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The Judiciary in Contemporary Society: Australia

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I. INTRODUCTION

James Crawford observes:¹

Central to the Constitution and the operation of a court system is the judiciary: in a real sense, the judge is the court. How judges are appointed, how their independence is maintained, how and on what grounds they can be removed, and what other (non-judicial) functions they can properly perform are thus important questions.

These matters and other issues are the subject of this report.

II. RECRUITMENT OF JUDGES

A. Appointment

In Australia the appointment of judges is, by constitution or statute, universally the responsibility of the executive branch. The federal government handles all such matters relating to the High Court, the Federal Court, the Family Court and other federal judicial bodies. State governments exercise similar authority over the state supreme courts, district and magistrates’ courts. All appointments are formally made by the Governor-General, or the Governor, in Council.

Eligibility for appointment is primarily limited to the statutory requisite of admission or practice as a barrister and/or solicitor within the relevant jurisdiction. Crawford comments that “once these not very exacting requirements are met, the appointment is at the discretion of the executive.”² In practice, therefore, the Attorney General, as the executive in charge of putting forward nominations to the Cabinet, is

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2 Id.
vested with considerable responsibility. Once nominated, ratification of the appointment is a collective cabinet decision.

Not surprisingly, this process of executive appointment leaves the system open to charges of political patronage or bias. The Honorable Justice Thomas writes:³

It is obvious that the selection of the best candidates virtually prevents serious problems from arising. Confidence in the honesty of the Government in making judicial selections is a necessary pre-requisite not only to the maintenance of ethical standards but also to the maintenance of public respect for the judiciary.

Crawford maintains that party political appointments have been rare in Australia and that those which may have originated in party maneuvers have usually been defensible on other grounds.⁴

However, the occasional political appointment is a problem. On a microcosmic level, it arguably detracts from the perceived independence of the bench as a whole in the eyes of those who do not perceive the checks and balances as an effective system. The former concern is usually neutralized by de facto controls exerted by judges in the course of their daily duties. Containment of damage potentially arising from the latter is more difficult as public confidence in perceived independence is essential for the proper functioning of the courts.

B. Social and Professional Background

The social and professional background of members of the Australian bench is perhaps most remarkable for its striking homogeneity. The general practice in Australia is still to recruit from the Senior Bar (i.e., Queen's Counsel). Little variation exists with Justice Teague of the Supreme Court of Victoria, a former senior solicitor, proving the notable exception. The exclusion of lawyers who are not members of the Senior Bar means that few solicitors, women, academic or government lawyers are appointed. Accordingly, there is a justified complaint that the Bench tends to be almost exclusively Anglo-Celtic and upper middle class and therefore not representative of the values of Australian society as a whole which is growing increasingly pluralistic.

There are few women on Superior Courts in Australia and none on the Supreme Court of Queensland. However, it must be borne in mind that recruitment is from the senior ranks of the practicing bar. Judicial office is not, as in many civil law countries, the culmination of a career.

³ J.B. THOMAS, JUDICIAL ETHICS IN AUSTRALIA 3 (1988).
⁴ CRAWFORD, supra note 1, at 56.
in magistracy which is commenced at a junior level, at a comparatively early age. Appointment of women to the Superior Courts therefore depends upon the availability of women barristers of appropriate seniority and experience.

This situation is particularly topical at present. Although it may be said that there are now such female candidates available, albeit, in relatively small numbers, it by no means follows that they desire appointment for reasons discussed below. It is known that efforts have been made to persuade women barristers of appropriate standing to go on to the courts but so far only one woman has, at a comparatively early age, been persuaded to accept an appointment to a District Court (the intermediate court) in Queensland. Given the current rate at which universities are graduating women lawyers, many confidently predict that within a generation, half the profession, barristers and solicitors will be women. Arguably, this will carry with it a proportionate impact upon the numbers of women in the judiciary.

As touched on fleetingly above, mention should also be made about the recruitment of solicitors and academics to the superior and district courts. Academic appointments to courts throughout Australia are exceptionally rare. The Supreme Court of Queensland has one judge who held an appointment as Professor of Law at the University of Queensland (Mr. Justice Ryan). The appointment is widely regarded as a success, however two things must be said. First, the judge did practice at the bar in his early days and second, as a former Trade Commissioner and appointee to several related diplomatic posts, he brought with him additionally varied experiences.

