COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE

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

FRIDAY, 12 JUNE 2009

MELBOURNE

BY AUTHORITY OF THE SENATE

TO EXPEDITE DELIVERY, THIS TRANSCRIPT HAS NOT BEEN SUBEDITED

INTERNET

Hansard transcripts of public hearings are made available on the internet when authorised by the committee.

The internet address is:

http://www.aph.gov.au/hansard

To search the parliamentary database, go to:
http://parlinfoweb.aph.gov.au

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS

REFERENCES COMMITTEE

Friday, 12 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 and Trood

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 9.12 am

CHAIR—This is the second hearing for the Standing Committee on Legal and Constitutional Affairs References Committee inquiry into Australia's judicial system and the role of judges. This inquiry was referred to the committee by the Senate on 16 March. 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. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to the committee and such action may be treated by the Senate as a 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 to give evidence in camera. If a witness objects to answering a question, the witness should state the ground 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.

LASRY, The Hon. Justice Lex, Vice-President, International Commission of Jurists, Victoria

McGOWAN, Mr Glenn, SC, Chairman, International Commission of Jurists, Victoria

CHAIR—Welcome. The International Commission of Jurists, Victoria has lodged a submission recorded as submission No. J2 with the committee. Do you wish to make any amendments at this time?

Justice Lasry—There is one amendment, Mr Chairman. It is to paragraph 17. There may be some other typographical amendments, but the amendment to paragraph 17 commences with the words 'Tenure for life provides a safeguard for judicial independence.' What we really meant to say there was that constitutional tenure provides a safeguard for judicial independence. I think tenure for life is—

Senator HEFFERNAN—Going on to 100 years old.

Justice Lasry—Yes. No-one really contends tenure for life, although in the United States it is still available.

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

Justice Lasry—Thank you, Mr Chairman. Bearing in mind that we are a little behind time, I will make it brief. In the course of our paper I think we have dealt with the terms of reference as

they were and there may be some of the present four terms of reference that we have not dealt with. We have dealt with the procedure for appointment and the method of termination of a judicial appointment. In essence, in relation to appointments, and I do not think this is contentious, appointment by the executive as opposed to some other body is appropriate and appointment primarily must be on merit, clearly. We do not see a difficulty in appointments following a series of applications and we do not see a difficulty—and we are really speaking from a Victorian point of view—with the establishment, which would affect Victoria, of a judicial appointments commission the role of which obviously would be to make recommendations to the executive.

I have had the advantage of seeing Justice McColl's submission, or at least her opening statement from yesterday, much of which I agree with, and also the written submission provided to the committee by the Chief Justice of the court of which I am a member, so I will not go into the detail about the desirability of appointment on merit. With respect, we would agree that merit and judicial independence are the primary important bases for appointment. I have also had the advantage, and I can provide it if necessary, of reading the article by Professors Evans and Williams in the *Sydney Law Review* in relation to the appointment of Australian judges. They make important points about the significance of diversity; that is, judicial appointment should reflect the community from which the appointments are made. That relates both to cultural groups and of course to gender.

If I can say so from my own very short experience as a member of the court, apart from the obvious professional and academic qualifications, an important part of the appointment process must involve some analysis at least of temperament and decisiveness and the ability to write, apart from the more obvious characteristics of objectivity and integrity and, as we have had experience of in Victoria, the absence of any outstanding matters, whether to do with tax or any other organisations, which might subsequently come to have an effect on judges' occupation of office.

So far as the termination of a judge's appointment is concerned, as the committee knows, in Victoria we now have part 3AA of the Constitution Act. Since those amendments were made as a result of the report by Peter Sallman to which the Chief Justice refers, the process has not been, as far as I know, tested at all. It has not had to be used. As perhaps you would know, the process under which that operates is that an investigating committee can be established for the purpose of performing a similar function to the function of the commission in New South Wales, that is, is there conduct on the part of a judge that might be regarded as justifying removal. A report is then provided by that committee with conclusions about that issue which is given to the Attorney-General and the Attorney-General then decides whether or not to table the report in parliament and pursue a vote of the parliament for the removal of the judge. There is a history which I am sure members of this committee know about better than I do as to how from time to time it has been attempted to conduct this pre-removal investigation, if we can call it that.

On page 4 and following in our submission, we have dealt with the term of appointment and compulsory retirement age. I also note in passing that the Chief Justice seemed to be saying—I am not sure whether she was actually putting it as an argument—that she would favour and the court has asked the government to consider amending the retirement age from 70 to 72. For our part, we see the merit in a retirement age of 70. We think there is a point beyond which the job is a job that cannot be adequately done.

But of course there are variations. Let me just in passing give you one example to which the Chief Justice alluded but did not identify. Justice Teague of our court was a judge for I think 21 or 22 years. He turned 70 last year and retired. He is the healthiest, fittest, strongest, most active 70-year-old I have ever seen. He desperately did not wish to leave the court. He loved the work; he was very good at it. Fortunately for him, although his leaving was very unfortunate for the state of Victoria, a job arose and he is now the chairman of the bushfire royal commission and by all reports is doing an outstanding job. The reason I mention that is because I think there is inevitably subjectively a variation. Some 70-year-olds will go on effectively and some perhaps will not. For my own part, I am waiting to see what happens!

In a sense that is linked to perhaps the argument about acting judges. There is a very strong argument against acting judges in the sense of drawing lawyers from the profession and appointing them as acting judges. On the other hand, I think there is an argument in favour of acting judges who are 70-plus who are available and well enough and are still keen enough to assist with what might be described as bubbles in the workload of the court.

CHAIR—And what is your view?

Justice Lasry—I am strenuously against acting judges under the regime that I understand Victoria would favour.

Senator HEFFERNAN—Which gets back to whether they go back to practice.

Justice Lasry—As I follow it, and as it has been outlined to me by the Victorian Attorney-General when I was at the bar, the idea would be that there would be in effect a pool of lawyers who indicated a willingness to act as judges and when a court reached a stage where there was a spike in the workload the Chief Justice would communicate with the Attorney-General and the Attorney-General would ring someone in that pool and say, 'For the next two or three months you are a judge and you will hear a couple of cases.'

Senator HEFFERNAN—How do you sort the conflicts out?

Justice Lasry—Impossible. But on the other hand there is an overlap between that issue and the issue of retirement age.

We have not dealt with the issue of handling of complaints, which I suspect is an area that the committee is interested in, apart from me now referring to part 3 of the Constitution Act in Victoria as it stands. Subject to my colleague correcting me, I think our position would be that by and large complaints about judges can be divided into two broad groups. One broad group is conduct which has the potential to warrant removal, and that would normally involve an investigation in Victoria by the committee established under part 3AA of the Constitution Act and that would take its course. The alternative is a complaint about conduct which clearly would not involve removal. In turn perhaps that category can be divided by conduct which is out of court or extrajudicial conduct and conduct in court. Our view is that, so far as conduct in court is concerned, there really is not any aspect of a judge's conduct in court that cannot be dealt with by courts of appeal, by the supervision of a Chief Justice, by continuing legal education and by, as we have, a system of mentoring.

That leaves the remaining category of non-removable conduct, if I can call it that, and how that should be dealt with. Our concern about a commission which would entertain relatively minor complaints is that there is at least the potential for harassment of particular judges. I can imagine cases both which I have seen and which I have been in where disgruntled litigants could potentially make the life of a judge extremely difficult.

Senator HEFFERNAN—Would you agree, though, that the New South Wales judicial commission seems to be able to wade through all that without any—

Justice Lasry—From what I have heard, apparently, but I could not honestly give you a direct answer because I simply do not know. Mr Chairman, I think that completes all I want to say by way of an opening statement.

CHAIR—Thank you, Justice Lasry, for those opening remarks. I apologise for the late start. In light of that, we will go over time a little bit to take into account if there is any evidence you need to put to us. We will have some questions and I will be reasonably rigorous with the amount of time I allocate to my colleagues and myself in terms of questions in light of that time.

I will kick off with a question about the appointment process. You have indicated that you support appointment on merit. You put a strong view to that effect. But you also said that you noted a report by Evans and Williams in the *Sydney Law Review* where there was a reference to diversity—the importance of gender and cultural groups in the community. From time to time there may be a conflict in that regard. There may be an overlap. I am wondering how you would deal with that. If merit is it then obviously the gender and cultural issue does not necessarily play a key role. What is your view with respect to entertaining and ensuring diversity across the board? How does that fit with your views that merit should be dominant?

Justice Lasry—I did not mean to convey the impression that the two things would be in some way mutually exclusive. I think merit is the primary basis for selection, obviously. But I include in merit professional background and professional ability. I do include also temperament and an aptitude and capacity to do the work of a judge, which is, as I have discovered, more different from being an advocate than I had quite realised. You do not realise until you get there how different it is.

On the other hand, the reason I referred to diversity and the reason that argument appealed to me is that a constant public criticism of judges is that they are, in a sense, out of touch. There are the common stereotypes: a gentlemen's club, white, Anglo-Saxon, public school and aloof. Whilst I do not think the criticism is necessarily a fair one, I think it underlines the need to endeavour to find people who do qualify so far as merit is concerned but who also have the other attributes that would reflect the community from which they are appointed. So it may be about making a choice between two people of, relatively speaking, equal merit—although that never really quite occurs—but choosing the female or choosing the member of a particular cultural group by virtue of their membership of that group. But I did not mean to suggest that you would diminish merit in order to elevate some other quality. I think merit is the primary qualification.

CHAIR—Do you support the recent reforms regarding the appointment process and the establishment of panels to provide a short list to the Attorney? Secondly, the new reform process,

at the federal level at least, has not applied to the High Court. What is your view in that regard? Is that exception appropriate?

Justice Lasry—I have to preface what I am going to say by noting that in this state we do not have that process. We have an informal consultation process but we do not have a formal process. Again, because I am speaking not for the court but for the ICJ, subject to any correction that Mr McGowan wants to make, I think our position is that we would not object to panels of that kind. I think it is, these days, such an important appointment as far as the community is concerned that there should be a process which the community are satisfied with. Regarding the establishment of a panel which makes recommendations, the query is whether the Attorney-General is to be bound by those recommendations—that is, may the Attorney-General otherwise appoint someone, notwithstanding that they are not on the panel's list?

CHAIR—What do you say to that?

Justice Lasry—I think I would still want the Attorney-General to retain the entitlement. I am not a constitutional lawyer, but there may be a constitutional issue generally about the role of these panels. Whatever the organisation, the judicial appointments commission, and however it is structured, as long as it is structured so that it aims at identifying candidates who fulfil particular criteria and makes recommendations which an Attorney-General can act on, I have no difficulty with that.

CHAIR—Mr McGowan, do you want to add to that?

Mr McGowan—I personally agree with that. Paradoxically, having a committee to make recommendations to the Attorney might itself serve as a reinforcement of the impression of having only those in a club being appointed, as opposed to an unrestricted discretion residing in the Attorney. But I still think it is probably a good idea because the Attorney should have as much input as possible.

CHAIR—All Right. And the issue of the High Court?

Justice Lasry—Because my High Court practice was virtually non-existent and therefore my experience of the court other than reading the *Commonwealth Law Reports* is pretty limited, I myself would not be in favour of excluding the High Court from such a process, simply because it is such an important court and as I sit here I do not see any reason to do so. But the process would be the same, that is, that if an Attorney-General wished to appoint someone to the High Court who is not a member of a panel's recommendation, of course it would be open to the Attorney to do so.

Mr McGowan—It is difficult to think of an objection in principle for distinguishing between High and other courts in the appointment process.

Senator BRANDIS—Justice Lasry, that observation you just made is at variance with what we have heard from Justice McColl yesterday morning on behalf of the Judicial Conference of Australia, who seemed to think that was a reason for excluding the High Court, that it was such an important court and she seemed to think that there would be correspondingly fewer suitable people to consider. I am not adopting that view, by the way.

Justice Lasry—No, and I am not suggesting you are, I am just responding to what you put to me. My practice at the bar was as a trial lawyer and I expect to spend my time at the Supreme Court as a trial judge. For my part, I think that is a fundamentally important role. Putting aside intellect and academia, of course the High Court is important but the fundamentally important courts for the community, where the community most actively interface with the court system, are the trial courts. First among those are magistrates courts. That is where the shopfront of the law is. So, with respect, I am not so far persuaded that, just because Justice McColl does not agree with me, that I should change. But I have not thought it through; it is not something that I have really spent much time thinking about, for the reasons I have given you.

Senator BRANDIS—Sure.

CHAIR—I have a question on another term of reference. Are there any further questions on this particular term of reference regarding the appointment processes? If not, I would like to go to the complaints handling mechanism, which you have touched on in your opening remarks. We have had a great good deal of advice and feedback from a range of witnesses yesterday, including from the New South Wales judicial commission, and we were certainly complimentary towards their approach and how they have handled it in New South Wales. I am interested to know the Victorian manner in which you deal with complaints as far as you are aware in your court system. We have this issue where complaints are made by litigants based on whatever reasons they have: delays, misbehaviour or whatever. But then we also have this issue where before the judge actually gets to the courtroom there is an issue regarding their ability or perhaps their health or capacity to deal with a particular matter. How are those matters dealt with, in your view, and how should they be dealt with?

Justice Lasry—The first thing I want to say, and I do not want a labour this but I do want to say that I do not understand that there is a significant problem about these issues. I do not say it does not occur, but in the sense that we are seeking a solution to a problem I do not presently understand that there is a substantial problem in Victoria. I may be wrong about that, but that is my understanding. Complaints in relation to the litigation itself, and there are and there can be complaints about the time that judges take to make decisions, I think can only be properly dealt with within the court.

In Victoria, for example, we have I think it is a 10-week rule. After a judgment has been more than 10 weeks, the parties are entitled to inquire of the Chief Justice as to what the state of progress is. It does happen that there are judges who find that process extremely difficult and there are long delays. Sometimes the delay is due to the complexity of the litigation, sometimes the delay is due to perhaps the workload of a judge, sometimes the delay is due to the fact that the judge is simply struggling to make the decision. In all of those sorts of cases it seems to me that the only way that those can be dealt with effectively, as opposed to having a complaints process overseen by a group of people who are not daily part of the court process, is to have an efficient supervisory role by the Chief Justice, the system of mentoring that we have in the Victorian court and of course judicial education which is real rather than token so that people are assisted.

Senator HEFFERNAN—The only option the Chief Justice has, though, is to counsel the person concerned. The person can tell him to go and bite himself.

Justice Lasry—Yes, that is right, but what is the alternative to that, if I can ask rhetorically?

CHAIR—We will just keep moving with questions.

Justice Lasry—You mentioned misbehaviour as well. I am not quite sure what sort of misbehaviour you were referring to. Do you mean, for example, misbehaviour in court or misbehaviour, for example, in some demonstration of bias? Is that the kind of thing that you are considering?

CHAIR—It covers the field: in court and outside of the court.

Justice Lasry—Inevitably in court what might be described as misbehaviour, bias for example, if it is clear will be dealt with by appeal courts.

CHAIR—I am not focusing so much on matters where there can be an appeal; I am focusing on matters where perhaps there cannot be an appeal, where there might be sleep happening or intoxication or something like that.

Senator FEENEY—Conduct unbecoming an officer, so to speak.

Justice Lasry—I think the first step in a situation like that is for the Chief Justice or his or her delegate, but a senior member of the court, to make some assessment of the problem. Someone who regarded themselves as the victim of that conduct could easily make a complaint to the court and to the Chief Justice. The Chief Justice or his or her delegate could then make some assessment of what the problem was. Then it becomes at least temporarily a scheduling solution; that is, the judge is taken out of court.

CHAIR—I have got your feedback on that. That is fine. What about this issue regarding the ability of the judge to conduct his or her role in an appropriate professional manner, whether it be a health situation or mental incapacity but something has happened before they get to court. What about situations like that?

Justice Lasry—Do you mean before they get to court for a particular case?

CHAIR—Yes.

Justice Lasry—Again, I do not think that is a problem that is amenable to a complaints process. It is really amenable to effective supervision by the head of jurisdiction, I think. You would expect that the head of jurisdiction would have enough feedback about the judges on the court through the network in the court to be aware that there is a problem and to go about a practical solution. I do not think it is amenable to a complaints process, if that is what you are asking me.

CHAIR—That is fine. Other questions.

Senator BRANDIS—Before Senator Heffernan starts, could I say in relation to your last observation that we heard from Mr Schmatt, the chief executive of the Judicial Commission of New South Wales, yesterday afternoon and I suppose, like you, I wonder aloud whether anything

a judicial commission can do in relation to counselling or otherwise disciplining, whatever that means in this context, judges is not something that the Chief Justice or the Chief Judge of that particular court cannot already do and presumably in appropriate cases is already doing. Is that your experience in Victoria?

Justice Lasry—Yes, it is. Look, I am aware of cases where there are those sorts of difficulties with judges and it can develop to a point, I suppose, where a head of jurisdiction cannot solve the problem and the judge becomes difficult to deal with and will not resign, for example. That then becomes quite a substantial problem.

Senator HEFFERNAN—There is no solution, though, is there?

Justice Lasry—There is, depending on—

Senator HEFFERNAN—Short of a heart attack.

CHAIR—Senator Heffernan, we have other senators who are seeking the call—

Senator HEFFERNAN—I am seeking the call too.

CHAIR—Good. Thank you.

Justice Lasry—I was just going to say that it may be that a problem of that kind ultimately develops into a set of circumstances which might justify a more serious approach.

Senator HEFFERNAN—Do you have an objection to the New South Wales judicial commission?

Justice Lasry—I do not know enough about the way it operates.

Senator HEFFERNAN—Wouldn't it be a good idea for other jurisdictions—you obviously have not; maybe it is not in your bailiwick—to inform themselves of what an efficient judicial aid as well as education process and a tool to have the wider community have full appreciation of and confidence in the judiciary? There is the speed camera effect where if you are a judge you know that there is a speed camera on the road. The system we have got now where the ultimate appraisal is that the Chief Justice counsels the bloke and if the person is obstinate or whatever, they can just tell you to go and bite yourself. Can I take you to—

Justice Lasry—Senator, can I just deal with that. Notwithstanding the lack of the so-called speed camera in Victoria, I do not perceive that there is a difficulty here. In other words, I think the supervision by head of jurisdiction, certainly in our court; the operation of the Judicial College of Victoria and its education program which is very substantial and operates very effectively. I do not perceive that there is a public lack of confidence in the court because of errant judges not being able to be disciplined.

Senator HEFFERNAN—But it is important to maintain public confidence in the institution. Can I take you to—

CHAIR—Do you want to respond, Justice Lasry?

Justice Lasry—No, I think I have made the point.

Senator HEFFERNAN—Perhaps you will accept the hypothetical or I could give you the actual case from a police running sheet. If there was a case where it came to the attention of the police through the interview of a solicitor who was given a task in a court case which involved many millions of dollars and the solicitor was recommended to the law firm to give the advice. He started to write the advice and it became too complex for him, so he sought assistance from a judge. The judge had in fact recommended him to the job. So that happened and the assistance was given. In due course that case turned up in court. It is quite a well-known case—

Senator BRANDIS—Hypothetically.

Senator HEFFERNAN—Hypothetically, and the judge sat in judgment of the case. If that is in a police running sheet, how do you deal with it? The police cannot deal with it. I have asked these questions, through you, Mr Chairman, very diligently and carefully through estimates for the last three years and I cannot get an answer.

CHAIR—Senator Heffernan, you have put your question to Justice Lasry.

Justice Lasry—The answer to that question in Victoria would be that if that all came out I would have thought that that would be the kind of conduct that might well be referred to the Attorney under part 3AA of the Constitution Act.

Senator HEFFERNAN—In this case it is in the federal jurisdiction and it went to the highest court in the land and nothing can be done about it other than to mount the argument to convene both houses of parliament, which I cannot do. The AFP Commissioner said in estimates on the record that there is nothing he could do about it, even though he has got the evidence.

Justice Lasry—Certainly it is not the complete answer to your question, but if the judge who had given the advice became the trial judge and resolved the matter—and you have not said it but I assume that the judge resolved the matter in accordance with his unofficial advice—you would only need to draft one paragraph in an outline of submissions to the appeal court to ensure that matter was remitted for at least retrial.

Senator HEFFERNAN—If anyone knew.

Senator FEENEY—If these facts could be proven.

Justice Lasry—If the facts could be established, you would be in a position to appeal out of time if the time limit had passed.

Senator BRANDIS—Without necessarily adopting what Senator Heffernan is saying, what he is putting, Justice Lasry, is that that conduct probably is not a crime. It is not something that can be prosecuted by the police, albeit it comes to their notice. Therefore, particularly because of section 72 of the federal Constitution—the proved misbehaviour or incapacity requirement—it is difficult to see how light could be shed on that, absent a prosecution. Perhaps it could be argued

that the informal counselling by the Chief Justice, particularly if the judge concerned in this hypothetical case were stubborn and uncooperative with the Chief Justice, would be of little avail.

Justice Lasry—I do not suggest that something like that should be dealt with only by informal counselling. All I am saying, and all I can really say, in response to Senator Heffernan, is that, in Victoria, an investigating committee under the Constitution Act would be entitled to investigate the matter and report to the Attorney-General.

Senator HEFFERNAN—This has come after the passage of some years. It was 1999.

Justice Lasry—It would not matter. The disadvantaged litigant could appeal out of time on the basis that this was evidence which was not available at the time. Assuming the judge was still a serving judge, the passage of time would not stop that judge from being the subject of the operation of part 3AA of the Constitution Act, I wouldn't have thought. If that conduct were proved, you would be pretty close to the kind of conduct that, you would think, the Attorney would want to persuade the parliament would justify removal. It is pretty serious.

Senator HEFFERNAN—Just for the record, these documents have been given to the government on three occasions—to different persuasions of government—and they have been returned to me.

Senator TROOD—Justice Lasry, to what extent is there a constitutional principle here that may be in jeopardy from the extent to which we may be going down this track of wider administrative control and judicial intervention? In paragraph 23 of your submission you cite, with approval, Justice Gleeson's remarks about judicial independence and courts. Do you think there is a—

Senator BRANDIS—I think there is a misprint in that quote, by the way, Justice Lasry. I think the word 'prerequisite' is meant to read 'perquisite'.

Justice Lasry—This is in paragraph 23?

Senator BRANDIS—This is in the quote from Justice Gleeson: 'Independence is not a perquisite of judicial office,' but a right of the litigant.

Justice Lasry—Yes, I think that is right. Thank you, Senator.

CHAIR—Well-noted, Senator Brandis.

Senator TROOD—Is there a constitutional principle here that may be at risk?

Justice Lasry—My answer is that there may be, but I am not a constitutional lawyer. Apart from adopting what the Chief Justice Gleeson said, I would not assert that with confidence. Do you mind if I ask—

Senator TROOD—I do not mean it in a narrow, technical sense—that is to say, not at the Commonwealth level—but in the wider sense of separation of powers and things of that kind.

Mr McGowan—Might your question be more directed to whether the types of commissions in New South Wales might infringe judicial independence in some way? The answer is that they can, depending on how they operate. If they are given powers to slap judges around, short of sacking them, then of course the possibility of intimidation and improper influence exists.

Senator TROOD—Is that a matter that you are troubled about at the moment, Mr McGowan?

Mr McGowan—I am, personally, yes.

Senator TROOD—And in relation to the New South Wales example, so far as you understand it?

Mr McGowan—I will not comment on the details of the New South Wales system, but it does trouble me that so-called discipline imposed on judges, short of sacking in the constitutional sense, can amount to intimidation and improper influence. What sort of conduct are we talking about? If we are talking about Senator Heffernan's example, both of us here think that, in Victoria, that could have been solved in a number of ways, either by appeal or by referral to the Attorney. But, if we are talking about other types of misconduct, delay is already dealt with by a mechanism in Victoria. If we are talking about bias, there are two ways you can deal with that, either during the trial or after the trial. If we are talking about error, that can be dealt with by appeal. We are talking about misconduct short of sackable offences. The real question is: what would the body do short of sacking? Does it reprimand? Does it fine? We think that those sorts of things would be highly undesirable.

Senator HEFFERNAN—I think it worked well in New South Wales, where you go to the bloke and say, 'Listen, old cobber, we'd better go and have a cup of tea.' It does work.

Mr McGowan—That sort of counselling, if I can call it that—

Senator HEFFERNAN—It is the speed camera effect.

Mr McGowan—Yes, that sort of counselling operates in Victoria in the sense that the chiefs of the jurisdictions will do so. Remember, too, as Justice Lasry said, we have a mentoring system and an educational system and both tend to minimise the prospect of judges going off on a frolic without anyone speaking to them at any time.

Justice Lasry—I would add to that, although you may not find it impressive. In Victoria, certainly there has always been a very strong tradition that colleagues and friends of someone who has been appointed to a court who are informed that the judge is in some way not reacting or behaving in a way that everyone had hoped, perhaps because of his or her demeanour as far as parties or counsel are concerned, is given exactly that treatment—that is, someone will contact him or her and say, 'Let's have lunch,' and he or she will be told, 'Look, this isn't going well. This is your reputation.' I think that, like all lawyers, judges are interested in their reputation amongst the profession.

Senator HEFFERNAN—For public confidence, though, you would have to agree that a structure—

Justice Lasry—It is not a structure; I agree with that. I do not think there is any secret about it—that is really all I was saying. It is something that is well known.

Senator HEFFERNAN—And there is this grey area between what is a criminal matter and what is just inappropriate—and that cannot be dealt with.

Senator FEENEY—Justice Lasry, you described informal mechanisms, if I can describe them that way, for guiding and counselling colleagues. It has been put to us by other witnesses that, while those systems exist, they are, of course, not transparent; they are not accountable—

Justice Lasry—I agree with that.

Senator FEENEY—They are not a substitute for a complaints process, are they?

Justice Lasry—No, they are not. I think in many senses what is more transparent is that the role of counselling judges who are difficult to appear in front of or who are not behaving sympathetically enough so far as the parties before them are concerned has been significantly taken over by heads of jurisdiction. That is a more formal process.

Senator BRANDIS—I wonder, though, if you conceded too quickly to what my colleague Senator Feeney said to you, Justice Lasry. I mean, everything that judges do as judges they do either in an open forum for contending parties or in their published reasons for judgment, which, of course, are always reviewable and analysable and criticisable. So I wonder how much more transparent the conduct of judges could be than it already is. A process of complaints might arguably be able to be made more transparent, I suppose, but it seems to me that judges are very naked to the public eye in the conduct of what they do.

