COMMONWEALTH OF AUSTRALIA

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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE

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

TUESDAY, 17 NOVEMBER 2009

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SENATE LEGAL AND CONSTITUTIONAL AFFAIRS

REFERENCES COMMITTEE

Tuesday, 17 November 2009

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

Participating members: Senators Abetz, Adams, Back, Bernardi, 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: Barnett, Brandis and Crossin

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 of judges, 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 4.03 pm

CHAIR (Senator Barnett)—Good afternoon. This is the fourth hearing of the 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 a full-time, part-time or other arrangement; (c) jurisdictional issues—for example, the interface between federal and state judicial systems; and (d) the judicial complaints handling system.

I remind the witness that in giving evidence to the committee he is protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee. Such action may be treated by the Senate as a contempt. It is also 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 if they intend to ask 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, of course, also be made at any other time.

[4.05 pm]

MARTIN, the Hon. Wayne Stewart, Chief Justice of Western Australia, and Chair of Council, National Judicial College of Australia

CHAIR—Welcome. The National Judicial College of Australia has lodged a submission, recorded as submission No. 6, with the committee. Do you wish to make any amendments or alterations to that submission?

Chief Justice Martin—No, thank you.

CHAIR—I invite you to make an opening statement, if you wish to do so, at the conclusion of which I will invite members of the committee—meaning Senator Crossin and myself—to ask questions.

Chief Justice Martin—Thank you. As I understand it, the particular subject in which you are interested is the possibility of the National Judicial College performing a role akin to the role performed by the Judicial Commission of New South Wales in relation to the handling of complaints against members of the judiciary. Am I right in thinking that?

CHAIR—You are correct. That is exactly spot-on.

Chief Justice Martin—Good. Let me give a little background. I think you may have received a copy of my submission to the government of Western Australia proposing the creation of a judicial commission in Western Australia, modelled essentially on the New South Wales commission.

CHAIR—We did.

Chief Justice Martin—You will have seen from that that obviously I support the notion of a formal mechanism for complaints handling along the lines of that created in New South Wales. I think it has enormous advantages in terms of transparency and accountability. That proposal was accepted by the previous government of the state of Western Australia, but of course it lost office last year and I am still awaiting a response from the Attorney-General of Western Australia as to the current government's attitude towards it.

I do not know if it is actually mentioned in that submission, but one of the things I was told by Ernie Schmatt, who is the CEO of the Judicial Commission of New South Wales, is that there is a synergy between the complaints-handling function and the education function, in that the complaints-handling function informs the program of education. He told me that they had in fact found that programs of education directed at the type of conduct that had generated complaints had been successful in reducing the level of complaints.

Many complaints about misconduct by judicial officers arise from poor communication by judicial officers, poor methods of explaining to litigants why the procedures are as they are. Those are obviously not the sorts of complaints that would lead to removal from office, but they

are nevertheless matters that are sufficiently serious to motivate litigants to complain about the conduct of the judicial officer and they are areas in which education has improved the performance of judicial officers, if you like, in terms of their capacity to communicate with the litigants about what they are doing. So there is a synergy in the way the New South Wales commission operates between its education function and its complaints-handling function, but I think it also has to be said that that synergy could be fairly readily achieved provided that there was a fairly rigorous protocol for the exchange of information between any entity that is responsible for dealing with complaints and any entity that is responsible for dealing with judicial education.

Moving on to the subject of whether the national college could be structured like the Judicial Commission of New South Wales, I suppose my answer to that is that anything is possible but grafting a complaints function onto the presently existing college would require a fairly radical restructure of that body. Let me try and explain why I suggest that. The college was created in 2002, approximately, essentially as an interjurisdictional education body. The courts of all the states and territories and the federal courts are all represented in various ways on the council of the college, and all the jurisdictions with the exception of the state of Victoria contribute to the running cost of the college, although the Commonwealth makes the major contribution to the fairly modest running costs of the national college.

Essentially, it was created so as to ensure representation of all courts in all jurisdictions and its governance has a relationship with the Council of Chief Justices in that the chair of the council, who at the moment is me, is appointed by the Chief Justice of Australia and that appointment is usually considered at Council of Chief Justices level. Obviously enough, all the members of the council have been chosen as judges and magistrates interested in education. They have not been chosen for any interest or expertise in relation to complaints handling, and the council itself has no consumer representatives—that is to say, representatives of litigants—although the consultative committee does have people who are not lawyers on it, but that is not part of the governing body.

