



*Law Council of Australia
Conference*

*Rule of Law:
The Challenges of a Changing World*

Judicial Appointments and Judicial Independence

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Introduction

The organisers of this conference have appropriately combined the topics of judicial appointment and judicial independence, as they are of course related topics. It is difficult to address those topics without also considering a number of related issues including the distinction between independence and impartiality, between actual and perceived independence, between independence and accountability, between institutional and individual independence, administrative independence compared to adjudicative independence, the procedures for the removal of judges and the performance of extra judicial functions by serving judges.

It is important to recognise the inter-relationship of these various issues because when they are viewed collectively, it becomes easy to see that these issues go to the very heart of our constitutional structures and systems of government. In particular, they go to the heart of the inter-relationship between the three branches of government - namely, the legislature, the executive and the judicial branches.

Characteristically, each of the branches of government have a significant role to play in relation to appointments, independence, removal and accountability. The executive branch of government appoints the judiciary and determines the extent of the resources that are to be made available to the judiciary for the administration of justice in all Australian jurisdictions. The extent to which the executive is involved in the administration of the courts varies as between Australian jurisdictions. The legislative branch of government passes laws which the courts are obliged to administer and can, through that means, control the administration of justice. The legislative branch is also responsible for

the removal of judges from office. The judicial branch of government applies and administers the common law and statute law, and reviews and controls the decisions and process of courts lower in the judicial hierarchy. Thus the courts determine the precise content and application of the substantive law, and regulate the procedures utilised in the administration of justice. They have authority to determine the legality of legislation passed by the legislature, and the administrative actions of the executive. These checks and balances have long been regarded as safeguards against despotism and tyranny.

Recent public debate in this area has often focused upon the extent to which other entities or institutions independent of any of the three branches of government should have a role in this area - for example, by creating a panel or commission to recommend prospective appointees to judicial office to the executive, or to investigate complaints of misconduct and recommend removal from office to the legislature, or assume responsibility for the administration of the courts.

Judicial appointments

Criticisms of the judicial appointment process are not new. Their content has become predictable. They commonly include allegations of political patronage or cronyism, calls for a wider judicial gene pool in order to avoid the perceived dominance of an old boys club of senior barristers drawn from the conservative upper middle class, and so as to provide a greater spread of gender, sexual orientation, and ethnic, cultural and religious background within the judiciary.

Public commentary on these issues over the last year or so has been voluminous and diverse. It has come from serving judges, including

Justices Sackville and McColl, Chief Judge Blanch of the District Court of New South Wales, retired judges including the Hon Geoff Davies and Sir Gerard Brennan, practitioners, including most recently the President of the Australian Bar Association, Stephen Estcourt SC and Greg Barns, politicians including Attorney-General Ruddock and Halls, and last year, from opposition spokesperson, the Hon Nicola Roxon, and from academics too numerous to name, but including perhaps most particularly Simon Evans and John Williams who delivered a thoroughly researched paper on this topic at the colloquium organised by the Judicial Conference of Australia in 2006.¹

As the roar of commentary on these subjects has recently risen to almost deafening levels, I will eschew the temptation of controversy, which is already in abundant supply in this area, and address my observations to a review of some of the themes which have emerged.

Merit

Almost all commentaries acknowledge and accept that the fundamental objective of any appointment process should be the identification and appointment of the most meritorious candidates. Where the commentators generally differ, is in their view as to the best means by which that fundamental objective might be achieved.

Although Attorney-General Ruddock has recently described the desire by 'intellectuals and other elites' to identify the meaning to be given to the word 'merit' in this context as 'boringly post-modern',² I will nevertheless say a little on the topic, starting with Attorney-General Ruddock's answer

¹ Evans and Williams, *Appointing Australian Judges: A New Model*, JCA Colloquium 2006

² Attorney-General Philip Ruddock - *The Australian*, 14 August 2007

to the question which he disparaged, when he described merit as 'legal excellence and independence'.

