LA TROBE UNIVERSITY LAW STUDENTS' ASSOCIATION

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INDEPENDENCE OF THE JUDICIARY

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REMINDER OF JUDICIAL INDEPENDENCE

Four recent developments have made the topic of independence of the judiciary are of pressing concern for me.

REBUILDING THE JUDICIARY OF CAMBODIA

The first is my work in Cambodia as Special Representative of the Secretary-General of the United Nations. My task is to provide technical advice and assistance to the government and people of Cambodia. I am obliged to report twice a year to the Secretary-General and to the General Assembly and Commission on Human Rights of the United Nations. Obviously, one of the key areas where progress must be made is in building institutions which uphold the rule of law. In a country devastated by war, revolution, invasion and genocide, it is vital to replace brute power with law.

My first contact with Cambodia was in the training of judges in 1994. They would help to replace the anarchy left by the Pol Pot regime and its aftermath. Since then, more than two hundred judicial officers have been appointed. Many of them were formerly teachers. Few judges or lawyers remained in Cambodia after "year zero" in 1975. Naturally enough, the autocratic regime first disposed of lawyers. The judiciary was dismantled.

Now it is being rebuilt. Things which we in Australia take for granted - court houses, trained judicial officers, an independent legal profession, adequate resources for the basic tasks of the administration of justice and a culture of independence - all of these need to be re-established.

One of the chief obstacles which I have seen arises from the simple matter of the salary paid to the judicial officers. They are paid the equivalent of $US20 per month. This is the same as most senior public servants and the military. But whereas teachers can perform private tuition out of hours, hospital doctors can engage in private practice and even the military can protect highways and throw across checkpoints to extract fees for their services, judges can scarcely charge litigants for what they do.

Some Cambodian judges tell me that they survive only because their wives work. Others have candidly acknowledged the receipt of presents from winning litigants. Most indicate that they could get by on about $US120 a month. Then, if there were a will to uncorrupted, honest judicial endeavour, their needs could be satisfied. The urgent necessity to secure proper salaries for the judges of Cambodia is a major item in my report to the General Assembly of the United Nations in November 1995. Without becoming involved in the never-ending burden of supplementing the Cambodian general budget, countries and institutions which support the restoration of the rule of law and the protection of human rights in Cambodia must, I have reported, consider the implications for human rights of the current judicial arrangements.

Those arrangements still carry the burden of colonial procedures. Because of the lack of library books and expertise, it is not uncommon for the judges, as in French colonial days, to consult the Ministry of Justice on legal

points. But as the government is often a litigant, as the separation of powers is enshrined in the Cambodian Constitution, this vestige of colonial rule must end. Yet who is to supply the books and legal expertise that will take the place of the skilled officials in the Ministry in Phnom Penh? These are the practical difficulties of building an independent judiciary observing the rule of law in a country such as Cambodia.

BEIJING PRINCIPLES ON JUDICIAL INDEPENDENCE

In August 1995 I was sent a copy of the *Statement of Principles of the Independence of the Judiciary* adopted in Beijing, China. In the preparation of these principles, the Chief Justice of Western Australia, the Honourable Chief Justice David Malcolm AC, has played a leading role. He was present at the Sixth Conference of Chief Justices of Asia and Pacific in Beijing when the *Statement of Principles of the Independence of the Judiciary* known as the *Beijing Statement of Principles* was adopted. The meeting of Chief Justices coincided with the Fourteenth Conference of LAWASIA whose primary object is "to promote the administration of justice, the protection of human rights and the maintenance of the rule of law within the region".

Australia, as it is at last recognizing, is part of the Asia/Pacific region. This is our great opportunity. We should make the most of it, including in the field of law.