The college operates from premises which it obtains from the Australian National University in Canberra pursuant to a memorandum of understanding with the ANU. Because of the overlap between the ANU's educative role and the educative role of the college, synergies exist there. Obviously there would not be the same synergies in relation to the complaints function. In that sort of context, it seems to me that if you were to repose a complaints handling function in the college it would really necessitate a separate arm of the college. You would need different people. The current premises from which we operate would not be appropriate, so you would need different premises.

If the complaints handling were to focus only on the federal courts then its current governance structure would not be appropriate because the governance structure is essentially aimed at all the courts of the states and territories. So I think you would need quite a separate governance structure if it was to be only focused on the federal courts. If it was to deal with all the courts of the states and territories except for New South Wales, and I exclude New South Wales because as I understand its position it is perfectly happy with the judicial commission it has got and would not be interested in participating in any national scheme for complaints handling—but if you were to attempt to cover all the other states and territories then I do not think a centralised body would be practical because you would need people on the ground in at least the more

populous jurisdictions to actually deal with complainants and resolve their complaints with some local context and knowledge. Again, in discussions with Ernie Schmatt at the Judicial Commission of New South Wales he has emphasised to me the importance of actually having somebody who can talk to the complainant and explain to them, very often, why their complaint in truth is not a complaint about judicial misconduct but a complaint about the fact that they lost the case. It is much easier to do that if you have got an office in the jurisdiction in which somebody can have a meeting with the complainant and explain to them just how it works.

So I think there would be a fairly radical restructure required if it were to be considered to graft a complaints handling function onto the NJCA. In that context I guess the question I would ask is: well, what is the point? Wouldn't it be better just to create a separate body, but on the basis that there would be fairly strong protocol for the exchange of information between anybody created to deal with the complaints handling function and the college as an educative body? Provided the college was getting all the information it needed to know the source and nature of complaints, then it could factor that information into its design of programs for judiciary around Australia. That is all I wanted to say by way of opening, thank you.

CHAIR—Thanks very much, Chief Justice. Before asking questions can I interpose at this point that our shadow Attorney, Senator George Brandis, has joined us.

Chief Justice Martin—Good afternoon, Senator.

Senator BRANDIS—Good afternoon, Chief Justice.

CHAIR—Thank you again, Chief Justice, for your opening remarks and introductory comments, which are most useful. In terms of the National Judicial College, I would like you firstly to summarise the extent of the work that you undertake for education and training for state and federal judges. Secondly, with respect to any proposed national judicial commission, I am interested in your view as to whether it should be a separate entity altogether or whether you would prefer it to be part of the National Judicial College, or don't you have a view? So there are two separate questions there to kick it off.

Chief Justice Martin—Thank you, Senator. I will deal with those in turn. The college exists in a rather cluttered environment for judicial education, if I can put it in those terms. There are a number of entities that are engaged in the provision of judicial education around Australia. Some of them pre-existed the creation of the college and some were created, particularly the college in Victoria, at the same time. The oldest standing and longest serving body engaged in judicial education in Australia is called the Judicial Commission of New South Wales, which was created in the mid-80s and I think paved the way for many of the subsequent bodies that have evolved including the National Judicial College and the Judicial College of Victoria. The Judicial College of Victoria was created at about the same time as the National Judicial College in 2002.

Because both New South Wales and Victoria have their own judicial education bodies, the work of the national college tends to be focused on, firstly, augmenting the programs provided by those two bodies for the judiciary of New South Wales and Victoria in areas such as—and a good example—our orientation program. So the college runs in conjunction with the Judicial Commission of New South Wales and the Australian Institute of Judicial Administration, which is another body peripherally involved in judicial education. In conjunction with those bodies we

run a program that is regarded, essentially, as compulsory for all new superior court judges around Australia and so the judges of New South Wales and Victoria attend that program and in that way we augment what is available to them.

But aside from areas of augmentation like that—and of course the judges in the other jurisdictions attend that program is well—we tend to focus more upon the provision of structured programs of education for the jurisdictions that do not have their own education bodies specifically created as such. Queensland of course has an arrangement under which the District and Supreme Court judges of that state are given what is called a 'judicial allowance', which is a component of their salary which they can apply towards programs. Quite often they will spend part of that allowance attending programs that are provided by the college. We also service the other smaller jurisdictions—the ACT, Tasmania, South Australia, Western Australia and the Northern Territory. So our programs tend to focus on augmentation of the programs provided by existing bodies and providing particular programs for the smaller jurisdictions and augmenting also their work. Many of those jurisdictions like Western Australia, for example, have their own education committee which runs programs in Western Australia so the college will supply assistance in those jurisdictions.