Solicitors, like academics, have been similarly subordinated to senior barristers in the selection process. With the exception of the senior solicitor recently appointed to the Supreme Court of Victoria, Mr. Justice Teague, appointment of solicitors in any significant number has been markedly limited to the specialized jurisdiction of the Family Court.

Opposition to the appointment of solicitors is rooted in the traditional view that barristers, as experts in advocacy, are best suited to effective court management. The merits of this view have been reinforced by the economic realities of economies of scale. The overheads which must be carried by solicitors make it increasingly impractical for them to spend time in courts. By contrast, barristers’ comparatively low overheads foster their development of advocacy expertise and specialized knowledge bases. Predictably, it has traditionally suited both branches of the profession for the bar to do the court work. It follows that it is natural for appointments to a working judiciary with a large case load to come from those experienced in litigation.
However, based upon solicitor appointments thus far, no reason has emerged to query the efficacy of such training for judicial decision-making purposes. Although it can fairly be said that, even in appellate work, prior experience in running cases at the trial level provides a valuable safeguard against the type of injustices that could potentially arise out of judicial unfamiliarity with court room tactics, it is equally viable to point to specific strengths that training as a solicitor brings with it. Additionally, as growing numbers of lawyers, for financial and practical reasons, are taking on workloads that blur the traditional barrister/solicitor distinction, these concerns are likely to diminish further.

C. Capabilities of Would-be Judges

Contemporary concerns about judicial capabilities in Australia center primarily on the overall availability of suitably qualified candidates. Difficulties encountered in conjunction with appointing female candidates, for example, the lack of individuals with coinciding experience and interest, are arguably pervasive across the board. In short, the Australian judiciary’s perception in general is not so much that would-be candidates lack talent but rather that many lack the experience.

Traditionally, judges of the superior courts tended to be appointed in their fifties from members of the Senior Bar and to retire by force of statute at the age of seventy. The rapid expansion of the judicial system in the last ten to fifteen years has been occasioned not only by a greatly increased work load for the courts but also by the Commonwealth’s establishment of its own courts, notably the Federal Court of Australia and the Family Court. Like other contemporary societies, increases in the work loads may be attributed to a rising crime rate, increased commercial activity and commercial disputes, and extensive expenditure on legal aid.

Demand for judges to meet the increased judicial activity to which reference has been made has meant that judges are being appointed at a younger age. Moreover, the appointment of younger candidates is further necessitated by the fact that experienced members of the practicing bar generally command very large incomes and are reluctant to leave practice for the substantially less lucrative judicial salaries offered.

A less tangible factor underlying recruitment difficulties is the demise of what has frequently been referred to as “the judicial mystique.” As a highly placed member of the judiciary succinctly observed:6

5 The Commonwealth formerly used the courts of the States.
6 The judge wished to remain anonymous.
Social change has meant that a judge is no longer the demi-god he used to be. The press and the public are today more critical of judges. Their decisions and behavior are now openly criticized. In the case of the Family Court of Australia some judges have been the victims of physical violence to the point of murder at the hands of the disappointed litigants. The mystique of judicial office has gone.

Australia, however, is hardly unique in this respect. Similar concerns appear to plague most common law jurisdictions to varying extents.

III. EDUCATION OF JUDGES

The education of judges is not undertaken systematically in Australia. The modern judge is a university graduate who has practiced at the bar as both a junior and a senior advocate. While at the bar the judge will have attended various activities designed for his or her further education. Upon joining the Bench, however, no parallel requirement or program for continuing legal education exists. Australian judges attend an annual conference of superior court judges at which topics of current interest are discussed, usually after presentation of an appropriate paper. Where a need for systematic education in a specific area is perceived, the need tends to be met by the organization of ad hoc seminars and the like.

The absence of formal training can be very problematic. The skills required of a good advocate are not the same as those required of a good judge. Nor are judges necessarily appointed in areas in which they have practiced. For example, an appointee to the Family Court may not have practiced in Family Law. Similarly, most judges sitting in criminal matters have had limited experience in this field.

At times, new judges’ inexperience with the relevant law or procedure, or lack of familiarity with the decision making process and/or judgment writing have rendered disappointing results. Courses for judicial education have been slow to develop. This stems in part from the traditional belief that a person upon appointment is presumed “to know it all.” Accordingly, some judges refuse to attend training courses on the ground that it offends their dignity to admit publicly they have something to learn. Some courts, such as the Family Court of Australia, do provide training courses for new appointments on a purely voluntary basis. But it may well be useful to require as a condition of appointment to judicial office at the trial level that the appointee undergo a course of training.

