National Judicial College of Australia

Conference: Confidence in the Courts

National Museum of Australia

9-11 February 2007

Judicial Appointments, Judicial Behaviour and Complaint Mechanisms

It is instructive to make some historical observations that illustrate a more tumultuous relationship between the judiciary and the Executive than the one we have today: Until 1701, judges held their office at the pleasure of the Crown (*durante bene placito*). The seventeenth century was blighted by a difficult relationship between the Monarch and the judiciary. In 1616, Chief Justice Coke of the King's Bench, after a series of decisions now foundational to the public law including the *Case of Prohibitions*,[1] was sacked. His successor, Chief Justice Montague, was warned that Chief Justice Coke's dismissal 'was to be a lesson to be learned of all, and to be remembered and feared of all that sit in judicial places.'[2] During the last eleven years of his reign in that century, Charles II sacked 11 judges. His successor and brother, James II, sacked 12 in three years. Clearly, the subservient nature of the Judiciary of the period was indicative of a larger battle being fought between the

[1] That is, where Coke CJ applies Bracton's dictum that the King is subject to God and the law.
[2] The Right-Honourable Lord Justice Brooke, 'Judicial Independence – Its History in England and Wales' in Helen Cunningham (ed) *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997) 96.

Executive and the Parliament. Upon the abdication of James II, the Parliament drew up Heads of Grievances to be presented to the new King, William III, which included a recommendation for making judges' commissions continuous (so long as they behaved themselves well); and for ascertaining and establishing their salaries, to be paid out of the public revenue only; and for preventing their being removed and suspended from the execution of their offices, unless by due cause of law. A provision to this effect found its way into the *Act of Settlement* in 1701, thereby relieving the English judiciary from the prospect of arbitrary removal by the King.

From the *Act of Settlement 1701* to the *Constitution of the United States of America*, the movement has mostly been in one direction: that is, towards the divorce of judicial power from that of the Executive and Parliament.

A most fascinating arrangement is in the United States where federal judges are appointed by the President 'by and with the advice and consent of the Senate.'[3] Clearly, the mechanism was intended to expose the procedure of judicial appointments to the scrutiny of the legislature. The result, being the Judiciary Committee, is a highly

charged political process where candidates are cross-examined on their political and personal beliefs. In this way, judges are labelled 'conservative' or 'liberal' before they even reach the bench.

The political nature of United States federal appointments is directly reflected in the manner in which they are scrutinised by the legislature. On more than one occasion, various members of the Congress have sought congressional impeachment on the basis of what was perceived as an unwelcome ideological bent to the substance of the judge's substantive judgments.[4]

The process of judicial appointment in Australian jurisdictions is not subject to parliamentary scrutiny in the same way. Accordingly, to a large extent, judges here avoid the initial conservative/liberal labelling. Absent a popular appointment process, the appointment of the judiciary is left to the Executive. Apart from some quite undemanding restrictions as to how many years an appointee must be admitted as a practising lawyer,[5] the appointment of judges is by the Governor or Governor-General upon the advice of the Executive Council.[6] As the criteria for judicial

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[3] *United States Constitution*, art II, s 2.
[4] I point, for example, to the Congressman Gerald Ford's attempt to remove Associate Justice Douglas of the Supreme Court of the United States.
[5] See s 7, *the Magistrates' Court Act 1989*; ss 8-13, *the County Court Act 1958*; ss 75B and 77, *the Constitution Act 1975*.
[6] See, with respect to Victorian Supreme Court judges, s 75B(2), *the Constitution Act 1978.*

appointments are left to a combination of unwritten convention and the idiosyncrasies of ministerial discretion, several issues are raised including how 'representative' the judiciary should be of the wider community; the extent and proportion to which judges should come from the Bar, academia and other sectors of the profession; and how widely the Executive are bound to consult in the appointment process.

