 50 people in the country who would be suitable appointees to the High Court. I think that is roughly about right. You say on the second page of your submission:

> … it remains desirable that the elected government makes the final decision and is held accountable for its selection by the Parliament.

I agree with that. But then you come up with a recommendation, against that background, saying that there should be a structure in place that restricts the Attorney-General's or the government's discretion to three people. If it is a core objective of this process that, as you say, the elected government makes the final decision and is held accountable for its decision, and if it is a premise, which you seem to adopt, that there might be roughly 50 people who would be appropriate at any given time, then why do you recommend that the Attorney-General's capacity to consider 47 of those 50 people—all but three of those people—should be withdrawn from him?

Dr Lynch—Well, we are not, because we go on to say that the Attorney-General can actually make any appointment that he or she wishes but then explains to the parliament that the decision has been made to take a name that was not one of those forwarded.

Senator BRANDIS—Yes, but that changes the onus. What about the fourth person? What about the person who comes forth in the consideration of the judicial appointments commission? Why should there be, if the Attorney-General goes with that person, almost a reverse onus to show why the fourth person is just as good as the first three when the potential pool is 50?

Dr Lynch—When the potential pool is so large there has to be a selection process of some kind. There is always going to be a short list and I suppose the way in which we conceive it is that the commission assists the Attorney-General from sorting amongst those 50 by saying, 'Here's three that we think are suitable, having consulted widely.' I have looked at the people who are currently being consulted and that is a very extensive process. The process would effectively work in exactly the same way which is to say, 'Here are the three people that we think would be eminently suitable, of those which we have canvassed who may also have other strengths.' The Attorney-General can then say, 'I am not fussed on anyone on this list.'

Senator BRANDIS—Sure. But if then on your own argument—

Dr Lynch—Should they forward the list of the full 50? Should they say, 'All right, we've gone out there and found the magical full 50,' according to what we will call the Stephen Gageler rule. It does not really assist the Attorney-General in making their decision.

Senator BRANDIS—Because, as you say—and I think this is where your submission argues against itself with respect—it ultimately does have to be the Attorney-General's decision. There is just an illogicality it seems to me that if the class of suitable people is, let us say, 50, and the decision has to be the Attorney-General's decision, that one would artificially narrow that class. I would go halfway with you, Dr Lynch, if you had a process whereby unsuitable people were identified or a much larger short list were prepared, perhaps, but to put beyond the capacity of the Attorney-General, without at the very least causing a degree of political embarrassment to himself and professional embarrassment to the ultimate appointee, to go outside a list of three when the class of suitable people, as we agree, is so much larger than that does seem to work against the core idea that this is the Attorney-General's responsibility.

Prof. Williams—Firstly, on the point about let us say there were a class of 50 people, I think one of the greatest advantages of having the process we are talking about is that, even though there is a pool, say, of 50 people, those people often do not come to the attention of the Attorney because the current processes are inadequate to identify the full range of people who should be considered. I think one of the greatest aspects of assistance that can be brought to bear is actually a process that will enable the full range of qualified people to be considered. Otherwise, I do respect the point you are making there limiting the Attorney's discretion and I think you do have a good point there about ensuring that the Attorney has the final say. I suppose we would defend the position we take on the basis that, clearly, it is the Attorney's decision ultimately in any event, but you are right about how these things are managed and the political costs that can come both to the appointee and to the Attorney by selecting outside of the short list. Personally, I would be happy to consider larger short list as you advert to as a way of dealing with that to emphasise that the Attorney has a very unfettered discretion and it is about the committee identifying a range of candidates from which the Attorney chooses without seeking to prevent the Attorney choosing from a wide range. Another option may be for the Attorney to come up with an entirely different name and to send that back to the committee to make sure that person is looked at against the criteria. If it is a good appointee then the likelihood is that that person

would be seen as someone entirely suitable, but again you would have a process to vet that person and ensure that they are someone who should be adequately considered. I respect the force of your point, but I do not think it detracts from the need to improve the process to make sure the full pool is adequately considered.

Senator BRANDIS—I will try to wind up. One rejoinder on that is that it seems to me that for a start, subject only to issues such as age or health, every state chief justice and the Chief Justice of the Federal Court would be prime facie on a short list for appointment to the High Court. That seems to me to be so obvious. Not everybody is as good as everybody else. Not every state chief justice commands the esteem and professional eminence of every other, but those people have reached a threshold of such eminence in the judiciary that it would be most surprising not to presumptively have every state chief justice and the Chief Justice of the Federal Court on your list. You are already at seven before you think of other judges, counsel, constitutional law professors, Professor Williams, or anyone else.

I want to ask another question on a slightly different topic but still about judicial appointments. You invoke this desideratum of transparency. How would the work of the judicial appointments commission itself be transparent? How would you envisage the way in which it assembled its three candidates to be a transparent process?

Dr Lynch—I think largely that the process itself would not be, given the nature of the exercise. But the existence of it in itself provides a transparent approach to the seeking of the answer rather than saying that we have had informal soundings. The difference lies in there: between the informal soundings and the informal approaches, and who they can often miss and overlook as opposed to the government receiving advice from a body comprising serving and former justices, members of the profession, chairs of bar associations and so on. The names that are in the government's mind for an appointment are ones that have come as a result of some process. So there is clarity in the process and describing what that involves without, in any particular case, actually saying, 'Well, we have talked to these people and these were the kind of responses we got from them,' I agree that the actual mechanics of it, so far as any particular round of appointment, would need to be kept private.

Prof. Williams—With regard to the point about a short list, I do not see necessarily that the categories of people you refer to would have to be on a short list. That may be because a particular appointment being made to the High Court might require a particular type of expertise. In fact, you can look at appointments in the sixties where there was often reference to the fact that the court might have needed an expert in equity or particular areas to ensure that the High Court fulfilled its mandate across all areas of law. That will particularly favour people skilled in some areas and not people skilled in others. Also, it could be that you might find people who are exceptionally good chief justices of state courts but are not the sorts of people who would be suitable for appointment at the High Court for a variety of reasons unrelated to age and the like. Finally, we have to remember that Australia is now an exception in not having a body of this kind. These processes do work very well overseas, they have been effective and they are regarded as improving the process of appointment in places like the UK. I think we can learn lessons from that, as to how we can improve it further for Australia. These are not exceptional, and, in fact, things like short lists do need to be balanced carefully. But they have been seen as improvements and that is why they are being adopted around the common-law world.

CHAIR—We might make this the last question on this topic.

Senator HEFFERNAN—I am a wool classer and a welder, so I am not a lawyer. Would this not lead to some sort of competitive process where your profile could be enhanced if you perform better on *Q&A*, as has been suggested to me? Then, when the appointment is made, they say, 'Wow! Wasn't that a great appointment,'—which often happens—when, in fact, buried down in the bowels of the law and the legal system are very diligent, hardworking people who never put their heads up but who would make excellent candidates but, if they have to perform well when they go on *Q&A*, they have got no chance.

Prof. Williams—I think this process would actually favour the sorts of people you are referring to, the people who often do not get noticed. That is one of the reasons that I support it. It is because it will provide more capacity to read their judgments across the board, to look at a broader range of people, to do it more systematically against criteria and to actually look for people who may not be the standouts in the media or anywhere else, but in a way that can be done more effectively. The process is well designed and it works well. I do not think you need to interview people, for example. You do not even need that *Q&A* aspect. It might simply be a process to look across the record of serving judges, barristers and the like, to assess their records and to come up with a broader range of people than would otherwise be considered as part of the current process.

CHAIR—I think Dr Lynch wanted to make a contribution.

Dr Lynch—No, that is fine, in the interests of moving on.

Senator BRANDIS—In the interests of moving on, I want to make this observation. I do not agree with you, Professor Williams. Senator Heffernan has a lot of wily common sense about this. If the system that you are recommending were to obtain, there would be several of the most eminent members of the current High Court, who are universally respected because of their legal scholarship and intellect, who before their appointment to the High Court, were virtually unheard of outside the narrow confines of the bar and the bench. They would never have got a look in and the High Court would be much poorer for it.

Dr Lynch—Can I respond to that, actually? That does take me back to the point I was going to make. I agree with George, in that it seems to me that—

CHAIR—Dr Lynch, you say 'George'. We have two Georges.

Dr Lynch—I am sorry. And it is quite difficult to agree with both of them on this point! I mean with Professor George Williams on the process. But it may well depend on the degree to which we have community representation, and I have made known my view on that. Given that the professional bodies who are currently consulted as part of the informal soundings—or now semi-formal soundings, under the recent changes—have produced the judges that you have referred to, who are of outstanding calibre, I cannot see that formalising that process is going to mean that we are going to miss out on those people. I do not understand why that could be so. The advantage of formalising it would be to make sure that we never do and to ensure that the people who are regularly in our courts—other judges, practitioners and the representative professional bodies—are all able to feed into that process and say, 'These are the people that you

really should have a look at.' I cannot see that formalising a process such as this is going to lead to the loss of outstanding appointments like those we have already had.

CHAIR—We might move on to the other aspects of your submission and another term of reference. Perhaps I will lead in that regard. You have said that you supported the creation of a federal judicial commission not unlike the Judicial Commission of New South Wales. You refer to former chief justices Mason and Gleeson and say that they:

> … 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.

I am interested in your views of the New South Wales amendments in 2006, which introduced a means by which health and capacity matters could be investigated without a formal complaint by a living and/or some other person. I would like a response on those areas if possible. I am interested in your views on the type of commission. Should it be exactly like the New South Wales Judicial Commission? If not then what differences would you recommend? Then would you deal with these other matters referred to in your submission?

Dr Lynch—I will start on this one. I would never counsel an exact replica of anything, particularly a transference from a state jurisdiction to the federal level. But the over 20 years experience of the Judicial Commission of New South Wales is something that cannot be ignored, and I think it is extremely valuable in discussions about complaints handling at the federal level. The issue of incapacity, though, we have spelt out in quite a bit of detail because it strikes us that that is often forgotten about or lumped in with misbehaviour because of the constitutional grounds for removal—those being misbehaviour and incapacity. But they are clearly two different problems. It is only recently—since those 2006 amendments to the Judicial Commission of New South Wales—that there have been specific attempts in that state to address the problems of incapacitated judges. We have cited those with approval. How they will actually work—

CHAIR—Well, they were both on the public record, weren't they? I mean the ones you are referring to, like Judge Bruce.

Dr Lynch—Yes. Sorry—we have cited the changes with approval.

CHAIR—I see—with approval as in support for those changes.

Dr Lynch—Yes. But I suppose we will have to wait and see how those new mechanisms will work when they are really put to the test. The way in which the commission has developed and the decision to enhance it in that regard is instructive to the design of any similar body at the federal level in that it should not simply lump misbehaviour and incapacity into the same sort of process.

CHAIR—Can I just come in on you there. You say they have only just come in—2006. Have there been any referrals? Can you describe to us how the system works in New South Wales and if there has been an incident which has been investigated?

Dr Lynch—I am not aware of any incident being investigated as an issue of incapacity. We have set out the actual process on page 3 of the submission. The most striking thing is that, by having a separate process, an issue of impairment is not regarded as a complaint and does need to be addressed in that way. It also enables the commission to request—and require, if refused—medical testing of the individual judge about whom an issue of incapacity has arisen.

CHAIR—That is only following a referral from the head of the jurisdiction to the commission?

Dr Lynch—That is right.

CHAIR—That is the only way an investigation can commence, is that correct?