In case you are thinking that this is all very complicated and confusing and possibly duplicative, I should tell you that under the auspices of the college in Sydney all the bodies engaged met about a month ago and agreed on a protocol and program moving forward for, if you like, greater cooperation and collaboration in relation to the provision of education programs to the judiciary of Australia by agreeing to share programs and to work together to design an overall curriculum that we can provide to all the judges and magistrates of Australia and in that way avoid duplicating efforts, reinventing wheels and so forth. So that is basically the structure of judicial education in Australia.

The second question is concerned with whether I think it would be better to have a separate entity. I have to say that if I were given a preference I think it would be better to have a separate entity. Now that the college has been created and structured the way it has, I think it would be difficult to graft another quite distinct function onto it and it would involve a fairly radical process. Either you would have two arms of the same organisation running quite separately and distinctly, in which case you would say why bother, or you would have to radically restructure the current structure of the college and its funding models and all of those sorts of things, and my concern about that is that it might imperil the delivery of the education function. So my preference, I think, would be for a separate entity.

CHAIR—Thanks for that. The Judicial College of New South Wales has been operating since the mid-1980s so we have had many decades to see how it is performing. I assume from your submission and also from the evidence from your Acting Chief Justice Murray when we were in Perth that you support a similar type of entity for Western Australia. Can you share your views on the strengths and weaknesses of the Judicial Commission of New South Wales?

Chief Justice Martin—I think it has enormous strengths. I think it has provided a transparency to the process of judicial complaints handling that is lacking in almost all other jurisdictions. It also provides a breadth of coverage that is lacking in almost all other jurisdictions because although some jurisdictions, like Victoria, have a complaints-handling function that is appropriate for cases where the conduct could lead to removal from office,

happily those cases are very rare and a tiny proportion of complaints. But in Victoria there is no other mechanism, effectively, for dealing with complaints that are not of that character.

The beauty of the judicial commission is that it enables a transparent process for the whole range of complaints. I think because it was created at a time when the complaints-handling and education functions were reposed in the same body, I think that works well. And if we were back in 2001 designing a new judicial college, and you were going to put those two functions together, then maybe my answer to your previous question might have been different and you might have seen a way of building a body that would work well together. But I guess events have moved on and, as I say, I think the national college has been structured quite differently because of its federal aspects.

So far as weaknesses of the judicial commission are concerned, I cannot conjure any readily to mind. I think it has been very well received by the judiciary of New South Wales. As I understand it, there was opposition to its creation back in the mid-eighties, but every judge from New South Wales I have spoken to now regards it as having been a very good thing because it in fact provides protection to the judiciary by providing a transparent and independent process which very often vindicates the judicial officer, the subject of the complaint. In the other jurisdictions that do not have such a process, the complainant can, with some justification, say, however the complaint to the head of jurisdiction is resolved, 'That really was not an independent or transparent investigation of my complaint; you have just fobbed me off.' That leaves the judicial officer, the subject of the complaint, under a continuing cloud. So I think that, perhaps counterintuitively, the creation of the judicial commission in New South Wales has actually strengthened the position of the judiciary in that state in relation to complaints that are made of misconduct.

CHAIR—To follow on from that: for those reasons, is it your view that you support a similar entity at the national level?

Chief Justice Martin—Whether it be at a national level or whether there be separate entities in each jurisdiction cooperating together I think is an open question. So far as the national level is concerned, of course, there are constitutional questions that are raised from time to time about the extent to which such a body is consistent with the independence of the Commonwealth judiciary under chapter 3 of the Constitution. Those issues do not, I think, bedevil the state jurisdictions—at least, they do not seem to have raised their heads in New South Wales in the 20-odd years that the commission has been in existence there.

The other thing is that, as I mentioned earlier, I think it is important that there be an office on the ground in the larger jurisdictions. So in Perth, for example, I think it would be necessary that there be a place to which complainants could go to orally ventilate their grievances and have somebody listen to them and explain to them why in fact what they are complaining about is that they lost the case and that there is nothing that can be done. Whether that works on a national model—I am just worried that a national model might find difficulty in having branches in most of those regions. But you would not necessarily need them in all regions.

I do not know about the level of complaint in the ACT, for example, but—taking the ACT as a recent topical example—the thing about judicial commissions is that you just never know when you might need them, and I think recent events in the ACT have shown the desirability of having

the capacity there to invoke a transparent and independent complaints-handling mechanism when that sort of situation arises.

