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11 June 2009

Mr Peter Hallahan
Senate Standing Committee
On Legal and Constitutional Affairs
PO Box 6100
Department of the Senate
Parliament House
CANBERRA ACT 2600

Dear Mr Hallahan

RE: FURTHER SUBMISSION TO SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Further to a discussion with Ms Toni Dawes, I understand that it is permissible for the Association of Australian Magistrates to make a further submission in relation to aspects of the Senate Inquiry which were not addressed in our initial submission. Please find attached that further submission.

On behalf of the Executive Committee I thank the Senate Committee for taking the time to consider this further submission.

Yours sincerely

John Lowndes
President of the Association of Australian Magistrates

attachment

FURTHER SUBMISSION BY THE ASSOCIATION OF AUSTRALIAN MAGISTRATES

Prior to the hearing, which is scheduled for 12 June 2009, the Association of Australian Magistrates wishes to make the following submissions in relation to the following aspects of the Senate Inquiry:

- Judicial appointments
- Compulsory retirement age
- Part time magistrates
- Judicial complaints handling

JUDICIAL APPOINTMENTS

Although the appointment of judicial officers is a prerogative of the Crown, exercised by the executive arm of government through Cabinet, it is essential to ensure that political considerations do not intrude into the actual appointment process. The appointment process needs to guard against judicial appointments made on a basis other than merit, and on the basis of personal or political affiliation.

The need to secure judicial independence is one of the fundamental principles underpinning a system of judicial appointments. To that end the appointment process should be open and transparent, and judicial appointments should only be made on the basis of merit.

The Association believes that a formal protocol for judicial appointments setting out the appointment process should be established, and made publicly available, so as to ensure that the requirements of openness and transparency are met and to enhance public confidence in those who are appointed to judicial office.

The Association recommends that the following protocol be established in relation to the appointment of magistrates; though it would seem that a similar protocol could be adopted in relation to judicial appointments to the intermediate and superior courts.[1]

[1] The proposed protocol is predominantly based on the protocol formulated by the Law Council of Australia in relation to judicial appointments to Federal Courts and its underpinning principles, as set out in its submission to the Committee dated 30 April 2009. Where the proposed protocol departs from that model it only does so to accommodate the special requirements of appointments to magistrates' courts.

As has been the practice for some time, there should be a call for expressions of interest in relation to a judicial vacancy or vacancies, affording interested persons the opportunity to put themselves forward as applicants for the position or third parties the opportunity to nominate suitable candidates. It is important to ensure that the advertisement calling for expressions of interest in no way detracts from the status of the court to which the appointment is to be made.

The virtue of calling for expressions of interest is that it gives the appointment process greater openness and widens the pool of suitable candidates.

However, it is recognised that some potential candidates may be reticent in expressing interest in a judicial appointment. Therefore, the protocol should permit the Attorney General to consult with the Chief Magistrate, the President of the local Bar Association as well as the President of the Law Society and such other persons or bodies as he or she thinks fit, and to invite such persons or bodies to submit names of suitable candidates whom they recommend, by way of nomination, be considered for appointment. Wide consultation should be encouraged to increase the pool of suitable candidates generated by the advertising process.

The established protocol should not treat self nomination through the advertising process any differently from nomination by third parties during either the consultation or advertising process. The protocol should make it clear that every candidate should receive equal consideration for appointment.

It is essential that confidentiality be maintained in relation to all expressions of interest and nominations in order to attract suitable candidates. Potential candidates may be dissuaded from expressing interest if their expression of interest were to become publicly known. Similarly, third parties may be reluctant to nominate suitable candidates if their nominations were to become public knowledge.

The established protocol should set out any statutory criteria for appointment[2] together with the judicial attributes that candidates are expected to possess. The selection criteria should be published to enhance the openness and transparency of the appointment process.

The New South Wales Attorney General's Department has formulated and published a list of requisite or expected attributes, which are as follows:

Professional qualities

- Proficiency in the law and its underlying principles
- High level of professional expertise and ability in the area(s) of professional specialisation

[2] These usually pertain to legal qualifications and experience.

- Applied experience (through the practice of law or other branches of legal practice)
- Intellectual and analytical ability
- Capacity to work under pressure
- Effective oral, written and interpersonal communication skills with peers and members of the public
- Ability to clearly explain procedure and decisions to all parties
- Effective management of workload
- Ability to maintain authority and inspire respect
- Willingness to participate in ongoing judicial education
- Ability to use, or willingness to learn modern information or technology

Personal Qualities

- Integrity
- Independence and impartiality
- Good character
- Common sense and good judgment
- Courtesy and patience
- Social awareness.