Dr Lynch—I think that is true. I can check that for you. There is obviously the sensitivity then, which we see throughout all the submissions to this inquiry, in undue interference with members of the judiciary. I think the referral of the matter from the head of the division is designed to ensure that it is not simply at the drop of a hat that these issues are raised. They need to be given full consideration before they even move to any formal status. But the existence of a formal process is an important one, I think. As we have argued in the submission, the informal 'clubby' approach is not really satisfactory, but then the full-scale parliamentary removal process clearly is not either.

CHAIR—What about the concerns of the former chief justices and the complaints handling mechanism as we have it at the moment. Obviously it occurs in New South Wales and to some extent in other states. Can you comment on that process and your approval, I assume, of the New South Wales approach, and do you think it should be replicated at a national level regarding complaints handling?

Dr Lynch—I think there is a definite case for a sliding scale of complaints. The emphasis on categorising complaints in New South Wales between minor and serious has been moved away from in recent years due to those 2006 amendments. There is the idea of needing a sledgehammer to crack a walnut approach and to simply talk in terms of misconduct and misbehaviour and not recognise that there are degrees of things which may be problematic in the way in which a judge is conducting herself or himself. It may well be something that can be resolved by the head of the division and which is just simply notified to the commission. But it may well be something that needs to progress to a much more formal kind of hearing with the individual being given a chance to state their own case.

Prof. Williams—Can I add to what Andrew has said?

CHAIR—Yes, Professor.

Prof. Williams—I also see that one of the advantages of having a complaints process is to deal with illegitimate complaints. There needs to be a process that enables complaints to be resolved so that, if there is no basis to those, that can be determined and the matter can be put to bed. Certainly as an academic I get an extraordinary number of letters sometimes from people who have complaints. Sometimes you can see there is no basis whatsoever but there is no way for those people to get satisfaction that their issue is being properly looked at, and also no

possibility for the judge concerned to have a process to determine that there has been no wrongdoing and no basis for the complaint. I think it is both a matter of real complaints being dealt with and the ones that do not have substance equally being disposed of.

Dr Lynch—I would add to that too. The Law Council of Australia in their submission, I think, has said that this is going to take up a lot of time and resources. They argue against the creation of a national judicial commission with a complaints function. But I would agree that giving people an avenue—and appeal is not often the avenue that they might even be seeking and certainly is not going to be an appropriate one—by which they can make a complaint and have a response from the court system is, I think, very valuable. I would not necessarily see that simply as just being a waste of time because so many of these complaints are going to be baseless.

Senator HEFFERNAN—Complaints can be very complex.

CHAIR—I just want to finish this line of questioning regarding the national judicial commission. How would it be constituted, and who would be on it?

Dr Lynch—If you look to the New South Wales judicial commission model it is largely something which the judiciary have control over themselves. I think that is important and also is going to be very important at the federal level, given the constitutional issues which surround interference with the judicial arm of government. But, again, it is about establishing structures and processes for the resolution of things, which clearly the courts have probably had experience in dealing with. But it ensures that things cannot be buried, or forgotten about or neglected. I think that is the important thing. Once you have a process to follow, even though it is one which is largely judicially driven, I think there have been calls for the use of lay people in the Judicial Commission of New South Wales and those have been strongly rejected in some quarters.

CHAIR—They are represented on the commission, however. There are three community representatives.

Dr Lynch—Sorry, I correct that.

Prof. Williams—Yes, they are now represented on that body despite the contrary views of the Chief Justice of New South Wales at the time. I think if you are going to have laypeople it should especially be in the area of dealing with complaints, if only because you run the risk that people who make complaints will feel that it is being dealt with in a self-serving manner.

CHAIR—So you support the commission being represented by not only members of the judiciary but representatives of the broader community.

Prof. Williams—I do. I think you need some laypeople with some expertise relevant to these issues and, again, I think that this comes to the issue of community confidence. If someone is complaining about the performance of a judge and the person from the community sees their complaint only being dealt with by judges and former judges or lawyers I think you run the risk that they will think that there is a cover up or it has not been dealt with adequately. Here I am not sure you would go for a large number but I do think you need members of the community involved in that process.

CHAIR—All right. We have the devil's advocate argument that it is going to take up too many resources. We are hearing from the New South Wales Judicial Commission formally this afternoon. We met with them yesterday informally as a committee. I think the budget is a little bit over $5 million a year. What is your view to the fact that it can tie up too many resources and it can impact on the independence of the judiciary?

Dr Lynch—As far as resources are concerned, as I indicated earlier, I think it is a necessary cost. The public are the users of the judicial system and it is something that governments should be prepared to assist the courts with in funding.

Prof. Williams—I agree. I think now the federal judiciary has gotten so large that it is appropriate that there is a complaints-handling system and also a system to deal with issues of incapacity. I think the costs of not doing it could ultimately be larger when you look at the risk of the damage it can to the judiciary and also the possibility that judges may remain on the bench when they should no longer do so.

CHAIR—Why has it not been replicated across other states and territories?

Prof. Williams—I do not know. Andrew may well know.

Dr Lynch—It is a good question. I was interested to note that the Victorian Constitution changes of 2005 produce a removal process which aims to overcome the crudeness of the tradition of parliament simply removing for misbehaviour or incapacity. The Victorian Constitution has now recognised this committee which will assist parliament in making a decision on that. That is one way I think you can improve upon that process but that is a long way short of a judicial commission which is aiming to address this. I go back to the point you raised earlier about the former Chief Justice's view that there are all sorts of things stopping short of grounds for removal that the public should be entitled to raise as complaints and do need to be addressed. I think it is interesting that the Victorian Constitution was changed in that way a couple of years ago but clearly that is no substitute for a full-blown judicial commission which is designed to be responsive to community concerns.

CHAIR—I just want to pursue this a little further and then I will pass on to colleagues. The New South Wales Judicial Commission has three main functions. One is the complaints handling that we are discussing. The second is education and training. The third is this consistency in sentencing initiative—which, it would appear, assists not just with the judiciary but with members of the legal profession generally, in terms of litigation and how they conduct their affairs. Do you have a view that a national judicial commission should have those functions or should the complaints handling mechanism be separate to either education and training or a consistency in sentencing initiative?

Dr Lynch—I think education and training is already being addressed by the National Judicial College. So the creation of any complaints handling mechanism at the federal level which was going to also pursue additional aims would need to either fit around that or absorb that. Certainly, if there is existing stuff on the landscape—existing machinery—then a decision needs to be made as to how you work around that or whether you consolidate.

CHAIR—And what is your view? Do you think they should be merged or that they should operate independently or do you not have a view in that regard?

Dr Lynch—I am happy to see what Professor Williams says but my own view is that you would need to talk to the professional bodies.

Prof. Williams—I would agree with that. I would only be proposing to move in the direction of the commission in response to a particular problem and that is the absence of adequate complaints handling mechanisms and the inability to deal with real questions of incapacity. I do not see the need to be bestowing extra functions unless, again, you can identify a problem that needs to be addressed. I would just be focusing on the question at hand.

CHAIR—Senator Heffernan has some questions.

Senator HEFFERNAN—I was mightily impressed—and I am not easily impressed I have to tell you—by what we heard and saw yesterday at the New South Wales judicial commission, which I would have thought was like a teachers aid almost for judges. A lot of aspects of it were the great resource in their library as well as other procedural matters. Surely if we have a recommendation for a federal judicial commission, what is wrong with the New South Wales model?

Prof. Williams—There is nothing wrong with it. I am very happy to defer to the personal experience you have had, but I have not had that sort of contact with the New South Wales commission. If it turns out there are good reasons for that kind of model, I certainly would not disagree with that. It is simply that, from my knowledge of the complaints issue, there is a need there, and if it turns out there are additional reasons to go down the path you suggest, as I say, I would not disagree with that.

Senator HEFFERNAN—Could I just ask a couple of questions on opinion, and I might get knocked over by the chair here. On the complaints issue there are a lot of reasons you might complain. A judge, like me, in all human endeavours has some human failure and for whatever reason might be falling off the pace as a judicial appointment. In circumstances where police come into information, which is not of a criminal nature but is evidence of a judge participating in the writing of an opinion, that later turns up in that judge's court on one side of the case, and then the judge sits in judgment on that case: how do you see that that should be dealt with? The police have the information—I have it in front of me here—and the committee will get access to it. Where a judge sits in judgment on their own advice, what should happen?

Prof. Williams—I think that that is exactly the sort of matter that could be looked at by a commission. You often do see complaints being raised including those in regard to the federal judiciary. The judges have sat on matters when they should have disqualified themselves as a conflict of interest. That is one of the typical areas where the procedures at the moment are often not adequate. There is often not a capacity to deal with those matters properly; it is all dealt with in-house, if you like, sometimes without even the knowledge being brought to bear by the judge on the case over the allegation. I think issues of disqualification should be looked at because they do raise questions about whether someone has received a fair hearing and whether a judge has acted with proprietary.

CHAIR—Dr Lynch, did you want to add something?

Dr Lynch—I would agree with those comments.

Senator HEFFERNAN—So would I. I think I will just err on the side of caution. I have raised this during estimates over the last four years. I just make the point that the police have been in possession of these documents—they are police documents but they came into my possession and I sent them back to the AFP—for some years in full knowledge that this happened. As the Commissioner, Mr Keelty, said in estimates—I think you were there Senator Barnett—it is not a police matter, yet it is a matter of serious impropriety which this system cannot deal with.

Prof. Williams—It is a case where, either your complaint should be resolved by finding there is an issue and there should be consequences, or it should be found that there is no basis to it in which case any judge involved should be cleared and should be able to move on without concern.

Senator HEFFERNAN—In the present circumstances, given this information which I have in front of me, how would I go about prosecuting the fact that I think it is wrong? This is a police document. Where do I go? How do I convene both houses of parliament under the present arrangements? How do I mount the argument?

Prof. Williams—That is exactly the problem—the system does not work.

Senator HEFFERNAN—The system does not work. Thank you very much.

CHAIR—I just alert the committee to the fact that we do not have the document to which Senator Heffernan is referring and that will need to be dealt with in an appropriate forum, if that is to be tabled as a public document. We would need to deal with that in due course. Are there other matters? I have some further questions, but Senator Heffernan or Senator Fisher, do you want to jump in?

Senator FISHER—No.

Senator HEFFERNAN—I have one other question. Bearing in mind that I am not a lawyer and you mob are, where a judge is arrested for a criminal matter, shouldn't the judge be stood aside when that happens?

Dr Lynch—Until that—

Senator HEFFERNAN—Do you have to wait until they decide what the outcome is? Upon the arrest, what should happen to the judge?

Dr Lynch—I would have thought that upon arrest the judge should offer to stand aside. But I agree: I think it would be completely unsuitable for anybody who is sitting in judgment in a court to have a charge hanging over their head.

Senator HEFFERNAN—There recently was a case in New South Wales involving the arrest of a judge and in fact the arresting officer got into more trouble than the judge because he did not refer it to the DPP, but he did not want to refer it to the DPP because of the person from the DPP's office who eventually went to jail.

CHAIR—I would like to move on to a couple of the other areas in your submission and in the terms of reference. You have touched on the retirement age issue—it is set out in the Constitution and you have indicated that it would be problematic having a referendum in regard to these matters—and, clearly, life expectancy has increased substantially. We had the issue referred to us this morning of the appointment of part-time judges, who, like in New South Wales, are retired judges. I am interested in your view firstly on the retirement age and secondly on the appropriateness of appointing judges who have retired as part-time judges.