Justice Lasry—He may not know it, but I think the example that Senator Feeney may have had in mind subconsciously is the one where the criminal judge is instructing the jury and, in the course of summarising the evidence, turns to the jury and says, 'And then the accused gave evidence.' What the transcript does not record is the tongue in cheek and the rolling eyes.

Senator BRANDIS—But even that happens in front of defence counsel.

Justice Lasry—It does, but it is not often part of the record, and it is that kind of attitude to parties which can be veiled as far as the record is concerned that I think perhaps Senator Feeney was referring to.

Senator BRANDIS—Could I go on to another topic?

CHAIR—Yes, we have got a few moments.

Senator BRANDIS—It is a completely separate and self-contained topic. Can I take you to section H of your submission, with which I must say I agree. Have you given any thought to the way in which the effect of the Wakin decision—which I think is probably the event which by striking down cross-vesting did more damage to a movement towards a national judiciary than anything else ever did—can be overcome, short of a constitutional amendment?

Mr McGowan—It is hugely problematic. In theory a national judiciary has obvious attractions.

Senator BRANDIS—I agree.

Mr McGowan—We can all see that. We would be spared jurisdictional issues in crime and contract, change of venue applications—all sorts of problems are solved. But how you do it in our complicated federal system is going to be difficult.

Senator BRANDIS—That is why I am asking you, because, like you, I have turned my mind to this question. I cannot think of a way of doing it other than a constitutional amendment, and I am just wondering whether you can.

Mr McGowan—There could be referrals of course.

Senator BRANDIS—But to make it comprehensive you would really have to swear all judges as members of all other courts, wouldn't you?

Mr McGowan—Yes, but you could do it by referral without an amendment to the Constitution, but the likelihood of that happening comprehensively is rather low, I suspect.

Senator HEFFERNAN—Could I ask for your august body's view on a matter. If there were a circumstance in which a police application was made and was approved to put a judge under surveillance for possible criminal activity, at what point does that become of interest to your august body?

Justice Lasry—Do you mean to the court of which I am a member, or the ICJ?

Senator HEFFERNAN—If a judge has raised enough concerns for the police to put him under surveillance is that an issue?

Justice Lasry—So that another judicial officer, magistrate or Supreme Court judge became aware of it because the police—

Senator HEFFERNAN—Would you be interested in becoming aware of it?

Justice Lasry—Of course. If it were a listening device or some other telephone intercept or something of that kind, our court may very well have to issue the warrant. And it would no doubt be drawn to the attention of the Chief Justice.

Senator HEFFERNAN—Sorry, it wasn't. In the event of the arrest of a judge for a criminal matter—that happened in Sydney two or three years ago—should that judge stand aside?

Justice Lasry—Yes.

Senator HEFFERNAN—Did he?

Justice Lasry—In that particular case? I am not sure I know the answer to that. But if you want to know whether he should, then yes, clearly he should.

Senator BRANDIS—That, by the way, was not Justice McColl's view, who, when that question was put to her by Senator Heffernan yesterday, did not respond as you just did, which I found quite extraordinary I must say.

Justice Lasry—I don't think a judge—

Mr McGowan—For what it is worth, I agree that a judge should stand aside.

CHAIR—Justice McColl yesterday—this is the Senator Brandis matter—tabled a 'Model protocol between heads of jurisdiction for short term judicial exchange.' I am not sure if you are aware of that document.

Mr McGowan—No.

CHAIR—I bring it to your attention and ask your views as to the merit or otherwise of a judicial exchange program, either horizontally or vertically.

Mr McGowan—It has happened of course, as you know, where, for example, the conduct of a sitting judge is the subject of a determination. It happened in New South Wales, I think, with Justice Heydon. Some judges were imported from interstate to sit temporarily on the Court of Appeal in New South Wales. It does happen. There is sense in that perhaps being formalised, but the need for it does not arise very often—as we hope will stay the case. But that this might be a halfway house to a national judiciary is, I think, the underlying thinking that is driving it.

CHAIR—Justice McColl talked about the merits of it in terms of education and training and cultural merits.

Mr McGowan—The federal judiciary has for some time lent its members to Pacific island nations. The judges I have spoken to who have participated in that all say that it has been beneficial both to the judges concerned and to the courts that they were assigned to. I think it would be highly desirable for there to be more exchange.

Senator HEFFERNAN—If there were a federal judicial commission, then for some of these matters that I have been describing the police could go to the judicial commission. At present they have nowhere to go.

Justice Lasry—Yes.

Mr McGowan—You are right, although the police could go to the Attorney.

Senator HEFFERNAN—In one of these cases I actually organised a meeting for the police to go and see the Chief Justice concerned.

Senator FEENEY—Yes, I was just going to make the point—why couldn't they see the head of jurisdiction?

Senator HEFFERNAN—And the Chief Justice's response to the police was, 'I can only counsel people.'

CHAIR—Thank you, Justice Lasry and Mr McGowan. We appreciate your time and evidence today. And thank you, committee members.

[10.01 am]

COLBRAN, Mr Michael John, QC, Chairman, National Judicial Issues Working Group, Law Council of Australia

EDWARDS, Mr Peter James, Policy Lawyer, Law Council of Australia

CHAIR—Welcome, Mr Colbran and Mr Edwards. You have lodged submission No. 11 with the committee. Do you wish to make any amendments at this time?

Mr Colbran—There are no amendments.

CHAIR—I now invite you to make a short opening statement after which we will have questions from committee members.

Mr Colbran—Thank you for the privilege of appearing before the committee. As I am sure the senators know, the Law Council is the peak body for Australian lawyers, representing over 50,000 members through their law societies and bar associations. Its constitution provides for a board of directors made up of representatives of each of what are called constituent bodies—that is, as I say, the law societies and bar associations of each state. There is also representation from what we call the large law firm group. The relevance of this is that the Law Council, when making a submission of this kind, seeks to draw together input from all of those constituent bodies. I am sure all of you are very well aware of the complexity involved when one does perform a representational function of that kind. The Law Council, by virtue of its peak representation of 50,000 lawyers, takes a great interest in any discussion relating to the structure and role of the Australian judiciary. The judiciary is fundamental to the legal system and, so far as the Law Council is concerned, the legal system is fundamental to our democratic society. So the importance of the judiciary and the concentration on issues concerning the judiciary cannot be overemphasised.

The terms of reference of the inquiry require the committee to examine a number of differing matters. I will briefly outline the Law Council's position on each of these. First, the Law Council has an established policy on the preferred procedures for federal judicial appointments that we recommend the committee consider. It is set out as an annexure to the submission and I am sure you have had the opportunity to look at it. This policy recognises that open, consultative and transparent access, which is currently adopted by the federal government's approach, is an improvement on what has occurred in the past. The Law Council's policy was itself amended generally to reflect its approval of the government's process in light of the changes that have recently occurred.

The policy establishes the expected attributes of the candidates of judicial office, including legal knowledge and skills, professional qualities and personal qualities. I was fortunate to hear some of the discussion with the previous speaker, Justice Lasry. You will find in the Law Council's policy a recognition, that, while merit is undoubtedly one of the key attributes, there are a series of other matters that it is appropriate to have regard to. The policy also contains a requirement that the Attorney-General should consult a minimum number of identified office

holders prior to the appointment of a judge or magistrate. This is regarded as important for a couple of reasons. One of those is that it does serve to ensure a transparency and openness in the process. Secondly, it provides a means by which, perhaps in a symbiotic way, issues beyond the conventional and fundamentally important ones of merit and professional attainment can find their way into the consideration of appropriate candidates.

The policy goes on to outline the processes that should be followed by the Attorney-General in making federal judicial appointments, including advertising, a selection panel and so forth and recommending a short list of suitable candidates. As we say, we invite the committee to look at the policy which has been adopted by this representative body of all the constituent bodies of law societies and bar associations.

Secondly, the terms of reference require comment on the terms of judicial appointment, including comment on the desirability of a compulsory retiring age and the merits of full time, part time and other arrangements in judicial appointments. The Law Council accepts that, on balance, the imposition of a mandatory retirement age serves a number of important public policy objectives. On balance, we support a mandatory retiring age. It prevents the situation of a judge who is unable to continue with his or her duties but unwilling to resign. As Justice Gleeson observed, you will find in our submission that it avoids the unfairness and inappropriateness of a judge being required to decide, in his or her own case, whether or not it is appropriate to continue.

Mandatory retiring ages help to maintain vigorous and dynamic courts by bringing fresh ideas and contemporary attitudes to the bench. Further, a mandatory retiring age reduces the possibility that judges will influence the choice of their successor. This is more likely to occur in a system where judges can time their retirement so as to coincide with a government of their political persuasion. This point underscores, or emphasises, the importance which the Law Council places upon the concept—which we do not think is an elusive one at all—of judicial independence.

That leads me to the issue of acting and part-time judges. The Law Council's position has always been and remains staunchly opposed to acting appointments and part-time judges. Being a representative body speaking on behalf of the constituent law societies and bar associations, we see acting judges and part-time appointments as inimical to judicial independence and therefore presenting a real threat to the integrity of the legal system.

Thirdly, the terms of reference require the committee to examine jurisdictional issues, the interface between the federal and state judicial system. The Law Council interprets this term of reference to be related to the potential of creation of a national judicial framework, which was touched on by the last speaker. You will appreciate that, in this area, a body such as that which I represent has particular difficulties.

The primary charter of the Law Council is to represent the constituent bodies in a peak way as a national representative body dealing with national and fundamentally federal legal issues rather than seeking to involve itself in telling the constituent bodies of the particular states or, even less, the state attorneys and judicial officers how they should go about doing their jobs.

Having said that, the Law Council in general supports the concept of a national judicial framework and the associated possibilities for judicial development for education and cross-fertilisation of ideas and approaches from one jurisdiction to another. Senator Barnett, you mentioned that Justice McColl had tabled a paper yesterday. I regret that the Law Council has not had an opportunity to examine that, but it certainly looks forward to doing so because the concept of short-term judicial exchange is consistent with the general approach which the Law Council has sought to explain in its submission. I say that but immediately express the qualification that the Law Council also recognises the importance of maintaining the specialist expertise of particular courts. It would be quite wrong to think that you can simply move a judge experienced in the application of federal administrative law into dealing with a personal injuries case in a state district court. This is obvious. Subject to those obvious qualifications, the concept of a short-term exchange program is one which we look forward to examining in detail.

Finally, the terms of reference seek comment on the judicial complaints handling system, which the Law Council takes to be related to a proposal by the Standing Committee of Attorneys-General to establish a single national judicial body to hear complaints against federal and state judges. Again, this is an area where we can take a position as a representative body where constituent bodies are prepared to sanction or approve a national approach, but the position that we have reached at the moment is that a number of the constituent bodies would not welcome a national complaints authority. That emerges from our submission and circumscribes what can be said by me on behalf of the Law Council in this respect.

Senator BRANDIS—You do put a view, though; you say that you do not favour it. You are not merely circumscribed. You state a conclusion, albeit stated gently. It is not as if the Law Council does not offer a view on this.

Mr Colbran—Yes. I think there are two or perhaps three aspects to what we have said. The first is that the Judicial Commission of New South Wales seems to be working well and the state of New South Wales has indicated that it is not interested in participating in a national complaints authority. Without New South Wales it makes it rather hard for it to be an effective national complaints authority.

CHAIR—Does the Law Council accept that the Judicial Commission of New South Wales is working well?

Mr Colbran—Yes, we do. The next aspect, Senator Brandis, is the constitutional difficulties to which we have drawn attention and which may lead one to think that too much time and effort put into that may be at the expense of other areas where intellectual effort could be more productive. The third observation is that, while we have expressed a general view at this time against the idea, we have also left the door open by saying that if the Standing Committee of Attorneys-General come up with something that is concrete we would be happy to look at it. I hope that explains the gentle resistance, as you may put it. I think that is all I will say by way of introduction. I am happy to deal with any questions.

CHAIR—Mr Edwards, did you want to add anything?

Mr Edwards—No. That contains the summary.

Senator BRANDIS—I turn to the issue of judicial appointments and take you to attachment C to annexure A of your submission.

Mr Colbran—Yes, the processes to be followed.

Senator BRANDIS—Point 5 of attachment C asks the selection panel to prepare a short list of suitable candidates for consideration by the Attorney-General. Do you have a view on the size of the short list?

Mr Colbran—When you ask that question, I imagine that you are asking me whether I can express a view on behalf of the Law Council, rather than a personal view.

Senator BRANDIS—Yes.

Mr Colbran—I am sorry; I just want to be clear. I am not aware that any actual consideration has been given to that question. Peter, do you know?

Mr Edwards—No, it has not.

Senator BRANDIS—To give you the context, Mr Colbran, we had a submission yesterday—I do not know if you have seen it—from Professor George Williams and Dr Lynch from the Gilbert and Tobin Centre of Public Law. They said that there should be a selection panel and that it should propose three names to the Attorney-General. They drew attention to the British practice where there is a panel that proposes two names to the Attorney-General. We had a debate about whether that is really preparing a short list or whether it is something much more intrusive in the process, and that is to in effect preselect a small number of people and to remove from consideration a large number of potentially suitable candidates. I know the term 'short list' is not one of very precise meaning, but is the Law Council's position that the role of a panel should be essentially to winnow from consideration unsuitable people? Or should it take the more intrusive approach of Professor Williams of actually reducing it to a very small number of names, which implicitly does exclude a number of suitable people?

Mr Colbran—As I said, I am not aware of any sustained consideration of the matter. My general understanding of the position of the Law Council in respect of this is that by the expression 'short list' we are intending to refer to something which is not as intrusive as seems to be suggested by the paper that you have referred to. My understanding of the position is that the short list is more in the nature of one which presents a significant range of candidates from whom selection can then be made.

Senator BRANDIS—Thank you. That is clear enough. On the same topic, is it the view of the Law Council that the short list should be made public?

Mr Colbran—I do not believe so—or I should say that I believe that that is not the view of the Law Council.

Senator BRANDIS—Thank you.

CHAIR—Can I just follow up on that, regarding the appointment process. Point 6 of attachment C says that the short list of recommended suitable candidates should be sent to the Attorney General, 'who will be expected to propose the actual appointee' from the list. Is it the view of the Law Council that it is expected or required of the Attorney to appoint from that list? There is a difference.

Mr Colbran—I think it is a matter of expectation. I am sorry; I do not think I really understand that question.

CHAIR—My point is: if there is a list of three, as was referred to a few moments ago, can the Attorney legally, under your approach, appoint outside of the three?

Mr Colbran—They can recommend the appointment of somebody from outside of that three. That can occur, yes. That is possible.

Senator BRANDIS—That has a bearing on the question I was asking you, Mr Colbran. Let's not take the Professor George Williams model, which really has people like Professor George Williams deciding who the only three are; let's take the Colbran model, or the Law Council model, which identifies, as you have said, 'a large range of potentially suitable people'. That document is not a public document. In the event that the Attorney-General were to recommend to the cabinet and the cabinet were to appoint a person not on the Law Council's list, what would happen? At that point, would the fact that the proposed appointee had not appeared on the Law Council's list become a matter of public knowledge or not?

Mr Colbran—I am sorry to say that this potential, although a matter of discussion, was not the subject of a conclusion by the council. The council did consider—I hope this helps—including as part of the policy a requirement that the Attorney provide an explanation to parliament if a candidate is chosen from outside the panel's short list. If that had been adopted, then clearly it would require a public statement.

Senator BRANDIS—But it was not adopted?

Mr Colbran—It was not adopted. I would not like you to read into the fact that it was not adopted, that a position was taken against that either. It is just that we drew the line at the point where we thought it sufficient to draw the line.

Senator BRANDIS—I understand.

Mr Colbran—I suppose the position would be that some things can best be sorted out when the problem actually arises in a concrete sense. I regret to say that the Law Council cannot help you further on this.

CHAIR—Thank you for that. I welcome Senator Fisher to the committee. I assume that, regarding the Law Council's views, you have a view that this should be open and transparent and that the criteria, views and processes that should be followed would be public?

Mr Colbran—Yes.

CHAIR—Do you have a view as to the merit or otherwise of not including the High Court with respect to the current reform arrangements?

Mr Colbran—The Law Council policy does take the view that the High Court is in a unique position and should not be included in the conventional process that would otherwise apply. There are already, as I understand—and, like Justice Lasry, I will not claim to be a constitutional lawyer—specific provisions requiring certain forms of consultation. Our position is that the High Court does present a unique set of challenges in appointment and therefore we do not regard the policy as being applicable to that.

Senator BRANDIS—On that topic, Senator Barnett, could I go on to the national judiciary issue momentarily?

CHAIR—Yes, please.

Senator BRANDIS—You heard my questions to Justice Lasry and Mr McGowan about the national judiciary. Mr Colbran, do you generally share the view—I certainly do—that the decision to strike down the cross-vesting scheme set the movement towards a national judiciary back quite a long way?

Senator HEFFERNAN—You are not leading the witness, are you, Senator Brandis?

Senator BRANDIS—I am allowed to, Senator Heffernan.

CHAIR—This is a Senate hearing. We are not in a court of law, Senator Heffernan.

Mr Colbran—Senator Heffernan, I will endeavour to not fall into the trap of simply adopting whatever may be put to me. I agree with you. I am sorry, I do not have a clever solution to it either, but I think it—

Senator BRANDIS—I do not think it can be done without a constitutional amendment.

Mr Colbran—The expression 'death knell to the system' really does sum it up, I think.

Senator BRANDIS—I am glad you agree with me, Mr Colbran.

Mr Colbran—On this occasion.

Senator HEFFERNAN—Do you have any fundamental objection to the Judicial Commission of New South Wales?

Mr Colbran—No, not at all.

CHAIR—Sorry, Senator Heffernan, we are dealing with another term of reference. We will come to that. Just on the national judiciary, the model protocol—which I appreciate you have not seen—was tabled yesterday by Justice McColl. Could you provide your general views on the merit or otherwise of judicial exchange either vertically or horizontally.

Mr Colbran—The Law Council recognises that there are significant benefits that can be obtained provided there is a series of safeguards in place. Speaking in principle, there are some real benefits that can be obtained from judicial exchange. However, it has to be done with the primary objective being the maintenance of public confidence in the strength of the judiciary, in its independence and its competence. You therefore have to be careful, as I mentioned in passing earlier, that the short-term exchange does not result in the appointment, even on a short-term basis, of somebody who is inappropriate to a particular jurisdiction.

Having said that, there are real benefits to it in terms of an education process for the judges themselves, maintaining the personal benefits of cross-fertilisation—mixing with people and learning how things are done in different places—and, hopefully, gradually the development of greater homogeneity in approaches that are adopted around the country, where that is appropriate, having regard to the requirements of specialist jurisdiction, which I referred to earlier.

CHAIR—You talked about the council's opposition to part-time and acting judges. That is obviously a strong view held by the council. In Victoria in, I think, 2004, they had legislation that would allow the appointment of judges for a five-year term. I understand that there has been one appointment under that legislation—you can correct me if I am wrong.

Firstly, I would like to get the council's view on that. Secondly, I would like to get the council's view on the appointment of retired judges on a part-time basis where a need has arisen in different state jurisdictions. I realise we are looking at a national judicial review and I know there is a difference but I am interested in the council's view.

Mr Colbran—If I could direct your attention to page 7 of our submission, I will say things with reference to that. I know that you have already looked at it.

Dealing with the first issue, I think you are asking me whether the Law Council has a particular response to the fact that Magistrate Cotterell was appointed to the County Court. The position is that the relevant members of the Law Council have a great deal of respect and admiration for the particular appointee. Notwithstanding that fact, the appointment is regretted because it is inconsistent with the policy that has been adopted by the Law Council after considerable deliberation.

As for the second part of the question, the Law Council recognises that there are occasions when there may be a need for a short-term increase in resources and it does not want to be silly or try to make things impossible or difficult. Generally, the Law Council's view is undoubtedly and clearly that it is the responsibility of the executive to provide sufficient judges to meet the needs of society. Where there becomes an unavoidable need for some additional increase in judicial resources, it is far better that it be met in the way that you have suggested, Senator Barnett—by the short-term appointment of retired judges—than by the appointment of people from the practising profession, who would then be expected to go back to the practising profession.

Senator BRANDIS—Just for clarification, by 'retired judges' you mean judges who have not only retired from the bench but have also retired from practice?

Mr Colbran—Yes.

CHAIR—Just to finish on that particular point, at the federal level, of course, that would not be constitutionally possible if they were past 70 years of age?

Mr Colbran—That is correct, yes.

Senator HEFFERNAN—This is a roomful of lawyers—I have just checked; Tim from the secretariat is a lawyer as well—and I am a wool classer and a welder. I do not think it is practical to have temporary judges for this reason: when you are a barrister, especially if you are a criminal barrister, your job is to try to get your client out of trouble. Would you agree?

Mr Colbran—Well, not being criminal barrister—

Senator HEFFERNAN—If you going to DUI or something, whatever it is—

Mr Colbran—There is probably some sophistication to it.

Senator HEFFERNAN—The courts are fundamentally about the law. Would you agree with that?

Mr Colbran—Yes—they are about serving the community.

Senator HEFFERNAN—So they are not necessarily about the truth. If the person is guilty, the lawyer is employed not to tell a lie but to avoid the truth to get him off.

Mr Colbran—As I understand it, a lawyer might be employed because somebody is charged.

Senator HEFFERNAN—But obviously lots of guilty people get off. You would agree with that?

Mr Colbran—I am sorry; I do not have access to the relevant statistics.

Senator HEFFERNAN—You are a QC, for God's sake.

Mr Colbran—Yes, I know, but I am a very limited—

Senator HEFFERNAN—Some people who are guilty get off because they have a smart lawyer. They use the law.

Mr Colbran—I do not know how many but, if you are saying that it has happened, then it might have happened. I will not argue with you too much about the possibility.

Senator HEFFERNAN—If you are a lawyer, a barrister, and you are going to court and you have got me and I have done something and I am saying, 'Well, I'll give you—

Mr Colbran—I cannot believe that that would be so!

Senator HEFFERNAN—But let's say that it were so.

Mr Colbran—Let's say you are innocent, then.

Senator HEFFERNAN—No, let's say I am guilty. I do not employ you to take me to court and have the court find me guilty. I take you to court to have the court find me not guilty, unless I am a mug.

Mr Colbran—Yes, you would hope—

Senator HEFFERNAN—Okay, yes is the answer. This is coming to a point.

CHAIR—Let Mr Colbran finish his answer before you go to the next question.

Senator HEFFERNAN—They have long-winded answers, lawyers.

Mr Colbran—I will try to be as brief as I can, but there is a bit of sophistication about this. If you come to me and tell me that you are guilty—

Senator HEFFERNAN—No, no.

CHAIR—Senator Heffernan, allow Mr Colbran to conclude.

Mr Colbran—So you are in fact guilty, but you do not tell me you are guilty. I suppose you actually tell me that you did not do it, do you?

Senator HEFFERNAN—I do not know, I have not been there. But, in any event, the court is fundamentally about the law. The defence is fundamentally about getting the person off the charges, whatever they are—right? It is about using the law to do that and, if necessary, not telling a lie but avoiding the truth if the truth is that the guy was guilty. If you are in that circumstance and then you swap over to the other side for a while to be the judge, the judge's job is to discover where the truth lies, I guess, in the case of a non-jury hearing.

Mr Colbran—I am sorry to interfere, but it is not. I do not think it really is. I will not hide behind the idea that I am not a criminal lawyer, but please accept that I am not and therefore I may be wrong. My understanding, though, is that the job of the criminal judge is to ensure that the correct evidence is admitted.

Senator HEFFERNAN—Let's not worry about criminal cases. Let's just say, in the court system generally—

CHAIR—Senator Heffernan, are you coming to a point?

Senator HEFFERNAN—I am. The conflict that I see for the person who switches from one side of the bench to the other is that on one side your task is completely different to what it is on the other side. If you go back to being the barrister after being the judge, there is an intolerable, unexplainable, long list of potential conflicts for that person.

Mr Colbran—There are many reasons why the Law Council opposes the idea of people chopping and changing between judicial office and the practice. What you have suggested is probably one of them.

Senator TROOD—Does the Law Council have a view as to how much weight should be placed on the need for diversity among appointees to the bench?

Mr Colbran—I would have to refer back to the paper for the answer to that question. I want to try to give you a more precise answer. The general answer would be, yes, there is a view that diversity is a desirable outcome of the process. That is why I sought to say at the beginning that, while merit and professional attainments are undoubtedly among the most powerful factors, there are others that are relevant in creating a judiciary which works for the various societies that it has to serve.

Senator BRANDIS—I must say, Mr Colbran, I cannot immediately see why the desirable qualities in 4(d), courtesy and humanity—particularly humanity—are necessarily a characteristic of a successful judge as long as he or she disposes of the case accurately, applies the correct legal principles and produces a just outcome.

Mr Colbran—'The quality of mercy is not strained.' As you are very well aware, there is more to the practice of the law and the exercise of judicial power than the mere technical application of the principles, strict rules or statutory interpretations.

Senator FISHER—What about comments made in a process of sentencing? For example, more humanity rather than less might be considered appropriate in that process.

Mr Colbran—I quite agree. Judges are human. When we look for personal characteristics in judges, we want to find characteristics that are human and show humanity.

Senator BRANDIS—If judges are human, as of course they are, then is this not an unnecessary requirement?

Mr Colbran—Human beings display humanity in differing degrees.

Senator BRANDIS—That is my very point.

Senator FISHER—It is obviously for the witness to answer the question, Senator Brandis. I was coming from the perspective where in South Australia some judicial officers might have been considered to have made insensitive comments in sentencing a perpetrator, comments which were insensitive to the particular victim or to victims in similar circumstances in other cases. That was an example where I was trying to suggest to the witness that that is an example of fleshing out the point, but then again maybe it is not.

Mr Colbran—I quite agree with you, Senator, and thank you for that. It is just that Senator Brandis was focusing on subclause (d) and the expression 'humanity'. However, I do draw attention to the ones on other side of it, including 'social awareness including gender and cultural awareness', and 'maturity and sound temperament', which are also of importance.

Senator BRANDIS—I do not have any quibble about that. I do not want to be flippant about this, but there is a more serious point underlying it. I take a very conservative view of judicial appointment. Perhaps it is just in Queensland, Mr Colbran, where I practise—but I am sure you would have had the experience yourself in the courts in which you have practiced—but it seems to me that some of the most abrupt, least obviously humane personalities are often the very best judges.

Mr Colbran—I see. It may be that we do not share completely an understanding of the expression 'humanity' where used in this context. The way you are putting it suggests, with respect, almost as if you are meaning urbanity and civility. I agree with you that judges do not always have to express themselves in woolly or welcoming terms. However, I think both your practice and mine would have demonstrated occasions where some of the most terse judges nevertheless are displaying a great deal of humanity, as I would understand it—that is, elements of compassion and empathy, not in the way they express themselves but in the way they go about the task of finding the correct solution.

