Inquiry into Australia's Judicial System and the Role of Judges

Senate Legal and Constitutional Affairs Committee

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Introduction

The Law Council of Australia is grateful for the opportunity to provide a submission to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into Australia's judicial system and the role of judges.

The Law Council regards the judiciary as a central part of the justice system. International instruments, including the International Covenant on Civil and Political Rights, the Universal Declaration on Human Rights, and the European Convention on Human Rights, all state that in the determination of civil rights and obligations or criminal responsibility, all people are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[1] The Law Council therefore takes a great interest in any discussion that relates to the structure and role of the Australian judiciary.

The terms of reference for the inquiry require the Committee to have particular reference to:

- procedures for appointment and method of termination of judges;
- term of appointment, including the desirability of a compulsory retirement age, and the merit of full-time, part-time or other arrangements;
- jurisdictional issues, for example, the interface between the federal and state judicial system; and
- the judicial complaints handling system.

In summary, the response to each of these terms of reference is as follows:

- The Law Council has an established policy on its preferred procedures for Federal judicial appointments, which it recommends be considered by the Committee.
- The Law Council accepts that on balance it appears that the imposition of a mandatory retirement age on judicial service achieves a number of valid public policy objectives. Governments should not be tempted to make acting or part time appointments in order to avoid their responsibility to provide an adequately resourced, permanent, full-time judiciary.
- In general, the Law Council supports the concept of a national judicial framework and the associated possibilities for judicial development, and for relevant and helpful cross-fertilization of ideas and approaches from one jurisdiction to another. However, a cautious approach must be adopted in the mechanisms that are introduced to achieve this and they must involve a recognition of the importance of specialist courts and the inescapable reality of differing local conditions and needs.
- While supporting the development of independent and transparent mechanisms for dealing with judicial complaints, the Law Council sees no need for and is not in favor of a national judicial complaints handling system.

[1] As discussed by Murray Gleeson, *The Federal Judiciary in Australia,* speech delivered to the Federal Magistrates Conference in October 2005.

Procedures for appointment and method of termination of judges

The Law Council's preferred procedure for judicial appointments is as set out in its Policy on the Process of Judicial Appointments (the Policy), a copy of which can be found at **Annexure A.**

The Policy applies to the Federal Courts and to all levels of judicial office in that jurisdiction except for judges of the High Court of Australia. The Policy affirms that judicial appointment should be a function of Executive Government and that, in addition to any statutory criteria for eligibility for appointment, the expected attributes for judicial appointment are as set out in Attachment A of that Policy. This attachment establishes the expected attributes of candidates of judicial office, including legal knowledge and skills, professional qualities, and personal qualities.

The Policy also contains a requirement that the Attorney-General of Australia consult a minimum number of identified office holders prior to the appointment of a judge or magistrate. The office holders that should be consulted at minimum are as outlined in Attachment B to the Policy, and includes office holders such as the Chief Justice of the Court or jurisdiction to which the appointment is to be made, the Presidents of the Law Council of Australia and the Australian Bar Association, the President of the Law Society and Bar Association of the State and Territory where the appointee will be assigned, the President of Australian Women Lawyers, and so forth.

Consultation between the Attorney-General of Australia and the specified office holders should involve an invitation to each office holder to submit names of suitable candidates whom the office holder (representing their organisation or institution) recommends, by way of nomination, be considered for appointment.

Attachment C to the Policy outlines the process that should be followed by the Attorney-General of Australia in federal judicial appointments. The Attorney-General of Australia should arrange for public advertisements in the national media seeking expressions of interest and nominations for judicial appointments. It is not an essential requirement that candidates self-nominate. Potential candidates may either be nominated by third parties, or, if a selection panel (as referred to below) believes there is a more desirable candidate that has not applied or been nominated, the panel may approach and invite that person to submit their name.

The Attorney-General of Australia should then undertake a thorough personal consultation with at least the individuals and professional bodies set out in Attachment B to the Policy, discussed earlier.

A selection panel should be established by the Attorney-General of Australia to assess all applications and nominations against published criteria. The selection panel should consist of:

a) the head of the court or jurisdiction to which the appointment is being made (or their nominee);

b) a retired senior judicial officer or officers of the Commonwealth; and

c) a senior official from the Attorney-General's Department.

The published criteria should be in accordance with Attachment A to the Policy.

The selection panel should assess all applications and nominations against the published appointment criteria and develop a shortlist of suitable candidates. The panel should be

able to reserve the right to conduct, where thought appropriate, an interview with a candidate to assist in this process, but it is not obliged to do so.

At the completion of its deliberations the panel should provide a shortlist of recommended suitable candidates to the Attorney-General of Australia, who will be expected to propose to Cabinet the actual appointee from amongst those so-identified suitable candidates.

This procedural element of the Law Council's policy recognises that that the open, consultative and transparent process adopted by the current Commonwealth Government is an improvement on what has occurred in the recent past. The Law Council's Policy was amended to generally reflect its approval of the Government's process in light of the changes to the previous federal judicial appointments process that occurred with the election of the current Government.

The Law Council invites the Committee to closely examine the attached judicial appointments policy as it applies to the Federal jurisdiction.

The Law Council does not consider the policy is necessarily appropriate to the needs of State and Territory appointment processes and does not advocate the application of this policy in such jurisdictions.

The issue really is which is the best process to ensure the selection of the best qualified judges in each jurisdiction. Though general requirements can be identified for judicial appointments this will not and should not change the appointment process which should focus on an appointee's previous experience and their suitability for appointment to the particular court.

Methods of termination of judges will be discussed in relation to Term of Reference (d), the judicial complaints handling system.

Term of appointment, including the desirability of a compulsory retirement age, and the merit of full-time, part-time or other arrangements

Term of appointment and compulsory retirement age

Generally, all Australian Supreme Court judges have relatively comparable terms of office. However, there are some variations in the tenure and retirement ages and judicial entitlements between jurisdictions.

The question of security of tenure until the maximum retirement age appears uncontroversial, as it is a fundamental aspect of the separation of powers doctrine and Australia's constitutional structure, and is an essential underpinning of judicial independence. This concept will be discussed in more detail in relation to the merits of acting and part-time judges.

The maximum retirement age in most jurisdictions is 70 years, although in NSW and Tasmania it is 72 years.[2] The Standing Committee of Attorney's-General (SCAG) is

[2] A*ustralian Constitution* s 72; *Supreme Court Act 1933* (ACT) s 4(3); *Judicial Officers Act 1986* (NSW) s 44(1); *Supreme Court Act 1979* (NT) s 38; *Supreme Court of Queensland Act 1991* (Qld) s 23(1); *District Court of Queensland Act 1967* (Qld) s 14(1); *Supreme Court Act 1935* (SA) s 13A(1); *District Court Act 1991* (SA) s 16(1); *Supreme Court Act 1887* (Tas) s 6A; *Constitution Act 1975* (Vic) s 77(3); *County Court Act 1958* (Vic) ss 8(3), 14(1); *District Court of Western Australia Act 1969* (WA) s 16; *Judges' Retirement Act 1937* (WA) s 3.
There is a capacity in NSW and some other jurisdictions for judicial officers to return as acting judges after reaching the retirement age and to remain acting until 77 years – s.37 *Supreme Court Act 1970 (NSW).*

reportedly considering setting 72 years as a standard retirement age for judges, although Section 72 of the *Australian Constitution* entrenches the tenure and retirement ages of federal judges at 70 years.