It is interesting that the Attorney has combined legal excellence with independence in his definition of 'merit'. While it is easy to see the relationship between legal excellence and merit, the relationship between merit and independence is less obvious. As will be seen later in this paper, 'independence' is usually seen as having a number of components, including the independence of the institution of which the judicial officer is a member, and also personal impartiality, in the sense of freedom from improper influence or from an interest or consideration which would align him or her with one or other of the parties to the cause he or she is required to determine.

For my part, I would have thought that both the institutional and personal characteristics of independence can only be meaningfully applied to a judicial officer after his or her appointment. In practical terms, I find it difficult to see how any individual could be meaningfully assessed on a scale of 'independence' prior to their appointment. In our adversarial legal system, legal practitioners are required to adopt and vigorously maintain partisan positions. I fail to see how 'independence' can be meaningfully assessed in that context. If, by referring to 'independence' as a component of 'merit', the Attorney means to connote individuals who are free from extreme political, social, cultural or religious views, he is I think playing into the hands of those who criticise the appointment process as having a conservative middle class bias and failing to acknowledge that history shows that judicial appointees have displayed a capacity to put aside sectarian or partisan political positions which they had adopted prior to appointment.

With the greatest of respect for the Attorney, I prefer the meaning given to the word 'merit' by the Hon Geoff Davies, when he observed that:

It requires the professional qualities of intellectual capacity, legal knowledge and relevant experience; the personal qualities of integrity, impartiality, industry, a strong sense of fairness and willingness to listen courteously to and understand the views of others.³

Appointment processes

As I have already observed, the difference between most commentators appears to lie in their view of the process best adopted to achieve the most meritorious appointments. I will now turn briefly to review the processes that operate in other jurisdictions, and those that have been proposed for Australia.

Election

In the United States, the majority of state judges are elected directly by the electorate. This strikes those of us who are not experienced in such a system as entirely bizarre, and it has been the subject of much criticism, because of the perception that judges are beholden to particular interest groups and political lobbyists who can influence their election or re-election - such as insurers, or groups supporting harsher sentences. As a model however, it is the exemplar of democracy in action, by providing a direct line of responsibility and accountability between the judiciary and the citizenry. The positive assessment which this process receives on the scale of democracy, is however offset by its negative assessment on the scale of independence, both actual and perceived.

³ *The Australian*, 10 August 2007

In some US states the process is modified to one of election by the legislature. In the US, where the executive is independent of the legislature, this brings about an appointment process which is very different to our processes in Australia. However, in Australia, where the executive comprises those who have control of the legislature, election by the legislature would not be so different, if party lines are maintained, although the process would be much more overtly political.

The process of election by the legislature is applied to the appointment of federal judges in Switzerland and to appointments to the German Federal Constitutional Court.

Confirmation by the legislature

In the US, federal judges are appointed by the President 'by and with the Advice and Consent of the Senate'. Senate confirmation hearings are routinely held in relation to the appointment of judges of the Supreme Court, and the process has on a number of occasions led to political controversy, and on some occasions to the withdrawal of nominees.

I do not sense much support for such a process in Australia. In this country while there are of course those who actively seek judicial appointment, it is not uncommon to have to actively encourage, cajole and persuade appointees to take up appointment. There are I think many reasons for this, including disparities in income levels between bench and bar, loss of personal freedom, vulnerability to media criticism and so on. However, exposure to a potentially political and highly charged process of public confirmation hearing would I think discourage many potential appointees. It certainly would have discouraged me.

Recommendation by a panel or commission

A common theme amongst recent commentary has been the call for a process of appointment by the executive from amongst a list of candidates provided by an independent panel or commission. A number of variants on this theme have been proposed, including one which would require the executive to give reasons if an appointment from outside the list is made. Processes of this kind have become common in other jurisdictions, and are now adopted, in a variety of differing forms, in England, Scotland, Ireland, Northern Ireland, Canada, South Africa, Israel, New Zealand, the Netherlands and in several of the United States.