Similar rationales apply to the institution of continuing education programs for the judiciary. Constant change, especially in the fields of
taxation, company, antitrust, and family law, pose considerable challenges to even the most diligent practitioners and judicial officers. Despite this reality, judicial tradition makes it difficult for some judges to admit that they have anything to learn, even new law.

The reception and use of technology in the court system provides another point of contention. Whether inherent in the traditional training of lawyers or simply indigenous to many contemporary judicial incumbents, hostility to or suspiciousness of new technology (e.g., recording and computing systems, and information technology) has resulted in failure to implement expensive equipment.

IV. TASKS OF JUDGES

The growing volume and complexity of case loads is a universal problem, with the law mirroring the society of which it is a visible expression. Although Australia's relatively small population has curtailed somewhat, the explosion of complex litigation found in countries like the United States, the tasks of its judges have increased considerably over the last twenty years. The by-gone perception that the role of the judge was leisurely, a job suited for the semi-retirement of a busy practitioner who was willing to exchange his high earning capacity for prestige and a more relaxed lifestyle has rapidly bowed to the reality of clogged court calendars, growing litigation costs, and increasingly challenging fact situations. Cases resolved through the simple application of statutory or precedential law have necessarily become less common.

Regarding the supreme courts and the High Court, lawyers do not admit that there is a growing demand for policy decisions. If this is occurring, it is treated as an instance decision in an area of discretion ordinarily created by statute. The policy issue is subsumed under one or other of the relevant factual considerations. Judges ordinarily deny a policy making function. However, this is not to say that the role of Australian judges is purely passive. There are those who still believe the fairy tale that the law is always pre-existing - clear and only awaiting discovery by the judges - but this is far from reality, as the President of the New South Wales Court of Appeal, the Honorable Justice Michael Kirby, asserted. "The debate has become not whether judges make law, but how much, when, and how far they may go in a particular case."7

This is not to deny the Honorable Justice Thomas' assertion that "the essence of the judicial process is the application of recognizable

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law to the facts proved in a particular case." There is considerable scope for judicial activism in the creation of law through the extension or adaptation of principles to new situations, and through construction, refinement, and analogy to mention but a few methods. As the Honorable Justice Michael Kirby writes:

Inevitably, as in any court, some of the work is routine. Some is even uninteresting. But much is important. The opportunities for judicial development, restatement and simplification of the law present themselves quite frequently. From my vantage point, some things are clear. A change is coming upon the Australian legal scene. With the end of the Privy Council appeals and the end of the appeals as of right to the High Court of Australia, the role of the High Court is changing. It is now, truly, a final court of rare resort. Inevitably, much of its time is taken up in constitutional cases concerning federal legislation of Australia-wide application. For more than ninety-eight percent of the cases, the state appellate courts, and the Full Courts of the Federal and Family Courts, are the end of the litigious line. It therefore falls increasingly to them to expound and develop the common law in Australia. Save for the contingency of the relatively rare instances of special leave to appeal being granted by the High Court, they will be the final expositors of the general principles of law and equity and of statutory construction. This is a reason why we must become more knowledgeable in every part of Australia of the fine work of the other Australian appellate courts. We must borrow from each other more in the future than we have in the past. Happily technology, and improved reporting services, will facilitate this development.

The judiciary is reluctant to involve itself in investigative and administrative functions distinct from their judicial work. Although the Royal Commission and other commissions of inquiry perform functions of a quasi-judicial nature, calling for the evaluation of material and the formation of opinions on matters of which judicial skills and experience are suitable, judicial practices, principles, and procedures are not always fully applicable to inquiries, and the involvement of judges in administrative functions (other than those related to the exercise of judicial power) has serious disadvantages. As E.G. Fitzgerald records:

The separation of judicial power from legislative and executive power

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8 THOMAS, supra note 3, at 29.
10 See REPORT OF THE INQUIRY INTO POSSIBLE ILLEGAL ACTIVITIES AND ASSOCIATED POLICY MISCONDUCT 328 (June 29, 1989).
is fundamental to the system of checks and balances designed to achieve a stable democracy. The distinction should not be blurred by those who perform judicial functions also engaging in superficially similar quasi-judicial functions on behalf of the Executive Government. The essential independence and impartiality of the judiciary, or at least the almost equally important public acceptance of those judicial qualities, particularly in a social environment in which much litigation, and almost all criminal litigation, involves disputes between individual citizens and the State, should not be compromised by judicial officers mixing judicial functions with functions on behalf of the Executive, especially where the issues may attract political or other controversy. The primary responsibility of the judicial system is the provision of speedy and efficient justice according to law, and its capacity to perform that function is diminished by any requirement that it perform other tasks on behalf of the Executive.