Senator BRANDIS—I do not disagree with that. Does the list of these criteria reflect some sort of—albeit informal—rank order of importance to be attached to these various attributes?

Mr Colbran—I had not myself interpreted it as a ranking but rather as a series of criteria which should be taken into account.

Senator TROOD—I cannot quite see where my point about diversity fits in amongst those criteria. Obviously cultural awareness is a quality of character which one might expect a judicial appointee to have, but it does not necessarily mean that the judiciary as a whole necessarily reflects cultural diversity or any other kind of diversity.

Mr Colbran—I may have misunderstood what you were getting at—I am sorry for that. If you are asking whether it is the Law Council's position that the judiciary should be constructed in a way which is representative in the sense of a proportionality of representation of Indigenous people on the one hand and Turkish, Greek and other people on the other hand, then that would not be the position.

Senator TROOD—Women?

Mr Colbran—Women, yes. But that would not be the position taken by the Law Council. It is not a simple matter of adding up the mathematics and then producing a result.

Senator TROOD—I should hope it would not be.

Mr Colbran—I go back to some of the professional qualities which were identified—

Senator TROOD—Does the Law Council have a view as to whether or not there is sufficient diversity amongst the judiciary at the moment?

Mr Colbran—I do not think they would have a view expressed in quite such general terms, because that would require quite considerable analysis at a state-by state-level. I am not trying to be evasive, but I cannot really answer that question, I am sorry.

Senator FISHER—Further to the answers that you gave to Senator Trood, if candidates for judicial office were to have the core attributes that the Law Council suggests they need, surely the Law Council would support judicial officers reflecting the diversity of the community that they preside over, would it not?

Mr Colbran—Absolutely. That is why, in the list of officeholders to be consulted and in the development of the selection process, we have identified a range of relevant people including, for example, the President of Australian Women Lawyers.

Senator FISHER—Consulting with does not necessarily mean the same thing as what I am asking about. In your answer to Senator Trood, you said it would not be a criterion that you would propose.

Mr Colbran—Not a mathematical criterion, but I think what I am endeavouring to do by reference to attachment B is to answer your question in the affirmative to say that the Law Council does regard diversity as being important as an outcome but that this is achieved through a process using the consultation mechanism rather than that one identifies that as being a precondition that you have to fit into particular pigeon holes.

Senator BRANDIS—So it is a desirable outcome but not necessarily an objective?

Mr Colbran—Yes, that is a good way of putting it.

CHAIR—Regarding the retirement age, I have read your submission and I note and share your views regarding it being problematic to find a constitutional amendment that can be passed. I have also noted your views regarding the different retirement ages in the different states and territories and the merit of some sort of a consistent approach. If we had a clean slate, what should the retirement age be?

Mr Colbran—I imagine that a different answer could be given by those who are responsible for these things in different states because the answer would require a consideration of what was regarded as appropriate to that particular state. It is obvious from what is contained in our submission that the Law Council is not going to express a view for 72, 75 or 70 because of what we have said and also that we do not think it is likely to be undone. If you are interested to ask the question of me personally, and you have given me the blank sheet of paper—

CHAIR—Away you go.

Mr Colbran—I am speaking entirely off my own bat. My own view is that changes have been noted in the longevity of the population since the age of 70 was introduced. I think with the general ageing of the population there would be a case for reconsidering this if you had a completely blank piece of paper. I am not sure that I would pick a particular age at the moment, but I certainly think that there are obvious questions that could be asked and information that could be obtained if you were trying to reach a conclusion as to what is the most efficient age, and it may slightly higher than 70 or 72.

Senator BRANDIS—It would go some way towards your view to take it out of the Constitution and have the maximum age regulated by statute, which could, with somewhat less trauma than a referendum, be revisited from time to time.

Mr Colbran—I would agree with that.

CHAIR—And, of course, that referendum was in 1977, I think—over 30 years ago—and the life expectancy of the average Aussie, male and female, has increased markedly in that time.

Mr Colbran—Absolutely.

Senator FISHER—But have their brains got better, Senator Barnett, so that they last longer?

CHAIR—That is for another inquiry.

Mr Colbran—I am not sure what you would want to check, but it is an impression. One does see very strong judicial officers who are required to hand in their ticket and it is of regret that they are lost to the community.

CHAIR—Just to conclude, you have indicated that the council does not favour a national judicial complaints handling system. You have indicated, using your words, a gentle—

Mr Colbran—Senator Brandis—

CHAIR—Senator Brandis's view, which I think you concurred with. I would just like to check as to whether this has been given serious consideration or whether it is a general, in principle view at the moment. Regarding your New South Wales counterparts, we get the impression that they are very supportive of their New South Wales judicial commission. Have you surveyed other parts of your council, for example, in this regard?

Mr Colbran—Absolutely.

CHAIR—Is this a consistent, unanimous view or is it just a view that it is a majority view across the council? How would you describe it?

Mr Colbran—I would have to describe it at present as a strong view of the representatives whom we consulted, and we consulted widely in the course of producing this report. There is a widespread view at the moment that the time is not right to invest considerable effort in this idea. That emerges from a perception from a number of the constituent bodies that there really is not a significant problem—that it would be taking a sledgehammer to crack a nut—and that there are issues of local practice that are of importance which cannot be ignored. So, when I say it is a strong view, I mean to convey that it is a view which is widely held; it is not a slim majority view.

CHAIR—I do not wish to misinterpret in any way the two former chief justices, Mason and Gleeson, in expressing their views. They said along the lines that they have cited lack of a process for complaints based upon conduct falling short of that which would warrant removal and that it is a real difficulty with present arrangements. They have indicated concerns in that

area. That is a matter that we will keep under close consideration. We will certainly be looking at that in terms of further evidence coming before this committee.

Mr Colbran—Could I supplement what I said before. The focus of the council's consideration and rejection was on the idea of a nationally arranged complaints handling authority. As you have seen, we do recognise the successes of the New South Wales commission. I think you put a question to Justice Lasry which, from my part, I would answer by saying that the Law Council would encourage its members to look carefully at the New South Wales model.

Senator TROOD—We are racing against the clock, but I would just like to ask Mr Colbran a question. We have received quite a lot to submissions referring to the difference between the high courts and the magistracy—the different basis upon which the magistracies are appointed. Of course, they have a different traditional foundation. Does the Law Council have a view as to whether or not there should be a greater degree of what might be called 'comparative entitlements' in relation to the magistracy and the foundations upon which they are appointed et cetera?

Mr Colbran—Is this coming back to the diversity question?

Senator TROOD—No, it is a completely different issue. The magistracy, of course, comes from essentially state jurisdictions and previously, as you are well aware, many of them were not required to have legal qualifications. There is an observation in several submissions about the increasing professionalism of the magistracy around the country. It seems to me that there are quite a lot of differences in the foundations upon which magistrates can be removed and things of that kind—questions of conduct, where they might be censured et cetera. Does the Law Council have a view as to whether or not there is a need to draw that diversity into—

Mr Colbran—The distinctions necessarily exist. They are historical and statutory. The Law Council does not suggest that there should be a change which would assimilate in all ways the conditions applying to magistrates seeing to the higher courts.

Senator BRANDIS—Magistrates, I think, take essentially the same oath as judges of intermediate level and superior courts. One would have to assume prima facie that magistrates and judicial officers at the lowest level are equally bound by the obligations of impartiality and integrity and fairness and the other desirable judicial qualities as does every other judge, no matter where they sit in the judicial hierarchy.

Mr Colbran—Absolutely, I certainly did not mean to suggest otherwise! But a total assimilation—

Senator TROOD—Given the point that Senator Brandis has made, does it follow that the basis upon which they should be removed from office ought to be more rigorous?

Mr Colbran—Ought to be more rigorous than?

Senator TROOD—Should it reflect more widely the practices that apply amongst some of the superior courts?

Mr Colbran—In terms of removal that may well be the case, although I do not think the Law Council has given that matter any thought. We would be happy to look at it. For appointments there are going to be clear differences in terms of the conditions in which they work—there are very significant differences. The challenges that are faced are very different so there are a number of reasons why you cannot necessarily apply the same principles to them in considering disciplinary issues, for example. In terms of removal, I am not sure that there would be basis for a difference.

Senator BRANDIS—As there is not with federal judicial officers, because federal magistrates, for example, are as subject to section 72 as High Court judges are.

Senator HEFFERNAN—I presume you heard my proposition and question to the previous witness? Under the present arrangements there is a federal jurisdictional issue where police have evidence, taken in written form, of a circumstance where a judge wrote advice for someone who then provided that advice to the court and that judge subsequently sat in judgment on that matter. How do we deal with that under the present arrangements, and how should it be dealt with? The police are aware of it and there is nothing they can do about it.

Mr Colbran—I think I detected a little confusion in Justice Lasry about the underlying facts here. If the information is verifiable, then I personally see no reason why it should not be presented to the appropriate authorities and something would be done about it. I find the whole thing very mysterious, to be honest. I do not know enough about the circumstances.

Senator HEFFERNAN—There is nothing mysterious. These are police matters and they have been provided to a series of attorneys-general, who say that they are outside their jurisdiction and have sent them back—I think that is probably because it is in the too-hard basket.

CHAIR—Senator Heffernan, you might want to deal with hypotheticals to ensure that you get your question put.

Senator HEFFERNAN—If, for instance, this person had indicated sheepishly that the judge that he sought advice from would not want it to be known that he was involved and had given certain advice concerning the matter, as there would have been matters arising in the nature of an appeal which would involve that judge in a clear conflict of interest, that is obviously police information. It is not of a criminal nature. In estimates, Mick Keelty told me that there is nothing they can do about this stuff under the present arrangements. But there it is in cold black-and-white. It is an interview—hypothetical—with a lawyer who was recommended by the judge to the task, which was to do with a London law firm and a $60 million fraud. The task became too difficult, so he sought assistance from the judge, according to the police statement—hypothetically. Subsequently, the case was heard by the judge.

Mr Colbran—Obviously the Law Council has not considered the particular circumstances of this. If you want a personal view, that sounds to me very much like judicial misconduct, but that is an entirely personal view on the basis of a very, very vague understanding of what is said to have occurred.

CHAIR—Thank you very much for being here today, Mr Colbran and Mr Edwards. Thank you for your evidence. It is informative and most appreciated.

Proceedings suspended from 10.56 am to 11.13 am

ROACH ANLEU, Professor Sharyn, Private capacity

CHAIR—Welcome, Professor Roach Anleu. The Judicial Research Project at Flinders University has lodged a submission, recorded as submission No. j4 with the committee. Do you wish to make any amendments to the submission at this time?

Prof. Roach Anleu—No.

CHAIR—I invite you to make an opening statement after which we will have questions from committee members.

Prof. Roach Anleu—Thank you very much for the opportunity to speak to our submission today. You will be aware that the submission is prepared by Professor Kathy Mack and me. I pass on apologies from Kathy who is unable to be here. The submission is based on a very large program of empirical research which commenced in 2001. It is national in scope and there are several major components. Firstly, there are three surveys, two of which were conducted in 2007, and surveys were sent to all magistrates and all judges in Australia. In terms of the submission, you will be aware that we treat judges and magistrates in the same breath rather than making particular distinctions between the two aspects of the judiciary. But where there are some different findings between magistrates and judges we do emphasise some of those. In addition, there has been a large national court observation study, which involved sitting in courts throughout Australia and recording decisions, practices and processes occurring in the magistrates courts.

Our submission addresses a number of things that are of interest to the inquiry, and one that I note is merit, which comes up in a number of the other submissions I have had the opportunity to have a look at. In the 2007 surveys both to judges and magistrates, we asked these judicial officers to indicate which qualities and skills they considered to be essential or very important to their work. The standout qualities that a very large proportion of judges and magistrates considered to be essential to their work were legal values: impartiality, integrity and a sense of fairness. The second band of skills that judges and magistrates considered essential to their work were legal skills: legal knowledge, problem-solving skills and legal analysis.

Senator BRANDIS—Is this table 1 again on page 5?

Prof. Roach Anleu—No, it is not table 1. Table 1 is a table that we have constructed from the findings of our survey to judges and magistrates as well as another survey, the Australian Survey of Social Attitudes, which provides information on the Australian public.

Senator BRANDIS—Are the figures you are quoting captured in the right-hand side of table 1 under the heading ‘Australian judiciary’?

Prof. Roach Anleu—Yes, that is correct. And there are some comparisons with the Australian public that I can elaborate on later, if needed. There is also quite a lot of agreement between the Australian judiciary and the Australian public regarding diligence, general life experience and compassion. Some of the other issues we have looked at are some of the reasons why judges and

magistrates decide to become judges and magistrates. The surveys revealed that very few judges or magistrates planned to undertake a judicial career, but for most judges a personal approach by someone in court or government is very important in their decision to become a judge or magistrate. We find that judges and magistrates are pulled into the work mostly by the intellectual challenge and the diversity of the work and these are also sources of job satisfaction. They are attracted to the idea of doing something of value to society, so there is a pull into the judiciary rather than a push out of other kinds of jobs. Issues which are important to judges and magistrates, but in a slightly different way, are job security, benefits and salary.

Another point that we raised in the submission relates to promotion, and you would all be aware that there is quite a lot of discussion about the inconsistency between ideas of promotion and judicial independence. However, we note from our survey that over a quarter of respondents to the National Survey of Australian Judges reported previous judicial appointment. This might be movement from an appeal division to a trial court or it might be movement from a federal court to a supreme court or vice versa but it is not unusual for a judicial officer, in particular, a judge, to have had a previous judicial appointment.

Another aspect to what has been going on in the Australian judiciary is the widespread change with the Australian magistracy, and I am aware that you will hear this afternoon from the President of AAM, Dr John Lowndes. Over the last 20 years or so there has been an increased professionalisation of the magistracy which has involved separation from the Public Service. Interestingly and perhaps ironically, recruitment into the magistracy via the Public Service was traditionally by a process of promotion and that process of separation from the Public Service was also paralleled by the formal requirement of legal qualifications, so quite a number of important changes have meant that the magistracy has moved much closer to the judiciary.

Our submission deals with complaints, termination and suspension, and the overall point there is that it documents some of the differences between magistrates in different jurisdictions as well as differences between magistrates and judges. A further point that the submission addresses is about the timeliness of judicial decisions and the different everyday work experiences of magistrates courts—or local courts as they are known in New South Wales—and the judiciary or the higher courts, and the submission speaks to some of the qualitative differences in the nature of work and the courtroom experience as it occurs in the magistrates courts.

There are a couple of sections dealing with retirement, and again retirement ages differ across jurisdictions and differ across the judiciary-magistracy distinction. Also, decisions about retirement are not based solely on retirement age. Finance is more important to magistrates than it is to judges; health is equally important to magistrates and judges; and job satisfaction is more important to judges than it is to magistrates in making decisions about when to retire.

Finally, with regard to remuneration, there is less protection against reduction in the remuneration of magistrates compared to that of judges in some courts, although 85 per cent of magistrates are satisfied with their salary, compared with 69 per cent of judges who express satisfaction with their salary. So, just to sum up—

Senator BRANDIS—Even though magistrates are paid considerably less!

Prof. Roach Anleu—That is right. But this may be a relative assessment, against the kinds of jobs that magistrates might otherwise have. A number of judges of course come from the bar, and it has often been reported that they come from very lucrative practices, which they leave behind when they join the judiciary, but magistrates do not come from the bar as frequently as judges. This is purely anecdotal; however, it has been presented by some magistrates that, after being in the magistracy for, say, 10 to 15 years, when they think about what comes next there are few options that would have the same kind of salary that they get as magistrates. We often draw a parallel with academia. It would not be very feasible financially for a magistrate who is looking for another career path, or to perhaps move into a law school, to make that sort of a sideways move.

Senator BRANDIS—That is because professors are very underpaid in this country, Professor Roach Anleu!

Senator Trood interjecting—

Senator BRANDIS—That is all right, Professor Trood!

Senator FISHER—That is why we are all politicians!

CHAIR—Do you have any further opening remarks, Professor?

Prof. Roach Anleu—No. I think I have well and truly taken my five minutes. I am happy to elaborate on any aspect of that or perhaps speak to the—

CHAIR—Well, we certainly have a good range of questions for you. I am sure you will be able to elaborate adequately. I know that my Senate colleagues will want to ask a range of questions, but first I would like to ask you how this research came about, if that is okay. I understand you have come from Adelaide today, from Flinders University, so thank you for being here. I thought you mentioned in your opening remarks that there was a link with ANU as well; if there is, could you tell us what that is. Just tell us a little bit about this research—it is a very informative submission; I have not seen this sort of research before, not in the manner in which you have done it—and perhaps, if it is possible, how it is funded. And is it at its end, or is there further research being done with respect to this project?

Prof. Roach Anleu—Thank you, Chair. The project really started in 2000; we are almost up to our 10th anniversary. Kathy and I had done some work for the Australian Institute of Judicial Administration on guilty pleas in the mid-1990s and so our work was known among members of the judiciary. In 2000 we were approached by the Association of Australian Magistrates, who were interested in doing some research and had a little bit of funding but did not have the capacity to undertake the research on their own. So we were asked whether or not we would be interested in doing some research in relation to the magistrates courts in Australia. It seemed like a very good idea at the time. Kathy and I had worked together quite well—extremely well, actually—during our research on guilty pleas. We bring different strengths and perhaps different weaknesses. Kathy is a law professor, while I am a professor in social sciences, so I have empirical research skills and she has finely honed legal skills.

So we set about putting in an application which was a kind of mini Linkage Project Grant with Flinders University. Flinders University put in an amount of funding; that was matched by the Association of Australian Magistrates and we got a small grant. We spent 2001 with that finance going around the country seeking support from all the magistrates courts in Australia to do further research. AAM had indicated that they were interested in continuing the research and we thought we should apply for a very large grant, it is important that this research is national—

Senator BRANDIS—It is always a good strategy.

Prof. Roach Anleu—Yes, especially as we thought that much of the other research on magistrates courts has been jurisdiction specific. There has been research in Victoria on magistrates courts, there has been a little bit in NSW but there has never been a national piece of research that collects such a wide variety of information from magistrates courts nationally. So we applied for a Linkage Project Grant. We were able to secure the commitment and agreement of all magistrates courts around Australia—which I have to say is no mean feat—to sign up and be part of the Linkage Project Grant. We were very fortunate to receive that grant and with that grant we conducted the National Survey of Australian Magistrates in 2002. We sent surveys to over 400 magistrates—that is all the magistrates in Australia—and got a response rate of about 50 per cent. We also conducted the National Court Observation Study under that funding, which involved observing the criminal—

CHAIR—We are a bit tight on time; is there anything else you wish to add about the project.

Prof. Roach Anleu—The research is currently funded by a discovery grant which has enabled the survey of Australian judges and magistrates in 2007.

CHAIR—Is the project continuing?

Prof. Roach Anleu—The project is continuing. Our funding will expire at the end of this year but we have put in for another grant. To clarify, there is no direct link with ANU; this is entirely conducted through Flinders University.

Senator TROOD—On methodology, what are the percentage responses that you had?

Prof. Roach Anleu—About 50 per cent. From judges we got 54.5 per cent; from magistrates, 52.9 per cent.

Senator BRANDIS—I will start by complimenting you and your colleague on this research. It is extremely interesting. I am quite fascinated by table 1. Perhaps you said it and I missed it but you have not said how many judicial respondents there were.

Prof. Roach Anleu—There were 547 responses out of a total of just over 1,000 surveys sent out.

Senator BRANDIS—What strikes me as alarming, just looking at the responses of the judiciary as opposed to the general public, against the item ‘Impartiality’ is that 99 per cent of judges and magistrates regarded impartiality as either essential or very important. One per cent did not. Could that be a rounding error?

Prof. Roach Anleu—It could be rounding error, and we can check that. It could be missing data—somebody did not answer the question, which does happen.

Senator BRANDIS—Yes, because I would hope that every judicial officer would regard impartiality as at least very important to their function. Do you care to express a view on the fact that impartiality was regarded as a more essential virtue than legal knowledge among the judicial respondents to your survey?

Prof. Roach Anleu—It is an interesting phenomenon that impartiality, integrity and a sense of fairness were all rated very highly. We have called it a legal value; I know that in some of the other submissions they are termed personal qualities, but we have termed it a legal value which seems to be a core defining characteristic of the very nature of what it means to be a judicial officer. The fact that there is such a high level of agreement between magistrates and judges on the quintessential nature of impartiality, I think, speaks to the fact that it is a value shared across the board, regardless of court or jurisdiction; it is the kind of binding, central legal value that defines a judicial officer.

Senator BRANDIS—Professor Rawls, in *A Theory of Justice*, describes impartiality as the first virtue of judicial institutions, so your empirical research is consistent with good philosophy, I think. If I may observe this, most cases heard by most trial courts, particularly but not just the lower courts, depend on their own facts, and a judicial officer can perfectly well dispose of a case accurately and fairly without a great apparatus of legal knowledge, but no judicial officer can accurately and fairly dispose of a case without the virtue of impartiality. Would you agree with that proposition?

Prof. Roach Anleu—Yes.

Senator BRANDIS—There is one other little thing, unless I have missed this. Do you address the issue of acting judges?

Prof. Roach Anleu—Yes, we do.

Senator BRANDIS—Could you take me to that, please.

Prof. Roach Anleu—I am sorry; I have answered ahead of myself. We do not address the issue of acting judges in the submission, but the research does.

Senator BRANDIS—What does the research conclude in relation to acting judges?

Prof. Roach Anleu—This is what the research findings show—and I had this at my fingertips a moment ago. We asked questions when we sent out the survey—'Are you an acting judge? Do you sit as a part-time appointee?'—and we found that of the whole judiciary, judges and magistrates, there were 13 individuals who have a part-time appointment and 16 who sit as acting magistrates or judges. We have combined those findings in that way to preserve anonymity, because once the numbers get very small someone says, 'I know who that person is,' and we have been very conscious of and cautious about anonymity.

Senator BRANDIS—During the republic referendum of 1999, at some polling places in western Queensland there was only one yes vote, and everybody knew it was the local schoolteacher, so your observation is quite right. Sorry, Professor Anleu; please go on.

Prof. Roach Anleu—That is all I wish to say.

Senator BRANDIS—I digressed.

CHAIR—Just slightly!

Senator BRANDIS—What do you say about acting judges?

Prof. Roach Anleu—We do not say very much, in the sense that that is a finding in some of the—

Senator BRANDIS—Coming back to the point about impartiality, though, I do not know if you have read the other submissions but both the Judicial Conference of Australia and the Law Council this morning were of a common mind that the appointment of acting judges is an undesirable thing, particularly in relation to people who might go back to legal practice, because if they are not there for life then there is a concern that their impartiality either might in fact be or might be seen to be somewhat compromised. Does that fit with your findings on the issue?

Prof. Roach Anleu—We have not specifically linked it to questions of judicial independence. I am certainly aware of the arguments that, if you have a part-time appointment and want to continue part-time appointments, that may impact on judicial independence. The other side of that is that there are a number of arguments that part-time appointments are going to be suitable and of interest to certain kinds of judicial officers and not to judicial officers across the board. I am aware that the situation of women is often put forward as the example of the judicial officer who might be most interested in part-time appointments, and there are some part-time appointees, I think, in New South Wales—magistrates who are women and who essentially job-share. The other thing is that, in our conversations with magistrates and other judicial officers, some have pointed out that even for men the part-time opportunity might be useful as someone is moving out of their career closer to retirement and wants to have a lifestyle change; that might be an opportunity. I understand that that is the kind of supply side and that there is some interest in part-time appointment, but it is a vexed issue in terms of the wider issues of judicial independence.

Senator BRANDIS—Lastly, going back to table 1, why was compassion chosen as being potentially a judicial virtue, quality or skill?

Prof. Roach Anleu—We had a long list of over 20 of the kinds of qualities of an occupation that we could think of.

Senator BRANDIS—Why did you think compassion was desirable in a judge?

Prof. Roach Anleu—It is not we thought it would be desirable. We were interested in finding out whether they consider it to be desirable. The 2007 surveys were based largely—but with

considerable modification—on a 2002 survey where a number of magistrates had indicated that compassion was an important quality or skill, in their experience.

Senator BRANDIS—Even though the judicial oath, certainly in some jurisdictions in Australia, is an oath to do justice without fear, favour, affection or ill will—which seems to ordain a rigid neutrality between being compassionate and being uncompassionate.

Prof. Roach Anleu—That is true, although a third of the Australian judiciary consider compassion to be essential.

Senator BRANDIS—That is interesting.

CHAIR—Before I pass to Senator Fisher, I just ask about this table 1. Is it possible for you to table the actual survey itself either now or by taking it on notice? Could we get a copy of that?

Prof. Roach Anleu—I would like to go back to Professor Mack and discuss that with her, if that is okay with you. Certainly I can get back to you on that fairly immediately.

CHAIR—And the timing—you said it was 2007, that survey?

Prof. Roach Anleu—Yes, 2007. I can show you can example of the magistrates survey now.

CHAIR—In light of the time, I am happy for you to take it on notice. I have a question about that but I want to pass to Senator Fisher and then Senator Trood.

Senator FISHER—I have a quick question at this stage, Professor Roach Anleu, coming off the back of your response to Senator Brandis about the dilemmas faced by the prospect of part-time appointees. In your broader experience at the university, surely those sorts of challenges are not a lot different from the challenges offered up by would-be part-time workers and offered up to workplaces which entertain the prospect of having people work part time. Surely the issues are different yet the same. You did single out particularly judicial independence, but part-time work is not easy work, either for the part-time worker—as I am sure you know—or the workplace that has to manage that happening. Yet it does happen in some jobs in some businesses in some workplaces. Can you comment on that?

Prof. Roach Anleu—I guess it comes down to whether or not one considers the judiciary to be a special kind of occupation that has certain obligations or constraints that are not experienced by other kinds of occupations. Of course, the one that has been mentioned—

Senator FISHER—It would not be unusual for the judiciary, like other professions, to consider themselves to be unique. That is not to say they are. I would like your deeper perspective on that as well.

Prof. Roach Anleu—Okay. As the judiciary becomes more diverse and there are increasing numbers of women in the judiciary who still take primary responsibility for family obligations, and we have a range of questions that deal with the work-family interface—

Senator FISHER—But this is not just about women, and you have said so yourself.

