COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE

Reference: Australia's judicial system and the role of judges

MONDAY, 13 JULY 2009

PERTH

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SENATE LEGAL AND CONSTITUTIONAL AFFAIRS

REFERENCES COMMITTEE

Monday, 13 July 2009

Members: Senator Barnett *(Chair)*, Senator Crossin *(Deputy Chair)*, Senators Feeney, Fisher, Ludlam and Trood

Participating members: Senators Abetz, Adams, Back, Bernardi, Bilyk, Birmingham, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Eggleston, Farrell, Ferguson, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Lundy, Ian Macdonald, Marshall, Mason, McEwen, McGauran, McLucas, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Sterle, Troeth, Williams, Wortley and Xenophon

Senators in attendance: Senators Barnett, Crossin, Feeney, Fisher, Ludlam

Terms of reference for the inquiry:

To inquire into and report on:

Australia's judicial system and the role of judges, with particular reference to:

(a) procedures for appointment and method of termination of judges;

(b) term of appointment, including the desirability of a compulsory retirement age, and the merit of full-time, part-time or other arrangements;

(c) jurisdictional issues, for example, the interface between the federal and state judicial system; and

(d) the judicial complaints handling system.

WITNESSES

Committee met at 2.06 pm

MURRAY, Justice Michael John, Acting Chief Justice, Supreme Court of Western Australia

CHAIR (Senator Barnett)—This is the third hearing of the Senate Legal and Constitutional Affairs References Committee inquiry into Australia's judicial system and the role of judges. This inquiry was referred to the committee by the Senate on 16 March. In conducting the inquiry, the committee is required to have particular reference to:

(a) procedures for appointment and method of termination of judges;

(b) term of appointment, including the desirability of a compulsory retirement age, and the merit of full-time, part-time or other arrangements;

(c) jurisdictional issues, for example, the interface between the federal and state judicial system; and

(d) the judicial complaints handling system.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence to the committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. The committee prefers all evidence to be given in public but under the Senate's resolutions witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice that they intend to give evidence in camera. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may also be made at any other time. I ask people in the hearing room to turn their mobiles off or to silent. I ask witness to remain behind for a few minutes at the conclusion of the evidence in case the *Hansard* staff need to clarify in terms of reference.

I welcome the Hon. Justice Michael Murray, who is the Acting Chief Justice for the Supreme Court of Western Australia. With your busy schedule, I thank you very much for giving of your time to be with us today at this Senate hearing. If you wish, you may make an opening statement, after which senators will be invited to ask questions.

Justice Murray—I saw your instructions to witnesses that you would like them to talk for five minutes or thereabouts. I wrote a paper for you, which I am sorry I was not able to get to you earlier. I have left a copy with the secretariat. No doubt that can be copied, so far as it is of interest, and read later. In that document I addressed the various issues raised in the terms of reference. The judicial appointment process, so far as this state is concerned, is one which is handled in what might be regarded as traditional terms.

But the Chief Justice, Wayne Martin, has during his term of office made submissions to government for the creation of a judicial commission. That is a commission which would be essentially made up of the heads of jurisdiction. One of the tasks that would fall to that commission, in his view, is the appointment of judges.

To my mind, the processes do not seem to me to be of great importance in the way they are structured, provided they give you access to appropriate candidates and provided that the tap into the political process is one which involves a degree of accountability at that end. By that I mean that—as is in fact the case and has been the case for many, many years, all through my time in the profession—the Attorney's recommendation to cabinet, from which a choice is made that will go through to an appointment by the government with the advice and consent of the executive council, is based upon a series of recommendations, or concerns, resulting in names being put forward. Those inquiries are conducted by the Chief Justice. The names are provided, with references to the qualities of the people concerned which, in the opinion of the Chief Justice and the others consulted, result in the person being able to be respectively put forward as a candidate for judicial office, and it is from that list that the appointment is made. To my recollection, it is a rare occasion when there is any addition sought to be made by an Attorney to that list, but of course it can happen.

The structure of a judicial commission, it is anticipated, would be one which would leave the government and the Attorney fettered in the sense that they would make their choice from the list and would not be permitted to go outside of that list. So that really seemed to me to be the essence of the matter in terms of appointment.

With regard to the term of appointment, which is the committee inquiry's second term of reference, I have expressed a view in the paper that the notion of a compulsory retirement age is a useful mechanism. I do not think there is any magic in the age, whether it is 70, 72 or indeed any other age. But, where you are giving

proper attention to judicial independence and where you are concerned with judicial officers who are appointed during good behaviour, it is a convenient way of terminating the appointment. That is particularly so when, I think in most jurisdictions, certainly in this jurisdiction, there is a capacity to renew an appointment—this time, for a term—as an auxiliary judge. A retired judge can be appointed for a period of up to a year, and that can be rolled over or that can be brought to a close. So I suppose it gives you the opportunity to keep on-stream the experience of a judge who is regarded as still having a capacity for service at that point but gives you the ability to end the relationship without embarrassment on either side when the use-by date arrives.