Moreover, the nature of many inquiries involves an immersion into highly emotional and charged political environments, for example the Mt. Erebus Air New Zealand aircraft disaster conducted by Mr. Justice Mahon of the Supreme Court of New Zealand. His description of senior executives of Air New Zealand engaging in “an orchestrated litany of lies” caused a huge political storm and he resigned following severe criticism of his commission.

Judges exert caution in the non-official roles and activities which they pursue. Thomas observes:  

Most of us, I think, try to keep a low profile, and even to minimize close relationships with members of the Bar in case they are misinterpreted.

Ethical duties bind judges both in the exercise of their official functions and in their private lives. They must abstain from conduct which may cause members of the public to question their standards or which may weaken the public trust that permits the acceptance of judgments as honest unprejudiced decisions based on the evidence.

The publicity-conscious judge, although perhaps intending to popularize the judiciary, may actually lower its prestige. Headline hunting may rebound on judges.

Judges in Australia do not readily admit to any conflicting requirements of creativity, neutrality, or integrity. Judges at all but the highest

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11 THOMAS, supra note 3, at 33.
12 Id. at 36.
appellate levels tend to operate reasonably comfortably within parameters established by legislation and case law. The highest courts break new ground in certain areas of which promissory estoppel, damages for economic loss and a restatement of long established understanding of the constitution of the country are leading examples. While some see this as a form of maverick keltic wilfulness, it is probably fair to say that similar tendencies are to be perceived in most parts of the judicial world. However, none of this says anything about judicial neutrality, which means neutrality between the parties and not in terms of one's socio-legal attitude. Similarly, integrity implies an absence of improper motivation: it cannot mean that the judge trims his or her apprehension of principle because strict application of principle may be to the detriment of one or other party.

V. JUDICIAL INDEPENDENCE

Crawford states: 14

[I]t is a fundamental principle that a person once appointed a judge should be independent of executive direction or control. This is the undisputed core of the notion of separation of powers. Judges decide legal disputes between government and government, between government and private citizen, and it is essential that they be independent of any party. Even in cases between subject and subject, there would be no point in the elaborate presentation of evidence and argument if the decision depended on external direction. Judicial independence is fundamental to any system of justice . . .

Security of tenure is essential for judicial independence. The Australian Constitution provides in Section 72 that High Court Justices and other federal judges shall not be removed except by the Governor General in Council, on an address from both Houses of Parliament in the same session, praying for such removal on the ground of proved misbehavior or incapacity.

In the context of the lengthy proceedings against Justice Murphy of the High Court, the Parliamentary Commission of Inquiry took the view that the words "proved misbehavior or incapacity" were not restricted to serious criminal offenses or misconduct in office but extended to any conduct which, judged by the standards of the time, was so serious as to demonstrate the judge's unfitness to hold office.

The judges of the supreme court of the states in Australia enjoy statutory but not constitutional protection. In all states, supreme court

14 CRAWFORD, supra note 1, at 56.
judges are appointed during good behavior. However, with the exception of New South Wales, the removal of a judge on an address of Parliament is not conditioned upon misbehavior or incapacity, as it is under Section 72. For example, Section 15 of the Constitution Act 1967 (Queensland) provides for tenure during good behavior but Section 16 of the Act provides that "it shall be lawful nevertheless for Her Majesty to remove any such judge or judges upon the address of the Legislative Assembly." It follows that (except in New South Wales) the Houses may in law move an address for removal on any ground at all. However, in practice this is extremely unlikely. For instance, the recent removal of Mr. Angelo Vasta, QC, from office as a judge of the Supreme Court of Queensland was a result of extensive investigations and findings of a Parliamentary Judges Commission of Inquiry where misconduct in respect of taxation matters were clearly proven.

In New South Wales, controversy surrounding the trials of Murphy led to the New South Wales Parliament passing the Judicial Officers Act of 1986. This Act governs the tenure of judicial officers at all levels (including magistrates). Judicial Officers hold office "during ability and good behavior." They may be removed only on address of both Houses of Parliament, and only if the Conduct Division of the Judicial Commission, established by the Act, has reported a matter which could justify removal.