The question of whether to implement a mandatory retirement age of 70 for justices on the High Court of Australia was debated in the 1977 referendum. Supporters of the reform argued that it would prevent the situation of a judge who was unable to continue with his or her duties, but unwilling to resign.[3]

Two other arguments are made in support of mandatory retirement ages. It is suggested that a mandatory retirement age helps to maintain vigorous and dynamic courts, bringing fresh ideas and contemporary social attitudes to the bench. Further, it is pointed out that a mandatory retiring age reduces the possibility that judges will influence the choice of their successor, as 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.[4]

Recently retired High Court Justices Murray Gleeson and Michael Kirby have spoken out in favour of mandatory retirement at the age of 70. Former Chief Justice Gleeson stated in favour of this view that: "There are plenty of people over the age of 70 who are fully competent ... there are some people under the age of 70 who perhaps aren't fully competent. The problem about not having a fixed age is that it makes a person a judge in his own cause. He has to decide for himself whether he's too old, and it's unfair to put people in that position."[5]

The primary argument opposing a mandatory retirement age for justices is its inflexibility, in addition to the difficulty of setting an appropriate age. A judge's effectiveness and ability to keep abreast of new developments in the law is not a function of age. A mandatory retirement age could also potentially be considered a form of age discrimination.

However, on balance, it appears that the imposition of a mandatory retirement age on judicial service achieves a number of valid public policy objectives, as described above.

Although it is desirable for there to be consistent retirement age, it is also difficult to imagine a constitutional amendment being passed to increase the age of federal judges or that relevant state governments would decrease the retirement age for newly appointed Supreme Court judges. As such, it appears likely that there will remain some divergence in retirement ages between jurisdictions.

This fact creates the opportunity for a judge compelled to retire in one jurisdiction to be offered appointment for a short period in another jurisdiction with a later retiring age. Because of the circumstances in which such appointment may be made the Law Council does not regard this kind of short term appointment as raising to any meaningful extent the serious problem of acting and part-time appointments that have led the Law Council to hold strongly to a policy against such appointments as set out below.

The Law Council also accepts that there may be exceptional circumstances in which it is necessary or appropriate that a judge holding an appointment in one jurisdiction should for a short time be appointed to deal with a particular matter as a judicial officer in another jurisdiction. Again, these pragmatic and exceptional appointments do not impinge upon

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[3] Andrew Leigh 'The System Works in Australia', *The National Law Journal,* 2-06-2006.
[4] When put to the Australian electorate, the mandatory retirement age proposal was overwhelmingly carried, winning the support of four in five voters. The mandatory judicial retirement age remains the third most popular of the 44 referendum proposals that have been put to the Australian public since the nation was founded in 1901. See Andrew Leigh 'The System Works in Australia', *The National Law Journal,* 2-06-2006.
[5] Cited by *The Australian,* 26 March 2007, "Chief judge backs retirement age".

the requisite independence of the judiciary to the extent that the Law Council considers it appropriate to oppose them.

Accordingly, the following comments are not directed towards acting or part-time judicial officers that are appointed to State Courts after they have reached retirement age in the Federal jurisdiction or to temporary appointments of judicial officers from one State to act in a particular matter in another State.

The merits of acting or part time judges

A crucial element of the rule of law is that decision makers should not only be, but also be perceived to be, impartial when called upon to resolve disputes. Judicial independence is therefore one of the most fundamental safeguards to an effectively functioning democracy.

Judicial independence is not a privilege of judges but rather a protection of the people whose rights can only be preserved by an independent judiciary. An independent judiciary requires a state of affairs in which judges are free to do justice in their jurisdictions, protected from the power and influence of the State and also made as immune as possible from all other influences that may affect their impartiality.[6]

It is fundamental to judicial independence, therefore, that judges enjoy security of tenure until they reach the compulsory retirement age.

Any consideration of short-term appointments of acting or part-time judges to deal with periods of high demand threatens judicial independence. If a judge is appointed for a fixed term rather than until a fixed retirement age, the judge could face accusations of delivering verdicts which pleased a government that controls who fills the tenured positions when they arise.[7]

Justice Ronald Sackville, while Chair of the Judicial Conference of Australia, explained the situation as follows:

> *"It is fundamental to judicial independence that Judges enjoy security of tenure until they attain retirement age. The reason is obvious. If Judges are appointed for a fixed term, there is a danger that they will be seen as attempting to curry favour with the Government of the day in order to obtain reappointment for another term.*
>
> *Security of judicial tenure is built into Chapter III of the Australian Constitution. That is why there can be no acting Judges appointed to Federal courts like the Family Court or the Federal Court of Australia."*[8]

A conflict of interest arises where a judge's continued appointment becomes subject to a decision of the Executive Government, which may either influence or appear to influence the exercise of the judge's public duties and functions. Judicial officers need to be able to make decisions without fear of having their ongoing employment prejudiced by that decision, and must have the confidence of the public that they are in a position to apply the law impartially.

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[6] Sir Ninian Stephen,1989 Judicial Independence, Australian Institute of Judicial Administration, Melbourne. Cited by The Hon. Justice Sheller, Compensation Court Conference, Anchorage, Port Stephens, 30 March 2001.

[7] Former Australian Bar Association president Robert Gotterson, cited by NSW Law Society Journal (1999) 37 (2) LSJ 52.

[8] Justice Ronald Sackville, *Acting Judges and Judicial Independence,* Opinion piece published by The Age, 28 February 2005.

Furthermore, if the Victorian model of acting judges is used as an example, it is likely that the acting judge will only receive remuneration for whatever periods of full-time or session work the Attorney-General may subsequently assign to them. It may be the case that the acting judge will hope that if they can win the Attorney-General's favour they may secure more frequent commissions, eventually leading to permanent tenure.

Under the Victorian model, an acting judge has no pension entitlements, but if he or she is later appointed as a permanent judge their service as an acting judge can count for pension purposes. As Justice Sackville has pointed out:

> *"This means that an acting Judge coming to the end of his or her five year term of appointment has a double incentive to be appointed a Judge of the Court. Appointment will not only mean a secure tenured position, but the Judge will receive credit for five years service as an acting Judge for pension purposes. This amounts to a notional sign-on bonus that could be worth hundreds of thousands of dollars. What if an acting Judge is hearing a case in which the government is a party when a permanent vacancy in the Court is about to be filled? If the government wins and the acting Judge is later appointed as a permanent Judge, will the losing party accept that the two events were unrelated?"*[9]

Difficulties may also arise in cases involving plaintiffs or defendants that are from a jurisdiction or industry in which the acting or part-time judge frequently acts as counsel. In addition to conflicts of interest, the need to balance judicial duties with the responsibilities as a barrister or solicitor means that acting or part-time judges would be unable to deliver a satisfactory level of justice. This situation may be made worse if, as is likely, acting and part-time judges are provided little or no administrative support.[10]

Short term judicial appointments may also create problems due to the associated lack of experience and familiarity that the acting or part-time judge will likely have with undertaking the duties of a judicial officer. The Law Institute of Victoria has pointed out that:

> *"The use of acting judges with limited experience may result in poorer decision making and an inevitable increase in appeals. This is problematic in the context of current high levels of congestion in the appeal courts.*
>
> *The LIV submits that care needs to be taken to ensure that acting judges are not used to reduce the number of required serving judges. If the use of acting judges becomes more than the exception, there is a danger of a second class system of justice emerging in Victorian courts where many judges may be inexperienced and not appropriately trained at the expense of appointing appropriately trained tenured judges."*[11]

The use of acting and part-time judges has traditionally been seen as a measure to temporarily replace permanent judges when they retire or are on extended leave. Relying on short term judicial appointments as a method to overcome chronic court delays is not a viable option for the above-stated reasons.

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[9] Ibid.
[10] Former Australian Bar Association president Robert Gotterson, cited by NSW Law Society Journal (1999) 37 (2) LSJ 52.
[11] Law Institute of Victoria, Litigation Lawyers Section and Criminal Law Section, *Submission of Acting Judges and Magistrates,* 7 September 2004.

The Law Council submits that a more suitable solution to court delays that does not compromise judicial independence would be for governments to fund the appointment of a sufficient number of permanent judges. Governments should not be tempted to make acting or part time appointments in order to avoid their responsibility to provide an adequately resourced, permanent, full-time judiciary.