It is noted that these criteria approximate the attributes for judicial office referred to in the Law Council's submission. However, the latter include additional criteria such as decisiveness and the ability to discharge judicial duties promptly, reputation, fairness, maturity and sound temperament and gender and cultural awareness. Although it is arguable that these criteria are subsumed under some of the attributes referred to in the NSW selection criteria, they are best treated as discrete criteria which reflect either necessary or desirable qualities for judicial office.

In light of the findings of the Flinders University Magistrates Research Project and Judicial Research Project referred to in the submission made by Professors Mack and Anleu, it may be necessary to make some minor adjustments to the list of criteria used to assess merit in relation to judicial appointments.

The Association considers that the selection criteria presently applied in NSW, coupled with the additional criteria suggested above, provide a good working model for the appointment of judicial officers. Although the concept of merit is somewhat elusive, the specified attributes are designed to assess a candidate's suitability for judicial office and to facilitate appointments on the basis of merit. As pointed out in the Mack and Anleu submission, merit "at the very least must relate to those qualities and skills which are needed to carry out the institutional role and the specific tasks of the judicial position", and "judicial appointments must be made on the basis of a close correspondence between the attributes of the candidate and the requirements of the job".

Of course, the more difficult question relates to how the various criteria should be weighted in assessing merit. The Association needs to consider this question more fully, and does not propose to express an opinion at this stage.

As made clear in the submission made by the NSW Law Society "the sole criterion is merit: the best candidate for the position, irrespective of whether the candidate is a barrister, solicitor or academic lawyer, should be appointed". This view is reflected in the commitment in NSW to "actively promoting diversity in the judiciary" and giving consideration to "all legal experience, including that outside mainstream legal practice".[3]

The protocol should next provide for the establishment of a selection or assessment panel by the Attorney General to assess all applications and nominations against the published selection criteria.

There appears to be no general consensus as to the composition of selection or assessment panels.

In relation to appointments to Federal Courts (other than the High Court) the Law Council of Australia favours a tripartite panel comprising the head of the court or jurisdiction to which the appointment is being made (or their nominee), a retired senior judicial officer or officers of the Commonwealth and a senior official from the Attorney General's Department. This model currently operates at the Federal level.

With respect to the appointment of magistrates, the Department of Justice of Tasmania stipulates that an assessment panel shall consist of the Chief Magistrate (or their nominee), the Secretary of the Department of Justice (or their nominee) and the Attorney General's nominee.

In New South Wales the practice has been for the panel to consist of the Chief Magistrate, the Director General of the Attorney General's Department, a leading member of the legal profession and a prominent community member.

[3] See www.lawlink.nsw.gov.au

The Association has reached no definitive view as to the composition of selection or assessment panels, though it makes the following observations.

The Chief Magistrate (or his or her nominee) would be an obvious member of such a panel. It is essential to have as a member of the panel a member of the Court in which the appointment is to take place and a serving judicial officer who possesses significant judicial experience.

The Association also sees merit in having a senior magistrate on the panel in addition to the Chief Magistrate[4] for the same reasons that support the presence of the Chief Magistrate(or nominee) on the panel. Whether or not that judicial officer is retired, or is serving, is of no real moment provided the judicial officer has recent significant experience in the judiciary.

As noted above, it has been usual to appoint as a panel member a nominee of the Attorney General or the Departmental Secretary or some other senior public servant.[5] If a selection panel is intended to be independent of institutional or political bias, one might well question the desirability of having a representative of government on a selection panel.[6]

The Association sees no problem with including on the panel a leading member of the legal profession and a prominent community member. The selection process would stand to be enhanced by the presence of such persons who would approach the selection process from their own particular perspective – one that more broadly reflects the makeup of the community – and bring to bear upon the selection process their special expertise.

Finally, there should at least one female member and at least one male member on the panel, in line with widely accepted current practices with respect to selection panels generally.

According to the established protocol the selection panel should then proceed to shortlist the candidates against the published criteria. Although there are views to the contrary, at least in relation to judicial appointments in the Federal courts,[7] the Association maintains that all short listed candidates should be interviewed by the selection panel.

The value of conducting face to face interviews with candidates for positions in magistrates courts cannot be overstated. Candidates for the magistracy come from a large pool of potentially suitable candidates, and generally speaking are less well known than candidates for appointment to the intermediate and higher courts.