I would have very little to say about jurisdictional issues. It seems to me that on the criminal side the current system is one which operates effectively and well whereby the state Supreme Court and District Court in particular have the capacity to exercise the jurisdiction of the Commonwealth in criminal matters both substantively and, in some respects but not completely, procedurally. That works well. I cannot see why one would want to depart from that system and create a separate criminal jurisdiction within, presumably, the Federal Court to run in parallel with the handling of federal criminal matters by state courts.

As to the complaints-handling system, I take the view that one should not be too hung up on process. Here there are protocols which I think are replicated generally around Australia. They are protocols which work where the involvement of the Corruption and Crime Commission occurs. There is a protocol which applies generally—and this is a published protocol—as to the handling of complaints so that people know and can understand how that process is to be undertaken. They all seem to me to be valuable. They certainly involve the conduct of inquiries and investigations and the intervention by the head of jurisdiction and, where necessary, by the Chief Justice or by the next most senior judge of the Supreme Court as the occasion requires. They are protocols which work in a system that is accountable in this sense, in that it involves complete contact with the complainant, it involves a process by which the views of the judge in question are sought, it involves an explanation of the reasons for the decision which is taken in respect of the complaint and at the same time it preserves the privacy of both the complainant and the judge. I suspect that in areas such as New South Wales, where the judicial commission works very effectively, in substance the process is not markedly or at all dissimilar from that which is adopted by the protocols under which we work. Incidentally, those protocols, and I suspect that they are replicated around the country, come originally from a draft approved by the Council of Chief Justices of Australia and New Zealand and first adopted here in 2003. They have been updated since then. The Corruption and Crime Commission process has a parallel role in relation to that where the allegation is of something which may constitute official corruption as a criminal offence or is of a seriousness sufficient to warrant the termination of a judicial appointment. That probably very broadly covers the sorts of areas that I have been concerned with.

The other thing I have done is left with the committee, for such interest as it may have, a paper presented by our Chief Justice on judicial appointments and judicial independence, which gives, at least as to the appointment process and in relation to judicial commission, His Honour's view about all those matters.

CHAIR—Thanks very much, Justice Murray, for that.

Senator HEFFERNAN—Whatever papers there are, Mr Chairman, could they be faxed to my office here in Sydney as we speak? My fax number is 02 9357 2800.

CHAIR—Yes is the answer. Monica, on behalf of the secretariat, will do so we will sort that out for you, Senator Heffernan. We have just received these papers and you will get those by fax.

Justice Murray, I have a question in regard to the appointment process—and I would like some clarity around this. We have had some reform at the federal level regarding the appointment process and the recommendation regarding the establishment of a list. I think in your opening statement you indicated that you recommended that the government choose 'from' the list but not 'off' the list. Is that right? Can we get clarity around that, please.

Justice Murray—Yes, that would be the view that has been expressed here and the view that we would have.

CHAIR—Secondly, do you think it is appropriate that in this reform process the High Court should be specifically excluded from such reform arrangements as proposed by the federal government?

Justice Murray—I do not see any reason in principle why they should be. But I think what needs to be borne in mind is that you are really seeking to search out a candidate of merit and the pool that you are working from is so small. The things that make the candidate a candidate of merit are things that are only ascertainable by knowing about the person and about the person's career history and things of that sort.

So far as the High Court is concerned, I would have thought that the candidates very often really, as a small group from which one may make a very respectable choice, pick themselves. Very often they are people who are appointed from other courts where they have had the opportunity or the requirement to display their qualities as a serving judicial officer.

CHAIR—Thanks for that. On the other issue regarding the terms of appointment—and you have provided some views on that—you were aware of the constitutional amendments back in 1977 regarding the 70-year age determination. If you had a clean sheet of paper, what would that age be, or do you think we should remove that from the Constitution altogether and provide a little bit more discretion for the executive or the government of the day or the parliament of the day?

Justice Murray—I think that the age is not a matter of particular concern. It seems to me that 70 is as good an age as any, speaking as a person who is rapidly approaching the dreaded statutory use-by date. The point I think that is important is that it provides a convenient mechanism to end an appointment which is of good behaviour or during good behaviour. So then one does not have to make a judgement about an individual judicial officer and whether that person can be rolled over indefinitely. Although, as I say, I think that almost universally in every jurisdiction there is the capacity to depart from that where a particular need is seen with the appointment of auxiliary judicial officers, and they are very often appointments which are made. So where you have got—

CHAIR—Are you talking about part-time judicial officers?

Justice Murray—There can be. Yes, I think that could be done, but part time only in the sense, I would think, that they would serve for a particular period of months during a year, or something of that kind. I find it very difficult to envisage but perhaps that is because I come from a relatively small court. I find it very difficult to envisage how the court would be well served by a judicial officer who is working, say, two or three days a week or something of that kind. I just do not see how you could possibly manage it. It has to be for an extended period. While you are on deck, it seems to me that the appointment should be full-time.

CHAIR—Do you think it is only the appointment of retired judges that should fulfil such appointments? In other evidence we have had to the committee from other states, the eastern states, the view was put that there was some concern about appointing part-time, or short-term appointments for judges.