As Justice Kirby has previously stated, overcoming the problems of judicial administration "by the use and expansion of exceptional devices such as acting appointments is no real alternative to the proper funding of a judiciary of adequate numbers and greater accountability, transparency and efficiency on the part of permanent judges".[12]

Jurisdictional issues, for example, the interface between the federal and state judicial system.

It appears that this term of reference is related to the potential creation of a 'national judicial framework', a topic currently being examined by SCAG.

In the SCAG communiqué of November 2008, it was noted that "Ministers agreed to establish a working group to consider options for developing a national judicial framework which could assist and improve the functioning of courts in Australia."

The development of a national court structure would not be possible without significant constitutional reform. However, the development of a national judicial framework would potentially be more achievable.

A national judicial framework, as envisaged by the current SCAG consultation, would have the following key components:

Phase 1:

- Judicial exchange program.
- A national judicial complaints scheme.

Phase 2:

- Developing matching federal, State and Territory legislation relating to:
  - the pre-requisites for judicial appointment,
  - tenure in office; and
  - retirement ages.

Phase 3:

- Developing a single structure or process for adjusting judicial salaries and allowances.
- Developing a common judicial remuneration package.

The objectives of a national judicial framework, as articulated by SCAG, would be directed at enhancing the administration of law and justice at a national level; facilitating nationally consistent standards of judicial decision-making and efficiency; providing opportunities for career enhancement for individual judicial officers; and promoting a more flexible, responsive and engaged judiciary.

The goals of judicial integration and a single court system in Australia have been debated extensively over the years. In the absence of constitutional amendment, these were

[12] The Hon Justice Michael Kirby AC CMG, Acting Judges . A Non-Theoretical Danger, Speech to the New South Wales Young Lawyers, Conference, 12 September 1998, p.6.

sought to be effected by the cross-vesting scheme, but this effectively collapsed in 1999. The full potential of judicial exchange would be best served if it was able to be married to effective jurisdictional exchange.

The Law Council's views on this issue were recently articulated in a submission to the SCAG consultation that is currently ongoing. A copy of this submission can be found at **Annexure B**. The Committee is invited to consider the Law Council's views as contained in this submission.

The judicial complaints handling system

Traditionally, judicial accountability is seen to be fully provided for by judges functioning in public, hearing both sides of the question, and providing reasons for their decisions (that in many cases may also be reviewed by other courts).[13]

All jurisdictions make provision for tenure until the maximum retirement age is reached, with removal from office by the Executive on an address by Parliament on the grounds of proved misbehaviour or incapacity. New South Wales, Victoria, Queensland and the ACT all require allegations of judicial misbehaviour or incapacity to be independently investigated before Parliament considers removal.[14]

Section 72 of the Australian Constitution provides that:

> *The Justices of the High Court and of the other courts created by the Parliament - (ii) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehavior or incapacity.*

The Federal Courts have each established effective informal complaints handling mechanisms with usually the head of the jurisdiction being ultimately responsible for deciding the response to a complaint.[15] The Law Council believes that these existing mechanisms of dealing with complaints have operated successfully.

The Federal Court, the Family Court and the Federal Magistrates Court have judicial complaints procedures which set out the procedure for dealing with complaints about Judges and Magistrates. The procedures recognize the constitutional limitations and safeguards with respect to such matters, and therefore do not provide a mechanism for disciplining a judge. The Chief Justice is nonetheless able to "to advise, warn and take appropriate administrative steps" in relation to alleged misconduct by a judge of the court.[16] For example, the Federal Magistrates Court's Judicial Complaints Procedure states that:

> *This complaints procedure does not, and cannot, provide a mechanism for disciplining a Federal Magistrate. It does, however, offer a process by which complaints about judicial conduct can be brought to the attention of the Chief Federal Magistrate and, if appropriate, the Federal Magistrate concerned, and it provides an opportunity for complaints to be dealt with in an appropriate manner.*

[13] ALRC Discussion Paper 62: *Review of the Federal Civil Justice System*, Chapter 3.
[14] SCAG Issues Paper, *National Judicial Framework*, December 2008.
[15] ALRC Discussion Paper 62: *Review of the Federal Civil Justice System*, Chapter 3.
[16] The Chief Justice of the High Court, Murray Gleeson, in an address delivered on 27 April 2002, cited by the Commonwealth Attorney-General's Department, in response to a question on notice from Senator Heffernan on 31 October 2005.

> *For constitutional reasons, the participation of a Federal Magistrate in responding to a complaint is entirely voluntary. Nevertheless, it is accepted that a procedure for complaints can provide valuable feedback to the Court and to its Federal Magistrates and presents opportunities to explain the nature of its work, correct misunderstandings where they have occurred, and, where appropriate, to improve the performance of the Court.*

The Law Council agrees with these sentiments and believes that the existing complaints mechanisms in the Federal courts have promoted judicial accountability in matters that do not give rise to appeals while also ensuring judicial independence.

It should also be noted that another mechanism of dealing with perceived recalcitrant judicial behavior is exposure of that behavior and peer-pressure. The transparency afforded by the publication of court data that demonstrates judicial performance through indicators such as sitting days, sitting times, numbers of outstanding judgments and periods of time for outstanding judgments places informal pressure on judicial officers to perform appropriately.

A proposed national judicial complaints handling scheme

Again, developments from SCAG are relevant to the current discussion. In the November 2008 Communiqué it was stated that:

> *Ministers, with the exception of NSW which has an existing judicial complaints system, asked the working group to identify options to receive and consider judicial complaints. A transparent, impartial and accountable system of judicial complaints handling has the potential to enhance public confidence in Australia's judiciary.*

SCAG is reportedly considering a proposal to establish a single national judicial body to hear complaints against both federal and state judges.[17] The proposal is that such a body would operate as a division of the National Judicial College of Australia, which would then model future education and training programs for judicial officers around problem areas identified in complaints.[18]

The proposed national judicial complaints body is reportedly being based upon the Judicial Commission of NSW (JCNSW), which has a role in both education and discipline. It is worth considering how the JCNSW operates in order to generally understand how a national complaints body would likely operate.

In the Australian Law Reform Commission's *Discussion Paper 62: Review of the Federal Civil Justice System,* the operation of the JCNSW was described as follows:

- In NSW, a complaint may be made by any member of the public (including another judicial officer) or referred by the NSW Attorney-General. On receiving a complaint in an appropriate form, the JCNSW is required to conduct a preliminary investigation. On the basis of this, the JCNSW may summarily dismiss the complaint; classify the complaint as `minor'; or classify it as `serious'. The JCNSW considers a complaint `serious' where, if substantiated, the grounds would justify parliamentary consideration of the removal from office of the judicial officer in

[17] See Supplementary Budget Estimates 2008-09 (October 2008), Attorney-General's Portfolio, Questions 14 and 15, accessible here: http://www.aph.gov.au/senate/committee/legcon_ctte/estimates/sup_0809/ag_qon/index.htm

[18] As stated by Queensland Chief Justice Paul de Jersey AC *Judging the judges: Do we need a national judicial complaints handling body?* Proctor, August 2008.

question. Where a complaint is considered `minor' it may be referred to the appropriate head of jurisdiction or to the Conduct Division.

- All serious complaints are referred to the Conduct Division, which comprises a panel of three judicial officers, or two judicial officers and a retired judicial officer. The Conduct Division must prepare a report to the Governor after investigating the complaint, setting out the Division's conclusions. In cases where a complaint is wholly or partly substantiated, and the Conduct Division is of the view that the matter may justify parliamentary consideration of the removal of the judge or magistrate from office, the Attorney-General must lay the report before both Houses of Parliament.