CHAIR—So again to follow on: you raised the constitutional issue which, you are right, has been raised from time to time over years with respect to the possible establishment within the federal jurisdiction. Would you share your views on that?

Chief Justice Martin—I have not really investigated that at any great length, and it is probably not entirely appropriate for a state judge to be expressing views about Commonwealth jurisdictional issues. I had heard on the grapevine that the Commonwealth had sought advice from the Solicitor-General on the issue and that his view was that there were ways around those sorts of issues. But on the other hand former Chief Justice of Australia Chief Justice Gleeson said on a number of occasions, both publicly and in private meetings, that he thought there was a significant issue there that needed to be addressed. So I think that would be an issue for resolution by constitutional scholars rather than by my own good self, I am afraid!

CHAIR—Fair enough. At this point I will pass to Senator Crossin and then Senator Brandis, if he wishes, to ask questions.

Senator CROSSIN—Good afternoon again, Your Honour. Does the judicial college have a database similar to that of the New South Wales commission?

Chief Justice Martin—No, we do not, but we contribute funding provided by the Commonwealth to the commission for the maintenance of the Commonwealth sentencing database. So we have effectively subcontracted the Commonwealth sentencing database to the Judicial Commission. It provides that service in relation to Commonwealth offences and we fund it but we do not personally do it. The Judicial Commission of New South Wales has the expertise and the skill there, and the data is provided by the courts to the commission and it generates the database.

Senator CROSSIN—So a Federal Magistrates Court judge can access that database if they need to?

Chief Justice Martin—Yes. They would have little occasion to do so, because it only deals with criminal offences. It is of much greater interest to state judges dealing with Commonwealth criminal offences.

Senator CROSSIN—I see. What sorts of induction courses are offered by the college?

Chief Justice Martin—We run two courses. One is called the National Judicial Orientation Program, which is a bit of a mouthful. It is better known around the country as ‘the baby judges’ course’, which is I think a better name! The Canadians call their similar course ‘the dumb judges’ course’, so I think ‘baby judges’ is a better name than ‘dumb judges’. That is the course that we offer for superior court judges in the state Supreme, District, Federal and Family Courts, usually within the first six months of appointment. We like them to have a few months on the bench before they get there so that they have had a bit of a taste of it. It is a week-long course that we run at different places around Australia usually once or twice a year, depending on the number of appointments. In addition, we run a program called the Phoenix Magistrates Program,

which is an induction program essentially for magistrates outside New South Wales and Victoria. In New South Wales and Victoria they usually have sufficient new magistrates to justify running their own separate courses, but sometimes they do not and they will send magistrates to our Phoenix Magistrates Program. So we run two courses: one for the superior court judges and one for the magistrates.

Senator CROSSIN—Does there need to be some sort of commission, not just for complaints handling but also for some sort of peer review of behaviour and expectations? What constitutes misconduct by a judge? When you are inducting or training new magistrates, is there some checklist against which they should judge or model their behaviour?

Chief Justice Martin—It is not so much a checklist as, if you like, a series of aspirational guidelines. There is a document called *Guide to Judicial Conduct* published by the Council of Chief Justices. It is called a guide quite deliberately because often in relation to judicial conduct there are no hard and fast lines. I am sure you will say that this is what lawyers always say, but so much depends upon the particular facts and circumstances of the case. So what we try and do through the orientation program is to teach an approach to the identification, firstly, of conduct issues and, secondly, of ways of approaching how they are to be dealt with. They include things like ethical behaviour—which includes the extent to which you can sit in a position when you know or have known one of the parties or you might be seen as having a conflict of interest through an association with a member for family, for example—through to conduct outside the normal working environment, what you can do with your private life and business interests—all that range of area.

I guess that if you asked me to define 'misconduct' I suppose that I would fall back on the familiar approach that lawyers take to the definition of professional misconduct, and that is any conduct which falls short of the standard which a proper and prudent judge would think appropriate. I accept that that is a fairly circuitous definition, but essentially that is what it is. One of the advantages of defining it in that way is that one finds that acceptable standards of judicial conduct tend to change over time. They have changed in a number of areas, like the extent to which it is now considered inappropriate to engage a family member as one's associate. In the past, that was quite commonplace. Most judges now would think that that is not appropriate. There are a whole range of areas like that where the standards of judicial conduct are evolving.

CHAIR—We have a division. Chief Justice, we might conclude at that point. If we have any further follow up, perhaps we could do it writing.

Chief Justice Martin—Yes. I would be pleased to do that.

CHAIR—I thank you for giving evidence to the committee. I declare the meeting of our committee adjourned.

Committee adjourned at 4.31 pm