With a view to resolving these questions through public consultation, various jurisdictions have adopted various mechanisms. Recently in Victoria, in a step towards making the appointments process transparent, the Victorian government called for expressions of interest for those seeking appointment to the Supreme, County and Magistrates' Courts.[7]

How judges are appointed in some other jurisdictions is instructive:

- Justices to the US federal courts are nominated by the Executive and approved by the Congress after a hearing of the Judicial Committee.
- In several of the US states judges are elected in periodic partisan

[7] See Office of the Attorney-General, 'Victoria Seeks Expressions of Interest for the Bench' (Press Release, 19 January 2007).

elections. Both these systems are very politicised and result in the appointee receiving a conservative/liberal labelling.

- As part of the recent constitutional reform in England,[8] the majority of the decision making process is no longer left to the Lord Chancellor but given to a body entitled the Judicial Appointments Commission ('JAC').[9] The 15 members of the Commission come from the Judiciary, the legal profession, tribunals, the lay magistracy and the lay public.[10] The role of the Commission is to:
    1. Seek candidates through a wide advertisement process to 'encourage a wide range of applicants';[11]
    2. Evaluate those various candidates according to specified objective criteria which represent the desirable qualities of a judicial officer;[12]
    3. Having done this, present one name for each judicial vacancy to the Lord Chancellor who is then entitled to reject the recommendation or accept it.[13]

A process similar to that used in England and Wales was recently raised

[8] That is, pursuant to the *Constitutional Reform Act 2005* (UK).
[9] See http://www.judicialappointments.gov.uk/about/about.htm.
[10] *Constitutional Reform Act 2005* (UK), sch 12.
[11] Simon Evans and John Williams, 'Appointing Australian Judges: A new Model' (Paper presented at the Judicial Conference of Australia, 7-9 October 2006), 17.
[12] *Constitutional Reform Act 2005* (UK), s 63(2)-(3).
[13] *Constitutional Reform Act 2005* (UK), s 96.

by academics Simon Evans and John Williams.[14] In short, what they propose is the following:

- That commissions be formed at both State and Federal level consisting of, *ex officio*, the head of the relevant jurisdiction, the President of the relevant Bar association, the President of the relevant body of solicitors, a high-standing academic as well as three other lay men and women.[15]
- That this commission, after a wide consultative process, evaluate potential appointees according to objective criteria defined by the commission.
- That the commission, having assessed the merits of each candidate, compile a short-list of three names to be presented to the Attorney-General.[16]
- The Attorney-General, upon receipt of the names, can either recommend a particular person to the Executive Council (who will in turn advise the Governor or Governor-General) or request, in writing, that the commission consider the names again.
- If the latter course is taken, the commission may recommend the

[14] Simon Evans and John Williams, 'Appointing Australian Judges: A new Model' (Paper presented at the Judicial Conference of Australia, 7-9 October 2006).
[15] Simon Evans and John Williams, 'Appointing Australian Judges: A new Model' (Paper presented at the Judicial Conference of Australia, 7-9 October 2006), 4-5.
[16] Simon Evans and John Williams, 'Appointing Australian Judges: A new Model' (Paper presented at the

same three names. Even in this case, the Attorney-General is bound to choose one of the three names referred to him/her in this second round of recommendations.

Both Evans and Williams have sought to reconcile two otherwise contrary imperatives: namely, the de-politicisation of the appointments process and the maintenance of the Executive's public accountability for the appointment process.

Under both the current UK arrangements and the proposal by Evans and Williams, the particular Commission is charged with the duty to have regard to the need to encourage diversity in the range of persons available for selection as judges. Diversity in the judiciary is a topic in itself. However, for now it is appropriate to note that the case for diversity in the judiciary is premised on the notion that public institutions, especially those not democratically elected, should reflect to some extent the make-up of the community if they are to command its confidence.[17]

These issues relate to the appointment of judges. At the other end of

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Judicial Conference of Australia, 7-9 October 2006), 5.