- The JCNSW ordinarily does not consider allegations of criminal conduct (for example, corruption), which are left to prosecuting authorities or the Independent Commission Against Corruption.

- The JCNSW investigates complaints but has no power to impose penalties or otherwise discipline judicial officers. Serious complaints may result in parliamentary action. Less serious matters may result in action by the head of the relevant jurisdiction, such as counselling or making new administrative arrangements to deal with the source of the problem. There is no provision for a judicial officer found to be performing unsatisfactorily - but perhaps not so poorly as to warrant outright dismissal - to be required to undertake a program of judicial education, but this could potentially be considered in a national scheme.

NSW has indicated that it does not intend to participate in the proposed scheme at this stage due the perceived success of the JCNSW, which has demonstrated an ability to identify judicial officers no longer fit for office. In 2006, for example, NSW Chief Justice Jim Spigelman, who leads the NSW commission, revealed that the mere threat of an investigation by the commission had led to the early retirement of six judges or magistrates in the past 20 years.[19]

The fundamental issue is how to balance the demand for greater accountability against the maintenance of the independence of the judiciary. It appears that the community's perception of judicial accountability now demands that there should be a procedure enshrined for receiving and investigating complaints against the judiciary. The Law Council believes the existing procedures adopted by the courts perform this function adequately, without incurring unnecessary cost or diverting judicial resources. As will be seen, the view of the Law Council is against a proposed national complaints handling system having regard to the various issues and obstacles discussed below. However, if a detailed model was presented that deals with all the potential problems, the Law Council would of course be willing to consider that proposal on its own merits.

Before the limitations of a national complaints system are examined it is necessary to first acknowledge some of the potential benefits that may arise from such a system.

Possible positives

It may be suggested that a national body would provide a single entry point for complaints that is separated from both the court and the executive government. "It is suggested that, absent such a commission, some complainants may be deterred by the current need to approach either the Attorney-General...or head of jurisdiction. Also, an inquiry by a

[19] Cited by *The Australian,* 20 June 2008, "Cause for Complaint".

properly constituted independent body could avoid suggestions of preferential treatment for the judiciary, thereby indirectly enhancing public confidence in the courts".[20]

Another possible benefit could be that, depending on the design of the mechanism, the national body could develop processes for dealing with complaints that do not warrant removal but that does demand some kind of response. As Queensland Chief Justice Paul de Jersey AC has stated:

> *"There is a spectrum of judicial behaviour warranting critical or adverse assessment, but not removal. It begins with discourtesy in the courtroom, such as impatience or brusqueness or inappropriate comment. It extends to unfairly criticising a witness, failing to give a fair hearing, and perceived bias. Then there would be unreasonable delay in delivery of judgement. Those are illustrative examples. Unless persistent or extreme, that sort of conduct would not ordinarily warrant removal from office, and there are at present adequate ways of dealing with it."*[21]

Justice de Jersey then goes on to state that judicial peer pressure or allocating further time out of court for judgement preparation may facilitate a resolution to these problems.

The Law Council considers that these benefits flow from the existence of an independent and developed system for handling complaints regarding judicial behaviour whether that system be national or state and territory based.

There are some significant obstacles that would need to be overcome before a national complaints body could be seriously considered. Furthermore, given the effectiveness of existing mechanisms, the Law Council does not see a need for a new complaints system to be considered. There have been few circumstances in recent history that would have benefited from the kind of mechanism described above. Even if the existing complaints mechanisms were inadequate, it is not clear that a national complaints system would necessarily be the best model to adopt as a replacement. Most seriously, however, are the potential constitutional limitations that a national complaints system may encounter.

Constitutional limitations

There does not appear to be any obvious constitutional power to establish a body to examine and report on complaints against federal judicial officers, particularly if the possible sanctions are extended to administrative sanctions short of removal. As discussed above, "removal of federal judges is the prerogative of the Governor-General in Council on an address from both Houses of the Parliament".[22]

Certain states appear to be in the same situation. In regards to the situation in Queensland, for example, Justice de Jersey has stated that "Neither the Commonwealth nor the Queensland Constitution provides for the administration of a sanction short of removal. In non-removal cases, would the commission report, as in New South Wales, to the head of the jurisdiction?" Again, it is difficult comment without having seen the proposed model.

The Law Council notes that in a 1999 Discussion Paper the ALRC proposed that an independent judicial commission, modelled on the Judicial Commission of New South Wales, be established to receive and investigate complaints against federal judges and

[20] Queensland Chief Justice Paul de Jersey AC *Judging the judges: Do we need a national judicial complaints handling body?* Proctor, August 2008.
[21] Ibid.
[22] Ibid.

magistrates.[23] However, in its final report the ALRC had moved away from this proposal. The final report, *Managing Justice: A Review of the Federal Civil Justice System,* concluded that:

> *In the course of the Commission's consultations, senior judges (including some heads of jurisdiction) cast serious doubt on the constitutional viability of establishing a standing judicial commission for the federal courts. Although the Commission believes that it is arguable that a judicial commission, with carefully drafted enabling legislation, could pass constitutional muster, it is inevitable that its status would be challenged upon its first use, and would become drawn into the controversy over the potential removal of a judicial officer - thus adding complexity and uncertainty to the proceedings rather than facilitating a smooth process.*[24]

The Law Council considers that even if a carefully constructed national judicial complaints body may be constitutionally possible its constitutional validity would be, and remain, so controversial that its legitimacy would inevitably be called into question. This would prevent a national complaints body from becoming an accepted mechanism of receiving and investigating complaints against the judiciary as its constitutional validity would be uncertain.

In its submission to the ALRC inquiry, the Federal Court of Australia stated that:

> *There are at least two fundamental problems with respect to the establishment of a judicial commission with general `jurisdiction' over complaints about the federal judiciary. The first involves Chapter III of the Constitution and the second, related to the first, involves the operation of the appellate process.*
>
> *Chapter III of the Constitution and the principles of independence of the judiciary that it reflects and supports, provide substantial limitations upon what can validly be done by way of the establishment and operations of a Judicial Commission. Secondly, where complaints concern essentially matters that (if they have substance) fall within the appellate jurisdiction of a court they must be dealt with in the appellate process. With some possible exceptions (presently irrelevant) the appellate process is the exclusive method for correcting judicial errors, including alleged errors by reason of matters such as bias or apprehended bias. Close analysis will reveal that the range of matters that, on the widest view, could permissibly be the subject of an inquiry by a body operating anywhere within the reach of Chapter III of the Constitution are limited indeed.*

In regards to this second point, it is clear that if the national complaints body were based on the JCNSW it would not review a case of judicial error, mistake, or other legal ground, as reviews of those matters are the function of appellate courts. As is stated in s.20(1)(f) of the *Judicial Officers Act 1986,* which guides the JCNSW on this issue, "*the JCNSW must summarily dismiss a complaint if it is of the opinion that the complaint relates to the exercise of a judicial or other function that is or was subject to adequate appeal or review rights".*

The Law Council's submission to the ALRC inquiry pointed to an added complication, stating that any judicial commission involving the federal courts would need to specifically exclude the justices of the High Court:

[23] Discussion Paper 62: Review of the Federal Civil Justice System, Proposal 3.5.
[24] At 2.271.

> *The justices of the High Court of Australia should be excluded expressly from any legislation establishing a federal judicial complaints body.*
>
> *This is because of the High Court's essential apex role in Australia's justice system. Given the High Court's role under the Commonwealth Constitution, the Law Council considers it singularly inappropriate that the High Court justices should be placed in a position where they may have to consider a justiciable complaint against one of their number, arising from a complaint made about that High Court judge to the federal judicial complaints body. Even worse, by analogy with the litigation [in relation to Justice Bruce and the JCNSW] the prospect of the High Court judicially reviewing the work of a federal judicial complaints body in relation to one of its own number, is too appalling to contemplate.*
>
> *The Law Council considers it imperative that the conduct of a High Court judge should remain firmly for sole consideration and scrutinisation by the two Houses of Parliament.*

On balance, it appears that these concerns remain valid. In addition to the absence of any clearly articulated requirement for a national complaints body, the constitutional difficulties that such a body would face further argue against any consideration of a national complaint system as is being considered by SCAG.