[4] This appears to be the practice in Victoria.
[5] The Law Council of Australia appears to support the presence of a representative of government on selection panels.
[6] This is probably one of the arguments for establishing a commission for judicial appointments along the UK model.
[7] See the submission made by the Law Council of Australia.

The interview process can be helpful in identifying the best candidate for the position. The process is designed to identify the necessary qualities in a candidate. Furthermore the interview process may give candidates a better understanding of the function which he or she is to discharge, if appointed, and may reveal qualities of a candidate not previously known.

Interviewing all short listed candidates is not only the most effective way of assessing the merit of candidates, but it is also the fairest and most equitable way of considering their expressions of interest. By subjecting each candidate to a similar series of questions, the interview process enables the selection panel to compare and properly assess the respective merit of the candidates.

The protocol should require the selection panel to assess each candidate as being highly suitable, suitable or unsuitable for judicial office, without otherwise ranking the candidates within those three categories.[8] The panel should then provide the Attorney General with a report containing those assessments.

Finally, the protocol should provide that although the Attorney General, and ultimately Cabinet, is not bound by the assessments made by the panel any appointment that represents a marked departure from those assessments should be explained through an appropriate mechanism and in an appropriate forum.

The Association wishes to make two final observations.

The first is that "gender, political leanings or any other consideration should not influence selections" and "the principles of equal opportunity should be borne in mind when selecting between two candidates who are in all respects of equal merit, eg if the candidates are of different gender, the female candidate should be chosen".[9] Obviously, these considerations should underpin the deliberations of the selection panel. The panel should ensure that in assessing the merit of individual candidates gender is disregarded.

The second relates to what should be done with expressions of interest after the appointment of the successful candidate or candidates. It is not necessarily the view of the Association that all unsuccessful expressions of interest or any record thereof should be destroyed, unless the applicant requires that to be done. It is common these days for expressions of interest to remain active beyond the appointment of a successful candidate or candidates, such that an Attorney General can draw upon them subsequently as vacancies arise, and until such time as fresh expressions of interest are called for.[10] What is important is that there be put in place adequate procedures to ensure the confidentiality of expressions of interest.

[8] This is the current practice in NSW. In Victoria there is a similar protocol, with each candidate being assessed as highly recommended, recommended and not recommended.
[9] See the submission made by the Law Society of NSW.
[10] That appears to be the case at least in NSW.

COMPULSORY RETIREMENT AGE

The fixing of a compulsory retirement age for judicial officers does not interfere with the security of tenure that all judicial officers should enjoy, and therefore does not violate the principle of judicial independence. All careers have a finite life and a judicial career is no exception.

The Association considers that the submission made by the Law Council of Australia adequately makes out the case for a mandatory retirement age. The obvious objective of a compulsory age of retirement is to overcome the prospect of a judicial officer who is unable to continue performing his or her judicial functions, but not prepared to resign from judicial office. There are also positive aspects to a mandatory retirement age, as outlined in the Law Council's submission. A mandatory retirement age assists in maintaining a vigorous and dynamic judiciary, allowing a "breath of fresh air" to permeate the judicial system, as well as infusing the judiciary with contemporary social attitudes and community values.

Of course, the difficulty is arriving at a consensus as to when such a career has effectively run its course.

The present maximum retirement age for magistrates is 72, which applies only in NSW and Tasmania. The retirement age in Victoria and at the Commonwealth level is 70. In all other jurisdictions magistrates must retire at 65.

By way of comparison, the retirement age for judges in NSW and Tasmania is 72 while judges in all other jurisdictions must retire at 70.

The Association considers that a compulsory retirement of 65 for magistrates is too early and should be increased for the following reasons:

- Life expectancy has increased and there has been a trend within the community towards later retirement from the work force;[11]

- There are plenty of people over the age of 65, and even 70, who are fully competent to discharge their judicial functions. The fact that some people over 65 or 70 are perhaps not fully competent is not a cogent argument against extending the retirement age beyond 65.[12] In any event, there are adequate mechanisms in all States and Territories for the removal of magistrates on the grounds of incapacity or misconduct;

- People over 65 can continue to contribute valuable professional experience, skills and expertise to the judiciary, and mandatory retirement at 65 can lead to premature loss of experienced judicial

[11] See the submission made by the Hon Justice Marilyn Warren, Chief Justice of the Supreme Court of Victoria.
[12] See the submission made by the Law Council of Australia.