[17] Simon Evans and John Williams, 'Appointing Australian Judges: A new Model' (Paper presented at the Judicial Conference of Australia, 7-9 October 2006), 9.

the spectrum of issues relating to judges is how judges are to be removed. Instruments that provide for judicial scrutiny are, quite understandably, treated with suspicion. They are enacted at the risk of derogating from judicial independence. However, if an appropriate mechanism can be struck, the value of a pre-determined mechanism for the removal of judges should not be doubted. The late Richard McGarvie, a former judge of the Victorian Supreme Court, said on this topic:[18]

> If a government comes under political pressure through allegations that there are judges in office who are unfit for the offices and there is no fair and effective machinery available to determine the issues, the government may precipitately introduce a new system which is not in the best interests of the judicial system or the community. Nobody argues that judges who are proved to be unfit for office should exercise judicial power. If there are workable procedures to remove from office judges made unfit for the office by incapacity or misconduct there will be fewer pressures to impose on judges who are fit for office new systems of investigation, supervision and discipline which would reduce the quality of the judicial system and the confidence of the community in it.

In other words, the process according to which we scrutinize judges should not be decided in the midst of potential political furore.

In a system of guaranteed tenure, confidence in the judiciary depends

[18] Richard McGarvie, 'The Operation of the New Proposals in Australia' in the Accountability of the Australian Judiciary: Procedures for Dealing with Complaints Concerning Judicial Officers, AIJA, 1989, 22.

upon a robust, established mechanism whereby judges are, in certain cases, held accountable. This, of course, is to be measured against the ever-present concerns of judicial independence which underpin our constitutional arrangements. The removal of judicial officers is the minute exception to the otherwise steadfast rule that judges should enjoy guaranteed tenure – a guarantee integral to the expectation that judges act without fear or favour. Accordingly, the removal and disciplinary mechanisms of judicial officers is a topic that goes to the heart of judicial independence and, as the term applies in each jurisdiction, the rule of law.

The current procedure in Victoria arose out of a report by Crown Counsel, Professor Peter Sallman, on *the Judicial Conduct and Complaints System in Victoria*.[19] Before the reforms arising out of this report, the mechanisms in place in Victoria were inconsistent. Supreme Court judges, County Court judges and Magistrates were removed by three different instruments. Whilst a Supreme Court[20] and County Court[21] judge could be removed for lack of good behaviour or upon the address of both Houses of Parliament, a Magistrate could be removed

[19] Professor Peter Sallman, *Report on the Judicial Conduct and Complaints System in Victoria* (2003).
[20] Section 77, *Constitution Act 1975.*
[21] Section 9(1), *County Court Act 1958.*

upon the application of the Attorney-General to the Supreme Court.[22]

Before going on to the current arrangement in Victoria, it is necessary to distinguish between various types of conduct. A distinction persistently made in the Sallman Report is that there will be complaints that, although perhaps on a sound factual basis, do not warrant the removal of the judge. These are dealt with internally.

The removal provisions in Victoria now apply to all judges and masters of the Supreme, County and Magistrates' Courts.[23] Under this procedure a judge may only be removed if the following occurs:

1. The Attorney-General is satisfied that there are reasonable grounds for the carrying out of an investigation;[24]
2. The Attorney-General appoints an investigating committee[25] from a pool called the Judicial Committee consisting of seven ex-Federal and Family Court judges as well as Supreme Court judges of the

[22] Section 11, *Magistrates' Court Act 1989.*
[23] See s 87AAA, *Constitution Act 1975.*
[24] Section 87AAD(1), *Constitution Act 1975.*
[25] Ibid.

other States;[26]

3. The investigating committee conducts an enquiry vested with powers similar to those of a Royal Commission;[27]
4. The investigating committee submits a report to the Attorney-General as to whether facts exist that could amount to proved misbehaviour or incapacity such as to warrant the removal of that office-holder from office;[28]
5. If the Attorney-General considers appropriate, a report of the investigating committee is laid before each House of Parliament;[29]
6. Each House of Parliament, having considered the report, pass a resolution by special majority (that is, a majority of three-fifths) praying for the removal of the relevant judicial officer on the grounds of proved misbehaviour or incapacity;[30]
7. If all of the above occurs, the Governor, acting on the advice of the Executive Council,[31] may remove the judicial officer.[32]