The Beijing Statement embraces the doctrine in Article 10 of the *Universal Declaration of Human Rights*, reflected in turn in Article 14(1) of the *International Covenant on Civil and Political Rights*, promising that everyone is entitled to a fair and public hearing by "a competent, independent and impartial tribunal established by law". The Beijing Statement" asserts

that an independent judiciary is indispensable to the achievement of this fundamental human right. Independence of the judiciary requires that :

> *"(a) the judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and*
>
> *(b) the judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature."*

After a number of paragraphs asserting the integral importance of the independence of the judiciary for the attainment of a rule of law society, the *Statement* recognises :

> *"8. To the extent consistent with their duties as members of the Judiciary, judges, like other citizens, are entitled to freedom of expression, belief, association and assembly."*

As to appointment of judges, the *Beijing Statement* places emphasis on the choice of the persons who are "best qualified for judicial office", chosen "on the basis of proven competence, integrity and independence." No discrimination is to be tolerated in the selection of judges. Paragraph 13 is extremely wide in this respect :

> *"13. In the selection of judges there must be no discrimination against a person on the basis of race, colour, gender, religion, political or other opinion, national or social origin, marital status, sexual orientation, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory."*

The *Statement* recognises that the structure of the legal profession differs between societies. In some, the judiciary is a career service. In

others, as in Australia, judges are chosen mid career from the independent practising legal profession. Under this system judges tend, by their career preparation, to bring to the judicial office an independent non-governmental outlook simply because their life has generally not been part of government service.

The section on tenure of judges in the *Beijing Statement* is important. It stresses that judges must have security of tenure although it recognises that, in some countries, the tenure of judges is subject to confirmation from time to time by vote of the people or other formal procedure. The following paragraph should be noted :

> *"21. A judge's tenure must not be altered to the disadvantage of the judge during her or his term of office.*
> *22. Judges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct which makes the judge unfit to be a judge."*

The *Beijing Statement* records that a judge whom it is sought to remove from office must have a fair hearing which conforms to established standards of judicial conduct, the judgment in respect of which, whether the hearing is held in camera or in public, must be published. There is then a paragraph of considerable importance for what follows in this essay :

> *"29. The abolition of the court of which a judge is a member must not be accepted as a reason or an occasion for the removal of a judge. Where a court is abolished or restructured, all existing members of the court must be reappointed to its replacement or appointed to another judicial office of equivalent status and tenure. Members of the court for whom no alternative position can be found must be fully compensated."*

There follow sections dealing with judicial conditions, the jurisdiction of judges, judicial administration, the relationship with the Executive, the provision of adequate resources and the relationship with military tribunals and other bodies. The *Statement* concludes :

> *"It is the conclusion of the Chief Justices and other judges of Asia and the Pacific ... that these represent the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the Judiciary."*

It is a heartening sign, much to be welcomed, that the judiciary of Asia and the Pacific have come together and given voice to this common cause. Although the language of the *Beijing Statement* may be regarded as very general, its value in the context of countries of Asia and the Pacific is indisputable.

INDEPENDENT COURTS IN SOLOMON ISLANDS

In August 1995 I also took up my appointment as President of the Court of Appeal of Solomon Islands. I sat in the impressive court house in Honiara with judges from Solomon Islands and New Zealand. I was welcomed by the Governor-General (Sir Moses Pitakaka), the Chief Justice (Sir John Muria) and a military guard-of-honour which I inspected in full ceremonial robes. I saw at once the great blessing of an established judiciary conforming to the rule of law and defending human rights which are part and parcel of the common law and are also enshrined in the *Constitution* of Solomon Islands. It is a humbling experience for an Australian lawyer to be invited to sit in a court house in a country whose people have many shared traditions but, necessarily, enjoy a different culture. To be trusted by those people to bring law and justice is a great privilege. Despite many economic and other problems, Solomons Islands has an infrastructure of law which

brings much credit on those who established it and to the Solomon Islands lawyers and judges who continue its great tradition. The fact that they continue to invite judges from Australia, Papua New Guinea and New Zealand to sit in their Court of Appeal is a clear signal of the dedication of successive governments of Solomon Islands to the strong maintenance of the rule of law. They know that judges of our tradition would not be parties to any intrusion from the Executive branch into the judicial branch.

When I was in Solomon Islands I went to the Church Service at St Barnabas Cathedral. Save for Westminster Abbey, I have never heard such magnificent singing. The point I noticed was that there was not a single white face among the priests who served the sacrament to one thousand congregants. Religion has been planted deep. It has grown strong in the soil of Solomon Islands. It is now my responsibility, and that of the other expatriate judges, to do the same with the rule of law and the independence of the judiciary. That is why, from the beginning of my term as President, I have insisted that a judge of the Solomon Islands High Court should sit as an Acting Judge of Appeal in the Court of Appeal. The objective, as in the Church and in the other branches of Government, must be to transfer entirely the principles of the independence of the judiciary and the rule of law to the judges and lawyers of Solomon Islands.