Other obstacles

The funding of a national judicial commission would also present an issue that would need to be overcome. It is likely that a judicial commission that involved all Australian jurisdictions would present a substantial cost to establish and run. Further, "the invariable human experience is that such bodies spawn bureaucracies".[25] Clearly this is a question that would need to be resolved before a national commission could be seriously contemplated.

Looking at the expenditure of the JCNSW as an example, it appears that 10% of its annual expenditure is directed at examination of complaints. Of a budget of $5,375,000 in 07/08, roughly $2 million was spent on judicial education, $2.5 million was spent on sentencing information, and $500,000 was spent on complaints examination.[26] The responsibility for funding would likely need to be shared by both the Commonwealth and the states and a suitable agreement would therefore need to be entered into.

Additionally, as Justice de Jersey has pointed out:

> *Apart from the cost, a practical concern attending the establishment of a new body is the likely generation of a host of unwarranted complaints, and disposition of the judicial time necessary to deal with them. A judge cannot afford to let an unjustified complaint go unanswered, and even answering a dressed up frivolous complaint can be consumptive of resources, dredging back through diaries, official records, files, transcripts, etc.*[27]

As an example, in the year 2006-07, the JCNSW received 53 complaints, of which 50 were dismissed. The vast majority of complaints received by a national body as

[25] Queensland Chief Justice Paul de Jersey AC *Judging the judges: Do we need a national judicial complaints handling body?* Proctor, August 2008.
[26] JCNSW Annual Report 2007-08.
[27] Ibid.

described above would therefore be unwarranted, thereby incurring unnecessary costs and diverting judicial resources.

Conclusion

The Law Council's view is that it does not support the introduction of a national judicial complaints handling system due to the potential constitutional issues that it may face, the apparent lack of any need for it and the fact that not all state's are yet willing to commit to such a body. The current mechanisms, whereby complaints are handled by the head of the relevant jurisdiction, appear to be functioning effectively. The Law Council is not aware of any clearly articulated policy requirement for the introduction of a national system, nor that a national complaints system would necessarily be the best model to adopt as a replacement to improve upon existing systems.

The constitutional limitations that such a body would face are serious and its legitimacy would inevitably be called into question upon first use. Furthermore, the absence of NSW precludes the establishment of a national body in any event.

The Law Council will, however, consider on its own merits any particular model which may be proposed which deals with the various difficulties identified above. In particular the Law Council looks forward to reviewing the particular model that is currently being considered by SCAG in detail.

Annexure A: Law Council of Australia Policy on the Process of Judicial Appointments

INTRODUCTION

From 1999 to 2002, Law Council policy processes resulted in a Judicial Appointments Policy, which was in effect from 2002 to 2008.

In November 2007, a new Federal Government was elected and subsequently announced changes to the previous Government's judicial appointments process.

The Law Council has considered its position regarding these changes through a Working Group appointed in March 2008.

This Policy results from consideration of the Working Group's recommendations by Directors at their meeting in September 2008.

The Policy affirms that judicial appointment should be a function of Executive Government. The Policy also affirms that, in addition to any statutory criteria for eligibility for appointment, the expected attributes for judicial appointment are as set out in Attachment A. The Policy then goes on to address the establishment of a formal Judicial Appointment Protocol (**Attachment C**), which outlines the judicial appointments process in the Federal Court, the Family Court, and the Federal Magistrates Court (hereafter referred to as the "Federal Courts").

POLICY

This Policy applies to the Federal Courts and to all levels of judicial office in that jurisdiction except for judges of the High Court of Australia. The High Court is in a unique position as the ultimate appellate court for Australia, and judicial appointments to the High Court are already subject to a statutory requirement for consultation prior to appointment (section 6 of the *High Court of Australia Act 1979*). The Policy is applicable to all other levels of judicial office in the Federal Courts as follows.

1. Judicial Appointment should be a function of Executive Government performed by, or upon the advice of, the Attorney-General and, subject to the following principles, discharged at the discretion of Executive Government.

2. In addition to any statutory criteria for eligibility for appointment, the expected attributes for judicial appointment are as set out in Attachment A.

3. The Attorney-General of Australia in consultation with the Chief Justice, chief judge and chief judicial officer of courts within the jurisdiction and the legal profession should establish and make publicly available a formal Judicial Appointments Protocol which outlines the judicial appointment process in the Federal Courts.

4. The Judicial Appointment Protocol should set out the skills, attributes and experience which candidates for judicial appointment are expected to possess as well as those professional and personal qualities which it is desirable that candidates for judicial appointment possess. The recommended "Attributes of Candidates for Judicial Office" are as outlined in **Attachment A**.

5. The Judicial Appointment Protocol should include a requirement that the Attorney-General personally consult a minimum number of identified office holders prior to the appointment of a judge or magistrate. The office holders that should be consulted at minimum are as outlined in **Attachment B.**

6. Personal Consultation between the Attorney-General and the specified office holders should involve an invitation to each office holder to submit names of suitable candidates whom the office holder (representing their organisation or institution) recommends, by way of nomination, be considered for appointment.

7. The Judicial Appointment Protocol should also acknowledge that the Attorney-General may consult such other persons as the Attorney-General thinks fit and state that wide consultation is encouraged.

8. The Judicial Appointment Protocol should state that all suitable candidates will receive consideration for appointment. The process will involve advertising for "expressions of interest" for a particular judicial appointment, so long as:

    (a) the advertising is undertaken in a way that does not diminish the standing of the court or jurisdiction concerned;

    (b) all expressions of interest and nominations are treated as and kept confidential, and they, and any record of them, are destroyed once the appointment has been made; and

    (c) it is acknowledged in the Judicial Appointment Protocol that advertising is auxiliary to personal consultation by the Attorney-General and not a substitution for that essential component of the process.

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Attachment A

Attributes of Candidates for Judicial Office

Legal Knowledge and Experience

1. It is necessary that successful candidates:

   a) will have attained a high level of professional achievement and effectiveness in the areas of law in which they have been engaged while in professional practice; and

   b) will possess either:

      (i) Sound knowledge and understanding of the law and rules of procedure commonly involved in the exercise of judicial office in the court to which they are to be appointed; or

      (ii) In the case of candidates with more specialised professional experience, the ability to acquire quickly an effective working knowledge of the law and rules of procedure in areas necessary for their work not covered by their previous experience.

2. It is desirable that successful candidates have court or litigation experience.

Professional Qualities

3. It is desirable that successful candidates possess the following professional qualities:

   a) intellectual and analytical ability;
   b) sound judgment;
   c) decisiveness and the ability to discharge judicial duties promptly;
   d) written and verbal communication skills;
   e) authority – the ability to command respect and to promote expeditious disposition of business while permitting cases to be presented fully and fairly;
   f) capacity and willingness for sustained hard work;
   g) management skills, including case management skills;
   h) familiarity with, and ability to use, modern information technology or the capacity to attain the same; and
   i) willingness to participate in ongoing judicial education.

Personal Qualities

4. It is desirable that successful candidates possess the following personal qualities:

   a) integrity, good character and reputation;
   a) fairness;
   b) independence and impartiality;
   c) maturity and sound temperament;
   d) courtesy and humanity; and
   e) social awareness including gender and cultural awareness.