Dr Lynch—On the retirement age I think, as we have alluded to, individuals might be looked at now and we would say, 'Well, it was a shame that they had to be moved on when they were.' But I did note in one of the other submissions the comments from former Chief Justice Murray Gleeson who said that the individual is always the worst judge in their own case. So there is something to be said for the process being an automatic one. It is always difficult if you individualise the issue because there may well be others for whom the age of 70 is an appropriate time for them to go, and perhaps there was a case for them to leave earlier. So you have always got to peg it at a particular age. The community did so in one of our rare successful referendums. It seems very unlikely that we would revisit that question, given the process that would be required to do so. On the issue of part-time judges, which I know are used quite extensively in New South Wales for one, there is a constitutional issue with their use in federal courts.

CHAIR—Yes, but they are used in state courts, specifically in New South Wales.

Dr Lynch—Yes.

CHAIR—Do you have a view on the appropriateness of appointing part-time judges firstly and then secondly retired judges who are past the retirement age as part-time judges?

Dr Lynch—I think the initial case for use of part-time judges was really as a supplement than as a mainstay of the system, and I think we now may have moved, unfortunately, to the latter. I do not think that is terribly desirable. Professor Williams may wish to add to that.

Prof. Williams—I think the flaw in the Constitution is that it fixes 70 as the retirement age. I think a better outcome would have been to say that the retirement age must be fixed by parliament to enable it to change over time. I think there clearly should be a retirement age; it is just that leaving it at 70 will over time become more anomalous. It would be better to have more flexibility there. Of course, any changes to the retirement age should not affect any sitting judges; it should only operate prospectively. But I think that would be a better way of dealing with the problem. I agree with Andrew; it is not something that should be at the forefront of issues around constitutional reform because even if it did go to parliament we may only increase it to 72 or something like that, which really takes away the need to act on this issue now.

When it comes to part-time judges I think that they should be available for appointment at the federal level in very limited circumstances, such as dealing with retired judges and the likes of particular matters. But I would recognise that the need for that seems far more limited at the federal level than at the state level given the additional responsibilities at the state level with the matters that they deal with. I am not sure that the pressure is there at the federal level to justify very limited capacity for appointment of part-time judges so as to again lead to a constitutional reform. I think these are issues of some importance but not in the first rank as to require them to go to referendum.

CHAIR—But you would agree that, constitutionally, you cannot appoint a retired judge who is post the age of 70 as a part-time or acting judge in the federal jurisdiction?

Prof. Williams—I think that is not possible.

CHAIR—That is right. I am interested in your views on the appointment of acting judges. We had this issue in Victoria in 2004, when legislation to appoint acting judges for a period of five years was brought in and passed by the government and Mr Hulls. I think we heard earlier some evidence to say that that has occurred with at least one appointment. Would you put on the record your views regarding the appointment of acting judges.

Prof. Williams—I think that, again, that is constitutionally prohibited. Section 72 says, 'The appointment of a justice of a court created by parliament shall be for a term expiring upon his attaining the relevant age.' I think that is clear in that, when you appoint a federal judge, it must be until the retirement age, which is set at 70 for High Court judges or otherwise by parliament for other members of the federal judiciary.

CHAIR—Thank you. Turning to another matter, we heard from Justice McColl this morning, from the Judicial Conference of Australia. She tabled before the committee the model protocol between heads of jurisdiction for short-term judicial exchange. Are you aware of that and what are your views of this judicial exchange process, both between state and federal jurisdictions and within the jurisdiction, as it were—so both vertically and horizontally?

Dr Lynch—I personally am unaware of it.

Prof. Williams—I have heard of it, but only in passing. I am broadly supportive of the idea that, for reasons of efficiency and for reasons of gaining experience and the like, those types of exchanges should be available, subject to important safeguards. But I am sure people such as Justice McColl have those safeguards well in mind.

CHAIR—They advised that they will have a meeting this weekend to consider the judicial complaints-handling mechanism. They will get back to us once they have had their meeting. That is just that your interest. As there are no further questions on this or related matters, thank you, Professor Williams and Dr Lynch, for your evidence today. We very much appreciate your input and the time you have given us.

Proceedings suspended from 11.57 am to 1.12 pm

PASCOE, Mr John Henry AO, Chief Federal Magistrate, Federal Magistrates Court of Australia

CHAIR—I welcome Mr Pascoe, from the Federal Magistrates Court of Australia. We have your submission; it is submission No. 8 for the committee. For the record, I note that this is a joint submission with the Family Court. Is that correct?

Mr Pascoe—Yes.

CHAIR—Do you wish to make any amendments or alterations to that submission?

Mr Pascoe—No, Senator.

CHAIR—I now invite you to make a short opening statement, after which my colleagues and I will have questions for you.

Mr Pascoe—Thank you for the opportunity to comment on the various issues raised by the committee inquiry. There were two areas of particular interest. One was the issue of complaints procedures, which are often misunderstood by litigants and others in the community, and I think they have been more fully explained in the submission. The other issue was about the division between the states and the Commonwealth in the overall child protection framework, where the family courts and the Family Law Act have a limited reach in relation to children who may be in difficult circumstances. The paper really refers to the difficulties where there is no overarching framework for child protection.

CHAIR—Do you have any further opening comments you would like to make at this stage?

Mr Pascoe—No, Senator.

CHAIR—Perhaps I can kick off the questions with regard to the complaints handling mechanism that you mentioned in your opening statement and have also set out in your submission. We are hearing later from the Judicial Commission of New South Wales and, just for your interest, we had an informal meeting with them yesterday at their premises. I am interested to hear your views, your feedback, on the merits or otherwise of the New South Wales judicial commission and on the merits of a similar type of commission at a national level—how such a body currently operates and how it should operate. If you can give us your thoughts on that, noting in particular the recent changes or developments you have made to the complaints handling system within your court.

Mr Pascoe—Yes. If we leave aside any constitutional issues about a body similar to the Judicial Commission of New South Wales in the federal system, I think there is a lot of merit in the New South Wales arrangements. I think one of the problems for me in dealing with complaints is that there is a misunderstanding as to what the head of jurisdiction can actually do, and I often get letters from people who are asking me to reverse a decision of a federal

magistrate or to interfere in some way in the manner in which proceedings are conducted in his or her court. Obviously, those are not matters for me. In fact, the head of jurisdiction has very limited ability to deal with complaints. In our case, where there is merit in a complaint, it is more about talking to individual members of the court. The Federal Magistrates Court in fact has very few complaints when you consider the number of matters coming through. I probably get no more than a couple of hundred complaints, if that, each year, many of them—

CHAIR—From litigants?

Mr Pascoe—From litigants.

Senator BRANDIS—This is the Federal Magistrates Court?

Mr Pascoe—This is the Federal Magistrates Court; right.

CHAIR—So how many would you get? Can you give us a number?

Mr Pascoe—I cannot—

CHAIR—Do you have those figures?

Mr Pascoe—I can get some figures for you. In the year from 1 July 2008 to 30 April 2009, we received a total of 115 complaints. Thirty-eight were of an administrative nature, and we have had 74 that relate to court proceedings. Now, some of those complaints can be that they did not like the way the judicial officer looked at them, or they felt that the judicial officer smiled at the counsel for one party or smiled at one party and frowned at the other. The ones that I take most seriously are those where there are delays in judgment outside the court's protocol.

CHAIR—How many of those were there?

Mr Pascoe—I think there were probably no more than about 10 or 15.

CHAIR—Right. I know you have got procedures in place for handling complaints, but do people outside the court know what the protocols are? You mentioned the court's protocols; are they on the public record as well?

Mr Pascoe—Yes, they are.

CHAIR—And the complaints handling system is on the public record?

Mr Pascoe—Yes, it is on the public record.

CHAIR—Yes, I thought it was. So you have dealt with those complaints about delays. Can you just take us through the process for dealing with those.

Mr Pascoe—Yes. All complaints are dealt with by me with the assistance of the principal registrar of the court. All complaints receive a written reply. In many instances, all I am able to

say is that I cannot interfere in decisions which have been made or the manner in which individual federal magistrates conduct their courtroom proceedings. We usually give litigants advice about the appeal procedure and, if they need other assistance or counselling, we try and refer them to other services.

CHAIR—Out of the 115 complaints, how many ended up with you taking some sort of action, be it counselling a judge or something—where you have needed to follow up? How many were legitimate complaints, where they had concerns and you acted on those concerns?

Mr Pascoe—I would say 10 to 15. I think nearly all of them would relate to judgments outside of the court's protocol for the delivery of judgments.

CHAIR—As in delays?

Mr Pascoe—Yes.

CHAIR—How extensive were the delays?

Mr Pascoe—The delays are relatively minor in the court. We have a protocol that says that a judgment is delivered within three months of the hearing. Many of the judgments in the family law area of the court's jurisdiction are in fact delivered ex tempore, so they are delivered immediately. Some take longer. In general federal law there are fewer ex tempore judgments, although in migration there are often ex tempore judgments given.

CHAIR—How long was the longest delay, for example?

Mr Pascoe—The longest delay in the court would be somewhere around 18 months, I think.

CHAIR—What has happened in that situation? Walk us through it.

Mr Pascoe—When there is a serious delay in a judgment, I follow up with the federal magistrate concerned to try and ascertain the reasons for the delay and to get a date for delivery of the judgment so that the parties can be advised when they can expect a judgment. Then at least there is some certainty around the proceedings coming to a conclusion.

CHAIR—It sounds like that has not worked all that well, with an 18-month delay.

Mr Pascoe—No—that is, I am happy to say, very rare in the Federal Magistrates Court. There can be a variety of reasons for it. Sometimes it can simply be someone who is relatively new to the court being confronted with a problem they may not have encountered before or with difficult evidentiary issues, and just because of the sheer volume of work they do not get back to having enough time to consider the matter and deliver the judgment. It is rare but it is totally unacceptable.

CHAIR—So what would happen? What sort of discipline or counselling would occur?

Mr Pascoe—I could put it most simply by saying that the federal magistrate would be plagued by calls from me and my chambers wanting a date for delivery of the judgment and they

would be regularly followed up to see how they were going with the completion of the judgment. We also, in the court, receive a list of judgments every month that are outside of the protocol. Each one of those judgments is followed up to see what is happening and when the judgment is likely to be delivered. A list of outstanding judgments is also circulated throughout the court so that, again, peer pressure can apply to those federal magistrates who perhaps are not meeting the standard. I have to say, though, in making those comments, that the court is a particularly busy one. It is a court where federal magistrates may be confronted with upwards of 50 matters in a duty list. We significantly overlist trials to try and get through the workload.

CHAIR—That is fine. We have evidence from other submissions and other witnesses on this. Two former chief justices of the High Court, Mason and Gleeson, for example, have indicated their concern that there is a lack of process for complaints handling where there has been an issue such as a delay. So this is an area that we are looking at and we need to get your advice and feedback on it. You have indicated that you support a commission type arrangement, at least to some degree. You are handling the complaints currently and you have relationships, obviously, with the other federal magistrates. Would it be easier if there were an independent entity like a commission that could look at these matters, investigate them and then report in due course, presumably in liaison with you as Chief Federal Magistrate? Do you think that is a better and preferred method?

Mr Pascoe—I do, Senator. I think it would be better for collegiality and the court generally because it can become a source of considerable tension between me and members of the court if there is significant delay or delay on a number of judgments. That can make it more difficult to manage the relationships overall. My understanding is that the commission in New South Wales is well placed to offer counselling and advice to judicial officers, which, in some instances, may be better received from members of an outside body than the head of jurisdiction.