There is nothing particularly novel in these proposals. In 1983 the *Universal Declaration on the Independence of Justice (The Montreal Declaration)* provided:

Participation in judicial appointments by the Executive ... is consistent with judicial independence, so long as appointments of judges are made in consultation with members of the judiciary and the legal profession, or by a body in which members of the judiciary and the legal profession participate.⁴

More recently, the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (The Beijing Statement)* stated:

In some societies, the appointment of judges, by, with the consent of, or after consultation with a Judicial Services Commission has been seen as a means of ensuring that those chosen as judges are appropriate for the purpose. Where a Judicial Services Commission is adopted, it should include representatives of the higher judiciary and the independent legal profession as a means of

⁴ Montreal Declaration 1983, Article 2.14(b)

ensuring that judicial competence, integrity and independence are maintained.⁵

The reasoning supporting such an appointment process is fairly obvious. Those processes aim to diminish the risk of political favouritism and nepotism which might undermine both the quality of the judiciary and its independence. The fact that these processes have now been adopted in a number of jurisdictions suggests that concerns with a purely political process of appointment have been real and tangible.

Appointment by executive government

In all Australian jurisdictions, federal and state, appointments to the judiciary are made by the executive government. In some jurisdictions, there is a statutory requirement of consultation prior to appointment. In most jurisdictions the processes of consultation are informal, and vary from time to time, depending upon the personal view of the Attorney General of the day. I am pleased to be able to report that in my own state of Western Australia, the current Attorney General takes the consultation process very seriously, and gives considerable weight to the views expressed by the judiciary and others consulted in the course of that process. However, one of the weaknesses of this system is that there can be no guarantee that such an approach will be maintained. The acceptability of the process of executive appointment seems to be directly related to the extent of the meaningful consultation prior to appointment.

There are other criticisms frequently directed at this process. They include the almost total lack of transparency, and the tendency to lack of detailed scrutiny or investigation of prospective appointees. Criticisms

⁵ Beijing Statement 1995, Article 15

include an assertion that this process lacks the capacity to identify prospective candidates from a broader range of backgrounds, and assertions that the system is inherently biased against women, those who are not senior members of the Bar, and those from minority, cultural or ethnic or religious backgrounds. In answer to the latter criticism, some governments have taken steps in an attempt to broaden the range of persons considered. Perhaps the most dramatic of those steps in recent times was the advertisement placed by the government of Victoria, calling for expressions of interest from those interested in being appointed to the position of Chief Justice. I have to say that such a step appears to me to be more cosmetic than substantial, given what I would take to be the extremely remote possibility that somebody suitably qualified for appointment to the office of Chief Justice would be overlooked when consideration was being given to the appointment.

Appointment of heads of jurisdiction

Although heads of jurisdiction have in Australia always been appointed by the executive, for many years of the last century it was the practice to appoint the most senior member of the Bench to serve as head of jurisdiction. That practice has now been largely abandoned, and it is quite common to appoint heads of jurisdiction direct from the profession (as in New South Wales, South Australia and Western Australia at the moment), or from amongst the judiciary without regard to seniority (as in Queensland and Victoria at the moment).

This is a good thing. There is no necessary correlation between longevity of appointment and qualification to serve as head of jurisdiction. These days the duties of a head of jurisdiction are quite different in nature to those of the other members of the court. They include administrative and

managerial responsibilities, responsibilities relating to policy development and liaison with politicians, resourcing, human relations, liaison with the media, and a public representational role. The skills required are substantially different to those required for those whose functions are limited to judicial duties. However, as far as I am aware there does not appear to be any suggestion that the processes of appointment applicable to a head of jurisdiction should be any different to those generally applicable to the judiciary.

A representative judiciary?

One recurrent theme has been the proposition that the process of appointment should result in a judiciary which is more representative of society generally, and less dominated by middle aged male former barristers. This proposition was formally enunciated in 1993 when then Federal Attorney General Michal Lavarch released a discussion paper on the procedure and criteria for judicial appointments. One of its assertions was that:

It is a reasonable aim of an appointment process, and consistent with merit principles, that the process can seek to ensure that all sections of society (particularly women, Aboriginal and Torres Strait Islanders, and members of different ethnic groups) are not unfairly under represented in the judiciary.

Not surprisingly, this proposition attracted considerable criticism. It was publicly rejected by my predecessor, Chief Justice Malcolm, and by former Chief Justice Gibbs. It is obviously difficult to reconcile the notion of a representative judiciary with a fundamentally merit based appointment process. Why should the fact that somebody has a particular

cultural or ethnic background, or is of a particular religion, be relevant to the assessment of their capacity for judicial office?