Justice Murray—I think there are difficulties with the appointment as commissioners of people from active practices and having them then go back into the profession, particularly when they asked to serve on senior courts such as mine. It seems to me that it is most desirable that the appointments of that character be from the ranks of retired judges, because that gets you away from lot of those difficulties—difficulties of perception more than anything else—with a person serving on a court and then appearing before erstwhile judicial colleagues when one resumes practice.

CHAIR—You referred in your opening remarks to the proposal for a judicial commission—I think you mentioned the chief justice.

Justice Murray—Yes.

CHAIR—I have only just got to it very briefly in your paper before the committee that you support a judicial commission similar to that in New South Wales.

Justice Murray—Yes.

CHAIR—Is that the sum of your support for a similar type of commission?

Justice Murray—I think it provides a good working model.

Senator HEFFERNAN—So do I.

Justice Murray—The difficulty from the point of view of advancing that here is, I am sure, the cost implications that would be involved.

CHAIR—Senator Heffernan has a special interest in this area, so I will pass to Senator Heffernan.

Senator HEFFERNAN—Thank you for your indulgence, Mr Chairman. I am pleased to hear that there is support for a judicial commission. I was absolutely blown away when we visited the New South Wales Judicial Commission and seeing the commitment of the people working there and the assistance it provided—like a teacher's aid or a judge's aid; some of the assistance that can be given in sentencing and the educational aspects of it; the speed-camera effect of having a body where you can go with a complaint and then, if necessary, there is a process which is civilised and does not involve a public ambush. In precipitating some

discussion, I want to go to the *Hansard* of 31 October of the Legal and Constitutional Affairs Committee. I asked a question of the department. I will read from the transcript. I want to use an example with the no names. This is me speaking:

I have here a memorandum from a strike force commander in a police agency to a commissioner of police. It is dated 1998. In part it reads:

The attached report relates to—

the report names a judge—

who has emerged prominently during my investigations to date ... it paints a disturbing picture of a senior member of the legal profession who may or may not have committed criminal offences but who is certainly in my view open to compromise.

In the circumstances, I feel that I have no alternative but to seek your permission to carry out a sustained surveillance operation against this target.

I am of the view that such an investigation would serve a dual purpose. Primarily, it may provide evidence of criminal offences … Secondly, it may yield evidence of inappropriate behaviour which (whether or not it constitutes a criminal offence) would leave—

and the report names a judge—

open to compromise and ought be reported to the appropriate legal body.

My question is: in those circumstances, as I asked at estimates, what would the appropriate legal body?

Justice Murray—A commission of this kind. I do not think we are talking about matters which come to the attention of the police which involve—

Senator HEFFERNAN—I agree with you: if it is a criminal matter, it is a police matter. But with your indulgence, Chair, I am about to lead to another matter. That is the answer I wanted: a judicial commission would be the appropriate way to report.

CHAIR—Senator Heffernan, away you go.

Senator HEFFERNAN—I have circumstances, which you, Chair, are aware of, in another police document where a person giving evidence to the police gives evidence that he was commissioned—and I would ask the judge's view on this—by a particular judicial figure he was recommended to a law firm in London to present a submission fraud case which involved I think about US$70 million. The London law firm, who were acting for the insurers on the recommendations of a judicial figure in News South Wales, appointed a New South Wales lawyer to give them advice. In the police interview—which I have a transcript of and which some people on the committee, I believe, may have seen but not received—there is evidence from the person who is giving the statement to the police that, because the case got so complicated, he sought advice from the original person who recommended him to do the work for the London law firm and that person helped him write the submission. He owns up in the police inquiry—the transcript of which I have in front of me, which we will call a hypothetical for the sake of ease—that he would not like it to be known that he was telling the police this because the judge concerned would have had to absent himself from the proceedings if it ever turned up in his court. As it turned out, it turned up in that judge's court and he did not absent himself from the proceedings. As I asked Mr Lasry in Melbourne the other day, what would you do and what would your view be if you were to sit in judgment on your own advice? The police have evidence of this. I have presented it at estimates to the Australian Federal Police and asked the commissioner, 'What can you do with that evidence, because it is not of a criminal nature?' and the answer is: 'There is nothing you can do.'

CHAIR—Could you get to the point of your question.

Senator HEFFERNAN—My question is: how would you deal with that issue under the present arrangements in Western Australia without a judicial commission—obviously a judicial commission could deal with it?

CHAIR—Senator Heffernan, hold for the moment while Justice Murray considers his response, please.

Justice Murray—Perhaps I have not understood it completely. It depends whether you are concerned with the judge's involvement in a matter privately which then came before him. If there was impropriety in the private involvement—I am really sure that I have not understood quite all the ramifications of what you were speaking of—

Senator HEFFERNAN—Could I just clarify?

CHAIR—Please let Justice Murray respond.

Justice Murray—If it were a matter concerned with impropriety in the judge's private involvement, then nonetheless that would be a matter which would be resolved by whatever appropriate complaints procedure you had. On the other hand, if you are not concerned with impropriety of that kind but with the failure to declare the involvement in the course of the proceedings before the judge then you are concerned with a failure to declare what would have been a reasonable perception of bias. The law involves clear directions about that. If it comes to light it may ground an appeal against the decision of the judge. Inevitably, when you get a matter of that kind, any complaints procedure backs off and leaves it to the processes of the law and the courts by the appellant mechanism.