CHAIR—Can you describe to us the extent of your other concerns in areas like intoxication, liquor, sleep apnoea—we have that issue with Judge Bruce some years ago—or misbehaviour?

Mr Pascoe—I have never had complaints about federal magistrates not being in control of their courts—if I can put it that way—for any reason, whether it was liquor or sleep apnoea. Sometimes litigants simply are not happy with the way a federal magistrate conducts his or her court. Sometimes the fact that the court has very busy lists means that people may not feel that they have been properly heard. It may well be that they wanted to say something that was not strictly relevant to the proceedings. In instances where there may be some legitimacy in a complaint that the federal magistrate has dealt rudely or abruptly with a litigant, then that complaint would be discussed with me and with the federal magistrate in question to see whether there was some reason for it on the day. The judicial officers are human; they have good days and bad days, they have days where there are worries with their children and other things, or there may be some deeper issue which might simply be fatigue. This might mean that they need to have a bit of time out of court. Those sorts of complaints are dealt with on a cooperative basis just by sitting down and talking to people.

CHAIR—How would you deal with more serious behavioural type issues such as drink driving—we have seen incidents of that in the past—misdemeanour or even more serious matters?

Mr Pascoe—I would arrange to sit down with the judicial officer concerned to talk about his or her behaviour. If it were serious enough, we would discuss whether they felt they needed time out of court. In extreme circumstances, we would discuss whether he or she felt able to continue in the job. Fortunately, I have not had that circumstance. I have had situations where federal magistrates have been ill and there has been a need to have a conversation about whether continuing to sit in court is in their best interests and in the best interests of the court.

CHAIR—You have put forward this proposal with Chief Justice Bryant with the possibility of developing a joint complaints oversight committee, which is set out on page 15 of your submission. Can you tell us more about that and how would it operate?

Mr Pascoe—That was really an attempt to look at how we could pick up on some of the elements of the New South Wales commission by having some outside scrutiny of complaints. In the case of litigants, they would feel that they were being heard by an external party who would have a completely independent view.

Sometimes the view is expressed that the court receives the complaint about the court and does not deal with it in the same way that a truly external party would do. I think it would be an opportunity, for example, to bring in a very experienced, retired judge and perhaps someone with other qualifications—psychology being one—that could give us some feedback from the complaints they see about what we could do by way of judicial education to perhaps remove some of the things that upset and irritate litigants and perhaps make them feel they have not been properly heard.

CHAIR—That is certainly heading towards the judicial commission approach, as you indicated, vis-a-vis New South Wales. Just before we get onto that, I want to ask about this. We were talking about complaints from litigants. If you do not mind me asking, what about issues of capacity, health, mental illness or whatever before they actually get to a courtroom? You would become apprised of this, I assume, from time to time depending on the circumstances. How do you deal with that? For example, in New South Wales they amended the law in 2006 to provide for the chief judge to refer a matter to the New South Wales Judicial Commission to investigate those types of matters where the capacity and ability of the judge or judicial officer was brought into question. Do you have a view on how that is currently handled—if you can advise us of that—and, secondly, on how it should be handled?

Mr Pascoe—Yes. Can I say firstly we do provide for annual health checks for all members of the court.

CHAIR—That is compulsory, is it?

Mr Pascoe—It is not compulsory and we cannot make it compulsory, but we encourage everyone to have an annual health check—which the court will pay for.

CHAIR—Do they? What proportion would?

Mr Pascoe—Again, I am not aware. I do not get statistics as to who has or has not had a health check.

CHAIR—You just send them a notice once a year saying, 'It's recommended to have a health check and we can pay for it'?

Mr Pascoe—Yes. There are members of the court who think that it might be incompatible with their independence for me to know whether or not they had a check and that I might like to know what was in it. It is really encouraging people to have a health check.

Senator FISHER—Nonetheless, Chair, someone must know or it would be trackable, because someone is paying the bill.

Mr Pascoe—Yes. It is certainly trackable through the court's administration.

CHAIR—Could you perhaps take that on notice and let us know?

Mr Pascoe—Yes, certainly. I would be happy to do that. We also provide for judicial officers to have counselling at the court's expense if they feel that they need it. Again, that would be undertaken by a psychologist of their choosing, although we can also help recommend various psychologists. Again, I do not know who has taken advantage of that.

CHAIR—Again, could you take that on notice? Obviously, we are not after names but rather the number of people per annum who avail themselves of such a service.

Mr Pascoe—Yes. In an instance where, for example, a federal magistrate's behaviour was found to be erratic or I became aware of concerns about behaviour in the courtroom or outside of the courtroom, I would have a meeting with the judicial officer concerned and talk about what the problems might be and whether he or she felt that it was appropriate to continue sitting. If there was evidence, for example, of some long-term problem then the court would work with that judicial officer to get proper medical attention and advice. If it appeared that they were not physically or mentally fit to continue to sit then that would be matter we would then raise with the Attorney-General's Department and with the Attorney.

CHAIR—Has that occurred in the last 12 months or previously?

Mr Pascoe—I think that is a difficult area of confidentiality, Senator. I can say I have had occasion to counsel people in this regard, yes.

CHAIR—Of course.

Senator HEFFERNAN—In the federal jurisdiction generally—it applied to Murray Gleeson when he was the Chief Justice—if something was going wrong with a judge, there is really nothing you can do other than counsel them, is there?

Mr Pascoe—No, it is all you can do.

Senator HEFFERNAN—He can tell you to go and bite yourself and get on with life.

Mr Pascoe—Indeed, yes.

Senator HEFFERNAN—I just wanted to make the point.

CHAIR—Thank you. You have indicated support, at least in principle, for a New South Wales judicial commission type of entity within the federal sphere. The New South Wales judicial commission has the three functions, obviously complaints handling, then education and training, and then a consistency in sentencing initiative. We have the judicial college at the federal level which deals with the education and training side. Are you suggesting, or would you support a separate entity for the judicial commission to deal with complaints or do you think it should all be combined to deal with education and training and consistency in sentencing? Do you want to just respond to the merits or otherwise of those three functions?

Mr Pascoe—I think sentencing is not a matter that usually falls within the work of the federal courts, so I do not think that applies. In relation to judicial education, I think the current system with the judicial college and the courts focusing on judicial education works quite well. We send judicial officers quite regularly to judgment writing courses, and we also try and arrange regular judicial education in areas of the court's jurisdiction, often in conjunction with the superior courts, the Federal Court or the Family Court.

Senator HEFFERNAN—You mentioned that the Judicial Commission of New South Wales seems to work wonderfully well, and it is a great aid, I suppose you could say, for the judiciary. If it turned out you could do a cost benefit analysis on your existing system of education and combine it, to save duplication on administration and a whole lot of other things and you got more punch for your pound as it were, you would have no objection to combining it?

Mr Pascoe—None at all. I think the key thing is ongoing judicial education. In a sense it is less important how it is delivered than that it is delivered.

CHAIR—Time is relevant here and I want to pass to other senators who have other questions but I have one more question. You indicated in your opening statement, you sort of equivocated slightly when you talked about the constitutionality or otherwise of the judicial commission. Can you share your views or if there are concerns about any constitutionality of the establishment of a national judicial commission?

Mr Pascoe—I think the argument is, insofar as the removal or disciplining of judicial officers, that it is a matter for the parliament and is dealt with in the Constitution. I think there are two views: one view is that it is perfectly reasonable to have a judicial commission to deal with these issues; the other is that it would simply be unconstitutional for such a body to be established.

CHAIR—For what reason though, separation of powers or because of the termination clause in the Constitution regarding the method of termination.

Mr Pascoe—I think it is the termination clause in the Constitution.

Senator HEFFERNAN—Surely the termination clause in the Constitution is there because you cannot impose it?

Mr Pascoe—No.

Senator HEFFERNAN—It does not work. Within the statute of the parliament how do you mount the debate that draws together both houses of parliament to give consideration to putting someone out the back door? You cannot do it.

Mr Pascoe—I think that is the difficulty. As you say, there is nothing to actually gather the evidence and present material to the parliament. I think one of the great benefits of the Judicial Commission in New South Wales is that they are able to talk to judicial officers who have difficulties and, on most occasions, people resign.

Senator HEFFERNAN—Exactly. It is a tap on the shoulder rather than a public ambush.

Mr Pascoe—Yes.

CHAIR—You have indicated that there are two views. What is your view?

Mr Pascoe—My view is that it ought to be possible to set up a body similar to the New South Wales Judicial Commission and that the establishment of such a body would be very useful to certainly the heads of jurisdiction, and I think it would add to public confidence in the judiciary.

CHAIR—Indeed. Thank you.

Senator FISHER—Coming out of the questions of Senator Barnett, Mr Pascoe, and the discussion you have just finished in relation to the prospect of some other overview. In your submission on page 15 you talk about yourself and Chief Justice Bryant having recently proposed the possibility of 'developing a joint complaints oversight committee between the two courts'. You have just expressed, essentially, your own disposition towards having a totally independent assessment. Can you comment further on what you have expressed would be the purposes of your and Chief Justice Bryant's joint recommendation. In your submission you say, 'For the purposes of providing a second tier of oversight.' Surely it is more than that, isn't it?

Mr Pascoe—Yes. We would be looking for a group of people who could become expert in the type of complaint that we are fielding. They would not have the capacity to talk to individual judicial officers unless, essentially, the judicial officer was happy to speak to them. I think the presence of such people would give litigants more confidence that their complaint was being dealt with in an objective way. Hopefully, we would have people who would build up some expertise in the sorts of complaints that occur in family law and maybe help us to develop some further protocols on, if necessary, changing court procedures or making judicial officers aware that some things may be done unwittingly which can offend or upset some litigants.

Senator FISHER—So you are accepting that, in addition to having someone second guess the first guesser, there is an important public perception component as well?

Mr Pascoe—Yes.

Senator FISHER—Although you have not directly commented on it here. I also hear you saying that, in any event, it would perhaps be a good idea to have a totally independent body to scrutinise rather than it being solely part of an internal review process.

Mr Pascoe—Yes. I think that would be good for collegiality in the court and also for maintaining and building public confidence in the judicial system generally.

Senator FISHER—Thank you.

CHAIR—At the top of page 6 you advise that, following the Semple review, you and Chief Justice Bryant provided comments to the Attorney-General about possible changes regarding a merger of the Family Court and your court and how that might be structured. Can you tell us how it should be structured? What comments did you have?

Mr Pascoe—The court's initial response to the Semple review was that it wanted to remain independent, sitting across all areas of its current jurisdiction. Having read the government's response to Semple, the court made a further submission. The court said that it accepted that the structure of the Federal Court system is a matter for government and the parliament but felt that, if there were to be merged courts in the case of family law in particular, for the culture of the Federal Magistrates Court to be preserved—and I think all of the public submissions indicated significant support for the culture of the court and the way it went about doing its work—it was important that that second tier had its own independent head, that it had a separate rule-making power, that within an overall coordinated family law system the federal magistrates were free to have their own culture and their own way of approaching their work and that there was separation between the two divisions of the court.

CHAIR—On pages 7 and 8 of your submission you touch on the issue of part-time and acting judicial appointments. The issue of part-time appointments for retired judges came up in evidence this morning. What is your view, firstly, regarding the part-time appointments of retired judges—that is, post the retirement age—and the constitutionality of that?