And why should a judge's state of origin be relevant in any way to their suitability for appointment to the High Court of Australia? The proposition that the High Court should somehow be geographically representative of the states and territories of Australia is inconsistent with the integrity and impartiality of the members of Australia's ultimate court. The most recent appointee to that court is an outstanding candidate, eminently qualified for appointment and whose appointment has been uniformly and rightly well received. However, for my part, I think it is regrettable that her appointment was preceded by publicity which suggested that it was likely, if not inevitable, that the appointee would be from Queensland, because of the impression of geographical representation which that publicity conveyed. State of Origin might be an appropriate basis for the selection of a football team, but it should be irrelevant to appointments to the High Court.

It is I think clear that governments commonly take a desire for greater gender balance amongst the judiciary into account when making appointments. Because I support that approach, I must struggle to find a way to reconcile that view with the views I have expressed in relation to the irrelevance of state of origin, religion, or ethnicity. The best I have been able to come up with is the proposition that a favourable disposition towards the appointment of women can be reconciled with a merit based appointment process, in a circumstance in which, if there are two candidates weighted equally on the perspective of merit, preference can appropriately be given to the female candidate, in order to redress the current gender imbalance.

The prior background of appointees

There has been debate from time to time about the extent to which a prior career in politics should qualify or disqualify a person from judicial appointment. There have of course been a number of judges appointed to the highest judicial offices from political backgrounds, including Sir Edmund Barton, Sir Garfield Barwick, Lionel Murphy, Dr Evatt, Sir Nigel Bowen and Len King. I think most would agree that Australian jurisprudence would have been the poorer if deprived of the services of judges of that calibre. That is not of course to say that all political appointees have been outstanding successes, but it does suggest that there is no necessary correlation, positive or negative, between the calibre of a judge and his or her prior experience in politics.

Questions also arise from time to time about the extent to which prior personal conduct should be taken into account in the appointment process. Obviously conduct which reveals a lack of integrity or a lack of adherence to appropriate ethical and moral standards which is likely to be enduring is properly taken into account. However, one can be overly sensitive about such matters, and my own view is that minor personal failings which occurred many years earlier, followed by long periods of abstemious conduct, should not weigh too heavily in the scales. If we are too precious about such things, we run the risk of excluding well qualified and able candidates because of historical events without enduring relevance.

Judicial independence

The civil law, drawn from the Roman model, has always valued judicial independence, and achieved that independence by use of a career judiciary, in which service is a vocation for life. However, under English

law, the judge was originally the personification of the King, and was often appointed because of his royal connections. This was an inauspicious start for an independent judiciary. However, by the early 17th century, the desirability of judicial independence had become the focus of much writing by two eminent common lawyers - Lord Coke and Francis Bacon. However, by the end of that century, during the reign of James II, independent judges had largely been replaced by incompetent and corrupt judges who would do the King's bidding. Matters came to a head in 1698 when the House of Lords summoned Chief Justice Holt to explain a decision. He refused to attend. The public sided with him and lobbied for greater judicial independence. This coincided with the fall of James II and the passage of the *Acts of Settlement* which included a provision that:

Judges commissions be made during good behaviour and their salaries be ascertain and established: but upon the address of both Houses of Parliament it may be lawful to remove them.⁶

Later in the 18th century the importance of an independent judiciary was recognised in the constitutions that were developed in what was to become the United States. For example, the Massachusetts Constitution of 1780 provided that:

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice.⁷

⁶ As quoted in Kristy Richardson, *Defining Judicial Independence: A Judicial and Administrative Tribunal Member Perspective* (2006) 15 JJA 206, at 207

⁷ Constitution of Massachusetts, Pt 1 Article 21

What is judicial independence

There have been so many attempts to define judicial independence that debate on the subject could consume the entirety of this paper. I will content myself with a definition provided by a leading writer in this area, Professor Stephen Burbank, who wrote:

True judicial independence ... requires insulation from those forces, external and internal, that so constrain human judgment as to subvert the judicial process.⁸

Independence and impartiality

Although the distinction may be a fine one, it is possible to differentiate between independence and impartiality. For example, in s 11 of the Canadian Charter of Rights and Freedoms, a resident of Canada charged with an offence is given the right to a fair and public hearing by an *independent and impartial* tribunal.