Attachment B

Office Holders to be Consulted Personally by the Attorney-General of Australia

Prior to the appointment of a Federal judge or magistrate (including a Chief Justice or Chief Magistrate), the Attorney-General of Australia should personally consult the following office holders:

a) the current Chief Justice (or equivalent) of the Court or jurisdiction to which the appointment is to be made;

b) the Presidents of the Law Council of Australia and the Australian Bar Association;

c) the President of the Bar Association (or equivalent) of the State or Territory where the appointee will be assigned, or predominantly assigned, upon appointment;

d) the President of the Law Society (or equivalent) of the State and Territory where the appointee will be assigned, or predominantly assigned, upon appointment;

e) representatives of the Bar Associations and Law Societies of the other states and territories;

f) the Council of Australian Law Deans;

f) the President of Australian Women Lawyers;

g) the Chair, National Legal Aid; and

h) the Director, National Association of Community Legal Centres.

Attachment C

Processes to be Followed by the Attorney-General of Austraila in Federal Judicial Appointments

1. The Attorney-General of Australia will arrange for public advertisements in the national media seeking expressions of interest and nominations for Federal judicial appointments. It is not an essential requirement that candidates self-nominate. Potential candidates may either be nominated by third parties, or, if a selection panel (as referred to below) believes there is a more desirable candidate that has not applied or been nominated, the panel may approach and invite that person to submit their name.

2. The Attorney-General of Australia should undertake a thorough personal consultation with at least the individuals and professional bodies set out in Attachment B to this Policy.

3. A selection panel should be established by the Attorney-General to assess all applications and nominations against published criteria. The selection panel should consist of:

    a) the head of the court or jurisdiction to which the appointment is being made (or their nominee);

    b) a retired senior judicial officer or officers of the Commonwealth; and

    c) a senior official from the Attorney-General's Department.

4. The published criteria should be in accordance with Attachment A to this document.

5. The selection panel will assess all applications and nominations against the published appointment criteria and develop a shortlist of suitable candidates. The panel will reserve the right to conduct, where thought appropriate, an interview with a candidate to assist in this process, but it is not obliged to do so.

6. At the completion of its deliberations the panel will provide a shortlist of recommended suitable candidates to the Attorney-General of Australia, who will be expected to propose to Cabinet the actual appointee from amongst those so-identified suitable candidates.

Annexure B: Law Council Submission to SCAG Consultation on a Proposed National Judicial Framework

National Judicial Framework

Standing Committee of Attorneys-General

20 April 2008

Introduction

The following submission was produced in collaboration with the Federal Litigation Section of the Law Council of Australia.

The introduction to the SCAG issues paper sets out the genesis of the paper and its purpose, namely to examine the feasibility of a national judiciary and to identify an appropriate model and the key benefits of such a model.

The goals of judicial integration and a single court system in Australia have been debated extensively over the years. In the absence of constitutional amendment, these were sought to be effected by the cross-vesting scheme, but this effectively collapsed in 1999.

The current paper proposes a "framework" which has a number of components: common legislative provisions for pre-requisites to appointment, tenure, retirement and remuneration, a national judicial complaints system and a "national judicial exchange". The last two of these are being considered in separate enquiries currently before SCAG.

The issues paper recognises that, putting to one side the accrued jurisdiction of Federal courts, those courts cannot be vested with State jurisdiction. Both Federal courts and State courts maintain areas of completely exclusive jurisdiction. The idea of a national judicial "structure" is recognised as not practically achievable and the alternative of a national judicial framework is proposed. As discussed below, the change of name may not solve the constitutional problems and the utility and practicality of the less ambitious framework concept is uncertain.

The benefits of the proposed changes, as currently articulated, focus largely on the professional and personal benefits to judges; the paper does not sufficiently explain how they will result in improvements to the administration of justice.

The paper does not discuss in any detail the reasons for establishment and maintenance of courts of specialised jurisdiction and why court processes may properly and reasonably differ. Any implementation of the proposals raised in the SCAG Paper must be done so as not to undermine some of the positive effects of specialisation.

The SCAG issues paper is also at a level of generality that does not deal with the practical issues involved in judicial exchange between courts of different jurisdictions. This may be simply because the current paper is directed to other aspects of the "framework". However it is appropriate in this submission to refer to some issues surrounding judicial exchange and to emphasise that, as we observe below, careful and diplomatic management of the framework will be essential if it is implemented.

The Australian Court System (Section 2)

The failure of cross-vesting

Section 2.1 of the SCAG issues paper refers to the existing integration of the State and Federal courts and refers to the system as 'an interlocking structure of State and Federal courts in which State courts are now invested with federal jurisdiction…'. Of course the integration or interlocking which exists is far from complete or comprehensive. The cross-vesting legislation enacted in 1987, once thought to be "a significant landmark on the road

towards the creation of a unitary judicial system in Australia"[28] continues to vest State courts with federal jurisdiction except in matters where the Federal courts have exclusive jurisdiction. However, the result of *re Wakim; ex parte McNally* (1999) 198 CLR 511 is that except in an incidental fashion where Federal courts exercise accrued jurisdiction, it is not possible for state jurisdiction to be vested in federal courts. Indeed, Sackville J has said of *Re Wakim* that it "sounded the death-knell for the cross-vesting scheme"[29]. There is a jurisdictional gap which precludes many proceedings from being able to be commenced in either jurisdiction. The national judicial framework promoted in the paper does not fill those jurisdictional gaps left in the wake of *Re Wakim*.

As noted above the goals of the current SCAG paper seem less ambitious. This may reflect the view, exposed in the paper, and held by commentators generally, that a unitary integrated Australian court system is something of a 'constitutional fantasy'[30] which existing courts, and executives and parliaments for that matter, may see as a threat to their independence.

Recognising that this is the case, the underlying premises behind that kind of reform, however, do provide an appropriate context in which to assess the utility of a national judicial framework/national judiciary as proposed in the SCAG issues paper. For this reason it is useful to consider why the current court system is organised in the way that it is.

Reasons for the establishment of the Federal Court

Australia has general courts, specialist courts, state courts and federal courts. State courts are entrenched in state constitutions. The history of the establishment of Federal courts is briefly canvassed in the issues paper at 2.1 but what, perhaps, is not given sufficient emphasis are the reasons for developing specialist Federal courts.

For example:

- the 1971 Kerr report asserted as a proposition of intrinsic merit that 'judicial review of Commonwealth officers should be by a Federal and not a State court'[31]; and

- that it was 'very desirable that there should be developing expertise in the reviewing court in relation to Commonwealth administrative decisions'[32]; and

- it asserted that 'there is no way of knowing whether the States would approach the matter of administrative law for State purposes in a uniform way or whether the courts would adopt uniform approaches. It is obvious that a uniform approach would be desirable for federal purposes'[33]. Indeed in the second reading speech for the Federal Court of Australia Bill, the Attorney-General said 'Uniformity of

[28] B Opeskin, "Cross-vesting of Jurisdiction and the Federal Judicial System: in B Opeskin and F Wheeler (Eds), *The Australian Federal Judicial System*, Melbourne University Press, Carlton, South Victoria, 2000, p 299.
[29] Justice Ronald Sackville "The emergence of federal jurisdiction in Australia' (2001) *The Australian Bar Review* 133, 134
[30] Opeskin, '*Cross Vesting of Jurisdiction and the Federal Judicial System'* in Opeskin and Wheeler (eds) The Australian Federal Judicial System, MUP (2000) at p 333
[31] Commonwealth Administrative Review Committee Report, Parliamentary Paper No 144 of 1971 paragraph 242
[32] Commonwealth Administrative Review Committee Report, Parliamentary Paper No 144 of 1971 paragraph 243
[33] Ibid

interpretation of major special areas of federal jurisdiction will be enhanced by the Full Court of the Federal Court of Australia'[34].

- In an article entitled "The Australian Judicial System – The proposed new federal superior court"[35] Sir Garfield Barwick explained that the major reason for setting up a federal court was that there would, as a rule, be something special about a class of matters that would call for the jurisdiction of a federal rather than State court.