Mr Pascoe—I do not think the federal Constitution allows part-time appointments beyond the age of 70. More generally, it seems to work very well in the states where retired judges who still wish to work and have the capacity to do so can come back and fill short-term gaps or deal with excess workload.

CHAIR—On page 7 of your submission you have talked about how a judge of the Family Court who has retired after more than 10 years of service may be appointed by means of a new commission to a part-time judge official role. So long as they are under the 70 years limit then you have no problems with that approach?

Mr Pascoe—No, although that is primarily a matter for the Family Court. The federal magistrate legislation itself envisages the possibility of part-time appointments. We have not had any part-time appointments. I would be concerned about the prospect of part-time appointments unless they were very carefully managed because the Federal Magistrates Court is a very busy court. It has a very large workload. I am not quite sure how part-time appointees would fit into the docket system in the court and the way we manage our work. It may be that such appointments are more suitable to the superior courts.

CHAIR—So it is allowed for under current legislation?

Mr Pascoe—Yes.

CHAIR—On page 8 you say it can be made on a part-time basis where that is specified in the commission. What are you referring to there?

Mr Pascoe—It simply would be that the Governor-General in counsel would appoint someone on a part-time basis.

CHAIR—What is your definition of part-time?

Mr Pascoe—That is part of my problem—whether part-time means three days a week, six months of the year or a certain number of hours. That would be the management problem for us. In the states, as I understand it, part-time judges are called in to do work and they are simply paid on an hourly basis for the time they spend in the court. This legislation would seem to envisage something different. For example, as head of jurisdiction, I would not have the capacity simply to call someone in and say, 'Someone has gone down sick,' or 'We've got a big increase in our workload. Could you help here?' It seems to envisage that the person would be there all the time on a part-time basis.

CHAIR—You make it clear that, constitutionally, acting judicial appointments are not appropriate in the federal jurisdiction.

Mr Pascoe—No.

CHAIR—Moving to this other key point you made in your opening statement regarding the merit of child protection arrangements for, I think, Family Court matters, on the page 11 you say:

Chief Justice Bryant also recently suggested that the Family Court should be given additional powers vis-à-vis child welfare protection.

Could you outline to the committee of the merit of that?

Mr Pascoe—Yes. Perhaps if I could speak more broadly on this. Very often children who come before the Family Court for parenting orders are also involved in other proceedings, often with DOCS. Sometimes the Federal Magistrates Court or the Family Court will also seek to get DOCS to intervene in the case. We have no power to make DOCS intervene. We often are making parenting orders without the benefit of knowledge of what has been happening to the child within the state system. In fact, you can have instances where there may be very important things happening in relation to the children where the state and federal courts do not speak to each other.

If I can give you a personal example from a case that I had to do a deal with myself. We had a case where the father in the proceedings had been found guilty of incest and had been charged. He was apparently let out on bail by the New South Wales authorities, had gone straight around to his former residence, where his wife was living with two other small girls, insisting on having time with those girls. I assume that would have been a breach of his bail conditions, but there was no mechanism for the New South Wales and the federal system to talk to each other. Perhaps that example also illustrates the fact that the children involved in that case were in two systems. The 13-year-old who had been the victim of incest was obviously tied up in the state criminal system and child welfare system. The other two children were also in that system. They

were also in the family law system. But there was no overall, overarching framework in which those children could be best protected. There is significant merit in creating an overall framework for the protection of children covering all aspects of child protection.

CHAIR—Thank you for that. I understand that is under consideration by the government.

Mr Pascoe—I know it was something that was being looked at. I am not aware of where that is at. I have to say that it is something that I feel quite strongly about.

CHAIR—Thank you for that. If you want to express any further views, I am happy to receive them. If you want us to pursue that further, please let us know.

Mr Pascoe—Thank you.

CHAIR—This morning we had tabled before us a model protocol between heads of jurisdiction for short-term judicial exchange by Justice McColl from the Judicial Conference of Australia. I was wondering if you were aware of that model protocol and, secondly, if you are, what is your response to it and the merits of the judicial exchange?

Mr Pascoe—I am aware of it. Generally, if it can be made to work in an efficient way, there is considerable merit in it. Judges are really no different from anyone else and exposure to different ways of doing things, different systems and different management styles is generally beneficial.

CHAIR—Does it happen at the moment?

Mr Pascoe—There is no exchange between the federal judges and the state courts.

CHAIR—That is right, but what about within the federal jurisdiction—is there any exchange program?

Mr Pascoe—No.

CHAIR—So it does not occur at the moment?

Mr Pascoe—No.

CHAIR—Why? Is there any impediment to stop it happening across the federal jurisdiction?

Mr Pascoe—I guess not, except for the fact that we have the Federal Magistrates Court which I might liken to a trial court, and then you have got the two superior courts. One of their important functions is to deal with appeals from the Federal Magistrates Court. That may create some difficulties.

CHAIR—Okay, but do you support it occurring. If so, how should it occur—on a case-by-case basis or should there be some protocol developed whereby there can be an exchange within the federal jurisdiction?

Mr Pascoe—If it is to happen, the courts should work together to develop a protocol. Again, my general view is that opening people up to new experiences and different ways of looking at problems would be very useful. I can see, for example, a lot of merit in a superior court judge spending some time in a busy trial court, because it may give a better idea of why judgments are perhaps less fulsome than they might otherwise be or the pressures that people in a court such as the Federal Magistrates Court are operating under.

CHAIR—Okay. Finally, the retirement age—retirement is compulsory at 70. Obviously it is different in different states and territories. I think most of them are different to some degree. Do you have a view as to the appropriateness or otherwise of the current retirement age, which was obviously set some 30 plus years ago and the life expectancy has increased? Are you happy to live with it or do you have a recommended preferred retirement age?

Mr Pascoe—I believe there should be a retirement age. My general view is that 70 is probably a bit too low but, because it requires a change to the Constitution, it is probably very difficult to do much about it. Some of the best judges in our system are judges who have accumulated significant experience. Sometimes where people are healthy and want to continue it is wasteful when they have to retire at 70. I would probably be more comfortable with an age of 75. Company directors and others can go on doing their work into their 70s. Generally in the community people are healthier and living longer and they should be all able to work if they have the capacity to do so.

Senator HEFFERNAN—Hear, hear! It is all in the genes.

CHAIR—My stepfather was 94 when he died and he was active up until about a year or two before he passed away—both mentally and physically. We are all different, of course—and senators, too, Senator Heffernan, in terms of retirement age. Thank you very much for that.

There being no further questions, can we thank you for your submission and for being here today and the time taken to make a submission and also following up on those couple of matters.

Mr Pascoe—Thank you, Senator. Thank you for the opportunity.

[2.00 pm]

SCHMATT, Mr Ernest John, Chief Executive, Judicial Commission of New South Wales

CHAIR—Welcome. We invite you to make a short opening statement, at the conclusion of which I will invite members to ask questions. Can I just put on the record our thanks for the informal briefing and review by your officers yesterday. It was greatly appreciated.

Mr Schmatt—Thank you, Senators. I am very pleased I have been invited to come along today and to answer questions. I have held my chief executive position for probably a little over 20 years. I am a lawyer and I have been admitted to practice for over 30 years. The judicial commission of which I am the chief executive is an independent corporation established by the Judicial Officers Act 1986. It commenced operation in October 1987 and it has three principal functions. The first is to provide a scheme of ongoing education and training for judicial officers. The second function of the commission is to monitor sentencing in New South Wales and provide sentencing information to the courts to assist in achieving consistency in approach to sentencing. The third function of the commission is to examine complaints about the ability and behaviour of New South Wales judicial officers. The term 'judicial officers' covers both judges and magistrates and it is defined in the Judicial Officers Act.

The commission has been operating for over 20 years now, in fact almost 22 years. It provides a very extensive program of judicial education for New South Wales judicial officers which includes 33 different conference and seminar programs and a very extensive publishing program, technical publications which are designed to assist judicial officers in their day-to-day work. In addition to the education, and I guess you could say part of the education, is the work we do in relation to sentencing. We have two main strategies for achieving consistency in approach to sentencing. The first is to provide information by a very sophisticated computer system known as the judicial information research system. That provides both legal and statistical information to assist the courts to make more consistent decisions. We believe that consistency in approach has been achieved through the work of the commission and in that way if we can reduce the number of appeals and judicial errors it frees up resources to put into other parts of the court system.

Our second strategy for achieving consistency in approach to sentencing is that we undertake research into various aspects of sentencing and we publish reports and trends papers to assist judicial officers with understanding the trends.

The third function is complaints. We have a function of investigating complaints about the ability and behaviour of judicial officers. We do not investigate complaints about alleged criminal conduct and nor do we usually investigate complaints of alleged corrupt behaviour. But matters have been referred to the commission from the Independent Commission Against Corruption for the commission to investigate. And I will just stress that the type of complaints that we investigate are those concerning the ability or behaviour of judicial officers.

There are two steps to the investigation of a complaint: the first is what is known as a preliminary investigation or examination and, at the conclusion of that preliminary investigation—

CHAIR—Do you undertake that?

Mr Schmatt—All complaints that are made to the commission must be lodged with the chief executive, who first notifies the judicial officer of the fact of the complaint and provides a copy of the complaint to the person complained about. I would then decide how a complaint would be best investigated. If it is a matter arising from a court matter, for example, I would probably call for a copy of the record, that being a sound recording or a transcript. I might call for the court file or whatever other written information was necessary to investigate the complaint. It could be that I would interview witnesses or potential witnesses and take statements. All of that information is then put together for the members of the judicial commission, who, at a formal meeting of the commission, will determine what should happen with the complaint. All complaints must go before a meeting of the commission. One of the benefits of the structure of the commission as it is presently structured is that not only does it have judicial officers sitting to determine those matters but it also has community representation on the commission, which gives greater transparency to the process.

At the conclusion of the preliminary examination the commission has three options. One is to dismiss the complaint for the various reasons that are set out in section 20 of the legislation. If it is not dismissed, the commission must either refer the matter to the head of jurisdiction to be dealt with, either by way of counselling or by way of making administrative arrangements within the court, or, if it is not dismissed and the complaint is not referred to the head of jurisdiction, it must be referred to a conduct division. The conduct division is a much more formal process. A conduct division is constituted by three people, two being judicial officers—one of those may be a retired judicial officer—and the third member is a person nominated by the New South Wales parliament. The conduct division has all the powers of a royal commission. It can compel witnesses to come before it, it can take evidence on oath and it is usually assisted by senior and junior counsel and solicitor during the proceedings. It can hold public hearings or it can decide to hold parts of the inquiry in private or the entire inquiry in private. But most matters that are referred to the conduct division have been dealt with by way of public hearings.

In the 22-year history of the commission, and I checked these figures overnight so I know they are accurate, there have been 24 complaints that have been referred to 14 conduct divisions and there have been three reports to the New South Wales parliament recommending parliamentary consideration of the removal of judicial officers. The ultimate action that can be taken by a conduct division is to refer a matter to parliament for its consideration.

CHAIR—And those three are obviously public. I can think of two of them. Can you just refresh our memories of them and the dates.

Mr Schmatt—Two were public hearings and one was held in private.

CHAIR—But you said there were three reports to parliament.

Mr Schmatt—That is correct.

CHAIR—Were those reports not made public then?

Mr Schmatt—The three reports were tabled. In one instance the judge, who was a Supreme Court judge, addressed the parliament. In the other two cases, while the reports were made to parliament and were tabled the judicial offices resigned before the matters were considered by the parliament.

CHAIR—But they were all on the public record, were they not?

Mr Schmatt—Once they were tabled, I would assume that they are. Yes.

