THE JUDICIAL CONFERENCE OF AUSTRALIA

Chair: Justice Ronald Sackville

Judges' Chambers
Federal Court of Australia
Queens Square
SYDNEY NSW 2000
Tel: 02 9230 8417
Fax: 02 9230 8997
Email: pa.sackvillej@fedcourt.gov.au

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The Hon Rob Hulls, MP
Attorney General of Victoria
Attorney General's Department
GPO Box 4356QQ
Melbourne Vic 3001

Facsimile: 03 9651 0556

Dear Attorney

I am writing to you on behalf of the Judicial Conference of Australia ('JCA') to express concern about the proposed legislation introduced into the Victorian Parliament on the topic of acting Judges.

The JCA would like to have had a full opportunity to comment on the legislation, but understands that the text of the Bill is not yet available. Newspaper reports, however, suggest that the intention is to provide for the appointment of acting Judges for a term of up to five years, so as to create a 'pool of Judges' from which selections may be made from time to time to hear and determine cases.

There is a substantial body of opinion among Australian Judges that the use of acting Judges is inconsistent with the principle of independence of the judiciary, except in very limited circumstances. The JCA understands that the Victorian Judges and Magistrates hold that view and have expressed their opposition to the proposed legislation.

The JCA acknowledges that the legislation of the States and Territories makes provision for the appointment of acting Judges. It is, however, important to appreciate both the limitations contained in the legislation itself and the practical constraints that affect the way in which the legislation is administered. In this respect, the proposed Victorian legislation appears to go well beyond the practice in other

Australian jurisdictions. In doing so, it may well pose a significant threat to the principles underpinning judicial independence even if one accepts the proposition that the appointment of acting Judges, of itself, does not necessarily threaten judicial independence.

The Department of Justice's Discussion Paper on *Acting Judges* (July 2004) stresses the importance of ensuring the Judges operate and are seen to operate impartially and in an environment which is free of pressures which could influence them to make a decision contrary to their conscience (Section 2.1). The Discussion Paper does not make any firm recommendations, but does not rule out a system of acting Judges. However, there are some significant matters that are either overlooked in the Discussion Paper or not fully explained. The JCA suggests that these matters should be taken into account very carefully before any final decision is made to enact the proposed legislation.

First, the proposed Victorian legislation apparently contemplates the appointment of acting Judges for a term of up to five years. The legislation governing the appointment of acting Judges to State and Territory courts, generally speaking, limits the term of appointment to a maximum of six or twelve months. This reflects the obvious legislative intention that acting Judges should be appointed only to deal with particular listing difficulties and, even then, only for a short period. The particular difficulties contemplated by the legislation presumably include the need to address a temporary backlog of judicial work; the extraordinary demands created, for example, by a particularly long criminal trial; and the special problems associated with cases that require 'the importation' of a Judge (as happens from time to time because of the identity of the parties to a particular dispute).

The only State that permits the appointment of an acting Judge to a Supreme Court for a term longer than twelve months is Tasmania. However, the *Supreme Court Act 1887* (Tas), s 3, provides for the appointment of an acting Judge to deal with

> '*a situation of a temporary nature [that] has arisen, or is likely to arise, in which it is necessary or desirable in the public interest [to make an appointment]'.*

Plainly, the object of the legislation is to deal with a 'temporary situation' that requires a short-term solution. The Tasmanian Act could not be used, for example, to create a large and continuing 'pool' of acting Judges from which selections could be made from time to time.

In Western Australia, s 11 of the *Supreme Court Act 1887* provides for the appointment of an acting Judge '*where a Judge is, or is expected to be, absent from duty*'. This provision is plainly intended to overcome a temporary difficulty occasioned by a specific absence from duty. Auxiliary Judges may be appointed under s 11AA of the *Supreme Court Act 1887,* but an auxiliary Judge must be a retired Judge, whose appointment is for a period not exceeding twelve months.

