A Disgraceful Blow to Judicial Independence

Judicial Officers BULLETIN

Keeping the Judiciary Informed

Judicial Commission of New South Wales

A Disgraceful Blow to Judicial Independence

The Honourable Justice Michael Kirby AC CMG
*President, Court of Appeal, Supreme Court of New South Wales**

The year past has not been a particularly good one for the Australian judiciary. For the first time in the history of our country since Federation, ten undoubted judges of your rank have effectively been dismissed from judicial office. I refer to the purported termination of the appointments of the judges of the Compensation Tribunal of Victoria.[1]

By an expedient that is becoming all too familiar in Australia their tribunal was abolished. Treated like any other public servant in the same position, they were given letters of thanks for their "service to the State" and a "package" to compensate them for their inconvenience. They were then sent on their way. The promise which parliament had given them, upon their appointment, was the same as that which you and I enjoy.

They would hold office until their statutory retirement, save for removal in the constitutional manner hammered out in the aftermath to the Glorious Revolution in England. They would not be removed except upon address to the Governor passed by both Houses of Parliament in the same Session praying for their removal on the grounds of proved misconduct or incapacity. This promise of parliament was purportedly put at nought by the Victorian Parliament using the simple expedient of abolishing the judicial body on which they served. I say "purported" because the case is now before the Supreme Court of Victoria. The "dismissed" judges are suing the Government of Victoria. Their case has attracted international attention. It produced a letter of protest to the Victorian Premier and Attorney-General by the distinguished Centre for the Independence of Judges and Lawyers in Geneva.

Defending the rule of law

When the Local Court of New South Wales was reconstituted from the Courts of Petty Sessions of this State 100 Magistrates were transferred to the new court. Five were not. This led to two cases that came before me judicially.[2] The Court of Appeal held that the Magistrates omitted had no right to be appointed to the new court. But they did have a legitimate expectation, grounded in the strong convention derived from the independence of judicial office, to have their applications for appointment to the new court considered in a just way, freed from procedural unfairness. This determination was over-ruled in one case by the High Court of Australia[3] in a majority decision. It is one of

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the few cases where reversal hurt. The issue at stake was greater than the particular case. Needless to say the Government of Victoria has called the High Court's decision in its aid to justify its right to terminate the Victorian judges. It is not my purpose to consider the legal rights of the judges. I simply call attention to a disgraceful chapter in the history of political interference in the independence of the judiciary of this country. It happened in the year past.

Where judicial independence is concerned it behoves the judiciary to speak out for they are not defending themselves so much as the judicial institution and the rule of law.

In this State, it is to the credit of the parliament that it has enacted an amendment to the Constitution Act which is to entrench the protection of judicial officers in this State from further erosion of their independence in this way.[4] The entrenchment is by a "manner and form" amendment to the Constitution Act. The measure specifically addresses the technique of the removal of judges by the abolition of their court or tribunal. It accords to the international principle for the independence of the judiciary. Where courts or tribunals are abolished, their judges must be appointed to a court or tribunal of equivalent rank or higher. This constitutional amendment deserves a fair passage. It does no more than to provide State judicial officers with the protection already enjoyed by Federal judges under the Australian Constitution.[5]

It is a tragedy for the judiciary of Australia that the need for such a constitutional amendment has been demonstrated in Victoria so recently and in such a shocking way. The other tragedy is that the protests of judges, and some lawyers, did not excite popular support.

Tinkering nonchalantly with fundamentals

These are rather hard times to be a judge. I do not refer to the salaries and conditions but to things more deep and lasting. The era of attacks on basic institutions is with us. We who are members of the continuing government must, by our lives and work, illustrate and demonstrate the value of the high tradition that we seek to maintain.

I recently read some of the comments on judges of Mr George Masterman QC, in an address which he delivered recently in New Zealand.[6] I was surprised to read the author's conclusion that:

> "While it can be accepted that a particular appointee [to the bench] may be qualified and fit to be appointed, for example, a judge of the Federal Court, there probably exists at least 50 other possible appointees who also would be so qualified and fit."[7]

And in a footnote:

> "Indeed in the case of an appointment to the NSW District Court, it could well be said that there could be at least 100 or more possible appointees qualified and fit to be appointed."