Prof. Roach Anleu—No, that is true. I am kind of getting there perhaps a bit too slowly. There is a demand and interest. Going back to the issue of merit, in order to retain some of the most meritorious applicants or candidates for the position there will need to be some flexibility in thinking about making the position attractive and amenable to people in their diverse lifestyles. If we go back to the idea of merit—the judiciary stands to lose meritorious applicants if there is not some accommodation or flexibility or recognition that different people have different kinds of needs, obligations and relationships to the workplace.

Senator FISHER—Yes. That is confirming that the judiciary in that respect faces exactly the same sorts of challenges as the broader workforce and workplaces. I have not heard anything different other than the ingredient that you gave in response to Senator Brandis earlier about judicial independence and judicial impartiality—which may well be a singling-out factor.

Prof. Roach Anleu—You have made the comparison with a university. While we value highly autonomy in terms of professional expertise in the context of a university, either we have not been as successful as judicial officers or the nature of the work is more bureaucratised in a university. But we certainly do not have anything like judicial independence operating in academic life.

Senator FISHER—At least, theoretically, you could manage the difficult and sensitive issues of judicial independence and impartiality for a part-time appointee. For example, if that judicial office were the only work, remunerated or otherwise, that that appointee did professionally, that might be a way to manage those sensitivities. Surely you are not saying, 'It's simply too hard.'

Prof. Roach Anleu—No, I am not. Certainly, if the part-time appointment is until age of retirement—like with every other judicial officer—there is not the same set of issues that emerge in relation to acting magistrates or acting judges, who may be on short-term contracts, and perhaps the situation of acting is much more problematic than part time.

Senator BRANDIS—Surely the point here is that the decision maker has to be free of all care about the personal consequences for them of a decision arrived at in good faith, subject only to the very important qualification that, if they get it wrong, it can be overturned on appeal and, if they get it wrong through lack of diligence or for some censurable reason, they will be criticised on appeal.

Prof. Roach Anleu—Yes. I agree with you.

Senator BRANDIS—There has been a lot written about this, but it seems to me that the reason impartiality is so central to the role is because what judges do is resolve disputes, and there are always at least two parties to the dispute. Unless the person against whose interests the dispute is resolved feels that he/she has been fairly treated, then confidence in the judiciary as an institution will begin to erode. That is the main rationale for impartiality, isn't it?

Prof. Roach Anleu—Sure.

Senator TROOD—Professor Roach Anleu, it is good to see the Australian Research Council's money being put to good purpose. I am interested in some of the observations you have made about magistrates in this research. Are federal magistrates included in the survey?

Prof. Roach Anleu—They are, and we have included them in the survey of Australian judges. We did have a discussion about whether they should be included in the magistrates survey or the judges survey. We came to the view that, because their jurisdiction is so different from state and territory magistrates courts, it would be more appropriate to include them with the judges in the judges survey. The two surveys are very, very similar.

Senator TROOD—The structure of the survey, you mean.

Prof. Roach Anleu—The structure, the outline, the number of topics, the kinds of topics, the kinds of questions, are similar. There are just a few changes in relations to things like 'Do you sit as a appeal court judge?' which is not relevant for the magistrates courts, or a question about the jury that does not appear in the magistrates survey. By and large, they are very similar surveys.

Senator TROOD—Have you disaggregated the material that applies to the federal magistracy?

Prof. Roach Anleu—No, we have not done that yet, and we probably will not do that and make it publicly available because of the small number of respondents from the federal magistracy. What we have tended to do is combine all the Commonwealth courts and report Commonwealth courts.

Senator TROOD—Do we have any material that compares the attitudes of the federal and state magistrates?

Prof. Roach Anleu—No, we do not. That is because of the very small numbers. I am not sure whether I have the information handy. Because of the size of the court and the small number of respondents, it becomes very difficult to break out and disaggregate.

Senator TROOD—I can see the problem. How many federal magistrates' responses did you receive?

Prof. Roach Anleu—Six per cent of our sample is federal magistrates—so about 20.

Senator TROOD—You obviously have a lot of quantitative material here relating the magistrates, but it seems to me that there are also quite a few qualitative observations you have made about them. For example, in the paragraph at the top of page 12 of your submission, you make a series of observations about there being no justification for treating magistrates differently from judges, there being a lack of transparency and fairness in relation to their removal and there being a threat to the institutional integrity in both the Supreme Court and the magistracy in relation to various activities. Those observations may be justified on the research, but are they in fact reflective of views that exist within the surveys or are they your own commentary on the findings or are they drawn from other research that you have been doing?

Prof. Roach Anleu—They are certainly commentary based on the research findings. This part of the research, which looks at the terms and conditions of remuneration, suspension and removal, really is part of a statutory piece of research, where we have looked at the various statutes which govern the magistrates courts and the supreme courts. We looked for differences in terms of those dimensions and made an argument that there was little justification or no

justification for some of the differences between magistrates and judges—they are both judicial officers and should have the same terms and conditions. The other issue is that some of the questions in the survey asked magistrates and judges for any other comments that they might have, and certainly there were some comments where magistrates made the point that they did not think that there should be such distinctions between magistrates and judges, because they are all members of the judiciary even though the kinds of work are somewhat different. The everyday work in the Magistrate's Court is somewhat different to the everyday work in the Supreme Court, for example.

Senator BRANDIS—Do you agree with that, by the way? Or do you not offer a view about that?

Prof. Roach Anleu—The reality is that it is different. During the court observations—the reality of the very large number of case lists, the quickness of the decisions, the extemporaneous nature of the decisions, the unpredictability of the lists—it is quite a different kind of experience and feeling. Many litigants do not have legal representation. Magistrates find themselves explaining things to unrepresented litigants in the way that judges in superior courts do not need to. The everyday nature of the work environment is somewhat different.

Senator BRANDIS—But even the brevity of the process does not of itself make Magistrate's Court proceedings different from the proceedings of higher courts. The High Court disposes of most special leave applications in 15 minutes of argument, for example.

Prof. Roach Anleu—Fifteen minutes is a long time in the Magistrate's Court.

Senator BRANDIS—Yes. True.

Senator TROOD—But that is a point. You are making an argument about this which, to put it colloquially, seems to take the side of the magistrates—in other words, you are persuaded that their circumstances are such that they deserve greater equality and equity with the judiciary, with the members of the superior courts. Is that a fair observation?

Prof. Roach Anleu—I think that is probably a fair observation; yes.

Senator TROOD—You said there was an argument in the paper about that. Is that a view drawn largely from your empirical research or is it an observation drawn from other research you have been doing?

Prof. Roach Anleu—Both. It is drawn from the empirical research but it is also an argument that we make based on looking at the nature of the work and the conditions of magistrates and their work.

Senator HEFFERNAN—Do you see anything fundamentally wrong with the Judicial Commission of New South Wales?

Prof. Roach Anleu—I do not have a lot of knowledge and no direct experience of—

Senator HEFFERNAN—Why is everyone telling us that?

Prof. Roach Anleu—That it is a good model?

Senator HEFFERNAN—No; I mean that people are saying, 'I don't know.'

Senator BRANDIS—Because we are in Melbourne, Bill, and all of these people do not know much about—

Prof. Roach Anleu—I am aware of the commission. I am aware of its functions. We have done no research which directly bears—

Senator HEFFERNAN—Wouldn't it help your research to have knowledge of how well that works?

Prof. Roach Anleu—We are familiar with how well it works and that it is presented as a very good model.

Senator HEFFERNAN—But you have not drilled down in it to see why it works well?

Prof. Roach Anleu—No. We have not done an evaluation of the New South Wales judicial commission.

Senator HEFFERNAN—I am amazed. I thought this was what professors did to get a full understanding.

Senator BRANDIS—No. They have done a different research project—

Senator HEFFERNAN—It is about the attitudes of judges—

CHAIR—The terms of reference, Senator—

Senator HEFFERNAN—I know, but—

CHAIR—Professor, I have a couple of questions I would like you to take on notice. Could you please talk to Professor Mack and confirm what the actual questions for the 2007 survey were? I would be interested in the actual wording of the questions.

Prof. Roach Anleu—Yes, certainly. Could I ask Senator Barnett: who should I get back to with respect to that?

CHAIR—The secretary, Mr Hallahan. I want to go back to table 1, because I have not seen a survey like this before. I find it very informative. The disparity between the two—the Australian public and the Australian judiciary—with respect to impartiality, is informative.

Senator BRANDIS—It is not all that great though.

CHAIR—It is not that great—

Prof. Roach Anleu—Thirty per cent.

CHAIR—You have got 63 and 24 per cent, and then you have got 99 per cent together. It is a 12 per cent differential. I find the issue of legal knowledge interesting. You have got the Australian public at 94 per cent either 'essential' or 'very important' compared with 90 per cent amongst the judiciary. You would think the judiciary percentage would be higher than that in terms of legal knowledge. That is why I am interested in the wording of the question. Why wouldn't it be higher?

Prof. Roach Anleu—Higher than 94?

CHAIR—No, higher than 90 per cent for the Australian judiciary.

Senator TROOD—I think the question is: what were the other choices that were available to the respondents?

Prof. Roach Anleu—There are a large number of questions. It depends on how people answer the questions. We had a scale from 'essential' to 'not very important'. Some people just rank everything as 'important' or they just rank everything as 'very important'. So it is the kind of mix of responses, without detracting from what these findings generally show—

CHAIR—That is why I am interested to see the actual questions.

Prof. Roach Anleu—Certainly. There are some differences between judges and magistrates in relation to legal knowledge. Judges rank legal knowledge more highly than magistrates do. I think that magistrates are dealing with a whole lot of other issues, problems and complexities which are not entirely legal in their nature. One of the other papers that we have published looks at emotion management and emotional labour in the Magistrates Court. Magistrates need to do quite a lot of that, which is not necessarily a strictly legal skill.

Senator BRANDIS—By the way, I know you did not want to disaggregate down to acting judges and part-time judges, because of the smallness of the sample size, but can you give us a disaggregation among the different courts, other than the acting judges and the part-time judges?

Prof. Roach Anleu—No, we cannot at the moment, because in the judges survey we did not ask them to identify exactly what court. We grouped courts, again for that problem. Once you couple together 'acting', 'gender' and 'court' you can figure out perhaps who has responded to the survey.

Senator BRANDIS—Was this survey sent to the High Court judges?

Prof. Roach Anleu—Yes. It was sent to every judicial officer in Australia.

Senator BRANDIS—Did any of the High Court judges respond to it?

Prof. Roach Anleu—I cannot answer that, because we grouped Commonwealth courts together.

Senator BRANDIS—So you do not know.

Prof. Roach Anleu—No.

Senator BRANDIS—Okay, thank you.

CHAIR—Just on this point, you said that you combined the part-time and acting judges:. What can we determine regarding their responses to these questions?

Prof. Roach Anleu—We have not disaggregated that. We have not looked at part-time. There are 13 part-time appointees in the whole judiciary. It really is not feasible to start giving percentages.

CHAIR—But you said there were 16 acting and 13 part-time and you have combined them, so you have obviously got 29.

Prof. Roach Anleu—No, I am sorry. I have perhaps been misleading. We combined magistrates and judges. So the 16 is the whole judiciary and the 13 is the whole judiciary rather than judges and magistrates. But I do not have the data here that indicates to what extent there is overlap between acting and part-time—that is, whether the 16 acting magistrates or judges are also on a part-time appointment. I do not have those figures here at the moment. It is very small. It is less than three per cent of the respondents, so it is a very small proportion of our responses.

CHAIR—Thank you. I have a question on the complaint-handling mechanism. Senator Heffernan, did you have a question?

Senator HEFFERNAN—I have a question on the skills. I see that 91 per cent of the judiciary think that impartiality is pretty important

Senator BRANDIS—Essential.

Senator HEFFERNAN—And they are well documented. So where does that leave cases where judges use their judicial authority to publicly prosecute a cause and then go into a court and sit in determinations on those causes? That happens all the time. How two-faced is that, in other words?

Prof. Roach Anleu—We have no direct evidence from our surveys that judges or magistrates are being two-faced when they respond to the survey question.

Senator BRANDIS—I do not think that is fair to the judges, Senator Heffernan.

Senator HEFFERNAN—No, that is colourful language.

Senator BRANDIS—But in fairness—

Senator HEFFERNAN—Can I just say that Justice Murray Gleeson did say in a speech in New York, which I have quoted in parliament, that judges should not deploy their judicial authority to a particular cause because in doing so they risk their judicial authority. So there are

well-documented cases of what we all 'activist judges' who prosecute particular causes publicly who then occasionally or reasonably often sit in judgment on some of those causes. Where does that leave the impartiality and the 91 per cent of judges? I think it is essential, but we seem to turn a blind eye, which is why Murray Gleeson raised that issue in that speech in New York.

Prof. Roach Anleu—Also, integrity and high ethical standards are ranked as essential by 92 per cent. You are raising some ethical questions, I guess, and that is also ranked almost as highly as impartiality. That is kind of beyond the bounds of my expertise to—

Senator HEFFERNAN—When your work is done in this project, what will be the outcome? What are you hoping to achieve? What is your mission statement?

Prof. Roach Anleu—Because we have got so much data, it will keep going. We can keep mining the data for quite some years. As we have been the recipient of public funding, it is really of value to us to have some of the findings more widely distributed. I know that there is quite a lot of misinformation among the public in relation to the work of judges and magistrates. Most people in the Australian community have no direct experience. If we look at the AuSSA, we find that 67 per cent of those respondents had not been present at a court proceeding in any capacity over the past decade or so. I think if we can get some of our findings into the public—

Senator HEFFERNAN—I will surrender to all those words, but what about if I am a person standing at the back of the court and there is a judge sitting on the bench at the front of the court and, as often occurs, there is a case about which the judge at the front of the court has had a lot to say? There are some judges who are well known to write a lot of articles and have a lot of public views and they continue to sit in judgment on some of those views. Do you think that is inappropriate, or should we just continue to turn a blind eye to the fact that it goes on—which is what Murray Gleeson was referring to when he made that speech in New York.

Prof. Roach Anleu—I am not directly familiar with the speech, so I will not—

Senator HEFFERNAN—Do not worry about the speech; just the principle. You have some work which could well turn out to be a United Nations thing which never gets measured, but surely to an ordinary person there are some things that are patently obvious. If you write a published article about a certain issue and then sit in judgment surrounding those issues, is that not flawed? Can you use your judicial authority to prosecute a particular cause without risking your judicial independence by sitting on those causes?

Prof. Roach Anleu—Is the logical extension of that that judicial officers should not write statements beyond their judgments? In a sense—

Senator HEFFERNAN—To cut through the long question, the answer is—

CHAIR—Senator, please allow the professor to conclude her remarks.

Prof. Roach Anleu—With due respect, perhaps the logical extension is that the former Chief Justice of the High Court should not have made those political statements in that context, at any rate. I guess I am heading—

Senator BRANDIS—It was not a judgment at that stage.

Prof. Roach Anleu—But he has made a variety of statements and published articles on numerous topics which have been, I think, of great value and have enhanced knowledge and information beyond decided cases.

Senator HEFFERNAN—But the point that the Chief Justice was making—and which you are inclined to find a way to ignore—is that, if you have a strong predisposition and you publicly state it, as opposed to privately keeping it, you could be seen by the person that is standing in the back of the courtroom as prejudiced in your view or judgment. And that goes on every day of the week and everyone turns a blind eye to it.

Prof. Roach Anleu—I am not sure about that.

Senator HEFFERNAN—I could detail it for you.

Prof. Roach Anleu—I think that then raises whether there should be something like the New South Wales judicial commission to deal with complaints—

Senator HEFFERNAN—Exactly.

Prof. Roach Anleu—and concerns that members of the public might have or litigants might have about the judicial independence of the judiciary.

Senator BRANDIS—Professor Anleu, are you familiar with the Kilmuir Rules?

Prof. Roach Anleu—No, I am not.

Senator BRANDIS—They were a set of rules promulgated by Lord Kilmuir in Britain in the 1950s which were taken to be a canonical prohibition on any comments by judges on virtually anything outside and certainly any matter of public controversy outside courtrooms. That was regarded as essential to maintain the reputation for impartiality of judges. those rules have not really applied for the last 20 or 30 years either in Britain or Australia, but it sometimes seems to me that, the more we hear judges setting themselves up as political and social commentators, the more they get into an arena that is best left for people who are allowed not to be impartial in their professional lives.

Prof. Roach Anleu—Like sociologists, for example.

Senator BRANDIS—Or politicians.

Senator HEFFERNAN—Do you agree with that? You nodded your head, but you did not say anything.

Prof. Roach Anleu—In terms of a strict division—

Senator HEFFERNAN—What Senator Brandis has just said.

Prof. Roach Anleu—I am not prepared to say whether I agree or disagree, in the sense that this has just been put to me now. It is like a public opinion survey. Do people really have opinions about the courts or are they simply responding to questions and constructing—

Senator HEFFERNAN—But isn't your life's work to figure all this out?

Prof. Roach Anleu—Our life's work is to provide information, data and survey findings and then, if they are to be used in particular ways or if some of our findings are to be used in a way to make arguments for a judicial commission, that is fine. We are beyond—

Senator HEFFERNAN—You are actually abiding by the rules that I was just talking about. You are not expressing a public view, because you do not want to be seen to be biased in the paper you present for other people to form a view. Is that right?

Prof. Roach Anleu—Our view is based on academic research and knowledge of our own survey findings as well as—

Senator HEFFERNAN—I will just put it to you in simple language. If a judge writes an article and says that black is white—has a view on something—and then sits in judgment on deciding whether black is white, wouldn't a reasonable person, including yourself, see that as a prejudiced view?

Prof. Roach Anleu—Perhaps.

Senator HEFFERNAN—Thanks.

Senator BRANDIS—Mr Chairman, I would just say this in fairness to Professor Roach Anleu, as I want this to appear on the record, because people who read the proceedings of this committee in the future will not necessarily have the benefit of the submissions. Unlike all the other witnesses we have had who have come before the committee on behalf of the various stakeholder bodies to put a point of view, Professor Roach Anleu has come before the committee not to put a point of view but to acquaint the committee with certain empirical research that she and her colleague have conducted. Therefore, it seems to me fair enough that she has been more circumspect than other witnesses in stating opinions about the terms of reference.

Senator HEFFERNAN—For which we are eternally grateful.

Prof. Roach Anleu—Senator Brandis, thank you. We are aware that a lot of opinions are based on anecdote and sometimes the research contradicts the general perception or anecdote. We, of course, have a vested interest in thinking that research is very empowering in terms of providing more—

Senator BRANDIS—It is very—

Prof. Roach Anleu—And it is research which is national in scope.

Senator BRANDIS—It is very, very good.

CHAIR—I have a final question regarding the complaints handling mechanism. On page 11 of your submission you refer to New South Wales and the ACT and their complaints handling mechanism and the judicial commission in those jurisdictions. Are you familiar with the ACT commission?

Prof. Roach Anleu—No, I am not. We are aware that it exists.

CHAIR—Have you asked any questions or surveyed or researched this area, apart from what is in your submission, in terms of the merits or otherwise of an independent judicial commission amongst the magistrates or judges?

Prof. Roach Anleu—No, we do not have a survey question that relates directly to judicial commissions.

CHAIR—What about complaint-handling mechanisms more generally?

Prof. Roach Anleu—No. The only place that would appear is in any open-ended questions—if judges and magistrates felt it was an issue. Certainly, in some of the open-ended questions, there are comments from judges and magistrates along the lines of, 'I wish my colleagues would behave differently'—I am paraphrasing—or 'I'm tired of political appointments.' But these are open-ended questions and we have not really analysed them to a great degree yet. And because they are open-ended questions not everybody raised it as an issue; some of the judges and magistrates raised it an issue in that context but not everybody.

CHAIR—I am happy for you to take it on notice if you did find any evidence or information in your research regarding how they viewed the appropriateness of dealing with complaints. Yesterday, Chief Judge Pascoe indicated a little bit of sensitivity and a concern about collegiality in relationships with his fellow judges when dealing with complaints. As the chief judge, he has to deal with them—he has a relationship with these men and women who are his colleagues—and he indicated a broad and general support for an independent commission which would take that immediate concern away from him to an independent mechanism. I wonder if his view is shared amongst other colleagues, such as magistrates and judges, around the nation, not just in New South Wales. I hope I am not misinterpreting his view, but I think that is a general view that he expressed, and that is why I am asking you.

Prof. Roach Anleu—Certainly there are some comments about collegiality: in some courts, the absence of collegiality; in other courts, the importance of collegiality. But collegiality does not necessarily relate to complaints.

CHAIR—In conclusion, let me concur with Senator Brandis's view that you are one out of the box, as it were, as a witness before this particular hearing.

Senator HEFFERNAN—Hear! Hear!

CHAIR—We do appreciate your evidence before us. You are presenting research and surveys which are not necessarily your opinion; however, you are delivering your results to us and then giving your analysis and feedback on it. That is the first thing. Secondly, thank you very much

for the very informative submission. This type of research is most valuable, and we thank you on behalf of the committee.

Senator FISHER—It is a spirited submission too—informative and spirited. Thank you.

Senator HEFFERNAN—If you were issued a kind invitation from the Judicial Commission of New South Wales to go and pay them a visit, would you?

Prof. Roach Anleu—Yes. As you can see today, we accept many opportunities to convey our research findings. We are very pleased to have the opportunity to present to you today, so thank you very much for making those arrangements and for your interest in our research.

CHAIR—Thank you.

Committee adjourned from 12.08 pm to 1.34 pm

BRYANT, The Hon. Chief Justice Diana, Chief Justice, Family Court of Australia

CHAIR—I now welcome the honourable Chief Justice Diana Bryant, Chief Justice of the Family Court of Australia. Thank you very much for being here, we know you have a busy schedule and we appreciate it. The Family Court has lodged submission No. 8 with the committee and, for the record, I note this is a joint submission with the federal Magistrates Court. Yesterday, we heard from Chief Magistrate Pascoe in Sydney. Do you wish to make any amendments or alterations to that submission?

Chief Justice Bryant—No, I do not.

CHAIR—We now invite you to make an opening statement after which I will ask for questions from my colleague senators.

Chief Justice Bryant—There is really nothing much that I want to say that has not been addressed in the submission. There are different parts of the submission, and I am sure that different senators will have an interest in particular parts of it. From my point of view, I am just happy to respond to any comments or questions.

CHAIR—Thank you very much. I will pass to Senator Brandis to kick it off, and then we will go from there.

Senator BRANDIS—I do not have very much for the moment. We discussed this submission with Mr Pascoe yesterday afternoon, as you would be aware, Chief Justice. There was just one small question I had and it is relevant to the Semple review, which you treat at page 5. In the event that the recommendations of the Semple review are given effect to and concerns the Family Court, what is your current thinking in relation to whether those federal magistrates, who become members of the Family Court in the division down from the existing judges, would have an autonomous rule-making power?

Chief Justice Bryant—This is a matter that you raised in the Senate estimates. Can I answer the question in a slightly roundabout way?

Senator BRANDIS—Sure. Please expand as fully as you like.

Chief Justice Bryant—I simply want to be consistent with what has been previously said. My letter of 5 February to the Attorney was the Family Court's response to the government's proposals on the Semple review. This was a response from the whole of the court, not just my own views, and we dealt with this on a number of levels. In response to my earlier submission to the Semple review, I said in this letter:

I identified a range of benefits associated with such a model, including the independence of the Chief Justice from either division, the ability to retain the existing work practices and cultures of both courts in separate divisions, and the capacity for both divisions to work more productively together ...

We then specifically addressed in the letter how that might happen. What I said was that the principal judges of each of the divisions:

... would assist the Chief Justice in accordance with arrangements made by the Chief Justice in the same way the Deputy Chief Justice carries out his or her duties under the existing statutory provisions. The legislation could, if thought desirable, set out matters of practice and procedure for the 'general division' so as to enshrine those practices thought necessary to preserve the present culture of the Federal Magistrates Court.

Under the heading 'Rule making power', we said:

A decision will be required as to whether to provide a separate rule making power for each division, enabling each division to make their own rules, or to create one rule making power for the Court as a whole. As it is the Government's intention, as I understand it, to preserve the culture and case management systems of each Court, it would be necessary for the rules of court—were there to be one set of rules only—to be of a relatively high level of generality and for each court's case management system to be promulgated through practice directions or like means.

To answer your question, it seems to me that it is a matter of how you practically give that tier the right to make its own provisions for practice and procedure, and, if it is to be done through a rule-making power, then I support that.

Senator BRANDIS—Do I take that to mean, then, that you would support the tier that would be constituted from the former federal magistrates having an autonomous rule-making power?

Chief Justice Bryant—I would, certainly in relation to their practice and procedures, absolutely. Whether that would extend to everything, I am not sure. I think I would want to think about that. Personally I think it would desirable—and we are working toward that—to have some common rules about divorce, for example; subpoenas, discovery and things like that. As far as practice and procedure is concerned, yes, I would support autonomous ruling.

Senator BRANDIS—That seems to put your position a little more sharply than it is set out in the letter. That is not a criticism. That seems to be a development of your thinking—to have arrived at a particular position in relation to this matter. Has that view been conveyed to the government yet?

Chief Justice Bryant—It has been.

Senator BRANDIS—When and by what means was that?

Chief Justice Bryant—There was consultation with Mr Govey from the Attorney-General's Department, about which he spoke at the Senate estimates hearing. It was in that discussion.

Senator BRANDIS—I do not have the *Hansard* of the estimates hearing here but, with all due respect to Mr Govey, it certainly did not sound to me—perhaps because he was being very careful and guarded with what he said, for understandable reasons—as if the position was quite as clear as you have just made it. But that is the position and the Family Court is happy for the public to know that the position, as you have outlined it, has been conveyed to the government?

Chief Justice Bryant—The letter that I referred to was a letter written by me in consultation with the judges. So that was the court's view—we did not express a view. We were careful in the letter to say that it is a matter for government.

Senator BRANDIS—I understand.

Chief Justice Bryant—So what I am expressing to you is my own views, and I am still very conscious that it is a matter for government in the end. My views have such weight as the government accords them, but in the end it is not my decision.

Senator BRANDIS—I understand that.

Chief Justice Bryant—I am happy to say that my personal view is that they should have an autonomous rule-making power in relation to their practice and procedure. I would expect it to be in consultation with the Chief Justice, for example, in the structure, but it would be enabling them to make rules about their own practice and procedure. That is my view, and that view has been conveyed.

Senator BRANDIS—If I understood you correctly a moment ago, that was conveyed in the conversation with Mr Govey. Is that right?

Chief Justice Bryant—It was, yes.

Senator BRANDIS—Has it been conveyed in any more formal way, for example by a letter further to the letter from which you have just read?