This whole process hinges upon there being 'proved misbehaviour or incapacity' on behalf of the judicial officer as adjudged by the Attorney-

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[26] Section 87AAA and 87AAC(3).
[27] See s 87AAF(1), *Constitution Act 1975* and ss 17-21A, *Evidence Act 1958*.
[28] Sections 87AAH(1)-(2), *Constitution Act 1975*.
[29] Section 87AAH(3), *Constitution Act 1975*.
[30] Section 87AAB(1)-(2), *Constitution Act 1975*.
[31] See s 87E, *Constitution Act 1975* which provides for the Executive Council to advise the Governor in all matters which he or she is, by convention, bound to follow.
[32] See 87AAB(1), *Constitution Act 1975*.

General, the Judicial Committee, the Parliament and, acting on the advice of the Executive Council, the Governor-in-Council. And so, whilst traditionally the Executive have been solely responsible for the appointment of the judiciary, the removal of a judicial officer is a process that enfranchises the Parliament as well as the Executive. It should also be noted that what is meant by 'proved' and 'misbehaviour' in this context is quite uncertain.

Much like the *Settlement Act 1701* (Imp), s 53 of the *New South Wales Constitution* provides for the removal of a judicial officer by the Governor, on an address from both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity. However, the arrangement in New South Wales is different in several respects from those in Victoria. These differences stem from the existence of a much larger body than the Victorian Judicial Committee; namely, the Judicial Commission which is also charged with the duty of educating judicial officers. Whereas the Victorian Judicial Committee reports only upon the request of the Attorney-General who has received a complaint, the New South Wales Judicial Committee is the first body to receive a complaint and then determine the appropriate course.[33] It may

[33] See s 15, *the Judicial Officers Act 1986*.

either summarily dismiss the complaint,[34] refer the matter to the relevant head of jurisdiction or to the Conduct Division who will examine the complaint with a view to preparing a report for the Parliament.[35] In this way, the NSW arrangements characterize complaints into three categories: those that are trivial and should be summarily dismissed; those that are substantiated but do not warrant parliamentary intervention; and those that, after the examination of the Conduct Division, will be subjected to parliamentary scrutiny. Amongst the several differences in the Victorian and New South Wales systems, the most pertinent is that the procedure of the removal of a judge is not initiated by the Attorney-General but by the Judicial Commission - an independent Executive body. In this sense, and in others, the New South Wales Commission is more powerful than its Victorian counterpart.

The *Constitution of Queensland 2001* is instructive in its clarification of an aspect to the removal process that is ambiguous in the New South Wales and Victorian arrangements; namely, the meaning of 'proved.' Section 61(3) provides that 'a judge's misbehaviour justifying removal from an office is proved only if the Legislative Assembly accepts a finding of a tribunal, stated in a report of the tribunal, that, on the balance

[34] See s 20, *the Judicial Officers Act 1986.*

of probabilities, the judge has misbehaved in a way that justifies removal from the office'.

Each of the other States allows for the removal of judges in an instrument similar to the *Act of Settlement 1701* (Imp). *The Constitution of South Australia* provides that: 'It shall be lawful for the Governor to remove any Judge of the Supreme Court upon the address of both Houses of the Parliament.' The same applies in that State for the District Court.[36] Magistrates, however, are removed upon application of the Attorney-General to the Full Court of the Supreme Court[37] - a position similar to that in Victoria prior to the reforms of 2005.

The Supreme Court Act 1935 (WA) provides that: 'All the Judges of the Supreme Court shall hold their offices during good behaviour, subject to a power of removal by the Governor upon the address of both Houses of Parliament.' The same applies for District Court judges[38] and stipendiary magistrates.[39] Under this arrangement, a Western Australian judge may be removed in one of two ways: 1. By the Governor for bad behaviour; or 2. By the Governor on address of both Houses of Parliament, for any

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[35] See s 21, *Judicial Officers Act 1986*.
[36] See s 15, *District Court Act 1991* (SA).
[37] See s 11, *Magistrates' Act 1983* (SA).
[38] See s 11, *District Court of Western Australia Act 1969* (WA).
[39] See s 5, *Stipendiary Magistrates' Act 1957* (WA).

reason whatsoever.