Senator HEFFERNAN—Thank you for that. There is a document—which I will not disclose but which is available to the committee—of this police record of interview. The point I am trying to make is that here we have evidence given to the police by the solicitor concerned of a judge helping this lawyer write advice to a certain case which involved $70 million and eventually the matter turned up in the judge's court and he sat in judgment against the advice which he helped write. There was nothing the police could do about it. I have raised it very quietly over a period of years. I have given the documents to two attorneys-general and two governments. The AFP still have the documents. They are authentic—they come out of Strike Force Corry. There is no way under the present arrangement, even at a federal level—and this is a federal matter in a very high federal court—that there a process other than convening both houses of parliament to deal with the matter. There is no capacity for anyone to set the arguments in court publicly to allow for the justification for the convening of those houses of parliament. Surely this sort of issue, which is not of a criminal nature, is simply a judge assisting in the writing of advice on one side of a law case and then eventually sitting in judgment on that law case. I will just read from the note:

The prosecution apparently was successful by ...—

and it names the solicitor—

He was very well paid for his services. Prior to terminating our interview with the solicitor, he indicated rather sheepishly—

this is in a police document—

that the judge would not want it to be known that he was involved and gave certain advice in the matter concerning—

then it names the case—

as there would be some matters arising in the nature of an appeal which involved the judge to be a clear conflict of interest.

Now that is noted in police documents. I have had these documents for a long, long time. It appears to me that it reinforces the need—through your indulgence, Chair—for a proper, civilised and due process. The police cannot deal with this sort of information because it is not of a criminal nature, but they have full knowledge of it and there is no-one to report it to.

Justice Murray—I am almost sure when you say that that I have probably not understood sufficiently. I can only repeat my observation: if it was not a matter that was thought to involve impropriety on the part of the judge in becoming involved in assisting presumably a friend or something of that sort in relation to some legal opinion, then, if the impropriety lay in the process of the judge's involvement in court later in circumstances which involved a conflict of interest or a perception of conflict of interest, the mechanisms of the law are well established to deal with that and it would not be in any event a matter for involvement of the police or a commission or other complaint-handling process; it would be a matter for the parties to ventilate before an appellate court.

Senator HEFFERNAN—I made the respondent familiar with this in due course, but during the proceedings there was no knowledge of this in the court because obviously the judge did not declare and remove himself that he had helped write the advice that was being presented in the court. Surely—

CHAIR—If I could interrupt; the judge will respond.

Justice Murray—The fact that that was not known at the time would not prevent it being raised before an appellate court later to overturn the decision and—

Senator HEFFERNAN—We are talking about a very senior law firm in Sydney. I took it to the senior partner when I discovered this through police documents and I have raised this since 2005-06 in the Senate—very quietly; it has not made the press. I took it to the senior partner and he said: 'Oh my God. We would

certainly have appealed had we known.' They had a partners meeting after which the senior partner came back to me and said: 'Bill, that has put a lot of pressure on me because we have got other matters before this person in that person's court. We have decided not to raise it because we have other matters before him and we do not want to get offside.' I would have thought that that was a clear illustration of the serious need for a due process to deal with these sorts of issues, which are inappropriate but not of a criminal nature.

Justice Murray—Can I answer that observation with a question. Was any attempt made to refer this matter through a complaints procedure to the head of jurisdiction?

Senator HEFFERNAN—I actually organised a meeting at the time with the chief justice of the jurisdiction and the police to discuss a range of issues. I gave this file to the previous government's Attorney-General, I have given it to the present government's Attorney-General and the Australian Federal Police have had it for some years. I have also asked questions about this matter, which you can go to in *Hansard*, but they are not done in a way that identifies any of the players. The answer from the Australian Federal Police—the Federal Police Commissioner, Mr Keelty—was that there was nothing that he could do about it. I think it is absurd that a judge in what would be called one of the very highest courts of the land could sit in judgment on their own advice and be subject to notation in police interviews on another matters and nothing happens about it. I will be—

CHAIR—We have to wrap it up there as we have other senators who want to ask questions. Do you have any further questions or is that it?

Senator HEFFERNAN—I will have a little contemplation period.

Senator CROSSIN—I want you to understand that none of the previous comments from Senator Heffernan are attributed to all members of this committee. I hope you bear that in mind; that is purely Senator Heffernan's line of questioning. I am almost embarrassed to think that we have got you here this afternoon—

Senator HEFFERNAN—I cannot hear you over the phone line.

Senator CROSSIN—for this duration. I have just one question: do you know if the Western Australian government has ever considered some sort of judiciary commission?

Justice Murray—Our chief justice made that recommendation after discussion with the other heads of jurisdiction. It was a comprehensive recommendation that would have involved the establishment of a commission. I can speak about it generally, but I think probably I would not be at liberty to ventilate the details except to say this: the role of the commission would involve it in the appointment process to the various benches of the jurisdictions; it would involve a process whereby the heads of jurisdiction would be constituted as an authority to administer the courts and run the budgetary process and employ the administrative officers who would be involved, much along the lines of the South Australian model. It would be a body that would be involved in professional development and educational matters. It would also take the responsibility of dealing with the complaints processes to the extent that those processes would not be within the remit of bodies like the Crime and Corruption Commission.