In *Valente v The Queen* (1985) 24 DLR (4th) 161, Le Dain J (delivering the judgment of the Supreme Court of Canada) distinguished between the meaning to be given to the words 'independent' and 'impartial'. In his view, impartiality 'refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case' (at 169). Independence on the other hand was, in his view, 'a status or relationship to others, particularly to the Executive Branch of government, that rests on objective conditions or guarantees' (at 170).

This distinction corresponds to another distinction which is often drawn between institutional independence and individual independence.

⁸ Stephen B Burbank, *Is It Time for a National Commission on Judicial Independence and Accountability?* (1990) 73 *Judicature* 176, at 177 - 178

Institutional independence has been defined by Sir Guy Green in the following terms:

I thus define judicial independence as the capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control.⁹

Individual independence, or impartiality, is the absence of a personal interest in, or prejudice towards, the particular issues to be determined by the tribunal or court in a particular case.

This distinction also corresponds with, but is not identical to the distinction which is sometimes drawn between administrative independence and adjudicative independence. Administrative independence is the capacity of a judge or court to determine its procedures and where and when it will sit. Australian courts vary in the extent to which they enjoy that independence, a topic which I will specifically address below under the heading of administrative independence. Adjudicative independence is the freedom to determine a particular case without improper influence or pressure in any form, including any promise of reward, or threat of reprisal. Australian courts take that form of independence for granted. However, it must be observed that there are many jurisdictions in other countries in our region and around the world where the same assumption cannot be made.

⁹ Sir Guy Green, *The Rationale and Some Aspects of Judicial Independence* (1985) 59 ALJ 135, at 135

Actual independence and perceived independence

As justice must not only be done but must manifestly be seen to be done, judges must not only be independent but must manifestly be seen to be independent. So, the transparency of the processes that guarantee and ensure independence is an essential aspect of public confidence in the judicial process. Transparency has two important benefits - it confers legitimacy on the process and prevents arbitrary action.¹⁰

Independence and accountability

Much has been written on the relationship between independence and accountability. Historically it seems to have been thought that there was a tension or antithesis between the independence of the judiciary from executive interference, and the accountability of the judiciary for performance. So, it has been suggested that the appointment of a judge for life or until a specified retirement age inhibits the capacity to hold the judge accountable for his or her performance during tenure.

However, more contemporary writing is generally to the effect that independence and accountability compliment each other and are properly regarded as two sides of the one coin. Neither is an end in itself, but a means to an end of a variety of ends.

At the risk of again being boringly post modern, I should explain what I mean by accountability - that is, accountability to whom, and for what. However, the range of persons affected by the judicial process, and the range of interests protected by those processes are so diverse that it is difficult to be exhaustive.

¹⁰ Stephen B Burbank, *Judicial Accountability to the Past, Present, and Future: Precent, Politics and Power* (2005) 28 UALR L Rev 19, at 56

Judicial accountability includes accountability to the public, whose interests the courts serve, to litigants whose rights and interests are determined by the courts, to the legislature, whose laws are interpreted and applied by the courts, to the executive, which supplies the public resources utilised by the courts in the administration of justice, to academe, which is responsible for reviewing and appraising the work of the courts, and to other courts, in an interactive judicial hierarchy.