The procedure of removal by address of Parliament is not without its deficiencies. In the cases of Justice Murphy who had been a cabinet minister, this circumstance made it impossible for some members on both sides of Parliament to consider the case in an apolitical manner. As Sir Harry Gibbs states:

> It is enough to say that damaging allegations concerning the judge were made publicly early in 1984, and were still the subject of investigation when the judge died in October, 1986.

A Report of an Advisory Committee on the Australian Judicial System (May 1987) has highlighted the difficulties which the parliamentarians comprising the committees investigating Lionel Murphy had in dealing with legal issues and the prolonged, uncertain, and highly publicized proceedings. The Advisory Committee accordingly has recommended that a judicial tribunal should be established to which serious allegations made against a judge could be referred without delay to enable it to decide whether the allegations are capable of being sus-

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tained by the evidence. Facts found to amount to misbehavior or incapacity warranting removal would be communicated to Parliament for its resolution.

Security of tenure and judicial independence may be threatened in less obvious ways. One possibility lies in the abolition of a court, or its reconstitution under new legislation accompanied by a refusal to reappoint some previous judges. A recent example is that of Justice Jim Staples, formerly of the Australian Conciliation and Arbitration Commission. Jim Staples was one of the deputy presidents of the old institution - all the deputy presidents moved on to the new body, the Federal Industrial Relations Commission, except Staples. It is asserted that his de facto removal from the Industrial Relations Commission will threaten the independence of other judicial or regulatory bodies and threaten the longevity of any judge who has the temerity to question the accepted order of things.¹⁷

Security of tenure and judicial independence may be threatened through remuneration provisions. It is usually provided that judicial salaries may not be decreased during tenure of office.¹⁸ Such protection may not be enough. Sir Ninian Stephen commented:¹⁹

Judges salaries should be lifted to put them beyond the reach of temptation and to secure their independence from government. Judicial independence is threatened by the erosion of judicial salaries and judicial independence is threatened where the sporadic and partial correction of the process of erosion is left to depend upon the very arms of government of which the judiciary should be independent - it being dependent upon the executive for effective initiation and upon the legislature for implementation.

There were many good reasons for ensuring proper and, in real terms, secure salaries and pensions for judges. Questions of recruitment of suitable candidates to judicial office, of retention once appointed, of public respect for the judicial office in a community that tends to measure most things in money terms, and perhaps even questions of placing judges in a financial position beyond the reach of temptation. [I]n the long term, by affecting the whole quality of the judiciary and their repute, the matter of remuneration bears quite directly on judicial

¹⁷ See AUSTL. FIN. REV., March 8, 1989.
¹⁸ See CONST. § 72(iii).
¹⁹ See THE AUSTRALIAN, July 26, 1989. Sir Ninian's speech to the Australian Institute of Judicial Administration followed Federal Cabinet's decision to approve a 15 to 20 percent pay increase for federal judges. The decision was a compromise after Cabinet refused to implement increases as high as 80 percent or $100,000 a year originally proposed by the Remuneration Tribunal in November 1988.
indirectly.

However, there are limits to the protections which legitimately can be afforded to judges' remuneration. For example, in *Krause v. Commissioner for Inland Revenue*\(^{20}\) Krause, a judge, appealed against his assessment for income tax on the ground that the imposition of the tax was contrary to a constitutional provision that judges' remuneration may not be reduced during their continuance in office. In rejecting the appeal, the Court held:\(^{21}\)

The purpose of this provision is . . . to safeguard the independence of the judiciary . . . . Though in theory Parliament is free . . . to repeal the provision, it would require the clearest expression of intention to induce the Court to hold that Parliament intended to depart from so sound a principle . . . . There is nothing . . . in the Income Tax Act . . . which shows an intention on the part of Parliament to do so. I am of the opinion that income tax does not diminish the remuneration of a judge. His remuneration is paid to him in order to meet his expenses, and one of these expenses is the income tax.

Judicial independence is also very largely dependent upon judges having administrative control of their own affairs. The Honorable Justice R.E. McGarvie, Judge of the Supreme Court of Victoria writes:\(^{22}\)

A court in which those responsible to the executive decide the way in which the operations of the court will be managed, the way cases will progress towards hearing and which cases will be heard by which judge at which time, is not likely to produce the impartial strength and independence of mind which the community requires of its judges. The relationship between administrators and judges will tend to develop to one where the judges are well cared for and even prized, but are treated as senior staff who do specialized public work in the courts which the administrators run on behalf of the executive.

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\(^{20}\) 1929 AD 286.

\(^{21}\) Id.