Senator CROSSIN—Is it under consideration with the WA government; have they flatly refused to entertain it; they like the idea but they will not fund it; or is it just a paper and a concept that is out there for consideration?

Justice Murray—My understanding is that it is under consideration. What stage it has reached within government circles or how it is being dealt with within government circles I am not privy to.

Senator CROSSIN—All right. Thank you.

CHAIR—Just to pursue that a little further, if I may, Judge, when was it put to the government?

Justice Murray—Relatively soon after the Chief Justice was appointed, so during the life of the previous government and before the election of this government.

CHAIR—Last year some time?

Justice Murray—No, earlier than that.

CHAIR—In 2007?

Justice Murray—I do not think I should say one way or the other. I have in my mind that it went forward from the Chief Justice in 2006-07, but I have no clear recollection of it.

CHAIR—Let's get a little further clarity around it. It is a proposal that has been put to the Western Australian government after due consideration by, I presume, the various heads of jurisdiction, as you have indicated—consultation, dialogue, meetings perhaps—and I presume with the various judges of your Supreme Court. Would that be accurate?

Justice Murray—By the heads of jurisdiction.

CHAIR—I have page 3 here under the heading 'Complaints and the termination of judicial office'. Is that the section you are looking for?

Justice Murray—Of my document?

CHAIR—That is what I have here—point 8, is it—'Complaints and the termination of judicial office'.

Justice Murray—Yes. That is in my document. What I was looking for was whether there was any more precision that I could shed on the process from the paper given by the Chief Justice.

CHAIR—Do you have a copy of that? Is it available?

Justice Murray—Yes. I have circulated that, too.

CHAIR—That is the Chief Justice's 'Judicial Appointments and Judicial Independence'.

Justice Murray—Yes. But I cannot pick a firm—

CHAIR—It is 31 August 2007.

Justice Murray—Yes. And I cannot pick up conveniently the reference to these matters in that paper.

CHAIR—It would have been submitted before that date, presumably.

Justice Murray—Yes; quite.

CHAIR—It seems like a long time for a government to respond to such a paper. Does that surprise you? Have you had any feedback to the paper?

Justice Murray—I have not. Whether the Chief Justice has is not something that I have any knowledge of.

CHAIR—Right. Is it possible for you to outline in a little further detail the structure and format of such a condition. Is it along the lines of the Judicial Commission of New South Wales? Does it establish a process for reviewing complaints similar to the Judicial Commission of New South Wales? Does it have other functions, such as an education and training role? Does it look at consistency in sentencing in the same way that the Judicial Commission of New South Wales does? Are there any other ways that you can expand on that?

Justice Murray—I think the best way to answer that is that it would be a commission that would be responsible for the operation of the judicial system within the state. It would be involved in the appointment process. It would provide to the courts, through the heads of jurisdiction, direct governance powers in relation to the running of the courts and the administration of a court's budget. It would have responsibilities in relation to the provision of professional development for judicial offices at various levels of judicial hierarchy. It would be involved in some fashion, whether directly or by processes which it would set up in the process of dealing with complaints against judicial offices in the various elements and levels of the hierarchy. So it would effectively operate in that way across the board of the processes of running the court system in this state.

CHAIR—In a nutshell, it is my view that public confidence in the independence of the judiciary would be enhanced and increased if such a judicial commission were to be established. Is that a view that you would share, that public confidence would increase as a result of the establishment of such a complaints process?

Justice Murray—In relation to complaints, I suspect—as I say in my paper—that public confidence may be increased but it should be said, I think, that provided the system that you operate has what I regard as being the essential features to which I refer in my paper towards the end—

CHAIR—Page 6.

Justice Murray—Yes, it is at paragraph 17. It seems to me that the process of accountability, if people understand how that is done, should lead to—and does, I think, lead to—a high level of public confidence in the way in which the process is conducted. I do say, in my paper at paragraph 15, that I have not encountered any dissatisfaction with the process in which I have been involved nor have I heard of it from any other head of jurisdiction. I think that is because of the accountability of the process within itself. It is flexible. It allows complete investigation. It keeps the complainant in touch with what you are doing. It provides reasons for the result. It does everything that a more formal judicial commission based process would do.

CHAIR—So, based on your paper and what you have just said, as long as the terms and conditions set out in your paper—that the independence of the judiciary is maintained and that natural justice is maintained and also those concerning the privacy of the complainant and those points that you set out in item 17—are maintained and implemented then public confidence should be enhanced if such a system were established.

Justice Murray—That is my view. I think our local experience would support the view that that should be the outcome.

CHAIR—Thank you.

Senator HEFFERNAN—Your Honour, in recent years—and I cannot recall the case—there was a case in Western Australia of a judge whom I think may have been getting old or for whom something was going wrong. There was some resistance by him to leaving the bench, and you can understand that; I would be the same. Did that trigger some of the debate in support of a judicial commission in Western Australia?