CHAIR—And they were reported presumably in the media.

Mr Schmatt—I think two of the three were reported in the media. I should add that one involved a situation where the judicial officer was found to be suffering from a medical condition which meant that he was not fit to continue to carry out his office and for that reason it had been dealt with in private.

CHAIR—I did not mean to interrupt your flow of remarks there. Please keep going if you have any further comments to make.

Mr Schmatt—That is a very brief overview. But what I have done, again overnight, is to prepare a paper on the complaints function which sets out both the procedures of the commission and also the legislative requirements under the act for dealing with complaints. So if you would like, I can present that.

CHAIR—Thank you. If you are happy to table that, we will accept that document. Do you have any further remarks to make at this stage before we go to questions?

Mr Schmatt—No, I am quite happy with what we have covered.

Senator BRANDIS—I have one area that I was going to explore with you for a moment, Mr Schmatt—that is, the possible overlap between circumstances in which judicial conduct on the bench might appropriately come to the adverse notice of the commission but might also be a ground of appeal against a decision made by the judge in the particular case during the course of which the misconduct is said to have occurred. Do you have a protocol for dealing with that? For example, would it be the case that all appellant processes are exhausted before you are seized of a complaint? How do you deal with that sort of issue?

Mr Schmatt—It is a matter that is considered in the preliminary examination of every complaint. There is a requirement under section 20 of the Judicial Officers Act that the commission must dismiss a complaint where there is adequate review or appeal available. So that is one matter that we do consider every time we look at a complaint. So if there is adequate review or appeal available then we have no option but to dismiss that complaint. A number of the complaints are dismissed under that head for the very reason that quite often the allegation is an allegation of bias, which in most instances there is an appeal available for.

Senator BRANDIS—So it is not open to the person to complain to you about the conduct of a judge if the complainant has not availed themselves of an appellant remedy open to them in relation to that same conduct?

Mr Schmatt—That is correct. Providing the appeal is available, whether exercised or not, we are compelled to dismiss that complaint.

Senator BRANDIS—The topic I will explore with you is the extent to which—if at all—your commission can examine the conduct of judges other than acting in the capacity as judges. In other words, do you have jurisdiction to examine off the bench conduct which does not bear upon the performance of their judicial function?

Mr Schmatt—Yes we do.

Senator BRANDIS—Will you expand on that?

Mr Schmatt—If I can take it one step further, we also have power under the legislation to examine complaints about matters that occurred prior to appointment to office. There is, however, a qualification on that. It is a matter that, if substantiated, would justify removal. It would have to be a reasonably serious matter.

Senator BRANDIS—So you would have to form a preliminary view to what level? A reasonable suspicion? Is there a test prescribed?

Mr Schmatt—That would be part of the preliminary examination, to look at that and make a decision as to whether it is a matter that justifies the commission's consideration.

Senator BRANDIS—So you have to make two decisions. You have to believe there are reasonable grounds to examine the matter and you have to be of the view that the allegations, if proven, were such that they would justify removal for those types of matters.

Mr Schmatt—I hope I have not confused you. I was talking about incidents that might have happened prior to appointment to the bench. In relation to what you initially asked me, about something that happens outside the court situation, providing it goes to the conduct and behaviour of a judge, we can investigate it—and we have.

Senator BRANDIS—How is 'behaviour' defined?

Mr Schmatt—There is no definition of behaviour in the Judicial Officers Act.

Senator BRANDIS—So it does not have to be a legality?

Mr Schmatt—Not necessarily, no.

Senator BRANDIS—Taking a purely hypothetical example: say a judge were known to be somebody who was a drunk—this was a notorious fact—he was not breaking the law but he was known to be a problem alcoholic, but it was not specifically alleged that this affected his conduct on the bench. Would that be something you could investigate?

Mr Schmatt—I should start by saying that the commission has no power to investigate a matter of its own motion. It must have a complaint before it. If we have a complaint from the public and it appeared that what was complained about could affect the judicial officer's performance, then we would certainly have to investigate it. It could be a matter that was referred to the commission by the Attorney-General, for example, under the special provisions under the legislation, but once there is a reference, it must be treated in the same way as every other complaint. There are provisions now in the legislation, since the amendments were made in 2006, that the head of jurisdiction can, if there are considerations such as impairment of some form, ask the judicial officer to be examined. The commission also has the power, if it is investigating a complaint, to have the judicial officer medically examined and so does the conduct division of the commission. In the case of the commission referring a matter, if there was concern about possible impairment and the judicial officer refused to be examined, then the refusal would be dealt with as a complaint.

Senator BRANDIS—You have used the word 'impairment' and I take it you mean 'impairment of a person's capacity to discharge the duties of a judge'.

Mr Schmatt—That is correct.

Senator BRANDIS—But what about conduct which did not demonstrate impairment and did not constitute illegality but might be thought to go to character, conduct that would be regarded as inappropriate conduct for a judge without either being unlawful or, as I said, impairing the exercise of the judicial function?

Mr Schmatt—The standing of the court?

Senator BRANDIS—Where do you draw the line on that?

Mr Schmatt—I guess that is a decision the commission has to make.

Senator BRANDIS—What about a judge, for example, with a gambling problem?

Mr Schmatt—For a complaint to the commission there is a proper form and certain provisions under the legislation which must be met, such as that the complainant must be identified, the judge must be identified, the complaint must be in writing and the particulars of the complaint must be verified by statutory declaration. Once all of those things are met, I think the commission would be obliged to at least carry out a preliminary investigation of the complaint and then make a determination, having regard to what is contained in section 20 of the act, as to whether it should be taken any further.

Senator BRANDIS—Okay. Let me give you another example. What about if a judge kept social company with people who were of interest to the police, what used to be and I think still is called 'consorting'?

Senator FEENEY—Not for a long time!

Senator BRANDIS—He is not breaking any laws, it is not impairing his capacity to act as a judge, but it would nevertheless raise eyebrows that the judge was associating with such colourful identities. Would that be a proper matter for the commission to inquire into?

Mr Schmatt—Once again, I would say that, if that complaint was in proper form and met all the statutory requirements, the commission would be obliged to conduct at least a preliminary investigation.

Senator BRANDIS—But what is the threshold statutory requirement for the character of the conduct that can trigger the commission's capacity to investigate?

Mr Schmatt—There is a gateway provision in the legislation. If the requirements are met to get the complaint through that gateway then the commission will carry out its investigation. As I said, there is no definition of either 'misbehaviour' or 'misconduct' in the legislation, so they would have their usual dictionary definitions—

Senator BRANDIS—I see.

Mr Schmatt—and the commission would then need to apply its own experience—the experience of all its members—to determine what should happen with that complaint. Each complaint is dealt with on its merits.

Senator BRANDIS—Would you feel more comfortable if the statute did define examinable conduct with a little more specificity?

Mr Schmatt—My own view is that it is not necessary, because you could restrict the type of matters the commission could investigate.

Senator BRANDIS—Conversely, because there is no definition of misconduct, if the commission were in the hands of someone who was prepared to misuse the powers, it could be an instrument of great oppression to members of the judiciary if its discretion were as open ended as that, couldn't it?

Mr Schmatt—There are 10 members of the commission. There are six judicial members—the heads of jurisdiction of the five courts in New South Wales plus the President of the Court of Appeal. There is a representative of the barristers and solicitors, and there are three community representatives. Those 10 people are required to make those decisions.

Senator BRANDIS—Unanimously or by majority?

Mr Schmatt—It would be by majority.

Senator FEENEY—You said something a moment ago which I wish to clarify. In response to a question from Senator Brandis you said that codifying some of these issues may restrict the commission in its investigations. I just want to clarify the fact that, in terms of its investigations, the commission has a threshold that is only able to look at matters that are raised by complainants. The commission cannot investigate matters on its own motion.

Mr Schmatt—That is correct.

Senator FEENEY—The commission cannot investigate matters of its own motion.

Mr Schmatt—That is correct.

CHAIR—Apart from the New South Wales amendments of 2006, where you can get a referral from the Chief Judge.

Mr Schmatt—There can be a referral from the Chief Judge. That would be the only situation.

CHAIR—That is the exception, and we need to note that.

Senator FEENEY—I think that has clarified the point. Thank you.

Senator BRANDIS—Coming back to my question, would it be a desirable reform of your statute to define inappropriate conduct or examinable conduct with specificity?

Mr Schmatt—I can only speak from experience. The fact that we do not have such a definition in the legislation, in my experience, has never caused a problem.

Senator BRANDIS—Has the commission, by the way, ever been credibly accused of mounting a malicious or vexatious investigation?

Senator FEENEY—A witch-hunt.

Senator BRANDIS—A witch-hunt?

Mr Schmatt—No, it has not.

Senator BRANDIS—It has never been credibly accused of that?

Mr Schmatt—No.

Senator HEFFERNAN—Which is one of three allegations that the opposition to a judicial commission could have.

CHAIR—I want to get a few other things on record. Again, I appreciate the committee's tour of your offices yesterday and the briefing yesterday. For the record, how many staff do you have and what is the budget you have?

Mr Schmatt—We have a staff of 38, and the budget of the commission is approximately $5.1 million.

CHAIR—Let us go through a few issues. Is the commission happy with the 2006 amendments? Do you support the ability of the Chief Judge to make a reference to you with

respect to a judge's ability to conduct their functions properly and professionally? Have you had such a referral since the amendments were passed?

Mr Schmatt—I think the amendments were well received. There has not been a matter referred since that amendment.

CHAIR—This issue of conflict of interest has come up during the inquiry today. Do these matters get referred to you? Is this a matter that has come before the commission a conflict of interest matter?

Mr Schmatt—I am not really sure what you mean by that.

CHAIR—Conflict of interest. Where a judge may have a stake or a financial interest in a particular matter and is dealing with a case. Do those matters come before you or are those matters dealt with on appeal? It is following up a Senator Brandis question from earlier.

Mr Schmatt—They are matters that could come before the commission, yes.

CHAIR—Let us go to the number of complaints you receive per year. How many preliminary hearings do you have and how many end up in the conduct division? You have indicated, I think, 24 complaints in the 22 years to 14 conduct divisions.

Mr Schmatt—Yes.

CHAIR—Can you give us some figures on your complaint handling mechanism?

Mr Schmatt—I might explain why there have been 24 complaints referred to 14. Sometimes there have been more than one complaint which have been referred at the same time to a conduct division. In one instance I can think of, there were five complaints from different people referred to the one conduct division against one judge.

Senator BRANDIS—Is that a record—five complaints about one judge?

Mr Schmatt—It was a particular matter that had got a lot of press and as a result of that there were further complaints made to the commission. But whether it is a record or not—

Senator BRANDIS—You do not know.

Mr Schmatt—I would not say. But can I just give you the particulars for complaints in the year 2007-08, which were the last published statistics. In that year, there were 66 complaints made to the commission. Of those 66 complaints, 61 were dismissed under the provisions of sections 18 and 20 of the legislation, following the commission's preliminary examination. Five—

CHAIR—Essentially meaning there was no substance to them?

Mr Schmatt—Or they may have been dismissed for one of the other reasons under the legislation, as we mentioned earlier—for example, there was a right of appeal in the matter that

was complained about. There are various heads, such as that the complaint may have been vexatious or not in good faith, the person complained about was no longer a judicial officer, or the commission may have come to a decision following its preliminary investigation that there was no purpose in taking the matter any further. All of those provisions are set out in the legislation. Once we identify one of those, we are compelled to dismiss the complaint. So it could have been under any one of those heads. But, in the annual report, we actually go into detail about which head of section 20 we have dismissed a complaint under—and I am more than happy to provide that.