Federally, justices of the High Court and of the other federal courts are removed by the Governor-General in Council on address of both Houses of Parliament.

Regardless of jurisdiction, the processes of judicial appointment, complaint and removal have become entwined in the dominating topic of access to justice. That topic has become dominant in the assessment of courts and what they do.

Courts evolved from ancient times. This is something overlooked. If an ancient form is subjected to the superimposition of a modern form it may not work. Ancient traditions and rituals exuding silence, measure, deliberation, consideration and scrutiny are not necessarily adaptive to modern styles and processes exuding informality, familiarity, expedition and brevity. The conventions that govern judicial appointment, complaint and removal are embedded in the past and are moulded to fit the here and now.

The system of justice has undergone a pushing down. Matters that thirty years ago would only have been heard in the highest court of state and

federal jurisdictions have been removed to the lowest courts and tribunals. This is viewed by governments as a strategy to deliver justice in an accessible and effective way. Most of the magistracy appointment processes were public service based. Tribunals functioned through a mix of members with fixed term and sessional appointments. Over time, the flexibility and adaptability of those types of appointment processes have been viewed as a more convenient way to make appointments. At the same time there has developed an approach to categorise all judicial appointees, that is judges, magistrates and tribunal members, as "judicial officers". There is a shift to blur the demarcation between judges, magistrates and tribunal members.

As discussion has permeated from government, academe and judicial administrators though to the community, "access" has become the catch cry. Commensurate with that development has been the blurring of the lines between ancient processes for judicial appointment, complaint and removal. If the unsatisfactory performance of a tribunal member, magistrate or judge during a limited term rankles, that individual may effectively have their tenure terminated by its non-renewal. The political fly in the ointment arises when the judicial officer cannot be easily moved. But there are good and obvious reasons for this: to ensure the independence of the judicial officer and to provide certainty to the

administration of justice.

The spectre of removal does not sit to the fore of the mind of a judicial officer in daily judicial performance. It is the task at hand – judging – that is in focus, performed in accordance with the oath of office. Yet when complaint and the prospect of removal arises it is generally public and painful. The subject is reluctant to depart. Experience demonstrates that generally the importance of the judicial institution prevails.

The Victorian system provides an independent structure that should be less cumbersome and more timely than the system of awaiting the decision of joint Houses of Parliament. Nevertheless, when reflection turns to the numbers of judicial officers who have been the subject of complaint in the context of the overall numbers in the history of state and federal appointees, the experience is stunningly confined. That vindicates the strength of the system overall and the appointment system in particular. So, appointment, complaint and removal systems are connected. The stronger the appointment process the more reduced is the likelihood of behavioural error, misconduct or impropriety.

A final reflection: all systems must have as their goal the recruitment and retention of the best individuals for judicial office. To achieve that

outcome there ought to be full confidence that the best and most suitable potential appointees will submit to the selection process. The predominant experience in Australia has been that the Executive method has worked well. This may be attributed to recognition by Attorneys-General of the significance of their judicial recruitment function. Removing Executive judgment and imposing a mandatory community-based selection model may render the appointment process transparent but at what cost? Transparency for the sake of satisfying modern pursuit of accessibility of process will make the process more open and public but political and, inevitably, controversial. Look at the American experience. And so the question is to be asked: if a public appointment process results in diversity, will it compromise excellence and confidence in the individual appointment? A de facto method of consultation by the Executive exists. It is not mandatory. Bearing the heavy burden they do, Attorneys-General should be encouraged and supported to reach the best decision and to perpetuate confidence in and respect for the courts. The Australian experience informs us that predominantly they have.