But these notions have been put rather more eloquently by others, and I will give you the benefit of their work. Professor Woodhouse has observed that judicial accountabilities:

... can be identified as managerial and financial accountability - what Le Sueur calls 'performance' accountability - which centre on efficiency and effectiveness and include the way in which a judge runs his or her court and manages the throughput of cases; personal accountability, which relates to the personal behaviour of a judge, both in the court and outside, and includes Le Sueur's 'probity' accountability as well as other conduct; process accountability, which concerns processes and procedures; and, finally, 'content' or substantive accountability, that is accountability for individual judgments.¹¹

Chief Justice Doyle has identified the ways in which judges are accountable in the following terms:

First of all, they sit in public and discharge their duties in public. They are open to complete scrutiny. Secondly, fair comment on what they do is protected, even if it is both inaccurate and

¹¹ Professor D Woodhouse, *Judges and the Lord Chancellor in the Changing United Kingdom Constitution: Independence and Accountability* (2005) 16 *Public Law Review* 227, at 234 (footnotes omitted from quote)

defamatory. Thirdly, a judge must give reasons for decision. Fourthly, most decisions are subject to appeal, and so to scrutiny of other judges. Fifthly, judges are accountable to peer opinion, which is a particularly powerful form of scrutiny. Sixthly, the decisions of courts can be reversed by legislation, as long as it is not legislation aimed at a particular case. Finally, the judiciary is accountable for the public resources that it administers.¹²

Viewed in this way, it can readily be seen that there are many and varied systems for judicial accountability which happily co-exist with judicial independence. In my opinion, there is no tension whatever between judicial independence and increasing attention being directed to the measurement and appraisal of judicial performance and efficiency. However, that view is subject to the important proviso that that which is being measured and appraised must be something that matters, and in the judicial system it is quality not quantity that matters.

But I can see no reason at all why the performance of judges, both individually and collectively, should not be measured and appraised in relation to things like the time taken to resolve cases, delay in delivery of reserved decisions, the efficiency of case management etc. These are all things that matter.

Administrative independence

There is a current debate in Australia relating to models of court administration. It is well beyond the scope of this paper to attempt any meaningful contribution to that debate. In any event, my position on the subject has been explained publicly before. I favour the model of an

¹² Doyle CJ, *Judicial Independence* (1997 - 1998) 16 *Australian Bar Review* 212, at 219

autonomous commission, under the control of the judiciary, assuming responsibility for the administration of all courts and relevant tribunals, along the lines of the Courts Administration Authority of South Australia.

There are many arguments in support of such a model. They are comprehensively set out in the recent study by Professor John Alford, Dr Royston Gustavson and Philip Williams.¹³ They are supported by a recent study published by the Canadian Judicial Council. For me, one of the strongest arguments is the coalition, under such a model, of the responsibility for judicial administration, and the authority to make decisions with respect to the deployment of resources in relation to judicial administration.

Under the conventional system of courts administration, which applies in all states except South Australia, including my own, I find it not only inconsistent with conventional economic and management theory, but also frankly, quite bizarre, that as Chief Justice, I am rightly held responsible for the delivery of justice throughout the state, but have no authority to make decisions with respect to the deployment of resources necessary to fulfil that responsibility.

Let me provide a recent example which illustrates my point. As a result of sustained activity over a number of years by health workers in remote communities, following the recommendations of the Gordon Inquiry, and as a consequence of some recent intensive police investigative activity, an unprecedented number of charges alleging the commission of sexual offences against children have been brought in Kalumbaru and Halls

¹³ Alford J, Gustavson R and Williams P, *The Governance of Australia's Courts: A Managerial Perspective* (Australian Institute of Judicial Administration, 2004)

Creek in the Kimberley region of Western Australia. It is essential for the well being of those communities for those charges to be resolved as quickly as possible.

The resources at our disposal to achieve that important objective, in terms of infrastructure and personnel, are very limited. I have created a taskforce, which I chair, to coordinate the efficient and expeditious deployment of those resources to the cases on hand. But decisions as to the provision of audio-visual facilities in these remote locations, the provision of the rooms and facilities necessary for the taking of evidence from vulnerable witnesses outside the court room, the provision of victim support services and so on will all be made by executive government, rather than by the judiciary.

While I am pleased to report that I have the full support of executive government in this endeavour, the point is that our capacity to deliver justice is entirely dependent upon the continuation of that support. However, under the model of an autonomous commission, decisions with respect to the re-deployment of budgetary resources, within the overall budget available to the commission, would be made by the judiciary not by government. In that way, responsibility for the delivery of justice is combined with the authority to decide how that will be achieved.