Justice Murray—No, I do not think it did. I would not wish to comment on any particular matter.

Senator HEFFERNAN—No worries.

Justice Murray—It has been a process which has been under some consideration for some time. In this jurisdiction I would answer it this way. I would say we have been responsive to concerns and considerations generally within the various Australian jurisdictions and I think we have done our own thinking about it all.

Senator HEFFERNAN—Very good.

Justice Murray—We have arrived at our own conclusions, which are much in line with those which are moving elsewhere.

Senator HEFFERNAN—Hopefully, we will be able to produce the same outcome in the federal jurisdiction. In terms of the chair's question and your response on public confidence, I want to make one observation about this regarding the federal jurisdiction, which involves several courts. They often say that what you do not know will not hurt you, but if people do not know some of the things that have gone on and what people have gotten away with, you can maintain public confidence in the system. There was a royal commissioner in New South Wales who said that they were not going to investigate who the judges and lawyers were who used to attend a certain place at Kings Cross because if they did the public would lose confidence in the judiciary. It is an observation that I think is valid. But with a judicial commission anyone who has a complaint can make one. Criticism of a law process in that way would be witch hunt. But it would be nice to know that people could legitimately go along and say in confidence, 'I think this, that and the other,' and it can be investigated, with someone getting a tap on the shoulder—if necessary—rather than be publicly ambushed.

CHAIR—Is that a question? If it is—

Senator HEFFERNAN—I am wondering whether confidence can be measured by what the system does not allow you to know or whether you should be allowed to have full disclosure so that we can deal with it.

CHAIR—That will be the last question. Thank you for that.

Justice Murray—I would respond by saying that in my view the various elements upon which the senator touched as being to material to the confidence with which the public can have regarding a system of handling complaints is evidenced by what happens in this jurisdiction through less formal processes that are governed by publicly announced protocols. These would be features of a more formal judicial commission process. We would see a change in that way as being as a change of mechanism rather than a change of substance.

Senator HEFFERNAN—Thank you very much for that.

CHAIR—Thank you, Acting Chief Justice Murray, for your time today and for the evidence that you have presented to us.

[2.57 pm]

STAUDE, Mr John Gerard, Member of the Law Society Council and Deputy Convenor of the Courts Committee, Law Society of Australia

CHAIR—I welcome the representative of the Law Society of Western Australia. Do you have anything to add about the capacity in which you appear?

Mr Staude—I am also a barrister at Francis Burt Chambers.

CHAIR—We are delighted to have you here with us. I invited you to make a short opening statement. At the conclusion of that, I will invite members to ask questions.

Mr Staude—In February this year, the society was invited by the committee to make a submission in relation to the terms of reference. At that time, the executive considered that it was really a matter for the Law Council of Australia, of which the society is a constituent member, to respond to the committee's invitation. It was not seen as a matter on which the society could offer much useful assistance to the committee. It is only in the light of the recent further invitation of the committee that I appear here today.

With respect to the terms of reference of the inquiry, the only point on which the Law Society of Western Australia has a formal position is with respect to the appointment of judicial officers. The Law Society has a paper which reflects its position and which also reflects the position of the Law Council of Australia on federal appointments. I will hand you the paper.

CHAIR—Thank you for that.

Mr Staude—This was submitted to the state Attorney-General by letter in March this year but no response has yet been received from the Attorney. The processes which are set out in the paper are not unusual and reflect a common position which is taken across the country in relation to judicial appointments both at the federal level and at the state level.

I should say that the position paper does not result from any general dissatisfaction on the part of the profession as to the quality of appointments to judicial office in this state. But it is surely a matter of principle that the society takes the view that there should be transparency in the way in which persons are selected for judicial office.

That really is the only point upon which I can assist the committee in an official capacity, if I can use that expression. If there are any other matters of interest to the committee with which I can assist, I would be happy to remain and do so.

Senator CROSSIN—I have just one question. Justice Murray mentioned the fact that a paper or position had been put to the Western Australian government about a judicial commission. Are you aware of that or had input into that?

Mr Staude—I am aware of it anecdotally. It is not a matter which has come to the society for its consideration. The society often gets asked to provide input into government decision-making to the extent that it has a consultative role to perform—

Senator CROSSIN—I do not think this is a paper of government; I think that this is a paper that has been generated by the judges.

Mr Staude—No, we have not had occasion to consider that paper—

Senator CROSSIN—So it is not something that you have raised with them—

Mr Staude—We are aware indirectly of the Chief Justice's views supporting the establishment of a judicial commission.

Senator CROSSIN—What is the view of the society?

Mr Staude—I do not think that we have a formal position but I do not think that anyone would have any reason to disagree with the proposal.

Senator CROSSIN—So the previous WA government or the current WA government have not progressed it further in the sense of consulting with the Law Society Council about it?