CHAIR—That is fine. We will refer to the annual report.

Mr Schmatt—It is in the annual report.

CHAIR—Go on.

Mr Schmatt—Five complaints were referred to the head of jurisdiction following examination by the commission. In that year, 2007-08, there were no complaints referred to the conduct division. If a matter is referred to the conduct division, it is a matter that usually requires investigation which is beyond the powers of the commission, or it is a matter that the commission has not dismissed because it is of a serious nature.

Senator BRANDIS—So what does that mean? Of the five complaints that were not dismissed at the threshold, none were referred to the conduct division; so did the complaints division, on closer examination of the matter, conclude that the complaints were not made out?

Mr Schmatt—What would have happened there is that the commission, having conducted its examination, would have determined that the complaint should not be dismissed but should be referred to the head of jurisdiction to be dealt with.

Senator BRANDIS—You mean the Chief Justice?

Mr Schmatt—Either the Chief Justice, the chief judge of the court, or the Chief Magistrate.

Senator BRANDIS—I see.

Mr Schmatt—Now, what would happen—

Senator BRANDIS—So it was resolved internally, within the court, in effect?

Mr Schmatt—Say, in the case of a magistrate, it would be referred to the Chief Magistrate, and the usual thing that would happen is that the person would be counselled about whatever the conduct was that was complained about. One thing to keep in mind, and I think it is very important, is that the powers of the commission are not to discipline judicial officers. The powers of the commission are to investigate complaints; it is an investigatory process, not a disciplinary process. But the commission, having conducted its preliminary examination, can then either refer a matter to the conduct division, which has much greater and wider powers than the commission itself—and it can make reports to the parliament—or refer matters to the head of jurisdiction to be dealt with administratively.

Senator BRANDIS—Can it refer matters to the police as well?

Mr Schmatt—There is a power under the Judicial Officers Act for the commission to refer matters to other bodies, yes. It could be the Independent Commission against Corruption, for example.

Senator BRANDIS—Sure. Well, if there were no matters referred to the conduct division—

Mr Schmatt—In that year.

Senator BRANDIS—in that year, it must have been a pretty quiet year for the conduct division.

Mr Schmatt—Let me just explain one thing. The conduct division is not a standing body. If the commission—

Senator BRANDIS—It is not constituted ad hoc, is it?

Mr Schmatt—It is.

Senator BRANDIS—I see.

Mr Schmatt—And it is usually not the same three persons that form the conduct division.

CHAIR—And it is made up of?

Mr Schmatt—Two judicial officers, one of whom may be a retired judicial officer, and one of two persons that have been nominated by the parliament—and that provision has only existed in the last two years. Prior to that, the conduct division was constituted by three judicial officers, where one could be a retired judicial officer. That was the most recent amendment to our legislation.

Senator BRANDIS—Remind me how long the commission has been in operation for, Mr Schmatt.

Mr Schmatt—It commenced operation in 1987.

Senator BRANDIS—So you have 22 years of history. Has there been an observable increase in judicial standards as indicated by a reduction in the number of complaints upheld over time?

Mr Schmatt—I have not brought the statistics with me, but I can give you a rough idea. For the first few years of the operation of the commission, we were examining in the vicinity of about 20 complaints a year. Towards the mid 1990s, that increased to about 100-120 complaints a year. From 2000 to today, that has reduced and we examine about 60-70 complaints a year. So there has been no huge increase in the number of complaints.

Senator BRANDIS—I guess the more accurate indicator would be the number of complaints that have been found to be of substance. Has there been significant movement over the 20-odd years in that indicator?

Mr Schmatt—I am not armed with that statistic but I can say that last year, of the 66 complaints that were made to the commission, 61 were dismissed for various reasons, which is about 90 per cent. You would find, for the previous years, it was running at much the same level. However, if I can make a comment about something else which is in line with that question, when the commission commenced operation, we were receiving a number of complaints alleging inappropriate comments or rudeness and matters of that nature—which are matters that the commission can investigate.

Senator BRANDIS—This is on the bench?

Mr Schmatt—On the bench. To either litigants or counsel.

Senator BRANDIS—I have experienced it in years gone by, occasionally.

Mr Schmatt—What I have noticed—and it comes about because of the dual functions that the commission has—is that as far as I am aware, the commission is the only body of its type, at least in the common-law world, that has both the function of judicial education and investigation of complaints. We gather quite a bit of information from the complaints function, which we can then tailor back into the education function.

Senator HEFFERNAN—Very good.

Mr Schmatt—So it has a very, very good effect. It may be that we find there was no substance in a complaint, but there is something in that complaint which alerts us to the fact that we need to be doing education in a particular area. Courtroom communications was a good example. As I was saying, in the early days of the commission we were receiving quite a number of complaints about very poor courtroom communications. So, we concentrated our efforts on that area in our education programs. Today there are very few complaints about that.

Senator BRANDIS—I am always a bit sceptical of this, Mr Schmatt—perhaps I am an old cynic. But some of the best judges I ever knew—not all, but some—were notoriously rude to counsel, and that was regarded as just part of the slings and arrows of professional practice. On a slightly more serious note, I think one does need to accept a tolerable degree of curmudgeonliness from judges. Do you not accept that?

Mr Schmatt—Well, yes. I would not disagree with you. That is why it is very important to have senior judicial officers as members of the commission, making determinations as to whether there is misconduct or not, because they can bring their own experience to that decision-making process. At the same time, however, it is equally important to have community representation on the commission, in order to participate in those debates that lead to the determination.

Senator HEFFERNAN—Hear! Hear! Because yours is a remote discipline.

Mr Schmatt—I do not think you would have as much public confidence in the process if it were only judicial officers investigating the complaints.

CHAIR—To pursue the complaints-handling mechanism a little further, in terms of resources per year I know your numbers go up and down a little bit, what sort of resources are required? Obviously, you are required to put an effort into it. What number of people do you need to deal with the complaints-handling mechanism? It seems to me that there is not a huge level of resources being put into the complaints-handling mechanism. You have a process in place which is very important and that helps to build confidence, I would imagine that is a key outcome in the system and in the independence of the judiciary. What about resources? Can you give us a stab at an estimated number of man-hours and the funding of this part of your function?

Mr Schmatt—Most of the work in relation to complaints is done by me as the chief executive. Because of the serious nature of this function it is not dealt with by junior people within the commission. I carry out much of the initial gathering of information to go before the commission. I do however use retired senior judicial officers to assist me in preparing that information to go before the commission. As to numbers, it probably takes up 50 per cent of my time dealing with complaints. I have an executive assistant who assists me with those complaints. It probably takes 50 per cent of her time. If I were to try and break it down into days, it would probably be two days a week of a retired judicial officer to provide me with assistance. You must remember that what we are doing is putting together the information to go before the commission. We do not actually make the decision.

I want to add one other thing because I think it is very important to understand how this whole process works. Whilst we deal with about 66 formal examinations a year, I also deal with many potential complainants. It is a very important part of the work because a lot of people will contact the commission before they ever make a formal complaint. For one thing they want to know how to go about making a complaint. If those people make an appointment and see me, I will spend time with them. I will listen to their grievance. I have been in practice for a long time and I am very familiar with all the court processes, so I can usually determine from what they are saying what their real grievance is about. Many of them are complaining about their solicitor or their barrister and, if that is the case, I can refer them to the appropriate authorities. Some of them have a complaint about other people who are really not even involved, so I can point them in the direction. I obviously do not give any legal advice. Many people are just looking for an appeal. Again I would not give them legal advice but what I would say to them is that they should seek some independent advice as to what appeal rights may be available to them. Most of those people go away happy. They have had somewhere where they can air their grievance that has not been a formal complaint but it has been dealt with, in my opinion, effectively. I sometimes do that by telephone calls as well.

Senator HEFFERNAN—Congratulations. I think you have a fantastic facility there for the New South Wales judiciary. It is almost an aid, as it where, in a lot of circumstances. There was a very good surgeon at Royal Prince Alfred Hospital Michael Besser, who has since retired, and he used to ride a pushbike home. I used to say to him, 'God help us, you should have an armed guard to take you home, you are such a valuable asset.' What would happen to the work being done at your commission if you got run over on the way home?

Mr Schmatt—Me personally?

Senator HEFFERNAN—A lot seems to rest on your great judgment and great management. Is there a backup?

Mr Schmatt—Yes. I have a succession plan. I have people within the commission, not so much on the complaints function, for the reasons I have already explained—but all my procedures are very, very well documented. Right from the day that I took over as the chief executive of the commission, we have kept a very detailed record of every commission meeting. Each monthly meeting is bound. Anyone who follows me can pick up exactly what has happened over those 20 years and find out exactly how every matter has been dealt with.

Senator HEFFERNAN—So it would be fair to say that you deal with complaints, education et cetera all in one bundle. The cost-benefit analysis against a determined budget would be that it is pretty beneficial. You can see no reason why we should not have this as a federal model, can you? They have a different education arm now, but that could be moulded into a judicial commission arm on a cost-benefit basis.

Mr Schmatt—I can only speak from the New South Wales perspective, which I know. If you are talking about the complaints function, I think it is something that has worked very well in this state. It provides people who have a grievance with a place where they can take their grievance and it will be properly investigated by an independent body. It also protects judges from scurrilous complaints because, during that preliminary investigation stage, everything is dealt with in private so there is no harm done to the reputation of the judicial officer. It is only if the matter is ever before a conduct division that it will ever be a public hearing. I also think that the education programs of the commission—and I would add in the sentencing function there as well, because that is education; if you are getting better sentencing results and greater consistency in approach to sentencing there is a huge benefit to the community of New South Wales.

CHAIR—I want to get on to those two aspects of your operation, but are there any other aspects on the complaints-handling mechanism? I have one other question on it.

Senator BRANDIS—I just wanted to follow up from Senator Heffernan's last question. Mr Schmatt, you obviously have earned a great reputation for wisdom and tact in the way that you do your job, hence Senator Heffernan's compliment to you, but those questions also demonstrate a potential problem, don't they? If too much of the effectiveness of a body like this depends upon the aptitude of the person running it, then conversely, if you get the wrong person, it could become quite a dangerous vehicle imposing upon the culture of the court. Let me give you a purely hypothetical case. Let us say a government of a particular ideological flavour decided to impose a regime of political correctness on judges, so it appointed in your job a person who was a bit of an ideological crusader for political correctness, who sought—through seizing upon chance remarks of judges from the bench or in judgments, for example—to change the culture of the courts by imposing a politically correct flavour upon them.

Senator FEENEY—Imposing a community standard?

Senator BRANDIS—However you like to phrase it, Senator Feeney. The fact is that the independence of the judiciary depends upon a great deal of vigorous independence among the members of the judiciary and a great variety of unconstrained capacity to be governed only by

the law and the judicial oath. And it is meant to be a self-correcting mechanism, so if judges go wrong they can be corrected on appeal.

Mr Schmatt—That is correct.

Senator BRANDIS—And I am always more than sceptical about attempts to acculturate judges in ways that sound to me like they have a flavour of political correctness about them. Now, I am not accusing you of that, but you see my point, don't you?

Mr Schmatt—I do, exactly.

Senator BRANDIS—There are dangers as well as virtues in an institution like yours—if it got into the wrong hands.