There have been differing views reasonably expressed as to the extent to which mechanisms and processes for the administration of courts can be said to bear upon judicial independence. Perhaps it is, in the end, a matter of semantics, because it is obviously highly unlikely that courts administration processes will impact upon what I have earlier described as adjudicative independence. However, it is difficult for me to accept

that a court which lacks the capacity to decide where and when it will sit can properly be characterised as independent.

Removal from office

Issues relating to the processes pertaining to removal from judicial office have also been the subject of much recent commentary. A review of the issues arising is well beyond the scope of this paper, and again my views on this subject have been previously published. I strongly favour the creation of an independent commission, governed by a board which includes senior members of the judiciary, to assume responsibility for the investigation of complaints against judicial officers including, where necessary and appropriate, the making of recommendations to the legislature with respect to removal from judicial office. Despite controversy at the time of its creation, the Judicial Commission of New South Wales is now well received in that State and is properly regarded as having been a success. My proposal for the creation of a similar body in Western Australia is currently under consideration by government. In my opinion, the creation of such a body aligns independence with accountability. Such a body also minimises the prospect of political interference in the removal process. Although in Australia we tend to take for granted the fact that government is unlikely to seek the removal of a judicial officer, recent events in our region suggest that we should not become too complacent in this regard.

Promotion

It is sometimes suggested that the prospect of a judicial officer being promoted to a higher judicial position provides a threat to independence. I am unable to see any basis for this proposition. Following the retirement of Callinan J, all members of the High Court of Australia will

have been appointed to that court from positions in lower courts. It is the usual (but not invariable) practice for the members of intermediate appellate courts to be appointed from the trial divisions of those courts. And it is not at all uncommon for judges in intermediate trial courts to be appointed to another trial court higher in the hierarchy. And as I have observed, in the civil law system, there is a career judiciary in which promotion is the norm.

I am not aware of any evidence which would suggest that the availability of promotion has posed any threat to judicial independence in any of these circumstances.

Extra judicial functions

There has been debate in the past about the desirability of judges performing non-judicial functions, while still retaining judicial office. Fortunately the Council of Chief Justices has published a booklet providing guidance on these issues, which can sometimes be difficult.¹⁴

One area of debate has been the desirability of a serving judge participating in a Royal Commission. My own view on that subject is that while there are some commissions of enquiry upon which it would be undesirable for a judge to serve, because of their political content or implications, there need be no hard and fast rule precluding such service. I would cite in aid of that proposition the HIH Royal Commission, which was constituted by Justice Neville Owen without any adverse consequences to the integrity or independence of his judicial office. More controversially perhaps, Justice Geoffrey Kennedy served on the WA Inc Royal Commission, which plainly had a significant political

¹⁴ *Guide to Judicial Conduct* (AIJA, 2nd ed., 2007)

component, but without any detectable adverse impact upon the integrity or independence of his judicial office, so far as I could see.

But there must be some limits. As a consequence of my office, I hold the office of Chairman of the Electoral Distribution of Western Australia and am presently engaged in overseeing a very significant redistribution of the electorates in that State. Although I have not encountered any tensions or conflicts with my judicial role in that exercise to date, the potential for such a conflict is certainly there, and I have advised the Attorney General of Western Australia that in my view, it would be preferable if the Chief Justice was not *ex officio* chair of the distribution committee, and that it would be preferable if that role could be performed by a retired judge.

In Western Australia the Prisoners Review Board (formerly the Parole Board) is also chaired by a serving Judge of the District Court. It has been suggested to me that there is some tension between the holding of that office, and the performance of judicial duties. I am quite unable to see that tension myself, although I understand her Honour would not, and does not, sit on the Review Board in respect of any case which she tried as a judge.

Conclusion

As I mentioned at the beginning of this paper, it has no greater objective than the provision of a rather general and simplistic review of a number of the issues which have arisen in relation to judicial appointments and judicial independence. The generality of the paper does not mean to diminish the vital importance of these issues, which go to the very heart of our constitutional structures. History shows that the processes

appropriately applied to the resolution of these issues have evolved and are modified from time to time, and there is every reason to think those processes of evolution will continue, hopefully stimulated by debate at conferences such as this.