In considering the benefits and objectives of integration and the development of a National Judicial Framework it is relevant to examine whether any of these reasons remain current. We note that the current proposal of judicial exchange would not necessarily undermine the specialist jurisdictions of Federal courts and State courts. However, what is demonstrated above is that there may be still valid reasons, which have been debated over many years, for the continued functioning of courts of specific or exclusive jurisdiction as specialist courts. There is at least the risk that judicial exchange may undermine that specialisation for the reasons which follow.

Specialist courts, particular experience and risks involved in exchanges

A court is constituted by individual judges with specific individual experience in particular areas of law. Within a court, a judge may only sit in one division or on only a handful of panels. While some areas of expertise or specialisation (for example, judicial review or commercial law) could be applied with merit in a different jurisdiction, others would not translate across jurisdictions as easily. Insofar as a reason for conferring exclusive jurisdiction on a court is to assist it in developing an expertise, judicial exchange, unless done in a way that is mindful of the relevant expertise of a court, has the potential to undermine confidence in the specialist expertise of the Court.

It is important to demonstrate that any benefits to litigants are not merely illusory. If a goal of judicial exchange is to use the skill and experience of a judge from one jurisdiction in another jurisdiction, then the skills and experience must be relevant to the matter on which they are asked to adjudicate in the visiting jurisdiction. The judge should be chosen carefully and by agreement between the submitting and receiving courts and should be able to maintain the existing confidence there is in the judiciary that he or she is visiting. A failure to do this could create a perception that litigants appearing before judges on exchange are being used for judicial training and professional development purposes. It may be desirable also that the selection process and agreement referred to not be so formalised as to give rise to potential embarrassment. If the matter was handled between Chief Justices it is probably less likely that there would be a problem in this regard. Interested judges could simply express their interest but the decision would ultimately be left to their Chief Justice who could liaise with the Chief Justice of the Court to be visited. It remains to be seen how burdensome the administration of the scheme may become.

National Judicial Framework – Objectives as Articulated (Sections 3.1 and 3.2)

The introduction highlights themes of **consistency** and **uniformity in the provision of judicial services** and the **movement of judicial officers between jurisdictions**.

A general comment is that it is not clear what 'greater consistency and uniformity in the provision of judicial services' is meant to mean - or that such consistency is necessarily desirable as an end in itself. Different kinds of cases merit using different judicial

[34] Commonwealth, *Parliamentary Debates,* House of Representatives, 21 October 1976, 2113 (R J Ellicott, Attorney-General)
[35] Barwick G, 'The Australian Judicial System – The proposed new federal superior court' (1964) 1 Federal Law Review 1 at 3

approaches. Some differences between courts may be simply a result of courts having developed in isolation of each other and deepened parochialisms but it must also be recognised that there are significant, useful and perhaps necessary legal and procedural differences in the approach to be taken, for example, to a dispute over a will heard in a Supreme court, a tax appeal heard in the Federal court and a "slip and fall" case heard in a District or County court. The point we would make is that differences in 'the provision of judicial services' may not necessarily be unjustified.

Those objectives listed in section 3.1 which are fairly uncontroversial – i.e. 'providing opportunities for career enhancement for individual judicial officers' and 'promoting a more … engaged judiciary' are judge-centric. The objectives which are focused on litigants or on the confidence in the judiciary generally – i.e. 'enhancing the administration of law and justice at a national level' or 'facilitating nationally consistent standards of judicial decision-making and efficiency' are not given any real content. The realisable benefits of the proposal with regard to these broader objectives of enhancing the administration of law and justice may be seen as uncertain without elaboration of how the scheme would work.

Presumably, facilitating nationally consistent standards of judicial decision-making could be achieved by greater referencing of State court authorities by Federal Courts and *vice versa*, an outcome which could be facilitated by judicial exchange. Judges on exchange in a visiting court would be more exposed to the jurisprudence of the visiting jurisdiction because practitioners would be more likely to cite those authorities. Judges more directly exposed to the jurisprudence of other jurisdictions are more likely to see the relevance of that jurisprudence to their own jurisdiction.

Again, this highlights the importance of there being a relevant relationship between the home and visited jurisdictions. It is difficult, for example, to see the advantage in placing a judge who has practiced exclusively in family law to sit on tax appeals or a judge who has never conducted a jury trial proceeding to do so with no instruction. However, the benefits of Federal Court judges sitting on the Land and Environment Court (essentially a court of administrative law) and *vice versa* could be advantageous for the jurisprudence of both courts. Similarly, expertise in commercial law may be interchangeable between the Federal Court and the various Supreme courts.

Procedural benefits of exchange

One of the first potential benefits referred to is the identification and development of best practice standards in court administration across jurisdictions. Subject to the earlier comments which acknowledge that there may be relevant differences between court practices for good reasons, we agree that there is merit in exposing judges to different types of case management systems and so forth.

Effective allocation of resources between courts

We have already commented on the need for there to be a relevant relationship between the case types that a judge usually sits on and those which they may sit on during an exchange. Putting those comments to one side, another issue which arises in the effective allocation of resources between courts is funding and the process for allocating judges.

On the issue of funding, an obvious reason why a court in a particular jurisdiction may be under-resourced is that the executive government has decided not to make available funding for improvements to court administration or to appoint new judicial officers. If such a court is then asked to pay the salary of a judge from another jurisdiction to assist to address its workload, this will not address the lack of funding unless courts with bigger budgets are to be asked to "subsidise" courts with insufficient funding.

These are issues which have been considered before in other contexts. For example, for Federal Court judges who also hold commissions as judges of the ACT Supreme Court or as judges on international courts, arrangements are made by the Chief Justice placing limitations on the time which can be spent on work in other courts and who pays for stipends and travel costs. The salaries continue to be paid by the Commonwealth.

Although it is contended that judicial exchange would have the potential for dealing with resourcing issues, careful consideration will need to be given to how exchanges will be funded, along with other practical issues such as the arrangements for determining when an exchange may be appropriate and who is selected.

Even if levels of funding were no issue and it was a simple issue of meeting demand, it is clearly undesirable to establish a court system that divides political responsibility for its administration between several executives and parliaments.[36] The financial issues of judicial exchange involved in the framework concept need serious consideration.

Another issue which may arise concerns the unequal demand that may occur for exchanges to some jurisdictions. For example, on the one hand because of remoteness and on the other because of the perceived attractiveness of a particular jurisdiction. Issues such as these serve to highlight the practical difficulties that are likely to arise in the administration of any exchange scheme.

Components of a National Judicial Framework (Section 3.3)

National Judicial Exchange and Judicial Complaints Schemes

These two issues are currently under consideration by SCAG in separate projects. Apart from the above general remarks that are relevant to the concept of a national judicial framework, further detailed discussion of these issues is unnecessary in response to the current issues paper.

Appointment pre-requisites, tenure and retirement

The current 'requisite qualities for appointment' to the Federal Court have been articulated by the Attorney-General in an information sheet. They are general qualities which could apply equally to judges of any jurisdiction or specialisation. In our opinion this process has led to increased confidence in the judiciary by adding transparency to the appointment process. However, we are not sure that it is necessary to give such requirements the force of law. It would be a simple matter for SCAG to develop an agreed guideline which could apply in all jurisdictions. As noted in the conclusion to the SCAG issues paper, there should not be any changes to appointment practices, however a common guideline may improve perceptions of transparency. The appointments process that the Law Council favours is published on the Law Council's website.[37]

We also note that it is unclear how creating a consistent guideline for the appointment process in different jurisdictions will facilitate judicial exchange. The issue really is which is the best process to ensure the selection of the best qualified judges in each jurisdiction, so as to encourage acceptance by other courts of the standing and ability of the judge chosen. The system of exchange simply will not work if the prospective visited court does not have full confidence that the visitor will contribute to the administration of justice at the level sought to be achieved by that court. Though general requirements can be identified for judicial appointments it will not and should not change the appointment process which

[36] Opeskin, '*Cross Vesting of Jurisdiction and the Federal Judicial System'* in Opeskin and Wheeler (eds) The Australian Federal Judicial System, MUP (2000) at p 333

[37] http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=01E4B35C-1C23-CACD-22F8-3E6310EB5592&siteName=lca

should focus on an appointee's previous experience and their suitability for appointment to the particular court.