Mr Schmatt—The first thing is that I am not employed by the executive government. I am employed by the 10 members of the Judicial Commission. I am employed under the Judicial Officers Act; I am not a public servant in the usual sense. When the Judicial Officers Act was first enacted in 1986, the staff of the commission were to be public servants employed under the Public Service Act. The then Chief Justice, Sir Laurence Street, and the judges of the Supreme Court were very much opposed to that, due to the fact that this was an intrusion into judicial independence, and I totally agree that it would have been. There was an amendment in 1987 to constitute the commission as a statutory corporation and to give it total independence from the executive government—and the Judicial Commission is part of the judicial arm of government, not part of the executive arm of government. Without the independence that the commission was given at that time and has enjoyed from the time it has existed, we would never have been able to get to the point where we are today.

Senator BRANDIS—Thank you for that. It is a very important observation.

CHAIR—A very good point.

Mr Schmatt—And I am the chief executive; I am not the person who makes the final decisions at the commission. Don't forget I have a 10-member commission, and they are the commission. I am an officer of the commission.

Senator BRANDIS—Who appoints you? Does the commission appoint you?

Mr Schmatt—The 10 members of the commission.

Senator BRANDIS—And who appoints them?

Mr Schmatt—The six judicial members hold office ex-officio—

Senator BRANDIS—What about the others?

Mr Schmatt—and the four other members are appointed by the Governor on the recommendation, or on the advice, of the Attorney-General, after consultation.

Senator BRANDIS—So the executive government appoints four, and six of them are ex officio.

Mr Schmatt—That is correct.

Senator BRANDIS—Thank you.

CHAIR—Two other things—firstly, constitutionality. You may not be able to answer this, but do you see any impediments to such a commission being established at the federal level? Do you see any problems with constitutionality issues that might arise?

Mr Schmatt—In fairness, I do not think I can give you an answer to that.

CHAIR—No. That is fine. I want to pick up on a point you made earlier. You made reference to a matter that you had to, and did, investigate that was referred by the Independent Commission Against Corruption in New South Wales. My understanding was that you take complaints and you get referrals from the chief judge, but I did not know you could get a referral from the Independent Commission Against Corruption. How does that work, and what happened?

Mr Schmatt—There is a power under the Independent Commission Against Corruption legislation—I think it is the ICAC Act 1989—to make referrals to other bodies. So it would be referral under that power to the Judicial Commission.

CHAIR—And under your act you obviously have an ability to investigate such matters?

Mr Schmatt—From memory, what happened there was that it was a formal complaint made to the commission.

CHAIR—I see. So you just took it on board as a complaint?

Mr Schmatt—Yes.

CHAIR—All right. That is important. These are issues that have been raised by other senators around this table in terms of not just complaints but matters of corruption or alleged corruption.

Can we just deal with the other two aspects of your functions, because we have not spent a lot of time on them. The education and training aspect—we accept that. and I understand it works very well here in New South Wales. We have got a national body which you would be fully aware of. As for the consistency in sentencing aspect, we had the informal tour yesterday, but can you explain on the record, firstly, how that works and, secondly, how it benefits not just the judiciary but also the taxpayer and the community financially.

Mr Schmatt—I think what you are talking about is our judicial information research system.

CHAIR—JIRS.

Mr Schmatt—JIRS is a computerised judicial support system, which has been developed by the commission. As a result of its mandate to provide sentencing information to the courts, the commission looked at the best way that this could be done. It made a decision that it could disseminate large volumes of both legal information—that is, case law, legislation and other information—and statistical information about court outcomes to the courts. By providing that information to judges, magistrates and all other users of the courts—such as the Office of the DPP, public defenders, the Legal Aid Commission, Aboriginal legal services and private practitioners—the courts would be in a better position to make better informed decisions and more consistent decisions. We are not looking for consistency, per se, because there is justifiable disparity in sentencing; we are looking for consistency in the approach to sentencing so that like cases are dealt with alike.

The other thing that the commission does is to provide bench books—bench books for the criminal trial courts, which contain suggested jury directions, and bench books containing the principles and practices of sentencing. If we take the criminal trial courts bench book as an example and judges follow the suggested directions contained in these, there is very little chance of a judge falling into error. If we can reduce the amount of error, even by a small percentage, it would more than cover the cost of running the commission every year. Now, it would free up the courts to do what they are there to do: to deal with disputes.

CHAIR—Over that 22-year period, do you have any evidence that suggests that the number of appeals in New South Wales has been restricted as a result of this excellent service that you are providing?

Mr Schmatt—You would have to do research into that. The difficulty is that there are a lot of other things that impact on it. I would be confident to say that, with the judicial educational programs and the other aids that are provided by the commission—such as the bench books and the sentencing information on the sentencing information system, or JIRS—there is a much more efficient system in New South Wales than we had 20 years ago. I think most judicial officers, and particularly those that have been around for a long time, would confirm that.

Let me give you an example that could be a measure, I guess, of the efficiency of the JIRS database. Obviously, we monitor the usage of JIRS. Last month alone, we had something like 92,000 inquiries on that database. About 50 per cent of those inquiries were from the legal practitioners and 50 per cent from the judiciary. So the usage of that database is just huge. That type of information out there must lead to better decision-making and a more efficient judiciary.

Senator HEFFERNAN—The flow-on from that, obviously, would be one of the great protectors of our institutions: public confidence.

Mr Schmatt—Certainly. I think that is very important. I think all of the functions of the commission lead to public confidence in a number of ways: through the complaints function, in that, if a person has a grievance, it will be properly dealt with; in the fact that decision-making takes place by people who are well-educated and who participate in an ongoing program of professional development; and in the fact that there is very valuable sentencing information provided to the courts to achieve a greater consistency in the process of sentencing.

Senator HEFFERNAN—Part of that public confidence would of course come from knowledge. Usually you get to know where they are—that there is a speed camera out there, as it were, in a judicial sense.

Mr Schmatt—Yes, I think that is right.

CHAIR—We are certainly appraised of that. Did you want to add anything?

Mr Schmatt—I just thought of something as a result of the comment by Senator Heffernan. When considering the number of complaints that the commission deals with—I said it was 66 last financial year—you have to consider that there are approximately 300 judicial officers in this state who deal with in excess of 500,000 cases a year. When you think that there are only 66 formal complaints—and there is plenty of potential for complaints out there from dissatisfied litigants—I think that is pretty reasonable.

Senator HEFFERNAN—Your organisation is living testimony to the fact that it works and it would actually add to public confidence in the other jurisdiction that we are talking about. I learnt a long time ago, as an old shire president of Junee Shire, that if someone complained that they did not have kerbing and guttering outside their house that as long as you had a system where you put them on the list to get it, it helped. So at least if you have got a complaint you know there is somewhere you can go where you do not actually have to have the spectacle of Justice Yeldham topping himself as a consequence of there being no way to deal with him in a civilised way.

Mr Schmatt—If I could just add one other thing that you have reminded me of. A paper was given by Justice Peter McClellan, who is now the Chief Judge at Common Law in the Supreme Court of New South Wales, on the benefit of a judicial commission for the head of jurisdiction. If the head of jurisdiction did not have a commission in place they can be in a very difficult position. The head of jurisdiction is first among equals of course, but once a matter has been dealt with by the commission if it is referred back to the head of jurisdiction, the head of jurisdiction then has the authority of the full commission when they sit down to counsel a judicial officer. That is just something I remember from that paper, but it may be worth your while, if you are interested, to have a look at that paper. It should be on the website of either the Supreme Court of New South Wales or the Land and Environment Court. He was at that time the chief judge of the Land and Environment Court.

CHAIR—Mr Schmatt, you outsource this service to Queensland I understand?

Mr Schmatt—The sentencing system we do.

CHAIR—Being a devil's advocate we would need to ask you why other states and territories are not adopting the same approach?

Mr Schmatt—When you say that we outsource it, what happened was that Queensland was aware of the sentencing system in New South Wales—the computerised sentencing system—and how highly it was regarded by the judges and magistrates here. As a result of that I was asked to demonstrate it in Queensland, which I did, to a number of senior judges. As a result of that the government of Queensland approached the commission to build a similar sentencing system for

Queensland, which we did, and we now run it as a bureau service for Queensland. The Queensland courts provide the commission with the raw information and we send it back to Queensland and it is used by the judges and magistrates in Queensland.

Senator BRANDIS—It is basically a database isn't it?

Mr Schmatt—It is a database but it is a very sophisticated judicial support system. It has been demonstrated in a number of parts of the world and—

CHAIR—I was going to ask you that, because you have had commendations from other parts of the world. Can you put that on the record for us.

Mr Schmatt—A report was done for the English parliament in 2000 by Lord Justice Auld, who, I think, later became the Lord Chief Justice of England, on the criminal justice system in England and Wales and in that report he made reference to judicial support systems. The committee he was heading had looked at judicial support systems in every jurisdiction around the world. He makes a statement in that report to the effect that the JIRS database is the most sophisticated and the least intrusive judicial support system operating anywhere in the world, which was quite a compliment to the commission.

CHAIR—Going back to my other question, why hasn't it been adopted in other states and territories? Do you want to make an observation on that matter?

Mr Schmatt—My own personal view is that it would be hugely beneficial for the other states to have a similar database. As to why they have not gone down that track, I cannot answer that.

CHAIR—And at the federal level, there is a view that this benefits in particular the lower courts—the issues like drink-driving or the lower criminal charges. Do you think it can be replicated amongst the higher courts and still have benefits at the higher court level and the federal level?

Mr Schmatt—Just taking the higher courts in New South Wales, I think the benefits to those courts are equal to the benefits in the local courts. You will find statements from the Chief Justice of New South Wales in his guideline judgments to the effect that the guideline judgments would not have been possible without the information that is available from the sentencing information system. Many of the inquiries that are made on the database are made by the higher courts. In fact, I would suggest that the usage is about 50/50.

CHAIR—That is helpful.

Senator HEFFERNAN—There is obviously some resistance. This has been a very long journey federally to get to the point where now we are giving consideration to a federal judicial commission. For me it has been 10 years, in part because of the resistance to the proposition of the federal judiciary. What do you think are the main drivers?

Mr Schmatt—If you look at history, there was resistance here in New South Wales in 1986—

Senator HEFFERNAN—Do you think it is because they do not under the service you can provide, or do they think it is just some sort of—

Mr Schmatt—That is possibly the case. I think many of the other states understand the services that can be provided in the way of eduction. In fact, I speak to many of the judges from around Australia and most of them say that they are envious of the situation here in New South Wales. But you must remember that to some extent there is an efficiency of scale. We have one-third of all judicial officers in Australia located here in New South Wales so to set up a body such as this is justifiable.

Senator HEFFERNAN—But you could outsource some of your resources to the smaller jurisdictions I presume.

Mr Schmatt—To some extent we do already offer our services to other jurisdictions. For at least 20 years now we have invited the other states to participate in our magistrates orientation course, and they do participate. Most of the states of Australia at some time or other have participated in the orientation courses that we offer at the commission. It is on a cost recovery basis for us—we charge a fee. And it is not only other states of Australia but we also invite some of our near neighbours to participate. For example, the Solomon Islands have sent judges and magistrates along to our courses. Papua New Guinea, until recently, sent judges along. We now have a memorandum of understanding with PNG that we provide education programs for the PNG magistrates.

Senator HEFFERNAN—What about the ACT and the Northern Territory?

Mr Schmatt—They are also invited to participate and do participate.

CHAIR—I want to put on record our sincere thanks to you and the team at the commission for your time today and for your evidence.

Committee adjourned at 3.09 pm