officers. By extending the retirement age experienced judicial officers can be retained for a longer period, resulting in the retention of intellectual capital, institutional knowledge and judicial experience within a court;

- There is no objective factual basis to suggest that magistrates function less effectively than judges as they age. Therefore, there is no reason for differentiating between magistrates and judges by requiring magistrates to retire earlier than judges;

- Compulsory retirement at 65 presents as a potential barrier to attracting highly suitable candidates, such as senior practitioners or lawyers, to the magistracy. Early retirement may mean that appointees do not have enough time to accumulate adequate superannuation entitlements and ensure a secure retirement. As pointed out by Mack and Anleu, "a secure retirement is important to judicial independence as it avoids the need for a judicial officer to seek paid employment after completing judicial service".[13]

The Association submits that in those jurisdictions where the current retirement age for magistrates is 65 it should be increased to at least 70 - and preferably to 72, as it is desirable to have a consistent retirement age within the judiciary.

PART TIME MAGISTRATES

NSW and Queensland have introduced legislation to provide for the appointment of part-time magistrates. Although there is no legislation in Victoria which provides for the appointment of part time magistrates, the Chief Magistrate has on occasions in the past few years exercised his discretion as to the way magistrates perform their duties by allowing a few magistrates to work part time, usually related to family circumstances. About 26 magistrates in Victoria are working 48/52, again with the approval of the Chief Magistrate, exercising his discretion.

As pointed out by the Hon Justice Marilyn Warren, the Chief Justice of the Supreme Court of Victoria, in her submission to the Committee, those initiatives have been directed at the provision of more flexible arrangements with the aim of:

- Retaining experienced judicial officers for longer;

- Removing provisions which may act as barriers to aspiring to, or accepting, judicial appointment for sections of the community including women; and

[13] See Mack and Anleu " The Security of Tenure of Australian Magistrates" (2006) 30 MULR 370 at 386.

- Creating a simple, effective and flexible system of additional judicial resources.

The obvious advantage of the system of part-time magistrates is that it widens the pool of suitable candidates for judicial office, and provides for the appointment of suitable candidates who would due to their domestic or other circumstances be unable to assume judicial office on a full time basis.

There are other advantages as referred to by the Chief Justice, though arguably those objectives could largely be met by the appointment of acting or relieving magistrates.

Some practical problems with the system of part –time magistrates have been identified.[14]

The nature of magistrates' work varies from dealing with high volume lists to presiding over lengthy contested hearings. By the very nature of their appointment, it may be difficult to assign part-time magistrates lengthy hearings running over several days or weeks. This is a case management issue. Furthermore, depending upon their working arrangements, part- time magistrates may not have the ability of full time magistrates (who are available at all times during the week) to give a decision or pass a sentence the following day. This aspect goes to the timeliness of decisions in magistrates courts.

Magistrates around Australia do a significant amount of circuit work. It may be difficult to assign part-time magistrates a circuit because of their working arrangements. That is an issue that goes to the allocation and distribution of work between magistrates

However, none of the identified problems are insuperable. Indeed, the problems created by the system of part time magistrates are not significantly different to the problems often encountered with full time appointments, where allowances have to be made for leave and illness and country service.

That the claimed problems are not insurmountable is demonstrated by the NSW experience which shows that sensible management of lists and deployment does not prevent part time magistrates from sitting on long and complex cases. Furthermore, two NSW part time magistrates have been successfully appointed to a circuit, and from all accounts the arrangement has worked quite well.

Although acting or relieving magistrates may be a source of additional judicial resources it is infinitely preferable to have permanent part time magistrates with security of tenure (which underpins judicial independence) than acting or relieving magistrates who do not enjoy that protection.

[14] Such problems were raised in a submission made by the Law Institute of Victoria to the Department of Justice of Victoria in April 2003 and are referred to in the main text.

JUDICIAL COMPLAINTS HANDLING

The Governing Council of the Judicial Conference of Australia (JCA) is due to consider the issue of judicial complaints handling this coming Saturday 13 June 2009. Some of the members of the Governing Council are also members of the Association of Australian Magistrates. Furthermore, one of the primary objects of the Association is to confer and liaise with, and if appropriate, to act in conjunction with other judicial organisations, in particular the JCA. In those circumstances, the Association would prefer to defer making its submissions in relation to the issue of judicial complaints handling until after the JCA has considered the matter. Therefore, the Association seeks permission to deliver its submissions at a later time.