Secondly, the legislation providing for the appointment of acting Judges is, in practice, administered very cautiously in other States. Indeed, there is a clear trend towards restricting both the circumstances in which acting Judges can be appointed and the range of persons regarded as appropriate for appointment. In particular, there is a trend towards appointing only retired Judges as acting Judges of the Supreme

Courts. This avoids the difficulty of appointing practitioners as acting Judges in circumstances when they are likely to return to practice after their appointment or even to maintain their practice in some form or other during their appointment. The problems include the perceptions of litigants who may believe that a former acting Judge who has returned to practice is receiving favoured treatment from the court when he or she again appears as an advocate.

In South Australia, only retired Judges have been appointed as acting Judges since 1989. In Tasmania no acting Judge has been appointed to the Supreme Court since 1976. In Queensland, the last appointment of an acting Judge to the Supreme Court was in 1992 (the appointment being that of a serving District Court Judge).

New South Wales is the jurisdiction which, in the past, has made the most extensive use of acting Judges. However, the practice in that State has changed significantly in recent years. Although it was once the case that appointments on an acting basis were made to the Supreme Court from the ranks of legal practitioners, this is no longer the position. The only acting Judges now appointed to the Supreme Court are retired Judges. Even then, retired Judges who are active mediators are not appointed in order to avoid any suggestion that the independence of the acting Judge or the Court might be impaired. Any appointments are made in close consultation with the Chief Justice. Moreover acting Judges are not regarded as a substitute for the appointment of Judges to deal with the permanent case load of the Court.

The District Court of New South Wales has also altered its practice materially, so far as acting Judges are concerned. Until about three years ago, legal practitioners were frequently appointed as acting Judges. Since that time, however, only retired Judges or retired practitioners have been appointed. The only exceptions to this practice are the appointments of several academics, who are not in private legal practice. The change was made because of concerns about the perceived independence of acting Judges and the need to preserve both the reality and appearance of impartiality in adjudication.

This necessarily brief account indicates that the legislation in Victoria, if implemented in the manner that is apparently intended, will depart markedly from the practices adopted elsewhere in Australia. It seems somewhat incongruous for this development to be contemplated having regard to the terms of the Attorney-General's *Justice Statement* of May 2004, which emphasises the need to maintain the traditional protections of judicial independence, including security of tenure.

The JCA's concern would be heightened if the institution of acting Judges was to be used in Victoria as a means of assessing the suitability of candidates for judicial office. Might there not be a perception, for example, that the Government was assessing the attitudes of an acting Judge towards sentencing? If an acting Judge under consideration for a permanent appointment decided a controversial case in favour of the Government, might there not be a suspicion in some quarters, however ill-founded, that the decision was influenced by a desire to secure the permanent appointment?

While I am sure that you are alive to the constitutional issues that may be associated with the appointment of acting Judges, it is perhaps worthwhile noting that there are

some unresolved questions. The High Court has held that s 72 of the Constitution, which prevents the appointment of acting Judges for fixed terms to federal courts, does not apply to the Supreme Court of the Australian Capital Territory. Accordingly, there is no objection to the appointment of an acting Judge to hear a particular criminal case: *Re Governor, Goulburn Correction Centre; Ex parte Eastman* (1999) 200 CLR 322. However, in *NAALAS v Bradley* (2004) 206 ALR 315, the joint judgment pointed out (at 326) that:

> '*[m]uch … turns upon the permitted minimum criteria for the appearance of impartiality'*.

Their Honours also observed that no question had arisen in *Eastman*:

> '*respecting the effect upon that appearance of impartiality [of] acting rather than full appointments* ***which is so extensive as to distort the character of the court concerned****'*. *(*Emphasis added*.)*

It follows from these observations that legislation authorising the appointment of acting Judges to State Courts might give rise to constitutional questions if the appointments authorised by the legislation were, or could be, so extensive 'as to distort the character of the court concerned'. Without access to the text of the proposed legislation, it is of course not possible to assess whether any constitutional issue is likely to arise. The important point for present purposes, however, is that the High Court has recognised that the appointment of acting Judges, in some circumstances at least, may give rise to questions as to whether the court concerned is perceived as truly impartial and independent.

Since these are important issues, the JCA would be grateful for the opportunity to make more detailed submissions once the text of the legislation is publicly available. I hope that the Bill will lie on the table until that opportunity is provided. I would be happy to provide any further information you think might be helpful or to discuss this matter with you.

Yours sincerely

JUSTICE RONALD SACKVILLE
CHAIR