Chief Justice Bryant—It has, and I thought I had that with me, but I do not think I have. I wrote a letter and it has now been tabled. It was a question on notice arising from Senate estimates. It has now been tabled and I do not think I have it.

Senator BRANDIS—I do not think it has come to my attention.

Chief Justice Bryant—In that letter, I said that I had no intention, if this came to pass, to interfere with the present and future capacity of the second tier to make its own arrangements. I might not have said in the letter 'and rule-making power', because I was not addressing my mind to that particular question, but I would have thought it was implicit in the letter, which was conveyed to all federal magistrates, that they were to be free to make their own arrangements for practice and procedure.

Senator BRANDIS—Was that a letter to the Attorney?

Chief Justice Bryant—No. That was a letter to the Chief Federal Magistrate.

Senator BRANDIS—Again, beyond your conversation with Mr Govey, I am trying to locate the point, if there is one, at which the view which you have just expressed in quite clear and emphatic terms was actually conveyed to the government.

Chief Justice Bryant—I would be pretty confident that it had—

Senator BRANDIS—In the conversation with Mr Govey?

Chief Justice Bryant—Yes, and there would have been other conversations with Mr Govey. Mr Govey, for example, is now a member of the family law courts advisory group. I was referring to a particular discussion or consultation which was formally for the purpose of having such a consultation, but, in the course of discussions at at least two or three meetings we have had of that group with Mr Govey there, I would be pretty certain it would have been discussed as well. So I do not think there would be any doubt.

Senator BRANDIS—Given that it is plainly your clear view—however arrived at, you now have arrived at a clear view on this matter—would it not be appropriate or a good idea to actually express that position to the government by letter to the Attorney?

Chief Justice Bryant—I would have no difficulty doing that if I was in any doubt that the Attorney was in any doubt about my views. I do not think there is any.

Senator BRANDIS—You are in no doubt that the Attorney is in no doubt?

Chief Justice Bryant—Correct.

Senator BRANDIS—So far as you are aware, has the government made a decision on that issue?

Chief Justice Bryant—I do not believe they have, or if they have I am not aware of it. But although I am not aware of the government having made a decision, my own view of the government's position is that they have at all times been anxious to retain the ethos of the Federal Magistrate's Court. I have always believed that implicit in that was the fact that there would be autonomous rule-making power in relation to—

Senator BRANDIS—In relation to all but the last part of that sentence I do not think there is any doubt in anyone's mind that you have said that, and the Attorney-General has said that, and that those remarks may be taken in good faith as a genuine statement of your intentions and expectations were this merger to go ahead. But it certainly was not the case at the evidence given at estimates; on the two occasions I have raised that, one indicated that in a practical nuts-and-bolts way there was an expectation that the federal magistrates would have an autonomous rule-making power. In fact I clearly recall your CEO—I am sorry I do not have the transcript here—when asked that very question, was certainly equivocal about that question, and perhaps rightly so. Perhaps no decision had been made at that time and it now has—that is fine.

Chief Justice Bryant—I think his equivocation was only that it has not always been raised as a question of rule-making power. I think it has always been understood, perhaps, that the practical result would be autonomy in relation to practice and procedure. I suspect that he was being a little cautious in what he said given the question was specifically about rule-making power.

Senator BRANDIS—I understand that I focused on a relatively narrow issue, but I must say that in a governance sense, and in a practical day-to-day sense, I would have thought that the most important way of preserving the culture of a court would be by determining who has

control over practice and procedure and what that practice and procedure is. That is why I have zeroed in somewhat on this rule-making power issue in engaging in this debate.

Senator FEENEY—With respect to acting judicial appointments, notwithstanding the issues of section 72 of the Constitution, and I think that is a caveat in your submission, you seem to have a general view that is favourable to acting appointments so long as they are confined to former judges?

Chief Justice Bryant—Yes, that is right.

Senator FEENEY—My recollection is that your submission is basically silent on the proposition that practising barristers and the like could also carry acting appointments. I just wondered if you have any remarks on that notion.

Chief Justice Bryant—Constitutionally, I think that is simply not possible. I probably did not consider it necessary to address it in terms of the Federal Court because I just do not think it can happen.

Senator FEENEY—Yes.

Chief Justice Bryant—My personal view is that I am not actually in support of that. I do not think it is a good idea, but it just does not arise for Federal Courts, constitutionally.

Senator FEENEY—In terms of section 72(iii), have you got any preliminary views about whether 72(iii) does mean that the Commonwealth has a discretion to make acting judicial appointments?

Chief Justice Bryant—I am not sure, ultimately, whether the advice would be they do or they do not. I raised this some time ago with the previous Attorney-General and the government. I do not know whether they got any advice at that time or not. I would have thought that you could do it, but I may be wrong. At the moment, without amending the Constitution I think it would have to be pretty limited. Certainly, they would have to be under 70. I suspect that you would have to make an appointment which was not for a confined time, so if it were a 65-year-old, for example, I think it would probably have to be for five years. I think you can get around the non-reducing salary by providing for a particular pro-rata amount each year; so if you said three months work each year. Given those constraints it seems to me that you probably could do it. But I have not seen any advice formally as to whether that is possible or not.

Senator FEENEY—Lastly, with respect to the complaints processes in part (d) of your submission, I guess it is obvious that the Family Court is probably a jurisdiction that generates as many complaints as any.

Chief Justice Bryant—More I think, Senator, we could safely say.

Senator FEENEY—I think that is probably right. I am wondering if you could expand upon the complaints' system that the family courts face and particularly inform us what proportion of those complaints might be characterised as vexatious or malevolent rather than complaints that the head of jurisdiction feels the need to actually deal with in a more substantive way.

Chief Justice Bryant—You are correct, Senator, we do get a lot of complaints and they break down into several groups. We get administrative complaints about the system and so forth which usually do not come to me and are dealt with by the CEO and his delegates. In relation to the judicial complaints, a lot of them are about the result of cases. Many people write to me and say they were not happy with a result and ask if I could do something about it. Obviously we write back to people and explain that the Chief Justice cannot interfere and change the result, and that there is an appeal process which is what they have to go through.

The remaining complaints then are usually about in-court conduct. I had a couple of complaints about out-of-court conduct but they are pretty unusual. The complaints that would come to me would be about in-court conduct. Usually these are combined with a number of things. There could be a complaint about the result coupled with a complaint about an in-court conduct. I have delegated the complaint role to the Deputy Chief Justice so the complaint letter goes to him. He has a former registrar of the court working with him who works on a part-time basis. When the complaint is received the complainant is informed that we have the letter. If the matter is ongoing, then we inform the complainant that there will not be a response until the matter is concluded because we do not want them to think that the judge might know about the complaint and therefore might be biased towards them or something. So we do not tell the judge about the complaint and we tell the complainant that we will deal with it at the end of the case, unless it was particularly something that had to be dealt with, and occasionally there are things that arise that have to be dealt with.

Senator FEENEY—Like a conflict of interest?

Chief Justice Bryant—A conflict of interest or something that might have to be dealt with, but that is pretty unusual. The judge would then be shown a copy of the letter but not asked to comment. The registrar would then get the file and a transcript of the part of the case in which the complaint was made. He would sometimes get the audiotape if there is a suggestion that there might have been a tone or something that was important, he will listen to that as well. Then he prepares a thorough report as to the complaint and a draft response. The Deputy Chief Justice looks at that and discusses it with him, and then I see that response as well and that is the way in which we respond. There are very few complaints that ever require, fortunately, anything further. What we find is that, because it is an emotional area, people are often wrong about the assertions they make. People say that the judge said something or something happened and it simply did not. Sometimes they misinterpret comments or misunderstand comments.

Senator FEENEY—Do you have any figures to hand about the number of complaints that go through these various stages?

Chief Justice Bryant—I can tell you this because I have a draft of a question on notice from the recent Senates estimates from Senator Barnett, I think. In 2007-08 there were 75 judicial complaints. I do not have the breakdown of how many of those were just about the result; a lot of them are.

Senator BRANDIS—Does a judicial complaint or complaints about judges include judges and registrars too?

Chief Justice Bryant—No, just judges. We really should have had the numbers. I can probably get a breakdown, if it would help us, about those that are really about the result—and many of them are. Some are also about delay in judgments too. So there is that specific issue. But if you remove those two issues—and I will return to the delay in judgments in a minute—then most of them prove to be misconceived.

Senator FEENEY—How many of those 75, if any, gave rise to you counselling the judge and taking some form of remedial action?

Chief Justice Bryant—Only on one occasion and that was really a complaint that came through the practitioners rather than the clients. It was about the kind of work practices of a particular judge and the way they operated.

Senator FEENEY—That is okay, I do not think we do not need to know any particulars.

Chief Justice Bryant—It probably is because in that case I did speak to the judge concerned and we actually arranged some counselling to change the work practices a bit; otherwise it has not. I would not have any hesitation in speaking to the judge concerned, and I would be happy to do so if I thought it was necessary. Of course, one of the problems that give rise to these issues is that in the federal sphere there is no disciplinary mechanism short of removal of the judge from office. I do not have any disciplinary powers at all, I have only remedial persuasive powers.

Senator FEENEY—Correct me if I am wrong, but you could in theory take a judge off the schedule, couldn't you?

Chief Justice Bryant—I can do that, and I do in relation to judgments.

Senator FEENEY—That is a form of disciplinary action, isn't it?

Chief Justice Bryant—It depends on your view. Some might think it is a respite.

Senator FEENEY—A holiday.

Senator BRANDIS—Presumably, you do that to give the judge concerned time to write the judgment rather than as a punitive measure, don't you?

Chief Justice Bryant—Absolutely. It is not a punitive measure. Judges do have time to write judgments anyway. If they require extra time, then it usually means that there is a bit of a problem with that judge that you need to address. I have threatened that if judgments were not completed, then I would suggest or require—I am not sure I have that power—that the judge take their long leave to do that. I have not had to do it yet. The power as to whether I can do that has not been tested.

Senator TROOD—Has this particular procedure for handling complaints been in place for very long?

Chief Justice Bryant—It has been in place for about three or four years.

Senator TROOD—Is it a significant reform or change from whatever was there prior to this being introduced?

Chief Justice Bryant—Prior to my being Chief Justice, there were particular judges in each registry who had a system of greater delegation of powers than I have had. That is partly because the courts are now smaller. The judges who were then called the administrative judges had this role. I think that is unsatisfactory as people were dealing with it in different ways and there was not a national register. We have now put it all in the one place and it works much better. My submission alluded to a suggestion that I had raised with Chief Federal Magistrate Pascoe, who might have mentioned this yesterday. I am certainly aware that, as far as the public is concerned, it cannot be seen by the public to be a particularly transparent process when the Chief Justice is the one looking at complaints about their own court. I perfectly understand that. I have a long history in law societies and bar associations of being on judicial complaints committees where you have had lay members, and I do not have any difficulty with that at all. I have spoken to the Chief Federal Magistrate—and we will discuss this with the Attorney—about putting in place a committee where people who get their initial response but are unsatisfied with it can go.

I have in mind that the committee might have on it the Ombudsman—I am not sure as to the Constitution but it probably would not have me. In a sense that committee could then review. They would have to be careful about the wording because they would not have any disciplinary powers either. But it could review the first letter and, if they want, they could make recommendations that something further be done—another letter be written, an apology be made or even an ex gratia payment or something could be made in cases like that. This would just add a bit more transparency to the process for the public.

Senator BRANDIS—By the way, where will the ex gratia payment come from? Presumably it would not come out of the court's budget.

Chief Justice Bryant—It does.

Senator BRANDIS—Is that right?

Chief Justice Bryant—We have had to do that on occasion—not often. I can give you one example. There was a husband who was particularly violent and there was a note on the file that the wife's address was not to be made available. But there was an administrative error and the address was made available. It was put on a document and he found her address and threatened her and she had to move into other accommodation. In moving, she incurred expenditure and the court made an ex gratia payment to her in relation to that.

Senator TROOD—Is your proposal for refurbishment borne of a concern about the level of transparency here?

Chief Justice Bryant—Yes, absolutely. It is about transparency.

Senator TROOD—Is that the primary motivation behind it?

Chief Justice Bryant—Yes.

Senator TROOD—Are you entirely comfortable about exercising these powers over complaint or do you think there is an argument for going outside the court system itself?

Chief Justice Bryant—I am not entirely comfortable. I think if you asked any of the heads of jurisdiction of any of the jurisdictions they would say they were not. I think the Judicial Commission of New South Wales works extremely well because the responsibility is removed from the Chief Justice. If we could have some sort of a commission then I would be in favour of it.

Senator TROOD—So you would prefer that arrangement to one whereby the court itself takes responsibility for these?

Chief Justice Bryant—Absolutely. I am aware of the discussions that are going on at the Standing Committee of Attorneys-General and between the Council of Chief Justices and the Attorney-General's Department about a commission. I just think it is a long way off—desirable, but a long way off.

Senator TROOD—Are there any questions of principle in your mind about this—outsourcing, as it were, the responsibility for this—being a possible challenge to the independence of the court and its capacity to run itself?

Senator FEENEY—Or perhaps your authority as chief of the jurisdiction?

Chief Justice Bryant—Sorry, in relation to—

Senator TROOD—If you were to give that power to deal with complaint to a judicial commission outside your court structure, is there an issue here of principle that worries you in any way?

Chief Justice Bryant—No, there is not. The proposal was put forward by Attorney-General Williams, I think, some years ago. I had some difficulties with part of it but not all of it. I think the New South Wales judicial commission works really well. The problem is what I can refer to as minor disputes—nobody think their disputes or complaints are minor but there clearly are differences between serious breaches of judicial obligation and minor complaints. The courts will still have to deal with all of the minor complaints but it is really those difficult areas where there is a significant problem and you run into problems and where the judicial commission is useful. I think New South Wales has proved that. I cannot remember how many cases have ultimately gone to their tribunal—not many—but there have been some resignations prior to the matter going to the tribunal. I think that is the benefit of it.

Senator BRANDIS—I must say that I am a little surprised that you take that position, when you seem—or your submission seems—to suggest that the complaints handling procedure that you have developed within your court is also working in a satisfactory manner. You are not dissatisfied with the way your complaints handling procedure is working, are you?

Chief Justice Bryant—Not at all but they are what I am calling the minor complaints. It works well for those. It is the troublesome areas of judicial behaviour—and fortunately I have not had to deal with them yet—that do arise from time to time.

Senator HEFFERNAN—It would be fair to say that to protect the public confidence in the judicial process an independent commission like the one in New South Wales would assist that—where people know that there is something out there, like the speed camera, that you can go to.

Chief Justice Bryant—I think that the public would always probably rightly think that you do need some external organisation being a bit of a watchdog. For the federal judiciary there is no discipline and then removal from office and that is difficult.

Senator HEFFERNAN—That is a good summary.

Senator BRANDIS—But constitutionally the introduction of a federal judicial complaints commission is not going to change that.

Chief Justice Bryant—No, it is not. Not really. I suppose, really, when you dig down—I think our complaints process works pretty well and I do not think it would much change. We would still get all of that referred to us presumably. I would presume that you would have a sort of gatekeeper and that work would still come back for the courts to deal with. There does need to be a process in place for how the removal of a judge would be dealt with, and I am not the first person to have raised that. It would be unfortunate to have the first time someone has to think about the process when you are actually faced with the removal of a judge.

Senator BRANDIS—I must say I am rather torn by this issue. I can understand the arguments—quite powerful arguments—on both sides. We had the gentleman who runs the New South Wales judicial complaints commission before us yesterday afternoon who was very interesting. It seemed to me that the procedure that his commission superintends basically merely replicates in a more formal and structured way what happens anyway—that is, that if a judge falls into error or commits something that gives rise to a legitimate complaint outside the appellant process then a complaint is received and it is looked at carefully. Now that would happen with your court anyway, as you have told us, and if those examining the complaint are satisfied as to its merits, then they discuss it with the judge in question and, to use the word that is always used, 'counsel' the judge or perhaps use other measures—I hesitate to use the word 'sanctions'—such as you have illustrated, for example taking the judge off cases until a long-delay judgment is produced. Those measures are then given effect to. Given that what the judicial complaints commission does in New South Wales seems to me to merely replicate in a more structured way what courts do anyway, and have done for time beyond memory, is the main argument for there being a more formal structure the argument about public reassurance—that is, that it looks better in the eyes of the public that there be an external body so it is not seen to be Caesar judging Caesar?

Chief Justice Bryant—I think it is both. In a sense it is that, and I suppose you would have to send most of that back to the jurisdictions to deal with. Maybe not New South Wales because they have the commission, but otherwise you would be duplicating what happens. But it is the more difficult ones. Perhaps if I can give an example of what we discussed at the chief justices' leadership conference a couple of years ago, because it was a very interesting topic. Because it has not happened to me, I can discuss it as hypothetical. We talked about an for example where the Chief Justice finds out there is an allegation of sexual assault or paedophilia or something on the part of a judge. They are the difficult ones for heads of jurisdiction. What do you do? Do you

go to the judge and ask them about it? You might be interfering with a police investigation. Do you go to the police and not tell the judge? I would certainly want to do something to protect myself if I had done something—

Senator BRANDIS—I remember there was an allegation of such a case in your court, in Queensland in 1980, that ended up in a criminal prosecution from which the judge was ultimately acquitted. But it was initially handled by the Chief Justice confronting the judge.

Chief Justice Bryant—I know of the case and who it is; I do not know about the detail. But that might have been a problem.

Senator HEFFERNAN—It is a haphazard way to go about it.

Chief Justice Bryant—It is haphazard, Senator. When we discussed this at the leadership conference, my initial view was that you should discuss it with the judge. But then other people were saying, I think rightly: 'Are you sure you should do that? You might interfere with a criminal investigation and so forth.' I think those are the kinds of problematic matters where a commission of some kind would be helpful.

Senator HEFFERNAN—Based on my own experience, I organised a meeting for the police to go to see a Chief Justice on a criminal matter. It is a very haphazard way to go about business. All the Chief Justice could do was to counsel the person concerned. In New South Wales, the matter of Justice Yeldham was well-known to a lot of legal people. In fact, some legal people lied to the Wood royal commission about it, and there was no way of dealing with it. That poor bugger topped himself. He should never have topped himself; it should have been a civilised process that was not a public ambush to deal with it.

Chief Justice Bryant—Those kinds of cases are the problematic areas. Fortunately they do not arise very often.

CHAIR—Sorry, I will just interrupt there. Senator Heffernan, I would just caution you on the views that you put on the public record and the manner in which you put them. I ask you to consider those for—

Senator HEFFERNAN—I will err on the side of caution.

CHAIR—That would be appreciated.

Senator TROOD—Chief Justice, there clearly are, or theoretically could be, some problematic cases, but do they occur sufficiently often, or are you concerned about the possibility of them occurring with greater frequency in the future, that justifies the kind of change that might be contemplated?

Chief Justice Bryant—I do not anticipate them increasing in frequency. As I said, fortunately I have not had any yet, but certainly some of my colleagues have from time to time and I think they are difficult. Whether that justifies having some sort of a commission, I do not know. I do not personally think it is necessary to duplicate the New South Wales commission on a federal basis, but those are the areas that would warrant some consideration.

Senator BRANDIS—I suppose if we were to go down this path, Chief Justice—this is what Law Council of Australia has been grappling with too, as we heard from Mr Colbran this morning—in an ideal world you would want a national body to deal with both federal and state courts, and/or if there were a series of bodies for them to apply a common set of principles rather than just a federal judicial commission.

Chief Justice Bryant—That would be ideal, Senator, but of course we live in a world of cooperative federalism.

Senator HEFFERNAN—You could do a cost benefit analysis on the duplication of administration. And by the way, the New South Wales judicial commission does a lot more than try to sort out things that have run off the rails; it is a serious public education tool to judges. But the cost benefit analysis of the little budget they have is pretty powerful.

CHAIR—I would like to ask some questions, Chief Justice. Many of the issues with which I am concerned have been answered, so thank you for that. First of all, Chief Magistrate Pascoe—I do not want to misinterpret what he has put to the committee, but I think his views are similar to yours with respect to, firstly, the support for the New South Wales judicial commission and, secondly, he indicated a sense of sensitivity regarding the counselling of colleague judges. He believed that was an issue and that if it was taken out of his hands to put in the hands of an independent commission then he could see merit in that. I think there may be a concurrence of views in that regard.

Chief Justice Bryant—I think that is probably true, yes.

CHAIR—In your comments earlier about dealing with complaints, you made a reference to out-of-court conduct. I know it has come up, but I am wondering if what was referred to earlier is the matter to which you were referring. Is there any particular conduct that came to mind? If so, how is it dealt with by you and the court?

Chief Justice Bryant—There are two examples I can give you, and they are the only ones I have. When I said out-of-court conduct, I meant someone complained that a judge had been at a function with his wife and one of the parties to a litigation case had been there. Obviously I cannot respond from the transcript to that; I had to speak to the judge about it and was satisfied that there was no suggestion of bias or anything else and the complainant was written to. That is the kind of out-of-court conduct—

CHAIR—What about the second one?

Chief Justice Bryant—The second one I am aware of because the Deputy Chief Justice told me about it as it did not get to my attention. Somebody had complained that a judge was behaving as though they had been intoxicated. 'Drinking at lunchtime' I think was the allegation. The judge had been at a meeting at which there were other people and the Deputy Chief Justice spoke to them and they said that no alcohol had been served or a response like that. They are the only examples I have of where we are not able to respond from the transcript or the audiotape.

CHAIR—In any event, if an allegation is made, it would come to you and you have delegated it to the Deputy Chief Justice in the usual way.

Chief Justice Bryant—Yes, always.

Senator HEFFERNAN—If one of your judges in your jurisdiction was put under police surveillance for possible criminal activity, how would you get to find out about it?

Chief Justice Bryant—I have no idea, Senator.

Senator HEFFERNAN—That is exactly the answer. You would not find out.

Chief Justice Bryant—I do not imagine they would tell me.

Senator HEFFERNAN—Wouldn't it be of concern?

Chief Justice Bryant—Of course it would be.

Senator HEFFERNAN—So the system fails in that.

Senator FEENEY—It is not necessarily a failure of the system that the Chief Justice is not informed of a police investigation.

Senator HEFFERNAN—I would have thought—

Chief Justice Bryant—It might depend on what it was. It is very hard to answer that, Senator.

CHAIR—Senator Heffernan, do you have any follow-up questions? I have some further questions.

Senator BRANDIS—In fairness to Senator Heffernan, can I pursue that? I think the point he has been making throughout today and yesterday is a fair point. There have been occasions, as we know, on which judges have been charged with criminal offences. I am not saying anything that is not on the public record. The most famous case was the late Justice Lionel Murphy, who was charged and convicted, and then successfully appealed and was tried again and acquitted. He stood down but to the best of my recollection nobody got to the point of moving for his removal under section 72.

Chief Justice Bryant—They almost did, Senator.

Senator BRANDIS—It would have been a matter of time, but it did not happen. Then there was the case of Justice Underwood, who I think is still alive but is now retired, so I will not say anything more than what is on the public record. He was charged and tried in 1980 for interfering with a minor, and he was acquitted and went back onto the court. During that period he stood aside. There may be other cases that I am unaware of, but those are two that spring to mind.

CHAIR—Senator Brandis, it is not the Tasmanian Justice Underwood, it is a different Justice Underwood.

Senator BRANDIS—No, it is the Justice Underwood who was a member of the Family Court at the Brisbane registry.

CHAIR—Just to make it very clear, Justice Underwood is a very highly regarded Tasmanian judge.

Chief Justice Bryant—And he just got an AC in the honours list.

CHAIR—Indeed.

Senator BRANDIS—Yes, the one who did not get a knighthood. There is this section 72 problem but even for lesser conduct than the serious offences alleged against those two men, both of whom were ultimately acquitted, even if you have a judicial complaints commission or some body like it, we still do not have a mechanism beyond the counselling mechanism. Short of removal from office under section 72 for a federal judge, have you turned your mind to what other intermediate level sanctions or precautionary measures in the case of yet-to-be resolved criminal proceedings might be used in relation to judges?

Chief Justice Bryant—I have not, Senator. Yet-to-be resolved criminal proceedings—

Senator BRANDIS—Requiring the judges to stand down.

Chief Justice Bryant—Mostly we just stand them down. There has been a recent example in Victoria in the Magistrates Court. No, I have not. In the Constitution there is not any other. The judicial commission, as I understand it, works—

Senator BRANDIS—Sorry, before you go on. The only thing the Constitution prevents you from doing is removing them from office other than by an address of both houses of the Commonwealth parliament. Anything short of that—and there is a lot of doubtful law and practice about the authority of chief justices to govern their own courts too—does not attract a constitutional prohibition.

Senator FEENEY—That is not really true, is it? You are prohibited from interfering with their salary and remuneration.

Chief Justice Bryant—Yes, their salary is fixed and the powers of the Chief Justice are limited. At the moment—

Senator BRANDIS—The Chief Justice does not decide the salary anyway. I am talking about things that it would be open for a Chief Justice—

Chief Justice Bryant—There is almost nothing. The Chief Justice's powers as presently expressed are to determine the orderly and expeditious business of the court. That is it.

Senator HEFFERNAN—During the Wood royal commission KR45 was the witness who gave evidence about a series of legal people who used to attend a thing called Costello's, which was a boy brothel. When that was raised in the Wood royal commission Paddy Bergin, who was counsel assisting, said to pause there, and they broke for lunch and never went back to it. In a

conversation with a person who was suitably equipped to comment, I asked when they were actually going to deal with who those people were, and the answer—which is why I think the system is fundamentally flawed in its present form—was 'We have decided not to revisit any of that because the public would lose confidence in the judiciary if we did.'

Now let me say to back that up: when the police have investigations and have people under surveillance and they take out surveillance orders and have intelligence gathering systems, as the special branch in New South Wales did, under that system it puts at grave risk of entrapment and blackmail the people that they are tracking. I think that is a fundamental flaw, and I am certain that Yeldham should have been dealt with to the point where he did not have to suicide.

CHAIR—Chief Justice, I have two final questions. You indicated earlier that the judicial commission is 'desirable but a long way off'. What makes you think it is a long way off?

Chief Justice Bryant—I just think that it is not going to happen quickly. That is all, and I cannot say much more than that.

CHAIR—What are the reasons though for such a thought?

Chief Justice Bryant—I think I can say this: at the recent Council of Chief Justices the overwhelming view was that there should not be a national judicial commission.

Senator HEFFERNAN—That was the view of New South Wales' same august body before they got it too. They got it and it works.

Chief Justice Bryant—I think that it would probably be clear to you from what I am saying that that was not necessarily my view.