Mr Staude—No. The Chief Justice was appointed during the last government. The Attorney-General in that government was Mr Jim McGinty. In his time in office Mr McGinty had referred to the Western Australian Law Reform Commission an inquiry into the civil and criminal justice system and at that time the Chief Justice, then Wayne Martin QC, was the Chairman of the Law Reform Commission. Together with Professor

Ralph Simmons, now that Justice Simmons, and Mr Robert Cock who is the Director of Public Prosecutions, he consulted widely in the course of that inquiry and with the other commissioners produced a very substantial document. It contained recommendations for changes to the civil and criminal justice system in Western Australia, but did not—I do not think from memory—address judicial appointments or matters with which this committee is concerned.

But when the Chief Justice was appointed he acknowledged quite frankly in the speech which he gave at his welcome that he was appointed to reform the administration of justice in Western Australia in line with the Law Reform Commission paper. So there was no secret made of the fact that reform was intended. There have been some changes made but certainly under the previous government there was a lot more energy given to the process of reform. I do not think that the judicial commission concept was one that was opposed for any particular reason by anyone in the last government nor I do not think there would be any reason for anyone in the present government to oppose it. But I suspect it is a question of legislative priorities and resourcing, and that in the context of a situation which has not so far presented any hard cases probably explains why the matter has not been progressed locally.

CHAIR—All right. Mr Staude, can I just get some clarity around the paper that you presented that sets out the Law Society of Western Australia's view regarding judicial appointments. You have indicated in your paper that all applications and nominations must be established against published criteria, and then, once the deliberations are made and the short list of recommended candidates is provided, the Attorney-General must select from that list. So the Attorney-General does not have the discretion, under the Law Society proposal, to select from outside that list; is that right?

Mr Staude—That is the position, yes.

CHAIR—That seems to be consistent with the view of the Acting Chief Justice, who gave evidence to us just before you.

Mr Staude—Yes.

CHAIR—All right. What is the current process in Western Australia in terms of judicial appointments?

Mr Staude—The appointments are made by the executive. There are no means by which anyone can indicate an expression of interest in an appointment, so it is very much the old-fashioned, tap on the shoulder approach.

CHAIR—Okay. So, with respect to the federal government's recent reforms, do you support those reforms or do you think they should be changed or amended in any way?

Mr Staude—I think the Law Society would generally support the reforms that have been announced.

CHAIR—Do you think the reforms should apply to the High Court in the same way they apply to the other federal courts?

Mr Staude—I cannot speak for the society or its council, but personally I think that the High Court presents a different category of appointments. The reasons indicated by the Acting Chief Justice make redundant the processes that might otherwise apply to perhaps first-timers in judicial selection. The category of personnel that would be eligible for a High Court appointment would be such that the potential appointees would already have their runs on the board. That is the only reason, I think, that you would not necessarily follow those sorts of procedures—

CHAIR—We have had clearly different views and evidence given by the eastern states in response to that same question, with, I think, probably a majority saying that it should be consistent across all federal jurisdictions and federal courts. Now, if you had a clean sheet of paper, do you have a view with respect to the retirement age for judges?

Mr Staude—I think that 70, which has been the age has some time, is probably regarded by most people as appropriate. When I say 'most people', I mean professionals—lawyers and judges. But there have been—

CHAIR—Well, not necessarily. Every state and territory is different. I am not sure exactly what it is in WA.

Mr Staude—Locally, the age is 70, and it is not a controversial age. It may be that, with the increase in people's longevity, the age of 72, which I think applies in some cases, or 75 might be considered. But I would generally endorse the observations of the Acting Chief Justice that it is a good way in which you can bring to an end an appointment which is otherwise indefinite.

CHAIR—It was 1977, which is 32-odd years ago, when that decision was made, and certainly life expectancy has increased markedly since then.

Mr Staude—Yes.

CHAIR—Does the Law Society have a view with respect to the appointment of part-time judges—on a short-term basis, under casual type arrangements?

Mr Staude—We do have in Western Australia a system which permits the appointment of commissioners of the Supreme Court and the District Court. I have in fact served as a commissioner of the District Court—that is in the nature of a temporary appointment, and it might be for a month or two or three. The appointments are made according to the need of the jurisdiction, so the way in which the appointments would come about would generally be that the head of the jurisdiction would notify the Attorney-General of a need to clear a backlog of cases, to provide extra resources to the court for whatever reason—absence of judges on leave or whatever. Traditionally in Western Australia such positions have been filled in the Supreme Court by barristers of the rank of Queen's Counsel or senior counsel, and in the District Court, either by senior counsel or senior juniors.

CHAIR—What is a senior junior?

Mr Staude—An old junior; an experienced junior. The work of the commissioner is limited to civil work. I do not think that is a restriction put in place by the legislation but it is a matter of practice. Commissioners only get asked to do civil cases. I think they hear civil trials. I do not think there is any sort of formal opposition expressed on behalf of the society to that system. It has worked for many years. It is regarded as a necessary process to support the court on certain occasions but generally I think both my colleagues would agree with what Justice Murray said about the undesirability of people in practice being called upon to meet that need, for the reason that when you are working in the profession as a practitioner—a solicitor or a barrister—and you are mixing with people, it is not difficult to then preside in a contest between your colleagues, but it may give rise to perceptions and it may be perceived as a process in which the traditional protections of judicial offices are not as obviously enforced. So it is probably viewed as a necessary evil and not an ideal means of remedying the problem of having an underresourced court from time to time. What Justice Murray said about the appointment of retired judges would generally be regarded as appropriate or preferable.