The serious question about the procedures for the appointment of judges — upon which there are legitimate viewpoints to be expressed — is dressed up in an apparent trivialisation of the issue and a thinly veiled denigration of current office holders with the suggestion that they are really two-a-penny. There are hundreds of people who could do just as well! Personally, I doubt that this is so. The sad reality of this moment in the 800 year continuous tradition of our judiciary is that fewer, and not more, candidates of excellence are willing to accept the life of lonely, burdensome responsibility on the Australian bench.

Why is this so? Recently it fell to a Melbourne silk to explain what is happening. Mr D Meagher QC, in an address in London in July 1992, now published[8] put it well:

> "The compensation once offered was a high level of prestige and satisfaction and the discharge of an important public service. I can recall times when our superior courts were acknowledged as amongst the finest in the world, and an offer of appointment was then seen as a fitting end in a career at the Bar. Once appointed, judges were treated with a high level of respect, and portrayed to the public as persons of great dignity. There was recognition of their worth by the conditions of their employment, by the grant of civil honours, and by public expressions of gratitude and support by the Government. Controversial decisions were supported by the Attorney-General, and any deficiency in the law was seen as a problem to be rectified by the legislature, and not by criticism of the bench.

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Regrettably, those times have passed. With the possible exception of our High Court, our judges are no longer treated with this degree of respect. They are the constant butt of criticism, being accused of failing to discharge their duties with expedition or to public satisfaction. They are no longer honoured in their courts and treated with indifference. Indeed, throughout the States of Australia, there is a legislative and executive strategy of removing their jurisdiction and placing it in tribunal to which, so it is said, more appropriate appointments may be made ... [T]he government has treated the judiciary more as a political competitor than a separate arm of government whose proper function is vital to the health of a democracy."

If we stand back from our profession in its present state, it does seem likely to me that changes will certainly come about in the appointment of judges. I predicted this, and much more, a decade ago in my ABC Boyer Lectures.[9] Modesty prevents me from saying how many of my predictions of those far away broadcasts have now come true.

There would be some who would have all judges appointed to their offices like any other public servant. Advertisements. Appointments Committees of bureaucrats. Jobs only on application. Candidates scrutinized for conformity to the current philosophical and social orthodoxy. But the strength of our judiciary has been, in the past, the fierce independence of its members. This has been nurtured in their training in the independent legal profession where they grow up without a devotion either to political allegiance or to safe, pedestrian ways of thinking. In a sense, it has been this independence of background that has underwritten the independence of thought of our judiciary. That mode of thought has been essential to the assurance of our inherited and developed liberties. Whilst I support some changes — including for a greater participation by women and people from a variety of ethnic backgrounds on our Bench — I would caution most earnestly against reducing our judges to simply another group of highly paid public servants. They are not and should not be so, least of all in their own eyes.

Endnotes

* This article is derived from an address delivered at the 1993 Annual Conference of the District Court of New South Wales. The full text of this address will be published in the November 1993 — Volume 3, Part 2 — of the *Journal of Judicial Administration*. The assistance of The Law Book Company Limited and the Australian Institute of Judicial Administration in enabling publication in the Bulletin is greatly appreciated.

1. See (1993) 67 ALJ 83, 243.
2. *Macrae v Attorney-General for New South Wales* (1987) 9 NSWLR 268 (CA) and *Quin v Attorney-General for the State of New South Wales* (1988) 16 ALD 550; 28 IR 244 (NSWCA).
3. *Attorney-General for the State of New South Wales v Quin* (1990) 170 CLR 1.
4. See *Constitution Act* 1902 (NSW), Part 9, esp s 56(1) introduced by *Constitution (Amendment) Act* 1993 (NSW), sch 1(4).
5. Section 72.
6. G Masterman, "Political Influences in the Legal Process — Who's Influencing Whom?", as yet unpublished paper for the New Zealand Law Conference, in Papers of the Conference, 311.
7. Ibid, 322. See also fn 34.
8. "Appointment of Judges" (1993), 2 *Journal of Judicial Administration* 190.
9. See M D Kirby, The Judges, (Boyer Lectures 1983) ch 6, pp 70ff.

JUDICIAL MOVES

Mr Nevil Pepper has retired from the Local Court of New South Wales.

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To respond to articles or to make a contribution to a future issue of the Judicial Officers Bulletin please contact the Editor, **Nicholas Chesla**, at the Commission.

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