Senator BRANDIS—Who sits on the Council of Chief Justices, by the way?

Chief Justice Bryant—The chief justices of superior courts and the Chief Justice of New Zealand.

Senator BRANDIS—What about intermediate level courts?

CHAIR—What are the reasons that they gave or that you are aware of—

Chief Justice Bryant—New South Wales said that they had their own and they did not need to worry about having another one. The smaller states, as I recall, said, 'We do not have that many complaints or problems and we do not see the need to have a large and expensive infrastructure.' Not all of the federal courts thought it was a good idea. So I do think that it is a long way off.

CHAIR—On another terms of reference topic, concerning the appointment of judges, you have referred to general support for the newly instituted processes for appointing judges and magistrates—

Chief Justice Bryant—Yes.

CHAIR—with the advisory panel setting short lists. What is your view in terms of the High Court and the merit of excluding the High Court from such a reform?

Chief Justice Bryant—I have a strong view about that. I can see reasons why you would treat the High Court differently.

CHAIR—But you do not have a strong view either way. In terms of the short list of suitable candidates, in your view, how short should that short list be?

Chief Justice Bryant—I think it would depend on the candidates. I do not think that there is a particular view about that. It would very much depend on who the candidates are.

Senator BRANDIS—In one other submission, which you may or may not have had an opportunity to look at, Chief Justice, Professor George Williams and Dr Lynch from the Gilbert and Tobin Centre quoted a remark published in an article by Stephen Gagler, before he was the Commonwealth Solicitor-General, about the issue of judicial appointments to the High Court. He said, 'Well, at any given time there'd be about 50 or so people in the country who would be suitable candidates.' That, roughly, seems about right to me. I wonder what sort of a short list it would be if it omitted people who would uncontroversially be regarded as suitable candidates.

Chief Justice Bryant—I think that is right.

Senator HEFFERNAN—Would that then become the danger? Beauty, they say, is always in the eyes of the beholder, so the suitability is in the eyes of the beholder. You exclude people for all sorts of reasons.

Chief Justice Bryant—I am familiar with the Family Court process. We have not had an appointment yet—that is, we have had only one since the present government has been in power, so this is the first one. Yes, obviously the views of the committee will be informative, but I think it is a much better process than was previously the case. That was very much hit and miss about what happened. Some attorneys sometimes consulted who was going to be appointed; sometimes they did not. People could be appointed who were quite unsuitable, where proper consultation had not occurred. There are all sorts of things. The process that the government now has is actually a much better process. Nothing is perfect, of course, but you do rule out a lot of that hit and miss stuff.

Senator BRANDIS—I always maintain that these things are tested pragmatically rather than theoretically. Since the appointment of Lionel Murphy to the High Court in February 1975, I cannot think of a single appointment to the High Court—which is always the most politically-sensitive appointment, as you know—that has been seriously criticised by anyone. The first two appointments to the High Court by the Rudd government were applauded by the opposition and by everybody else with an opinion on the matter. Certainly the last couple of appointments to the High Court by the Howard government were applauded by the then Labor opposition.

Senator FEENEY—Some belatedly.

Senator BRANDIS—The most sensitive kind of High Court appointments have customarily received the assent of both sides of politics and the profession and all the opinion leaders within

the broader legal community. Isn't that some—albeit rough and ready and unscientific but nevertheless reassuring—evidence that attorneys-general and cabinets from both sides of politics have been wise enough to settle on very suitable people?

Chief Justice Bryant—My comments were directed only to the Family Court. That is what I was talking about.

Senator BRANDIS—I am inviting you to respond to my question.

Chief Justice Bryant—I will. I am happy to respond regarding the High Court. I completely agree with you. That is why I said I do not have a strong view about that at all. From time to time—this is an absolutely personal view—we read of past appointments to the High Court where they are said to be 'political', and that is not a bad thing sometimes, assuming that everyone appointed has the capacity to do the job. There is nothing wrong with that and that is inevitable.

Senator BRANDIS—I agree with you entirely, Chief Justice. Had the Rudd government appointed, for example, the current Chief Justice of New South Wales as the new Chief Justice of Australia—it did not, as we know and the appointment of Justice French was universally applauded—but from my own view, and I said this at the time, it would have been no criticism of Chief Justice Spigelman's appointment that he had, for a very substantial part of his career, been a very senior figure in politics, because it seems to me that servicing government can be a great asset for a judge.

Chief Justice Bryant—I agree with you. I think it is different for other courts, though.

Senator BRANDIS—Perhaps.

CHAIR—We are pretty much out of time, Senator Heffernan, unfortunately, unless you have a very quick final question.

Senator HEFFERNAN—Murray Gleeson made a speech in New York in which he said that a judge really should not use his judicial authority to prosecute a particular cause or he risks his judicial legitimacy. Do you agree with that?

Senator FEENEY—That is an opinion.

Chief Justice Bryant—It is a broad question. Different people interpret it in different ways.

Senator HEFFERNAN—If you have a very restricted court and a very restricted process and you have people who are media type persons who prosecute particular causes continually in the media and then sit in judgment on some of those events surrounding those causes, what is their judicial legitimacy?

Chief Justice Bryant—There is a fine line between espousing those causes and sitting there, but sometimes we all benefit from the espousal of causes.

Senator BRANDIS—It all depends what sort of causes they are. If they are publicly controversial causes—

Chief Justice Bryant—Then you have to be careful.

Senator BRANDIS—then Senator Heffernan's observation is right. But, for example, there are some judges of the High Court at the moment who are very bold champions of certain restitutionary doctrines or certain equitable doctrines which are academically controversial but only within the narrow science of the law, and that is never thought to be a problem.

Senator FEENEY—We are now wandering off topic—but judges are part of civil society. We see in places like Pakistan that, at moments of crisis constitutionally, judges can play a critical role in espousing civic virtues that are important to the community as a whole. So we do not want to dismiss that entirely.

Senator HEFFERNAN—Not at all. No.

CHAIR—Chief Justice, thank you very much for your time today and for your evidence. It has been informative and valuable.

[2.31 pm]

KOK, Ms Daphne, Immediate Past President, Association of Australian Magistrates

LEVINE, Mr Gregory, Vice-President, Association of Australian Magistrates

LOWNDES, Dr John Allan, President, Association of Australian Magistrates

Evidence from Ms Kok was taken via teleconference—

CHAIR—I now welcome representatives of the Association of Australian Magistrates. Do you wish to make any comments in relation to the capacity in which you appear?

Dr Lowndes—I am a Northern Territory Magistrate and President of the Association of Australian Magistrates.

Mr Levine—I am a Magistrate in Victoria. I specialise in the children's court. I have worked in the children's court most of my career. I am the Victorian Vice-President—the Victorian representative on the executive of the Australian Association of Magistrates. Each state has its own representative; that is how it is comprised.

Ms Kok—I am a New South Wales Magistrate. I was on the Licensing Court of New South Wales for 11 years. That has now been abolished and I am back in local court. I have been a magistrate since 1991 and I am the immediate past President of the Association of Australian magistrates.

Senator HEFFERNAN—Have you been to Junee?

Ms Kok—Yes.

Senator HEFFERNAN—God bless you.

CHAIR—Thank you, Senator Heffernan. Dr Lowndes, Ms Kok and Mr Levine, I now invite you to make a short opening statement, after which I will invite members of the committee to ask questions. Do you have any amendments to your submissions that you wish to alert us to.

Dr Lowndes—No, we have no amendments to make to our submissions.

CHAIR—The committee has received your further submission which is in addition to submission 4.

Dr Lowndes—Thank you for accepting that late submission. In relation to our first submission, the thrust of our submission was that, within the terms of reference of this inquiry, we consider that it is very important to regard the magistracy as an integral part of the judiciary. We think that that is absolutely essential. It is an important tier of the judiciary, and the association is of the view that there is no material difference between magistrates and judges. The only difference is that of title. In our submission we included a paper which dealt with the arguments that favoured a change of title for magistrates, from 'magistrate' to 'judge'. We

believe it is necessary to approach these terms of reference within that conceptual framework, bearing in mind that magistrates and judges perform an identical function and should not be differentiated in any way. We think that is important when looking at appointments, termination procedures and judicial complaint mechanisms. We do not believe that, by and large, there should be any material distinction drawn between magistrates and judges, because they are all judicial officers.

In the first part of our submission we did express concern about the fact that magistrates do not enjoy the same degree of judicial independence as judges. In particular, we did refer to the fact that there are not adequate protections against the abolition of courts, particularly in relation to magistrates courts. There are some constitutional protections in certain states but in others there is no such protection, so that the lower courts could be abolished and there would be no entitlement to be reappointed to another court. The association is very much concerned about that.

Also, the association is concerned about the fact that removal mechanisms differ between magistrates and judges. Ideally, I think a combination of parliamentary process and executive action affords judicial officers the greatest protection against improper removal from office.

Senator BRANDIS—But there is no difference in the Commonwealth judiciary though, is there?

Dr Lowndes—As I understand it, there is not.

Senator BRANDIS—No, there is not.

Dr Lowndes—But at the state or territory level there is this differential.

Senator BRANDIS—I understand.

Dr Lowndes—Which, of course, is a matter of concern because, again, we hark back to the underlying principle that we are all judicial officers and we should not be treated in any different way.

There are some concerns about there being no statutory guarantees against alteration of remuneration. Not all states have that protection. We think that is important in the present climate. We are, unfortunately, experiencing very hard financial times; there is a tendency, of course, for everybody to tighten up. Obviously, magistrates in appropriate circumstances are happy to exercise self-restraint, but nonetheless we believe we need this guarantee against our remuneration being reduced.

Senator BRANDIS—Has that happened in recent history in Australia?

Dr Lowndes—I cannot tell you it has. I did a bit of research to see if that had happened and I unearthed nothing at all.

Senator BRANDIS—Did it happen in New South Wales during the Lang government in the late 1920s, when the public service salaries were reduced?

Dr Lowndes—I cannot answer that question.

Senator BRANDIS—Okay.

Dr Lowndes—But we say it is important to have that sort of guarantee. The second lot of submissions go to judicial appointments. We have put forward what we consider to be an acceptable protocol for judicial appointments at the magistrate level; though we do think that might have some benefit at the intermediate and even the superior courts. The High Court might be different. Basically we say that at the level of magistrates courts the process needs to be open and transparent. There is a need to attract the widest pool of suitable candidates, and that can be done not only through calling for expressions of interest but also through a consultation process in the normal way that the Attorney-General might consult relevant organisations within the community. Most importantly, people who express interest in a judicial position should be treated no differently to people who are nominated by third parties or who have been recommended as somebody who should apply for the job. Everybody should go in on an equal footing.

We also think it is important that the whole process not be allowed to result in appointments other than on the basis of merit—I think that is probably pretty trite to say that. But one has to develop a protocol that will ensure that happens as best as possible. In our submission we do refer to present selection criteria that are being used by the New South Wales Attorney-General's Department. We think that they are pretty good. However, I think that perhaps the Law Society of New South Wales has recommended a few additional criteria. I think they need to be considered.

There is Kathy Mack's project, the Flinders University project. Some excellent work is being done there. I think some of the criteria that they have looked at in their studies might have to be applied in the appointment process. All of these criteria are designed to ensure that the best candidate is appointed on the basis of merit. The composition of the selection or assessment panels has always been a bit of a problem. There is no uniform approach as to who should be on these committees, but we do say that the Chief Magistrate should be on that committee. He is head of the jurisdiction to which potential magistrates will be appointed. I think he—

Ms Kok—Or she.

Dr Lowndes—he or she is an obvious choice.

CHAIR—Dr Lowndes, I just indicate to you that we have limited time. These are your opening remarks, and then we will go to questions. I just wanted to note that so that you could get through them.

Dr Lowndes—Okay. I will move very quickly. We say that it is important to have a protocol as set out in the submission. Compulsory retirement age: we think that the arguments for extending the retirement age to at least 70 are fairly compelling—and preferably 72 in order to achieve uniformity within the judiciary because there are some magistrates who can sit to 72. But we say that it should be at least 70. The issue of art-time magistrates is something that we have addressed in our submission, too. Despite perhaps initial reservations about the workability of that, the New South Wales experience shows that it is working pretty well. Judicial complaints

handling: for the reasons set out in our submission, we would prefer to defer our submission in relation to that until the JCA has had a chance to consider that issue. I believe they are doing that—

Senator HEFFERNAN—This Saturday. This weekend.

Dr Lowndes—Yes. I am happy to field very general questions about that topic without necessarily expressing the association's viewpoint. I would prefer to reserve our collective position until a later time.

CHAIR—Thank you very much, Dr Lowndes. I will kick off with a few brief questions. Mr Levine and Ms Kok, did you want to add anything in terms of opening remarks?

Ms Kok—No. I will leave it until we get to questions.

CHAIR—All right. The first question relates to the appointment process. In your submission—which is appreciated—you focus on merit. But your submission also refers to the issue of gender and how that should not influence selections. Can you outline for us the reasons for that? I indicate that a range of other witnesses have put a different perspective on that. You are basically saying that the criteria should be merit and merit alone. Is that correct?

Dr Lowndes—Yes, that is our position. Our position is that there should be certain selection criteria along the lines that have been set out in the submission. Gender should only become a relevant consideration at a later stage when you have candidates that are of equal merit. Gender could then play a part in the ultimate appointment of, say, a female over a male. We believe that that should be left until the final stages but it is not something that the selection panel should actually be factoring into their consideration.

CHAIR—And that would apply to cultural diversity and other criteria like that?

Dr Lowndes—I will let Daphne answer that one.

Ms Kok—We have not said a lot about cultural diversity but I think that one of the problems up until now in judicial appointments has been the paucity of diversity of people with the qualifications in the available pool. That is now rapidly changing. We have many people who have the requisite academic qualifications, the requisite experience in practice and the number of years in practice to be able to be selected from a wider pool. That could mean that the pool that is represented for selection is automatically wide enough that you will get a fairly fast change in the demographic of who are considered to be the best candidates.

I think we have possibly gone a little beyond the stage of saying that we need too much affirmative action. We really need to concentrate on merit. We are getting incredibly well-qualified people to put themselves forward as magistrates in very, very large numbers. If there is equality of candidates, I do not have a problem with any attempts to balance ethnic groups and so on. But it would be a terrible shame if people were appointed on the basis that could then be challenged as being tokenistic. So it is a balancing exercise but one which we do not see as critically important to do until after the equality argument. If there were perceived to be a particular deficiency in the courts, this can often be addressed not by choosing people from

particular communities but by doing a lot more education of the judiciary about those particular finer points.

CHAIR—Indeed.

Ms Kok—There are of course a lot of cross-cultural education programs available for judicial officers these days, too, particularly in New South Wales where the largest numbers are.

CHAIR—Thank you. That is well noted. Just on a slightly different perspective regarding the appointment process: how short should the short list be and should the Attorney have a discretion to not appoint somebody from that short list and, if so, should they be required to advise the parliament or make public expression of the reasons why, or should they do nothing? What are your views on that?

Dr Lowndes—I think the short list should be short. I am not sure what my colleagues might say about this, but I would have thought something in the range of, say, five or half a dozen.

Mr Levine—I pick up Ms Kok's point that there are hundreds of applications. I think the Attorney in Victoria would have a long list of very suitable people, and so to reach a point where you have five or six people on a short list is a very difficult task. In the end, that is the way it has to happen. Given that there are so many very well-qualified people, I would have thought maybe you could be looking at longer lists and change them all the time because of the new lot of applications that are coming in.

Ms Kok—It also depends on how long the list is going to remain current. There has been a practice in some jurisdictions that you advertise and then get a short list. It is a list of people considered suitable. It may be that within a 12-month period all of the people on that list will in fact be appointed, or it may be that only one or two will be selected and then they will go for an entirely new list. It is an expensive process, so you really want to have some economies in the way that you go about it; but, at the same time, there are new people coming up all the time. So it is really a delicate question, I think, as to which way you go on that.

You have always got to have the possibility that people may or may not be appointed. If the list is only a list of people who are appointable and they are all considered to be pretty well put forward on the basis of being much the same, I do not think the Attorney has to do too much justifying in choosing one against another. But if there are three positions and he chooses to appoint only two because he does not like the third person on his list, that might become a matter of comment.

There are also questions of whether or not there have been any intervening political reasons or personal reasons as to why people have not received appointment. This is more in the underground discussion stage rather than the overt one. There are often allegations that particular people are declined because a particularly powerful person in cabinet says, 'Veto, veto.' The reasons may not be entirely to do with their ability as a judicial officer; they may be personal.

Senator HEFFERNAN—They may have forgotten to pay their tax.

Ms Kok—They should always pay their tax. They should have their tax returns in on time and pay their tax.

CHAIR—Are there any further questions on the appointment process?

Senator BRANDIS—Yes, I have one arising out of that and particularly, Mr Levine, the observations you just made about how big a shortlist should be. It seems to me that this discussion about whether there should be a shortlist and how big it should be is really somewhat misleading because there is always a shortlist. For any appointment to any position or job there is always a shortlist. The question is: who prepares it? And although this discussion about narrowing down the ultimate number of people who come before the Attorney for consideration has taken the form of discussion about a shortlist, it really is a discussion about whether it should be a one- or a two-stage process and, more specifically, whether there should be two sets of decision makers, not one.

The Attorney-General will always have a shortlist. But those who propound a panel procedure are not talking about a shortlist at all. What they are really saying is that there should be two sets of decision makers on judicial appointments. At the ultimate stage it should be the cabinet on the advice of the Attorney-General, but at an anterior stage it should be people other than the cabinet or the Attorney-General, who narrow the range of names from among whom the Attorney-General might choose so as to make it more difficult for the Attorney-General or the government of the day to appoint somebody who does not appear on that list. It is a bit like having a bicameral parliament, you have to get past one stage first and then you have to get past the second stage.

I question whether that is an appropriate thing. Why should not the government and the minister in particular, in this case the Attorney, who makes the appointment or recommends the appointment to cabinet take responsibility for the appointment that is ultimately made, and if they should, then how can it be appropriate by some rigidified process to exclude from their consideration suitable people?

Mr Levine—I do not think we are suggesting in our submission that the Attorney in the end does not have the final say. I think what we would say is that there needs to be an independent process that is transparent, that has an appropriate committee looking at the list of candidates, deciding who to interview and then making recommendations.

Senator BRANDIS—Independent of whom?

Mr Levine—Independent of the court, I suppose, although you would imagine the Chief Magistrate—

Senator BRANDIS—The Attorney and the cabinet are independent of the court. And indeed most of the recommendations for panels of one form or another include the Chief Justice of the relevant court.

Ms Kok—There have been many occasions when it has been suggested that, even though there is already an available pool of candidates which have been through a process approved in advance by the Attorney-General and his department, the Attorney will still appoint people who

did not appear on that list at all and who have not been through any transparent public or private procedure of an overt examination of their qualifications and their experience to compare them with other available candidates.

Senator BRANDIS—Just pausing there before you go on. Nobody is talking about a public procedure like they have in the United States. I think everybody is saying that if there is a panel process it is a private procedure and therefore I challenge whether the true transparency is met.

Ms Kok—There is an opportunity for people's names to go forward and for them to be examined and to be reported on by a committee which is charged with applying certain criteria.

Senator BRANDIS—My point is: doesn't the Attorney-General do that anyway?

Ms Kok—We do not know what criteria the Attorney-General applies?

Senator BRANDIS—The difference between a panel and the Attorney-General—

Ms Kok—We have said in the submission—and every organisation's submission, I think, has said the same thing—there are certain criteria which ought to be examined. If a committee, in reporting to the Attorney, says, 'We have examined these people against these criteria,' and they are satisfied against X, Y and Z, the Attorney can come back and say, 'Are you sure?' and can check the papers and do the material Nobody else can check what the Attorney looks at it if that is not the process even through cabinet, I would imagine.

Senator BRANDIS—But just a moment, if the panel procedure is a private procedure—and nobody is saying it should be a public procedure—then nobody can check what the panel does either. Why would anyone assume that the Attorney-General does not apply the same criteria as members of the panel would apply? If that is so, then doesn't it really come down to a question as to who takes responsibility?

Ms Kok—Why bother to have a panel?

Senator BRANDIS—Well, why bother to have a panel indeed?

Ms Kok—We really do not know what the criteria is because no Attorney has actually announced any criteria applied by attorneys-general or by cabinet. They have only ever announced criteria where there have been committees appointed to examine things.

Senator BRANDIS—Maybe I will address these questions to Dr Lowndes and Mr Levine simply because of difficulty with these electronic communications. We seem to be talking over each other.

Ms Kok—Sure.

Senator BRANDIS—Since you all have a common view about this perhaps I can go to them.

Dr Lowndes—Senator, we do not have any difficulty with the ultimate responsibility lying with government. But what we say is that, if somebody is chosen other than one of the people

that are put up to the Attorney, there should then be some process by which that appointment is justified over the recommendations, if you want to use that expression, of the panel which has been charged with the responsibility.

Senator BRANDIS—It is rather begging the question of why there should be a panel in the first place. That is what I am challenging.

Dr Lowndes—I think it is important to have the panel. What we say is that, although this assessment process is not conducted in public, there should be a protocol which is published so that everybody knows this is the process, we are going to have an assessment or a selection panel and we are going to tell you who is on it so you know the people who are actually comparing these candidates.

Senator BRANDIS—If the Attorney-General and the government of the day make the decision, we know the answer to that question. It is the Attorney-General and the government of the day. Does the interposition of a panel add some additional magic to the process?

Dr Lowndes—I think it does. We know that those people are being assessed according to published criteria and the advantage of the assessment or panel process is that we say all the candidates should be interviewed, especially at the lower level of a magistrates court, because we believe that is where the attributes of the candidates are best exposed, for better or for worse. The Attorney does not, for example, interview all the candidates that he might have had nominated to him. In fact, he may not know some of those people. He may have never heard of them.

Senator BRANDIS—Mr Lowndes, I remember that an Attorney-General—was it Mr Ruddock or Mr Williams?—was actually criticised by the then opposition for in fact interviewing or at least having informal conversations with people who were under consideration for appointment to the High Court.

Dr Lowndes—We say that is not part of the function.

CHAIR—I want to veer away from this. We have got limited time. I am happy for Senator Brandis to finish this point but there are a couple of senators who have questions.

Senator BRANDIS—Dr Lowndes, it seems to me that when you break it down what you are saying really is that appointments should be made against publicly known criteria and that appointments should be made on the basis of the appointor being as well informed as to the qualities of the people under consideration as possible. Those are the two matters you have identified and I agree with you in relation to both of them. But neither of those is an argument for a panel doing something that the Attorney-General himself could not do.

Dr Lowndes—The difficulty with that is that it may not be publicly known what criteria the Attorney applies.

Senator BRANDIS—Well, the Attorney-General would publish it, just as Mr McClelland has published the criteria that should go to the panel.

Dr Lowndes—But also he is not in a position to interview the candidates either, and you would agree with that too, you see—

Senator BRANDIS—He could.

Dr Lowndes—and that is why you need the panel.

Senator HEFFERNAN—Is there the capacity, in vetting the candidates, to background it if there is police intelligence of issues et cetera, or do you just fly blind on all of that?

Dr Lowndes—I think that should be done routinely but whether it is—

Senator HEFFERNAN—Is it?

Dr Lowndes—That is a good question. I personally have not sat on a selection or assessment panel.

Senator HEFFERNAN—Because there are various databanks of police intelligence.

Dr Lowndes—I cannot definitely say for sure that is done. It may not be done. But I think it should be done.

Senator HEFFERNAN—So do you think we have improved from the days of Murray Farquhar?

CHAIR—Senator Heffernan, we are going to move to a different area. I know Senator Fisher has a question. I know that Senator Brandis has to leave very shortly. If it is okay I will pass the questioning to Senator Brandis, who has a question on another term of reference.

Senator BRANDIS—It is on another topic, and thank you, Mr Chairman. Dr Lowndes, does your association include federal magistrates?

Dr Lowndes—No, it doesn't.

Ms Kok—It is open to them that they have not chosen to join.

Senator BRANDIS—So you do not speak on their behalf?

Dr Lowndes—No, we do not.

Senator BRANDIS—I want to take you back to your introductory remarks and to those parts of your supplementary submission in which you were very critical of the possibility that a court could be abolished. You made some observations about how the independence of magistrates was potentially prejudiced by the fact that, unlike other courts, their courts could be abolished and their tenure could be, in that rather brutal way, taken away from them. Does your association therefore have a view about the federal government's announced intention to abolish the Federal

Magistrates Court, even though you might not speak for them here? What is your view about that?

Dr Lowndes—We have not really considered that. I think I would prefer not to express a view about that.

Ms Kok—There are certain constitutional protections which are federal and do not exist in the states, so they are probably in a better position than state magistrates.

Senator BRANDIS—Except that they are going to be abolished. But anyway may we take it that your remarks, Dr Lowndes, in relation to the gross undesirability of a court being abolished or taken out from underneath its constituent members, are remarks that are of general application?

Dr Lowndes—Of general application. Can I say this: there is no difficulty with courts being abolished or restructured. Sometimes that is necessary because that is part of the dynamics of the judicial process. We accept that. But what should not happen is that when these courts are done away with, in the interests of improving the system, people lose their appointments and are not reappointed somewhere else.

Senator BRANDIS—Or would you go so far as to say they are forced to accept appointments that they do not want to accept?

Dr Lowndes—I agree with that too.

Ms Kok—We can always have the Jim Staples situation where you complain forever, whatever you are on, even though you do not have any work to do.

CHAIR—Thank you, Ms Kok. We will move to Senator Fisher.

Senator FISHER—Dr Lowndes, I refer to your proposition that the profession, as in the magistracy, should have a guarantee that their wages will not be reduced or their remuneration will not be reduced. What form would you propose that take and who would give that guarantee?

Dr Lowndes—I think it needs to be enshrined in legislation. In some of the states there are provisions within constitutions that give that guarantee, so it has a legislative basis.

Senator FISHER—How is that so? Can you provide an example?

Dr Lowndes—They would simply say that no magistrate's salary or remuneration will be reduced during the term of his office. I think that is the general type of provision that one finds. But what is also important is that not only should there be that legislative guarantee but it should be somewhat entrenched. I had better explain that. Those sorts of guarantees can be repealed by ordinary legislation, unlike with the Australian Constitution and I am thinking through the processes now but I think it is very hard to alter a provision of the Constitution without a referendum.

Senator BRANDIS—It is impossible.

Senator FISHER—Did you say, to the extent that these provisions exist in the states, they are in constitutions?