CHAIR—Just moving on and just for the record, we have spent quite a bit of time with the judicial complaints commission in New South Wales. We have been to the Judicial Commission of New South Wales as a committee. We have taken evidence in the eastern states. Is it correct that the view of the Western Australian Law Society is similar to the view of Justice Murray with respect to the merit of the Judicial Commission, not unlike the New South Wales Judicial Commission?

Mr Staude—As I said, I do not think the society has a formal position, but I have no reason to think that it would have a view different from Justice Murray's in that respect.

Senator HEFFERNAN—I would like to raise one of the issues concerning temporary judicial appointment. The driver of the courts obviously is the law and the interpretation of the law. In a criminal matter, particularly, if you are a criminal barrister who is to go temporarily to the bench, part of your skill is to deal with people who are trying to get off, even if, to the barrister, they may be unknowingly guilty. Part of the barrister's skill is to use the law not to tell a lie but to avoid the truth, because the court is about the law and the truth is a secondary matter in a way. Wouldn't it be a serious conflict with people who do heavy criminal work being appointed as temporary judicial appointment? Bear in mind, they have to deal with these characters and have conversations which may well leave them open to all sorts of difficulties. Wouldn't it be a serious difficulty if there were judicial appointments of temporary judges for non-criminal matters—if they come from a jurisdiction to which they will return, where they are dealing with people who go to court and, whether you like it or not, they are guilty but are proven by the law to be not guilty, by a skilful barrister. Obviously that is why you pay a skilful barrister. As a law society, do you see that as a problem?

Mr Staude—Your concern is probably the reason why commissioners in Western Australia are not appointed to hear criminal matters. In terms of dealing with matters as an umpire, you can come from one stream or the other and still bring an independent mind to bear on the merits of a case. When full-time judicial appointments are made, the appointee may come from a prosecutorial background or they may come from the defence bar in the criminal context or he or she might be well known as a defendant's lawyer or a plaintiff's lawyer in the civil context, but that does not prevent them from qualifying for appointment and bringing an

independent mind to bear on cases they are called upon to adjudicate. The same thing applies with temporary appointments. Part of a lawyer's training is to be objective and dispassionate. In my experience there has been no cause given in this state for anyone to doubt the capacity of commissioners or acting judges to discharge their obligations properly.

Senator HEFFERNAN—Thank you very much for that answer. From a lawyer's perspective—I dealt with this earlier; you may have heard this—there was a case which involved an island off Australia, a serious fraud matter, which was dealt with through London Insurers and their solicitors—

Mr Staude—Yes.

Senator HEFFERNAN—It was alleged in police interviews that the lawyer who put together the advice for the London law firm sought it from a judge who eventually sat in judgment on the case. The law firm, which was a large law firm here in Sydney, was intimidated when this was raised with them, because they had other matters before the court. Are these issues that you hear about or have experience in? I would have thought it would be a hanging offence for a judge to sit in judgment on his own advice. There is, shall I say, a not-so-strong view from some people involved in the judiciary, but I would have thought it were a hanging offence, especially when there was, I think, US$60 million involved and a quite well-known character who worked for a Sydney law firm in London and was committed for fraud. What is the view of the Law Society of Western Australia—and, by the way, the judge declared he had an interest because of a social contact in the law firm but did not actually acknowledge that he wrote the advice—when a judge is bold enough to sit in judgment on his own advice?

Mr Staude—It is difficult to come out on cases like that without being apprised of all the facts. You have a version of the events which may be quiet reliable, but—

Senator HEFFERNAN—There are court documents.

CHAIR—Senator, could you allow Mr Staude time to answer the question.

Senator HEFFERNAN—Thank you very much, Mr Chairman.

Mr Staude—I did hear the evidence of Justice Murray earlier and I would agree with him: in as much as there was cause for complaint by one of the parties on the receiving end of the judgment, their remedy would lie in an appeal and an application to set aside the judgment on the grounds of apprehended advice. Otherwise, it is just a matter of judicial behaviour, and there is probably no reason why a complaint could not be made through the normal channels. In New South Wales it would go to the judicial commission and here it would probably go to the chief justice.

Senator HEFFERNAN—It could be dealt with. The point I am trying to make is that the police, in an interview which is dated—

CHAIR—Senator, you do not need to go into those details.

Senator HEFFERNAN—There is too much detail—righto. They have been aware of this for some years but found themselves in a position where they had nowhere to take it.

Mr Staude—We have the Corruption and Crime Commission of Western Australia, which would have jurisdiction to receive a complaint by a non-party, such as a police officer, if the circumstances gave rise to it.

Senator HEFFERNAN—When I became aware of it a few years ago now, I approached a law firm and they had a meeting and decided that it was better to leave sleeping dogs lie because they had other matters before the court. I would have thought that the people who were the losers in that case got done over.

CHAIR—As there are no further questions, I thank you, Mr Staude, for your time today and for giving evidence to our committee.

Committee adjourned at 3.20 pm