ATTACKS ON JUSTICE IN AUSTRALIA

In September 1995 I received the latest issue of the publication by the Centre for the Independence of Judges and Lawyers (CIJL) *Attacks on Justice*. This is an annual report of CIJL on the harassment and persecution of judges and lawyers around the world. It contains entries on nearly sixty countries. There are many in our region of the world and many with a poor reputation for respecting the rule of law and fundamental human rights.

In the past, Australia tended not to be mentioned in this volume. Yet in the latest part, four pages are devoted to departures from the independence of the judiciary and of persons who should enjoy similar protection in Australia. Most of those mentioned by name are Victorian office-holders. They include the President and ten judges of the Accident Compensation Tribunal of Victoria; three members of the Administrative Appeals Tribunal of Victoria (Mr Neil Wilkinson, Mr Ray Rooke and Ms Angela Smith) and the past Director of Public Prosecutions of Victoria, (Mr Bernard Bongiorno QC). The report also contains a summary of the abolition of the Industrial Court of South Australia and the effective removal from office of the President of that Court (Justice Jennings), four Deputy Presidents, and a number of industrial judges and magistrates in South Australia.

It is rather sobering to see these paragraphs about attacks on justice in our own country. The original convention in Australia was that judicial office-holders were respected and their tenure safeguarded. The principle stated succinctly in the *Beijing Statement* was uniformly followed. When courts, Federal or State or tribunals of a court-like character were abolished, the uniform procedure was to appoint all of the members of the former court or tribunal to the new body that replaced them - or to provide the members with appropriate retirement arrangements acceptable to them and respectful of their former judicial or other independent office.

In an essay published in the *Australian Bar Review* ("Abolition of Courts and Non-reappointment of Judicial Officers") I traced the origins of this principle to the English Constitutional Settlement and the promise of judicial tenure of which we in Australia are heirs. That principle was not

always observed during colonial days. Perhaps that fact helps to explain the inclusion in s 72 of the *Australian Constitution* of the promise of tenure and non-removal to judges of the High Court of Australia and other Federal Courts. A similar provision has lately been inserted into the *Constitution Act* 1902 of New South Wales. This followed a referendum to entrench the provision of protected judicial tenure in the New South Wales *Constitution* which was overwhelmingly endorsed by the people in a referendum held at the time of the last State election. However, in other States of Australia and in the Federal sphere outside the Federal courts, the respect for independent office-holders depends not upon law or constitutional arrangements but upon conventions increasingly more honoured in the breach than in the observance.

In the Federal sphere the departure from the convention which occurred when Justice James Staples was not appointed by the Hawke Government to the Australian Industrial Relations Commission, following the abolition of the Australian Conciliation and Arbitration Commission, gave rise to a precedent which showed what could be done. That precedent was soon followed in New South Wales in the case of magistrates who were not appointed to the Local Court of New South Wales upon the abolition of the old Court of Petty Sessions. There have been many other instances. I wish to concentrate upon those which have occurred in Victorian courts and tribunals.

INCURSIONS INTO JUDICIAL INDEPENDENCE IN VICTORIA

VICTORIAN ADMINISTRATIVE APPEALS TRIBUNAL

Members of the Administrative Appeals Tribunal of Victoria ('AAT') were typically appointed for three year terms. But these office-holders were, usually automatically renewed in office. However, in March 1994, three appointees who had an earlier association with the Opposition Party were not reappointed by the Victorian Government. Of course, appointments are

within the prerogative of the executive government. But the former convention of reappointment was defensive of the independence of the office-holders of the AAT, which performs duties in many ways similar to those of courts. The government was accused of undermining the independence of the Tribunal, especially important because of its function in adjudicating disputes between the members of the public and the government and its agencies.