Dr Lowndes—In local legislation, in the magistrates act. I think there is one in the New South Wales Constitution Act, for example. I think there is a statutory guarantee there. It is embedded in the local legislation. What I am saying is that there should be added guarantees that these guarantees, once granted, perhaps can be difficult to remove.

Senator BRANDIS—They can be doubly entrenched in state constitutions, as some provisions—

Dr Lowndes—So they need to be entrenched. They are not really worth much unless they are embedded.

Senator FISHER—Guarantee the guarantee! Does any other profession enjoy a legislative wage guarantee?

Dr Lowndes—I could not answer that. It is certainly important in terms of the judiciary. I do not know the answer to your question, but what I say is that I think it is important that the judiciary has that protection, and that is related to security of tenure.

Ms Kok—And independence.

Dr Lowndes—And independence, because that underpins security of tenure.

Senator BRANDIS—There is a bigger issue there, though, isn't there, and that is that the judiciary is not just a profession; it is also an organ of the Constitution—

Dr Lowndes—Yes.

Senator BRANDIS—and its defining element is its impartiality or independence from other arms of government.

Mr Levine—The judiciary is usually made up of people who have sought appointment partly because of the superannuation entitlements that they will receive at the end of their judicial careers, and that would be considerably affected by any reductions in salary. If you want to get the best appointments you want to make sure that those people who are applying will feel comfortable with the sorts of terms and conditions which will make them feel secure.

Senator FISHER—Clearly this is an issue that is not without some sensitivity. However, the sorts of reasons that you have been proposing, which in your view justify what you are seeking, are arguably the sorts of reasons which other people in other professions may consider apply equally to them in their professions. I understand you are making this proposition based upon, to some extent, there being a guarantee and perhaps even a guarantee of the guarantee in some states. It is reasonably provocative, is it not, to suggest that magistrates should have a guarantee that their pay not be reduced, particularly at a time like now and particularly given what some might think is the view of the general population of the magistracy, judicial officers generally, given that the community would not draw a differentiation?

Dr Lowndes—I do not consider it is necessarily provocative. From the viewpoint of the judiciary, it is something that has to be recognised. It is an inevitable fact, because if it is—

Senator FISHER—What do you mean by 'inevitable'? Do you mean that no-one will take the jobs unless there is a guarantee of a guarantee? That proposition is kind of self-defeating, isn't it?

Dr Lowndes—Not only that, because, if remuneration can be reduced, that could undermine the independence and impartiality which is so essential to the judiciary. Without those things—

Senator FISHER—Has it ever been reduced?

Senator BRANDIS—It was sought to be reduced by King James I. That is the great event in British constitutional history that entrenched this principle.

Dr Lowndes—We rely upon constitutional principles. That is basically—

CHAIR—We will need to conclude this matter. I pass to Senator Trood.

Senator HEFFERNAN—You fellows would never be farmers!

CHAIR—I pass to Senator Trood for a final question, if he seeks to take that option.

Senator TROOD—The argument you are making in your submissions about what might be called the elevation of the magistry to a place of greater prominence and recognition of its—

Dr Lowndes—I did try to avoid putting it that way but—

Senator TROOD—You are free to characterise it as you choose to do so. But I am keen to know whether or not you have advocated this cause particularly amongst state governments and what sort of reaction you have had from them.

Dr Lowndes—We have written to the each of the attorneys of the states and territories and the federal Attorney. We have had a number of responses and they vary. Basically, the change is not favoured but not dismissed. It is important from the attorneys' viewpoints, as I see it, that if there is to be a change of title there needs to be agreement on that and it should operate in all states and territories. My perception is that it comes down to a lack of agreement between states and territories. Of course, that is not uncommon. That is probably one of the major impediments to the establishment of a national judicial framework. I think it is a question of, 'Are you going to get agreement?' So it is much the same sort of situation, I think.

Ms Kok—I would just like to mention that the Judicial Conference of Australia—which represents all Australian judicial officers from the Chief Justice of the High Court down—has in fact passed resolutions and forwarded them to all of the attorneys, indicating that it favours the change of magistrates now being called judges. So there is official endorsement from all other judicial officers in Australia to that change. The specifics of particular chief justices, including the Chief Justice of Victoria and the Chief Justice of New South Wales and the former Chief

Justice of the High Court—I am not sure about the present one—have been that they have all personally supported that change.

CHAIR—All right. Are there any final questions, Senator Trood?

Senator TROOD—No.

CHAIR—I thank the Association of Australian Magistrates for their time and evidence, and also to you for giving evidence via the phone, Ms Kok.

[3.14 pm]

FARIS, Mr Peter, Private capacity

CHAIR—I welcome Mr Peter Faris QC. I invite you to make an opening statement, at the conclusion of which I will invite members of the committee to ask questions.

Mr Faris—I have circulated a two-page summary of my views. I was asked by Senator Heffernan to come to this committee on the issue of a judicial commission. I will confine my remarks to that. I think there should be a judicial commission. It is a pretty straightforward argument. We are living in an era of accountability for people in public office, and politicians are carefully and thoroughly scrutinised, as we know. The current regime for practising lawyers like me involves quite heavy scrutiny compared with what it was when I started law. I do not complain about that, but I point out that that is the fact. Lawyers are scrutinised just in the public interest, not because they are being paid for by the taxpayer. Judges fall under both headings. We are at the stage where judges should be scrutinised: there should be an organisation available to whom complaints can be made by lawyers or by clients, and know that they are going to be dealt with independently. I do not think it is a very complicated situation. To be honest, I just do not understand how it is said that it will detract from the independence of the judges. It does not make the judges any more or less independent. This is a summary of what I have said in my paper.

CHAIR—Are you familiar with the Judicial Commission of New South Wales? If you are, what are your views with respect to its merits?

Mr Faris—I am a Victorian practitioner so I am not familiar with it. I have a general idea of how it works. I recollect that there was quite a big fuss about it in New South Wales, where, I think, a district court judge had sleep apnoea and was tried in parliament and acquitted or not dismissed, but in the end resigned. I do not know the commission and I cannot make a comparison. I can say from considerable experience at all levels in Victoria that it is something important to do so as to maintain the respect of the judiciary in the public's eyes. Also, if you have someone looking over your shoulder, you will be less prone to do silly things.

CHAIR—Do you think the reason for a judicial commission is because there are complaints put forward that are alleged not to have been adequately dealt with, or is it more, in your view, because it will build up confidence in the public view with respect to the independence and impartiality of judges and the judiciary?

Mr Faris—I think obviously both. Taking Victoria, where there is no judicial commission, as an example: there is not a mechanism there to complain about the judge. The last couple of times when I have had important and serious complaints, I have had to go to the Chairman of the Bar Council, who then spoke to the Chief Justice, who then spoke to the judge and it sort of fixed up in the club. I do not think it is the way things should be dealt with.

CHAIR—Was it dealt with adequately, in your view?

Mr Faris—Yes, absolutely. The Chief Justice gave me another judge. I said we had a problem with certain aspects of the judge.

CHAIR—Are we talking about misbehaviour, sleep apnoea, delays in judgment or other matters?

Mr Faris—No, I was acting for an alleged drug dealer. There were allegations of family connections of some sort which I did not want to bring up in court because it would be acutely embarrassing for the judge. On the other hand, my client was not happy to have that judge, for obvious reasons. It was a very unpleasant position for me professionally because I did my job and I had investigated the matter sufficiently through my client to be satisfied that there was a legitimate complaint. If I had to, I would have got up and said to the judge, 'You should disqualify yourself for the following reasons.' But that would have created—

CHAIR—So did you go to the chief judge or to the registrar?

Mr Faris—I went to the Deputy Chairman of the Bar Council. To the best of my recollection, he said that they had regular informal meetings with the present Chief Justice each week. He took on board what I said and that he would raise it at a meeting. The next thing I knew, we were given a new judge. That had to be as a result of my query. It was a proper end result as far as I was concerned, but I did not think the process was appropriate.

Senator TROOD—Normally you would think that the Chief Justice or the chief judge of a court would take those kinds of considerations into account when the list is being allocated.

Mr Faris—This is something that was entirely personal that they would not have known about.

Senator TROOD—You are saying it is beyond anything that you would have reasonably expected the chief judge or Chief Justice to know?

Mr Faris—Yes, absolutely. It concerns me that it is difficult for me as a lawyer to complain to judges and say, 'Your Honour's asleep,' or, 'Your Honour's not doing the job properly,' or, 'Your Honour's not paying attention,' or, 'Your Honour's been drinking at lunchtime,' or, 'Your Honour seems to have a hangover this morning and is in a terrible temper,' or, 'Your Honour's behaving rudely or badly or unfairly towards my client.'

CHAIR—Are they all legitimate examples, in your view?

Mr Faris—Yes.

CHAIR—That occurs in the court system?

Mr Faris—Yes, of course it does. Judges are no different to anyone else. I have no problem with judges, but the point is that they are like everyone else. The one I thoroughly dislike is the one about courtesy. I probably know most of the judges because of my seniority, and there may be people I like or dislike or have fought with or am friends with, but I believe it is a question of courtesy to the court. I go in and bow and do all the right things—I present my case courteously

and properly. I expect that back from the judge. I expect to be treated properly and courteously as well because I think it is a two-way street. Often judges do not behave like that and there is not much I can do about it.

CHAIR—Do you think you should be able to do something about that?

Mr Faris—Yes.

CHAIR—And you think this commission would be able to look at matters of discourtesy or inappropriate behaviour in the court?

Mr Faris—Yes, if those matters were serious enough. If the judge says one cross thing, it is not serious—one is pretty thick-skinned. Such a commission would do two things: it would give me an avenue where I could do something about it, but also the fact that the avenue exists would improve conduct. The deterrent factor, I think, is important. When you have no deterrent and judges have absolute power, they are not limited.

Senator TROOD—Is your advocacy of this position a reflection of your view that the poor behaviour of the judiciary is increasing? Would you say that there is a deterioration of standards and we have reached a point now where there is a greater need for this? Or would you make a case that there has always been an argument for this kind of commission?

Mr Faris—Probably neither. I started practice in the early 1960s and the judges were much, much worse then. It was pretty archaic in those days; it was pretty tough. They are much more civilised now, but there are a lot more judges. Basically they are all private school boys—people who saw themselves as fairly born-to-rule types—but these days there is a much wider range, so you get a wider range of personalities. I think overall it is better, but I think the problem is that with so many judicial officers you will get quite a number of people who do not behave as well as they should. So I think it has changed in that way, if that makes sense.

Senator TROOD—In your view there is an argument for some kind of independent watchdog.

Mr Faris—Yes.

Senator TROOD—The question we then have to confront is: what sort of powers should that watchdog be invested with? At a federal level there is a least a potential constitutional difficulty about—

Mr Faris—There are constitutional problems, yes.

Senator TROOD—how much one can do in that respect. And there may be in some state jurisdictions a constitutional problem as well which is perhaps more easily overcome than it might be at a federal level. What, in your view, ought to be the kinds of powers that are given to the commission for disciplinary activity?

Just taking the point about constitutional problems, my recollection of what I read in the papers in New South Wales was that this sleep apnoea judge was actually tried before parliament

or something like that. I do not see that as being a suitable way of dealing with anything—with all due respect to the politicians. I mean it is just not appropriate to try anyone like that. I see it more at the other end. I am not talking about judges committing murder or perjury or rape or paedophilia or things at that end of it, because that will be dealt with by the criminal courts. Obviously, if a judge is convicted of paedophilia, then he is going to go; it does not matter what process you have in place. It is more at the other end, where it is worse than everyday banter or conflict—it is not satisfactory conduct and it is not satisfactory behaviour—but it is not so bad as to be criminal behaviour.

So there needs to be not a body that has the power to try and dismiss the judge but a body that has the power to inquire into complaints and discipline the judge in some way, much the same as that end of the spectrum for lawyers. So, if I behave badly to a judge—if I tell him what he can do with his argument or if I say the wrong thing in court—he can make a complaint about me to the legal services commission and that can be dealt with, and odds are I would be punished in some way, but we are not talking about dismissal or debarment. So it is that kind of middle ground. It is these areas that the public sees. The comments I hear are from people in court. People will say: 'He's a lovely judge. He's a really nice man,' or 'He was horrible. Why did he speak to my son like that?' It is that sort of thing. I am not just talking about simple bad temper; I am talking about persistent bad behaviour. If there are no controls, nobody looking over their shoulder and nowhere to complain, you are more likely to have that.

Senator HEFFERNAN—So we need a speed camera, in effect, as it were.

Mr Faris—Yes. You just need judicial officers to know that, if they do go over the top, they are going to be complained against—the same as it is for lawyers. You will always get complaints from litigants who are dissatisfied with the decision the judge has made or something like that, but that speaks for itself, in the same way that, if I lose a case, the client will complain about me and say that I did this and did that and so on. That is par for the course. I think bad conduct in court is incredibly damaging to the judiciary and to the system.

Senator TROOD—You make a comparison between the bar and the court, but in fact there is a rather important distinction here about the constitutional importance and independence of the judiciary and the need to maintain that—which is not a matter which you trouble about, as I understand it.

Mr Faris—To be honest—

Senator TROOD—You are not persuaded by that argument?

Mr Faris—I do not understand how this makes judges less independent—if they have to behave properly.

Senator TROOD—No. Not necessarily 'behaving properly'. I think they ought to be behaving properly of course—

Mr Faris—And this reviews their behaviour. So it does not make them less independent. I would have thought that good, decent judges would have no problem with it.

CHAIR—Would welcome it.

Mr Faris—Yes.

Senator TROOD—We have had some argument that part of the fulfilment of the objective of judges being independent is that they have the capacity to not only be appointed in a way that is independent and preserves their appointment but also to monitor their own court lists, their own behaviour and things of that kind. So in other words—

Mr Faris—I do not think it—

Senator TROOD—You are not persuaded by that?

Mr Faris—Absolutely not. I do not think the capacity to monitor their own behaviour comes with their job. And in fact they do not—unless you are talking about individual judges monitoring their own personal behaviour. There is no monitoring. How does the chief judge know what Judge Bloggs is doing, whether he is misbehaving? What are we supposed to do? Am I supposed to go to the pub, meet people and tell them, and they tell somebody else? There needs to be some formalised system. If you are talking about systemic supervision—well, so am I. If you are talking about judges personally monitoring themselves—well, judges are like everyone else.

Senator TROOD—I do not mean that, in fact, I think most court systems have now moved to the point where they have some kind of formal mechanism. Chief Justice Bryant was here from the Family Court earlier in the day and was making the point about the way her court operates. There is a very formalised procedure for dealing with misbehaviour and as you can imagine in that jurisdiction there are quite a lot of allegations from discontent to litigants. I am not for a minute suggesting these matters should be left to individual judges to be self-referential. Each of the courts seems to have a formal practice in place by which they can deal with these things. You are saying even that is not adequate.

Mr Faris—If they have, I am not aware of it.

Senator HEFFERNAN—At the same time, with great respect to the earlier evidence to which we just referred, that particular person did point to flaws in the system in certain areas where there was no way of dealing with complaints. There are huge holes in the complaints system. Obviously I am a strong advocate for a federal judicial commission not only as a complaints mechanism but as an education and public confidence mechanism and a whole range of good reasons why.

Mr Faris—I am not aware of any system in Victoria. It does not mean it is not there but it just shows you how it is permeated into the profession. If there is such a system then it should be properly advertised to the public. The public, the consumers, should clearly understand that, if a judge does misbehave, they have this process. One without the other is not good enough. I think the other problem is: it is a bit like the police investigating the police. If you accept the premise, which is mine, that there should be some control over the judge's conduct other than his or her own personal control then the question then is: who should it be? Should it be within the judicial

system? Should it be the other judges, which smacks of hometown verdicts or should it be, as I say, an independent body?

Senator FISHER—Mr Faris, who should fund this independent body?

Mr Faris—I have no idea. Are we talking a federal body or a state body?

Senator FISHER—You are talking.

Mr Faris—I do not know the terms of reference here whether you are looking at making recommendations for states or whether you are only dealing federally. I do not know how you operate.

Senator FISHER—What is your view? Should it be state or federal, bearing in mind—

Senator HEFFERNAN—Let's just clear that up; we are looking at federal.

Mr Faris—I will answer the question.

Senator FISHER—Bearing in mind that there is a body of sorts in New South Wales that some would see as a sort of precedent to some extent—

Mr Faris—Which is a state body.

Senator FISHER—Yes, that is right.

CHAIR—Funded by the New South Wales government.

Senator FISHER—In that case.

Mr Faris—The fact is, as you know, the state courts have constitutional power to exercise federal jurisdiction and do so all the time. So if a Criminal Court is hearing a drug case it is actually exercising federal jurisdiction. I think it should be within the structure of the court system, so if it is a New South Wales court it should be the New South Wales government or if a Victorian court it should be the Victorian government. If it is a state court it should be the state government and if it is a federal court it should be the federal government. I do not have a problem with that.

Senator FISHER—The proposition from some witnesses has been that it would not be a justifiable spend of money, bearing in mind other priorities.

Mr Faris—I think this is a value judgment. It is a question of how important you think it is.

Senator HEFFERNAN—Can I just seek a point of order? Who actually said that?

Senator FISHER—Yesterday, it was the witness prior to the commission.

Senator HEFFERNAN—You said other witnesses; there was one, was there?

Senator FISHER—Yes, I am referring to another witness.

Senator HEFFERNAN—They said it was a waste of money?

CHAIR—Chief Magistrate Pascoe was, I think, before the New South Wales judicial commission.

Senator FISHER—It was Mr Pascoe who suggested that he would not see it as a priority for funding.

CHAIR—I do not recall that.

Senator FISHER—Actually we might clarify who it was. In any event, let me recast the question.

Senator HEFFERNAN—I do not think anyone said it.

Senator FISHER—Some might suggest that, if the money that would be required were to be expended, there would be other priorities to spend on and with the profession at this time rather than an independent body. What would you say to that proposition?

Mr Faris—First of all, I think priorities for expenditure are a political decision. It is up to the government—

Senator FISHER—It depends who is funding it.

Mr Faris—I see it every day in court, and I am dealing with court customers, consumers, and their families. I see how this impacts on the court process and on the public and I think it damages the reputation of the courts. In the end, my view of the court system is that it only works if there is a social compact. There is no magic way in which the courts can impose their will other than by the public accepting that they are the courts and the public accepting it must be bound by them. Otherwise you have anarchy. I am not saying that is a threat here, but what I am saying is that I think we need to maintain respect and I think this is an area where respect can be lost if you have got a rogue judge.

Senator HEFFERNAN—And public confidence.

CHAIR—Can I just follow up a few questions here. Mr Faris, you have talked about the level of misbehaviour or conduct. We are not talking about sackable offences because that is dealt with at least to some degree in the Constitution. At the moment, as I understand it, the witnesses have advised us from the various courts that there is a mechanism available for litigants to bring their complaint forward about a particular judge, and indeed the New South Wales judicial commission allows for litigants who are involved in a case to bring forward their concerns. What about out-of-court behaviour, outside the court? That is the first part of my question. Secondly, what about a judge's ability or health, mental or physical incapacity, before they actually walk

into the courtroom? How does that get reviewed, investigated and properly assessed by the courts at the moment, or isn't it at all?

Mr Faris—I think the questions are related. I think that basically it is not assessed. Practising lawyers have all had issues with judges who maybe drink too much. If you are on circuit, you are doing a case in Ballarat or in the country, the judge is out with the lawyers all night getting drunk and they are in court in the morning—

CHAIR—Does that happen?

Mr Faris—Yes, of course it does. Judges are ordinary, normal people. So we are not really talking misconduct but we are talking about a lessening of the capacity to do the job properly and some mechanism for picking it up.

Senator HEFFERNAN—The speed camera.

Mr Faris—I think that it should not just be the litigants who can complain, to take an earlier point, it should be lawyers. Things I see going to be different to what a lot of litigants see. A litigant is tied up in whether he has won or lost his case and maybe feels a judge was unfair to him. But I can see the judge misbehaving in different ways.

CHAIR—What about other entities? We had the evidence in New South Wales that the Independent Commission Against Corruption should be able to bring their concerns to the independent commission in New South Wales.

Mr Faris—Sorry, who?

CHAIR—There was an example in New South Wales where ICAC was investigating certain matters about certain alleged concerns they had regarding a judge and they could not take it much further from their perspective but they were able to register their concerns with the New South Wales judicial commission.

Mr Faris—Yes. I have been a criminal lawyer all my life and the amount of intelligence that was available to the police when I started was minuscule compared with what they get now. They have got an enormous range of intelligence, particularly eavesdropping and telephone tap surveillance, an enormous amount. There will be judges maybe online saying things they should not say or people saying things about judges. What are the police supposed to do and how do they deal with it? It is unsatisfactory that that should just sit there in police files, because you end up that touch of fear of blackmail: we can get this judge to do this because we have got this on him. I am agreeing with the point that is implicit in what you have just said.

Senator HEFFERNAN—Which is one of the reasons why they actually shut down the Special Branch in New South Wales, because of their capacity to blackmail.

Mr Faris—Yes. We had a whole lot of drug squad police jailed here for a number of years in the last 10 years. There is no question about that, and there were some fairly famous tapes about lawyers taking cocaine and so on. I just think that there needs to be some—

Senator HEFFERNAN—Independent.

Mr Faris—Yes, but middle range. I am not concerned about committing criminal offences; that will be dealt with by the criminal courts. I am not concerned about dismissal because that will be dealt with by parliament. And I am not concerned about the other end, the trivial stuff. But there is a whole range in the middle of conduct which needs to be moderated by somebody saying, 'Look, we've had this complaint, we've checked the transcript. This is what you said, you shouldn't have done it. Please do better in the future.'

CHAIR—Can I give you three examples to respond in terms of how they should be dealt with: undue delays, intoxication on the bench, and sleep apnoea, say. Should they all be dealt with by such an independent commission if a complaint is made?

Mr Faris—Absolutely. I think a lot of these things can be solved by someone speaking to the judge. I mean, judges are all pretty smart, capable people by definition and if an independent person was speaking to them saying, 'Look, this is where we are with you—

CHAIR—Okay. We had evidence from Chief Justice Bryant and then Chief Magistrate Pascoe yesterday that when they counsel judges related to certain things there is a level of sensitivity there because of the relationship with their colleague judges. I can understand that in terms of counselling or discipline. It is not easy. That would be challenging at minimum. So can you understand their view, and do you think by moving it to an independent sort of entity commission it would remove that challenge, that concern that they have or the sensitivity that they have?

Mr Faris—Yes indeed. I do not think it is inappropriate in any way, shape or form for the judges to be either doing it or to be required to supervise their own fellows. It does not seem to me that that is part of what a Chief Justice should be doing, for many reasons. Today in the way society operates you have transparency and accountability, particularly if you are getting taxpayers' money. I think this really needs to be done. Just to deal with what Senator Fisher said, I do not think it is going to cost a great deal. It probably needs one person, a judicial ombudsman or someone.

CHAIR—In New South Wales they indicated to us that they have got 38 or thereabouts people but in terms of this only a couple of people. Specifically the chief executive is dealing with these matters and one other person.

Mr Faris—Not much manpower.

CHAIR—So we are talking about a small amount of resources.

Mr Faris—I do not think it would happen that much. I am not talking about litigants complaining they have got a bad result.

Senator HEFFERNAN—The thing that is a strength in New South Wales—and I am amazed how many people in other jurisdictions do not even know how New South Wales works—is that if I am a complainant there is someone I can actually ring up. As the person told us in evidence yesterday, the boss of the commission, he can deal with a lot of his stuff by people coming in and

he can direct them to other areas et cetera. They provide a whole range of other services besides counselling people that run off the rails, as it were. They are a fantastic library of information, education processes. In terms of the question that Senator Fisher raised, cost efficiency and who should pay, of course the government should pay and of course it might be $3 million or $4 million. But that is a small amount of money in terms of maintaining public confidence in the system. It would be fair to say, Mr Faris, that there are parts of the present processes, especially in the federal jurisdiction, that simply do not work, would not it?

Mr Faris—Don't work in which respects?

Senator HEFFERNAN—For instance, in a hypothetical situation, where there is police information and surveillance et cetera coming in, where police gain information of a judge who may have assisted in the writing of a submission to a court and that judge eventually sat in judgment of that submission when it appeared in court. If that sort of information came to the police, there is nothing in the present system the police can do about it.

Mr Faris—I do not know. I know nothing about that instance. It simply again makes the point I made earlier: what are police supposed to do with this sort of intelligence? It falls short of prosecuting the judge. If you had the sort of situation where, for example, you have a telephone tap of a judge perhaps being involved in drug deals or buying drugs or something like that, what are the police supposed to do? I think there needs to be some sort of independent body. The Chief Justice has all sorts of other problems: the image of the court and all those sorts of things to worry about. Experience in life has taught me that people do not judge things well in the own interest. That is why we have developed, over the years, independent or semi-independent investigation of police—not so much now—police investigating police. I do not think judges should be investigating judges.

CHAIR—That is really the key question: who is judging the judges? Senator Heffernan, do you want to pursue any further follow-up questions?

Senator HEFFERNAN—I could labour the point but I do not think I will. I just think that the New South Wales system works well. It provides a multiplicity of services besides cautioning people and whatever. Mr Faris, I do not understand the resistance at a federal level. There was obviously resistance in New South Wales. We were told about that by the judiciary. The system works well—

Mr Faris—You are not going to just get resistance at the federal level; you will get resistance from all judges, because it is built into the system. You are a judge and you are elevated to become some sort of little God—for life, if it is a federal judge; most judges. Nobody can tell you what to do and nobody can tell you are wrong. It is a state of mind. I am not going to be appointed—I would make a terrible judge—but if I were appointed today it would mean that yesterday I was subject to all the restrictions of the Legal Services Commission about behaviour, complaints and God knows what, and when I am appointed a judge I am subject to no restrictions. I am suddenly free; I can do what I like.

CHAIR—Regarding the Legal Services Commission, there is a like body in every state and territory?

Mr Faris—I do not know.

CHAIR—In terms of judging lawyers' conduct?

Mr Faris—I do not know enough about it. I know there is certainly one in Victoria and there has been one in New South Wales for 12, 13 or 14 years which has worked exceptionally well. We have had the Victorian model for a couple of years. Again, the legal profession's state of mind is that they do not like anyone monitoring what they do—they want to quietly make their money and do what they want to do and not have anyone monitoring it. The legal profession, until recent years, has always investigated its own.

CHAIR—They would argue: why aren't the consumers or litigants up in arms calling for an independent commission? If it is such an important matter, why aren't they doing it?