Tenure and retirement

Although minor differences in tenure are probably of no great significance in terms of the maintenance of confidence in the judiciary or the promotion of excellence in the administration of justice, it is difficult to disagree with the proposition that it would be desirable for there to be a consistent approach to tenure. At the same time, it is also difficult to imagine a constitutional amendment being passed to increase the age of federal judges or that relevant state governments would decrease the retirement age for newly appointed Supreme Court judges.

We doubt that the lack of uniformity in this area is of great significance and consider that the real cause for what many regard as an unhealthy "competition" between courts for judges, and of the desire that individual judges may have to move courts for the 'wrong' reasons, lies in the very important area of remuneration. We deal with this further in the next section.

Uniform remuneration structures

The introduction of legislation applying a surcharge levy on the superannuation of high-income earners demonstrates the effect of introducing "competition" into the curial sphere in a way that is unhealthy. Federal Court judges appointed after the commencement of the legislation, which effected a levy on judicial pensions, will receive a reduction in benefits paid to them on retirement under the *Judges' Pensions Act 1968* (Cth). The equivalent legislation seeking to apply a surcharge on the superannuation of State judges was successfully challenged by a State judicial officer in the High Court (as discriminating against the states of the Commonwealth and placing a particular disability or burden upon the operations and activities of the states)[38]. The *Judges' Pensions Act 1968* (Cth) and the *Superannuation Contributions Tax (Assessment and Collection) Act 1997* (Cth) continue to apply to a 'judge' within the meaning of the first Act, such that the superannuation contributions surcharge is payable on a member's surchargeable contributions for the financial year that began on 1 July 1996 or a later financial year that ends before 1 July 2005 (see s 7 of the latter Act). The net effect was that those Federal Court judges who would otherwise face a reduction in their benefits on retirement can avoid that outcome by moving to a state court. This indeed has occurred on several occasions. Although this situation could be said to have promoted judicial exchange of sorts, such movement was not undertaken to achieve objectives of the kind identified in the proposal.

A crucial step towards creating uniformity in judicial remuneration between jurisdictions is the removal of the current anomaly which sees a surcharge applied to judicial pensions to those judges of the Federal courts and the Tasmanian and Territory Supreme Courts appointed after the introduction of the *Superannuation Contributions Tax (Assessment and Collection) Act 1997 (Cth).*

We also refer to the fact that although most judges are part of a non-contributory defined benefit scheme, Tasmanian judges are not. New Zealand judges appointed after 1992 are in the same situation and anecdotal evidence from that country suggest that this has resulted in difficulties attracting candidates to the bench and retaining current judges. As

[38] *Austin v Commonwealth* (2003) 215 CLR 185

noted by Blow J of the Supreme Court of Tasmania "Judicial independence will not be promoted if a judge needs to have an eye on his or her next career move"[39].

At the very least, all courts in Australia should provide their judges with a non-contributory defined benefits pension.

In principle it is highly desirable for there to be consistency between judicial remuneration packages and, at least at first blush, there would seem to be some efficiency in having all judicial remuneration determined by a common body. However, as with the judicial exchange program, this suggestion does not acknowledge the political reality that judges salaries in different jurisdictions are paid from different purses. It also does not account for the different types of work and work loads of different courts. For instance, some judges will be required to travel more than others, some to remote locations (e.g. native title hearings).

Further, Australian jurisdictions will need to retain their remuneration tribunals for other purposes. In those circumstances it is difficult to see what efficiencies are to be made by having one tribunal determine all judicial salaries and allowances.

We note, however, that the pegging of salaries or the "85% rule" should be retained and perhaps formalised into a common guideline for each remuneration tribunal to follow. As with the requirements of judicial appointments we do not see the need for such a guideline to be given the force of law.

Mutual recognition and concurrent appointment (Section 4)

The issues paper refers to a paper presented at the July 2008 SCAG meeting which raise the possibility of achieving a national judiciary through the development of mutual recognition legislation.

The current issues paper recognises that each of the mechanisms proposed to promote integration - mutual recognition and concurrent appointment - face very considerable difficulty.

The most fundamental barrier to a mutual recognition scheme which means that it must fall at the first hurdle is that for judges to carry out their offices they must be appointed and mutual recognition proceeds on the premise that appointment in each jurisdiction will not be necessary, rather, that appointment to one jurisdiction will, by agreement be recognised in another jurisdiction.

More specifically, in so far as mutual recognition would seek to effect State court judges being recognised as judges of federal courts, this will not meet the requirement in s 72 of the Constitution that Chapter III judges be appointed by the Governor-General in Council. Any mutual recognition scheme which did not involve the valid appointment to a Federal court by the Governor-General would be ineffectual.

The validity of a mutual recognition scheme which sought to effect Federal court judges being recognised as judges of State courts would also have to involve the valid appointment of the judge under the State legislation. For example, in New South Wales, the Governor may appoint a 'qualified person' as an acting judge (s 37 of the *Supreme Court Act 1970* (NSW)) or as a judge (s 26). Under that Act, a qualified person includes a current or former judge of the Federal Court of Australia. In this respect, there would not

[39]Hon Justice Alan Blow, Supreme Court of Tasmania, *'Judicial pensions and superannuation'* paper delivered at the Judicial Conference of Australia in 2004.

appear to be any statutory bar to the appointment of a Federal court judge as a State court judge, subject to the comments below.

Any such appointment or appointments would have to avoid changing the character of the State Supreme Court in such a manner that it no longer answered the description of a "court" in a Chapter III sense. For a body to answer the description of a court it must satisfy the minimum requirements of independence and impartiality (*Forge v ASIC* (2006) 228 CLR 45 at [41]). Also, no function could be validly conferred upon the appointed judge where the exercise of that function would be incompatible with either the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power (*Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 16-20). Although *Re Wakim* (1999) 198 CLR 511 was a case involving issues of vesting State jurisdiction in the Federal Court, that decision suggests a possible argument that it would be a threat to judicial independence and therefore incompatible with the Chapter III tenure provisions for federal judges for those judges to take on temporary appointments to a State or Territory court.

Another related issue is the exercise by Supreme court judges of administrative functions, which may, if conferred or exercised by Federal court judges, be incompatible with the judge's performance of his or her judicial functions or with the proper discharge by the Federal judiciary of its responsibilities exercising judicial power. For example, full-time membership of a Tribunal is not incompatible with the holding of judicial office. Whether administrative functions performed by Supreme court judges, such as issuing search warrants and undertaking reviews of sentencing decisions, are incompatible is a matter which would need to be examined more closely or determined by a judge on a case by case basis.

Conclusion

The proposal is aimed only at an aspect of integration (judicial exchange) but not all aspects (i.e. jurisdictional exchange). Accordingly, any impact may be relatively modest.

As articulated, the advantages seem largely judge-centric rather than practically directed to material and worthwhile changes to the way that justice is administered.

Even assessed on this basis there are practical issues which will require careful consideration. In addition there are some more fundamental questions which will need to be answered in relation to the various possible mechanisms proposed to effect judicial exchanges.

While there may be some benefits for the administration of justice arising form a carefully designed protocol for judicial exchange the dangers of weakening the system and undermining confidence in the judiciary are real.

If the proposals are introduced it may be necessary to start slowly and at appellate level, with agreement between particular courts to ensure that visiting judges are likely to be able to contribute to cross-fertilisation.

Annexure C: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.