Mr Faris—Because, first of all, they are not organised. They are often people who are—with some exceptions—in a vulnerable position. Certainly the ones I deal with are. They have other things to worry about, like going to jail or their family going to jail. People do not know that this is a remedy. I would feel much more confident about these inbuilt judicial investigations if there were a big sign in each court saying: 'If you're not satisfied with the conduct of a judge, complain. Here is the phone number of the Chief Justice. Complain to him.' I am unaware—I take myself as an example—of any actual system in Victoria. There may well be but it is so poorly advertised that it has not come to my notice.

Senator FISHER—Is there enough in the ether for a member of the public to decide that what they think is an issue is indeed an issue rather than just in their own head, in the own perception?

Mr Faris—Could you say that again.

Senator FISHER—A member of the public may consider that they have an issue with their interface with a member of the judiciary, but they might decide that it is only in their own head—because so much so is the keeper internal that the keeper doing the keeping is not transparent, it is not seen, so members of the public do not necessarily connect the dots.

Mr Faris—Undoubtedly you have been to court. Court is an extremely intimidating place.

Senator FISHER—Some of us have practised in the past.

Mr Faris—Yes. It is a very intimidating place for members of the public. I agree—they would not have the state of mind where they could possibly challenge what the judge says or does.

Senator HEFFERNAN—The situation of judges judging themselves: in the Wood royal commission it was found—without mentioning any names except for the dead person, Philip Harold Bell, who died in jail—that 20-odd years before he went to jail he was deliberately represented under a false name twice, in two separate court processes, and found guilty—with his defence lawyers and the barrister concerned knowing. They found that it was all done under a false name. Nothing came out of the royal commission as to why that person, who is now retired, was never dealt with or struck off. I have to say that the barrister concerned went on to become

someone that you would know in a judicial sense. There is one failing; the Wood royal commission found that nothing happened.

You might answer this in a hypothetical sense—a hypothetical instance where there was a police report. A solicitor was interviewed and said to the police that he was approached and recommended by a judge to travel to England to manage a fraud prosecution involving the sum of $60 million. By his own admission he saw it as a challenge and travelled to England and it got so complicated he had to seek assistance to write the advice for the London lawyers. He sought this advice from the judge who had recommended him and that judge helped him write the advice, according to the police interview. Then, in the police interview, the lawyer said—rather sheepishly—that he would not want it to be known that the judge was involved in writing the advice because there would be some matters arising that would be in the nature of an appeal, which would involve a clear conflict of interest where he was concerned. If that judge just happened to sit in judgment on that advice the police, with full knowledge of that, could do nothing about it and, obviously, nothing has been done about it. But it is in the system.

Mr Faris—I accept your hypothetical case, but if nothing were done I find that difficult to understand because there are plenty of avenues, one would have thought, for dealing with that sort of thing. You go to the Attorney-General or the Commissioner of Police.

Senator HEFFERNAN—But the difficulty is that might have been 10 years ago.

Mr Faris—Is this the Wood royal commission—

Senator HEFFERNAN—No.

Mr Faris—I think things have tightened up. My impression is that things have tightened up a lot as far as conduct of lawyers, generically—

Senator HEFFERNAN—But the point I am trying to make to you is if the police have that information—if it is hypothetically on police records—they are not in a position to do anything about it. I have actually asked these questions in estimates about a particular case and Keelty, the police commissioner, said. 'Well, there is nothing we can do about it. Receiving that information, like your police intelligence, we are powerless to act.'

Mr Faris—The problem is that it is their concept of what they can do; their perception of what they can do. They feel that they cannot do anything and there is nowhere they can go.

Senator HEFFERNAN—But if there were a judicial commission they could actually—

Mr Faris—Exactly. As I said before, the fact that none of this internal judging is advertised to the public makes me feel a bit suspicious of it.

CHAIR—You are here in your personal capacity.

Mr Faris—Yes.

CHAIR—We have heard views from the Law Council of Australia and, obviously, the various courts have been represented. Do you think your views are common amongst the profession, or are you one out of the box? What is your view with respect to other practitioners?

Mr Faris—I think my views are probably stronger and more independent that most lawyers—some people would say more extreme. Part of my nature is to speak out perhaps where other people do not. I think most lawyers put up with this. I see it every day: a judge behaving badly and no one really—

CHAIR—Yes.

Mr Faris—I think this is a culture thing. It is related to what Senator Fisher was saying before—people are intimidated by the system and they feel that you cannot do something. If you are a young barrister and the judge behaves reprehensibly, what do you do? You are afraid that you might damage your career if you make a complaint. Maybe your client suffers a little from it, but you wear it and this becomes entrenched as a state of mind. I think to liberate people from this by having the sort of system where there is an accepted access is desirable.

CHAIR—Have you given any consideration to this independent commission performing any other roles? For example, in New South Wales it has an education and training role, it has complaints handling role and it also has a consistency in sentencing role in educating and advising the judges and the profession of the sentencing arrangements that are currently in place in New South Wales.

Mr Faris—The short answer is, no, I have not given any consideration to it. My strong view is the fact its doing these other things does not damage its ability to perform this role. As someone said, we are talking about just two people. I would see it as being a fairly small role. I cannot imagine there will be that many serious complaints. There would be dissatisfied litigants.

Senator HEFFERNAN—In the case of a judge who happens to sit in judgment on his own advice, if that information becomes available to someone and they do nothing about it is there anything criminal there? It is not a criminal matter, is it?

Mr Faris—I do not think so. It would enable a successful appeal.

Senator HEFFERNAN—Would it surprise you, in this hypothetical case which involves $60 million, if the law firm was informed some years after the event of what went on and their response was, 'Well, we really do not want to raise the matter now because we have got other matters before the court and we do not want to upset the judges'?

Mr Faris—Can I literally answer your question—I know it is a parliamentary-type question—of whether it would surprise me by saying that nothing that happens in the legal profession would surprise me.

CHAIR—Mr Faris, thank you very much for your evidence today and for taking time to be with us.

Mr Faris—Thank you. I hope it was of some use to you.

CHAIR—We now call the Human Rights Law Resource Centre—our last witness for the day.

[3.58 pm]

LYNCH, Mr Philip, Director, Human Rights Law Resource Centre

SCHOKMAN, Mr Benjamin, Senior Lawyer, Human Rights Law Resource Centre

CHAIR—Welcome. We have your submission, which we have numbered j1, and it has been lodged with the committee. Do you wish to make any amendments to that submission?

Mr Lynch—No amendments to that submission, save to say that you would be aware that it was a submission made to this inquiry's predecessor—when the terms of reference were joined. We will raise a number of issues today which are not dealt with in that submission, but in relation to which we will be happy to provide a supplementary written submission if that would assist the committee.

CHAIR—Thank you very much. We invite you to make a short opening statement, after which we will have questions from committee members.

Mr Lynch—Ben is going to start out by providing some overview comments on the nature of the right to a fair hearing and the relevant instruments and principles, with particular regard to how that applies to the terms of reference of this inquiry. From those instruments he will draw out some basic propositions and best practice principles. I will then make a number of specific recommendations relevant to the terms of reference of this inquiry and which are drawn from that jurisprudence and those principles and instruments.

Mr Schokman—Just by way of an overview, I have a few general statements. Obviously our submission focuses on the right to a fair hearing in international law. First of all, I would like to make the point that the right to a fair hearing is protected in all general, universal and regional human rights instruments. The right to a fair hearing, as the committee would be well aware, is designed to protect individuals from unlawful and arbitrary curtailment or deprivation of other basic human rights. So from that point of view, the fundamental nature of the right to a fair hearing is extremely important. We are obviously going to focus on one of the elements. As the committee members would know, the right to a fair hearing consists of a number of different elements, such as the right to legal representation. In certain circumstances we are going to focus on the element of the right to a competent, independent and impartial court or tribunal. One final comment I would make of a general nature about the right is the fact that the Human Rights Committee, which is the body that oversees the International Covenant on Civil and Political Rights, has unambiguously held that the right to a fair hearing is an absolute right that can suffer no exception. In that sense, the right is applicable in all circumstances and in the context of all courts and tribunals.

As Phil said, we have looked at quite a number of international instruments, international materials, and I will quickly take you through those. First of all, article 14 the International Covenant on Civil and Political Rights relates to the right to a fair hearing. As committee members would be aware, Australia is a party to that covenant. The materials associated with the interpretation of article 14 that we have looked at include jurisprudence of the Human Rights

Committee itself, as well as general comment No. 32. Committee members may be aware that general comments are essentially authoritative statements on what the content of rights in the covenant mean. So we have relied a lot on the content of general comment No. 32. We have also relied a lot on the basic principles on the independence of the judiciary. These basic principles are a statement of principles that have been endorsed unanimously by the General Assembly, including being endorsed by Australia as a state party. They essentially elucidate the meaning and content of a lot of the elements of the right to a fair hearing, and in particular the concept of independence of the judiciary.

Finally, we have looked a lot at the comparative jurisprudence of the European Court of Human Rights as well as other domestic jurisprudence from the United Kingdom, from the United States and also from Canada. What we have essentially done with those relevant instruments and materials is, as Phil said in the introduction, try to elucidate some basic principles, some best practice propositions in terms of what the content of the right to a fair hearing is as it relates particularly to the questions of the terms of reference for this inquiry. As I said, of most relevance is the content of what is meant by 'competent', 'independent' and 'impartial'.

If I could, I would like to take the committee briefly through each of those elements. First of all, the concept of independence involves independence in both an institutional sense and also an individual sense. Institutional independence obviously refers to the independence of the judiciary arm. As an institution it refers to things like the institutional and administrative relationship that the judiciary shares with the executive and the legislature. We do not propose to make too many comments about that obviously, given the structure of the Australian Constitution, the Judiciary Act and other legislative instruments like that. There is less that is of particular relevance to this inquiry.

There are a couple of notes about the notion of individual independence of a judge. Judges must enjoy that individual independence in carrying out their duties, and they are reflected in really important matters such as tenure, financial security and issues like that, which Phil will be addressing in specific detail. So in that sense, judges have both a right and a duty to decide cases for them according to law and without fear from any personal criticism or anything along those lines. So the independence of the judge must be secured in a number of ways, in particular through things like processes of appointment, security of tenure, financial security, and issues around promotion and accountability, which are obviously relevant to this inquiry.

So very quickly, I will go through the basic principles in this; I will mention five to the committee. Firstly, the process itself for the point of judges constitutes a very strong factor in this notion of independence in both an institutional sense and in an individual sense. Secondly, is that irrespective of the method of selection of judges, candidates' professional qualifications, their experience and their personal integrity must constitute the sole criteria for their selection. Thirdly, the appointment of judges cannot be left to the exclusive discretion of the executive and the legislature. Fourthly, judges must be provided with long-term security of tenure in order to maximise their independence, and that also includes a notion of public confidence in the independence of the judiciary. And the final basic principle related to independence is that the question of accountability for individual judges for unethical professional behaviour must be dealt with by a fully independent and impartial organ, and that organ itself must ensure the due process of law.

Moving on to the issue of impartiality, the notions of independence and impartiality are, in some cases, very similar but, in other cases, it is important to draw distinctions. The concept of impartiality tends to relate a little bit more to the individual case that the judge is sitting before. The Human Rights Committee has stated that the notion of impartiality essentially implies that judges must not harbour preconceptions about the matter put before them and they must not act in ways that promote the interests of one party. As with the notion of independence, you can see that there is this very important sense of both a subjective element of impartiality and independence but also an objective element and the notion of maintaining public confidence in the institution of the judiciary.

Very finally, before I hand back to Phil, I will touch on this notion of competence. While we understand that it probably strictly sits outside the terms of reference of this committee, we do want to raise the point that the training and continued education of judges in national and international human rights law is essential if it is to become a meaningful reality at domestic level. Essentially, without such training, implementation of human rights law will remain illusory. I will now hand back to Phil, who is going to talk about some of the more specific recommendations.

Mr Lynch—We have a series of about 10 recommendations which we have developed by reference to those overarching propositions and principles. For your convenience, we have made some copies of relevant extracts from the Basic Principles on the Independence of the Judiciary; the Human Rights Committee's General Comment 32 on the right to equality before the law and a fair hearing; and recent robust recommendations, made in relation to Australia and Australian judges by two UN committees comprised of independent human rights experts, which were critical of the lack of judicial education and training, particularly as it pertained to fundamental rights and freedoms.

The first recommendation relates to the appointment and termination of judges. I understand that this is a recommendation which has been made and supported by others, and it is that Australia should adopt an independent judicial appointment commission to make recommendations to the Attorney-General regarding suitable candidates for judicial positions. We can obviously expand on these recommendations in response to questions from the committee.

The second series relates to the term and form of appointment: firstly, that judges must be provided with long-term, permanent security of tenure in order to maximise independence and public confidence; and, secondly, that judges must be provided with adequate remuneration and pensions in order to ensure financial security as a key aspect of independence.

We note that the committee's terms of reference specifically refer to 'acting and part-time judges'. In our view, the appointment of acting judges does raise prima facie concerns regarding the independence and the impartiality of the judiciary. We consider that any such appointments should be very carefully considered and subject to stringent safeguards which ensure compliance with the obligations and standards required by article 14 of the International Covenant on Civil and Political Rights.

The terms of reference also refer to the appointment of part-time judges. This is something which we would support, particularly so far as it may diversify the pool of candidates available

for appointment, including, particularly, women. But one must also be mindful of ensuring that the principles of independence and impartiality are strictly maintained. In our view, a judge who is a part-time judge and who maintains a part-time role in the legal profession would raise serious issues. We also consider that Australia should retain a compulsory retirement age for members of the judiciary.

In terms of judicial complaints handling, we consider that Australia should adopt uniform procedures for handling of judicial complaints. At a minimum, this should encompass state based complaints mechanisms, similar to that which currently operates in New South Wales, with an overlaying mechanism to deal with complaints at the federal level.

In terms of jurisdictional issues, and this is a high-level principle, principles and standards required by the notions of independence, impartiality and competence should be applied uniformly so far as is possible to all federal, state and territory courts and tribunals. Finally, regarding education and training, extensive human rights training and continuing training must and should be provided to all members, both judges and members, of Australia's courts and tribunals.

CHAIR—Does that complete your opening remarks?

Mr Lynch—Yes.

CHAIR—Thanks for that. Senator Heffernan.

Senator HEFFERNAN—Pretty impressive—you look far too young to be bloody lawyers. The basic principles on the independence of the judiciary that you have just circulated are a UN based thing. Have you blokes analysed the UN?

Mr Schokman—In what sense?

Senator HEFFERNAN—What proportion of the membership of the UN are dictatorships or corrupt judicial regimes? Probably 50 per cent of them are actually dictatorships—

CHAIR—Are you referring particularly to the Human Rights Committee?

Senator HEFFERNAN—Yes. I am try to work out whether, given that the wisdom of the UN is part of your master plan—and I agree with your comments on the New South Wales system: it works well—is the UN the right model? A lot of its committees are filled with people who actually come from corrupt dictatorships.

Mr Lynch—The first point I would make is that the UN, as you would be well aware, is comprised of a huge number of organs. I do not think it is appropriate to make a comment about the UN as a monolith, because it just does not exist as a monolith. They are no doubt problems with various UN organs comprised, as they are, of member states. A comment that I would make about the human rights committee, which is the committee on which we have drawn most extensively, is that it is a body comprised of 18 independent international human rights experts who are appointed for their expertise. They do not represent member states. It is to be distinguished in that regard from the UN Human Rights Council, which is comprised of member

states; the committee is comprised of independent international human rights experts. Members include people such as Sir Nigel Rodley, Chief Justice Bhagwati, formerly of the Supreme Court of India, Professor Ruth Wedgwood of Harvard Law School and other such luminaries.

Senator HEFFERNAN—So what you are saying is that they have been plucked out of what could be a dictatorship as a decent person to be on the committee?

Mr Lynch—No, what I am saying is that the committee is not comprised of state representatives.

Senator HEFFERNAN—But are they representing their country as—

Mr Lynch—No, absolutely not. As I say, the committee is not to be confused with the UN Human Rights Council, which is comprised of member states. No, members are there in their individual capacity. Professor Ivan Shearer happened to be an Australian, as did the Hon. Elizabeth Evatt, but they certainly do not represent Australia on the committee; they are appointed by consequence of their individual expertise. I think that it is important to look at the jurisprudence and the comments of the human rights committee in that regard.

Senator HEFFERNAN—Thank you. It is obviously my view that the UN is the largest, most corrupt body on the planet and they will not be able to deal with the 1.6 billion people who could be displaced on the planet in 50 years. But, anyway, there you go.

CHAIR—Mr Schokman, you said that you did not support the appointment of judges being in the exclusive domain of the executive. What appointment process do you support? Is the ultimate decision for the Attorney-General? If so, is it his or her exclusive right to make that decision?

Mr Schokman—I would make a couple of general comments. In a lot of instances, some overseas experiences are quite instructive to elucidate some of those principles. If we look, for example, to Canada and, similarly, to the United Kingdom, they utilise a method of having an independent judicial advisory committee, which exists essentially to provide recommendations to the minister of justice or the equivalent.

But just looking at the overarching principles, the idea that the responsibility for appointment does not rest solely with the legislature and the executive is necessary in order to maintain this notion of independence, and that is both in a practical sense and, as we outlined very hurriedly, also in a sense of the community's perception of the independence of judges. So there are models that exist and we would be very happy to expand on those in further written submissions about having some independent body that sits outside of the executive and legislature.

CHAIR—Have you considered the recent reforms undertaken by the federal government with respect to the appointment of judges, and what is your view on the reform process?

Mr Lynch—Yes, we have and we certainly support the direction of the reform, but we are of the view that it could well go further. As occurs in Victoria, the advertising of vacancies is appropriate, ensuring that there is a wide candidature is appropriate, open transparent consultation with stakeholders is a very welcome step, but, as Ben mentioned, we think the

processes in the United Kingdom and Canada, both of which have independent commissions responsible for identifying appropriate candidates and then putting up those candidates to the executive or legislature for selection is an even stronger model.

CHAIR—Do you think the Attorney/executive should have the right to not appoint from the recommended list and appoint outside that list?

Mr Lynch—I think we would need further details about the proposed model before we could make a definitive comment on that, but—

CHAIR—Well, with the current model, for example, where they put up a short list of, say, three, four or five, should the Attorney/executive have the right to appoint outside of that short list?

Mr Schokman—One comment I guess I would make about that is the importance of process in that sense in terms of maintaining this notion of independence and impartiality. We are aware that a lot of the direction in which the recent reforms are going is around areas to ensure transparency, accountability and things along those lines. My view would be that any process that was put in place should be a process that makes sure that it is conformed to for these reasons of transparency, accountability and this notion of maintaining an idea of the impartiality and independence of the process.

CHAIR—You are not answering the question.

Mr Lynch—I think it depends on the context in part. It depends upon the reason in part for which the appointment was made outside of those that were put up. I am reluctant—

CHAIR—What if they state their reason?

Mr Lynch—I think if there is a statement of reasons and it is public and there is a reasonable rationale for going outside of those candidates who were put up then it may be acceptable. I would be reluctant to adopt a rigid rule because you may get the situation where, unlikely as it may be, there are three or four candidates who are deemed appropriate by the appointments commission but further matters come to light or needs emerge which mean that they are no longer necessarily the most appropriate candidates. What I would say is that I think it would be very important that the Attorney revert to the commission with concerns, at least in the first instance, and ask for the commission's response to those concerns and whether there might be other appropriate candidates before merely appointing beyond the candidature.

CHAIR—Do you think the newly reformed appointment process should apply to the High Court or do you think the High Court should be excluded, as they have been to date.

Mr Schokman—My view once again probably would be that for the reasons of us getting back to the nature of the right to a fair trial we are talking about basic minimum standards here. I do not think that any court should be exempt from conforming with the standards of the appointments process.

CHAIR—In terms of the complaint handling mechanism, we heard evidence yesterday and again today about the New South Wales independent commission. I think you have indicated support for that type of approach. Can you provide further and better particulars to the committee in terms of the type of independent commission you would support?

Mr Lynch—Certainly, but it may be best for us to do that on notice because we have prepared some written materials in that respect, which we can provide to you in the form of a short supplementary submission.

CHAIR—Sure. You have already prepared that, have you?

Mr Lynch—Yes. But it is not in a final form to be handed over right now.

CHAIR—But you do support the independent commission approach. At the moment we have judges judging judges with respect to behaviour, or misbehaviour or what have you. Firstly, when you respond, and I am happy for you to take it on notice to consider, I am interested in out-of-court behaviour and whether that should be open to review and investigation. Secondly, what about the mental and physical incapacity, or lack of capacity perhaps, with respect to a judge. How would that be properly investigated or assessed? Could you expand on how that could be done?

Mr Lynch—Sure. I think we will take that on notice and our written response can cover those issues.

CHAIR—That would be good. I draw your attention to amendments in New South Wales in 2006 which allowed the Attorney to refer certain matters to ICAC, the Independent Commission Against Corruption, for investigation and report. It was, obviously, information that they may have become aware of by litigants outside of the normal complaint process. So we want to make sure that we cover the field if we go down that track. Perhaps if you could take it on notice if you do not know now: who would be on the commission; how would it be constituted; what functions would it have?

In New South Wales the functions of the independent commission can include complaint handling and they have an education and training role. It is noted there is the national judicial conference which performs that role to some degree at the national level. But it also has a role in New South Wales with respect to consistency in sentencing and preparing a computer database regarding a whole list of cases, the reasons for them and the types of penalties imposed by the judges. I am not sure if you are familiar with what does occur. It is on their website and I draw that to your attention if you want to respond to that.

Whether that would be of merit at a national level across the field because the evidence that we have received is that it has been most beneficial in New South Wales not just to the judiciary but to the legal profession in terms of preparing their cases, whether it be the DPP in criminal matters, defence lawyers, and likewise in the civil matters as well. I just draw that to your attention and any response you may wish to provide to the committee.

Mr Lynch—We will reserve our response on whether it is appropriate that all of those functions be collocated, but I would certainly support the establishment at the national level of

those functions. There are also alternative models in Victoria for example where those functions are all separately undertaken. So there is, for example, as you may be aware a sentencing council which develops sentencing guidelines.

CHAIR—We are not aware of that. Could you expand on that?

Mr Lynch—Certainly we can provide you with further material about that. Essentially it is a council convened to develop policies and guidelines and to provide advice on sentencing principles and practice.

Senator HEFFERNAN—Who convenes it?

Mr Lynch—It is chaired by Professor Arie Freiberg of Monash Law School.

CHAIR—Is the membership all lawyers?

Mr Lynch—No. There are lawyers but there are lay persons, criminologists, psychologists and psychiatrists. So it is widely constituted.

Senator HEFFERNAN—Gangsters.

Mr Lynch—I do not know about gangsters. In Victoria there is also a judicial college which has responsibility for ongoing judicial education. As I say, we will reserve our position on whether the function should be collocated but at the national level we think it is highly desirable that there be continuing judicial education, particularly in relation to fundamental human rights and freedoms and it may be appropriate also to promote sentencing consistency through a sentencing council or some such body.

CHAIR—Thank you for that; it is most appreciated.

Senator FISHER—The reference in your submission to the international covenant is particularly interesting, as are your comments about access to a fair hearing. You suggest, if I understand you correctly, that—if I can put it in my language and you will tell me if I have it right or not—we should enshrine here what you say is enshrined in article 14 of the international covenant to the right to a fair hearing. Is that not already enshrined here in the fabric of our domestic law? I appreciate you suggest specific examples where it ain't happening, but is that not already enshrined in the fabric of our domestic law?

Mr Lynch—When you say 'domestic law', do you mean 'common law' in combination with legislation, combination with the Constitution—

Senator FISHER—I mean common law, equity—what we do, how we do it and how we have done it.

Mr Lynch—I would certainly agree that the right to a fair hearing generally, and that aspect of a right to a fair hearing which is the right to a determination by an independent, competent, impartial court or tribunal, is overall well protected but not comprehensively protected. The protection by a combination of the Constitution, both state and federal legislation and the

common law is a bit like a patchwork quilt—a few patches missing and a bit frayed at the edges—rather than it being comprehensive. We see that, for example, in Victoria, where the courts are slowly developing but still lagging behind some of our comparators, notions such as the positive obligations of the court to unrepresented litigants or self-represented litigants, or the positive obligations of the court to ensure equality of arms by facilitating access to an interpreter where that is required in the interest of justice. These are principles which are being developed on an ad hoc basis through the common law in the absence of some comprehensive constitutional or legislative protection of the principle.

Senator FISHER—It is one thing and entirely proper for an organisation like yours to suggest that we have some particular shortcomings—and you have given examples in your submission—but it quite another to justify part of the suggestion that we need to do more, in respect of those examples, by saying that there is not only a link with an international covenant but we need to go one step further. Your suggestion is to enshrine here what is enshrined there when many might have the view that in fact what we do here, the very fabric of our legal system here, informed the development of the international covenant in the first place. Couldn't some say, 'Well, hang on, guys, you are kind of doing cart before horse in a way?'

Mr Lynch—I accept and agree that Australian law and lawyers and jurisprudence developed those principles.

Senator FISHER—In paragraph 10 of your submission you indeed say:

> International and comparative jurisprudence on the basic elements of the right to a fair hearing indicate that access to justice and equality before the law are fundamental values underpinning not just the right to a fair hearing, but also Australia's legal system.

In a way, your very submission accepts the proposition that I am putting to you.

Mr Lynch—As I say, I certainly accept that Australia contributed significantly to the development of the ICCPR and in some respects reflects best practice under article 14 of the ICCPR, but I do not think that is an answer to the critique that there have subsequently developed aspects of the right of a fair hearing which we protect inadequately or only in an ad hoc way. The fact that we do things well does not mean that we cannot, and should not, do things more comprehensively and better.

Senator FISHER—Thank you.

CHAIR—That was a very good response, Mr Lynch, I like your ending. Congratulations. I put on the record our thanks to your organisation for being here and accommodating that slight change in timeframe for today. Also, thank you for your evidence and your comprehensive submission, I know it covered both this inquiry and the Access to Justice Inquiry. We appreciate your evidence and your time.

Mr Lynch—It is our pleasure, and thank you for the invitation. We will provide a supplementary submission which drills down further into the recommendations regarding the terms of reference and responds to the questions on notice. Is there a timeframe within which that would be required?

CHAIR—We are very flexible on that. Several weeks would be appropriate.

Mr Lynch—So I do not have to work on it on the weekend?

CHAIR—No, the weekends are for yourself. I thank all witnesses who have given evidence to the committee today. I thank Hansard and the secretariat. I declare this Legal and Constitutional Affairs References Committee now adjourned.

Committee adjourned at 4.30 pm