The Attorney-General (Mrs Jan Wade) denied that there was any political motive whatsoever for the move. She claimed, rather unpersuasively, that she was simply seeking to find 'fresh faces'. The President of the Law Institute of Victoria, Mr David Denby, said that the legal community was concerned about the non-reappointments. Professor Cheryl Saunders of the University of Melbourne stated that the insecurity arises from short-term appointments to the AAT 'provides obvious potential for inroads to be made into the Tribunal's independence'. No convincing reason was given for the non-reappointments of the three retirees. The only common feature of the three members was their link, or that of their spouses, to the Opposition Party.

Mr Michael Wright QC, and other members of the Planning and Local Government Bar in Victoria, wrote to the Melbourne *Age* drawing to public attention the effect of the government's action in 'undermining the independence of the Tribunal' :

> *"Independence can exist, and can be seen to exist, only if members of the Tribunal have sufficient security of tenure of office to act without concern for reappointment. The legislation does not prescribe a particular term of office for members of the Tribunal. However, it has been the invariable practice to reappoint permanent members of the Tribunal who are of good behaviour and who are willing to continue in office. A number of members of the Tribunal have accepted short-term appointments, in many cases of only three years, in the*

expectation that this practice will provide the necessary security of tenure."

Mr Wright and his colleagues called upon the government to reinstate the previous practice. They warned of the destruction of 'fragile community confidence' in the Tribunal dealing with complaints against the government.

Once again, the government was unmoved.

INDUSTRIAL RELATIONS TRIBUNAL

Consider also the case of the Industrial Relations Commission of Victoria. The *Employee Relations Act* 1992 (Vic) replaced the Industrial Relations Commission of Victoria with the Employee Relations Commission as from 1 March 1993. The former Commission enjoyed both arbitral functions and judicial functions. The judicial functions were both original and appellate. There were fifteen members, any three of whom who were legally qualified could constitute the Commission in Court Session. In this respect, the structure of the Commission was not dissimilar to that of the former New South Wales Industrial Commission. By the *Employee Relations Act* 1992 (Vic) s 175(1) it was provided that 'on the appointed day the former Commission is abolished and the members of the former Commission go out of office'. The Act did not make provision for the appointment of members of the old Commission to the new. True, the President of the old Commission, Justice Alan Bolton, was offered appointment as President of the new. However, he declined to accept the appointment. He reverted to his position as a full-time Deputy President of the [Australian] Industrial Relations Commission.

The Deputy Presidents and other members of the old Commission were advised that they were to be regarded as having applied for appointment to the new Commission unless they indicated otherwise, notwithstanding that

their applications would 'not be treated more favourably than those of other applicants'. It is clear that the letter to the former office-holders of the Commission was drafted with the majority opinion of the High Court in *Attorney General for New South Wales v Quin* (1990) 170 CLR 1 in mind. Of the fifteen members of the old Commission, five declined to apply for a position in the new Commission. They were offered a non-negotiable *ex gratia* termination package as determined by the State Department of Industry and Employment. The remaining members, including two Deputy Presidents and eight Commissioners, sought appointment to the new body. As the appointments were not finalised by 1 March 1993, the government made temporary appointments for a period of three months. In the result, within that time, the two Deputy Presidents were successful in their application but only two of the eight Commissioners succeeded. The unsuccessful Commissioners were offered *ex gratia* termination packages.

When informed of the operation of the Act, members of the old Commission, through the President, expressed their concern to the Minister at the failure of parliament to provide for automatic appointment of the members of the existing Commission to its replacement body. Attention was drawn to the report of the Joint Select Committee of the Federal Parliament on the tenure of appointees to Commonwealth tribunals. In the final *Annual Report* of the President of the old Commission, the retiring President observed:

> *"The policy of the Employee Relations Bill is not for consideration in this Annual Report. However, it is appropriate that all members of the Commission have been duly appointed by successive Governments until the age of sixty five years under the Industrial Relations Act 1979 and have performed their duties on the Commission with distinction. In these circumstances, all members of the existing Commission should be offered equivalent positions on the Employee Relations Commission in accordance with the recommendations in the report of*

the Joint Select Committee. Statutory protections are provided to the holders of office on quasi judicial tribunals so as to allow them to bring independence of judgment to the resolution of the issues which come before them. The resolution of industrial problems and disputes often involves consideration of complex and controversial issues and a balancing of various interests. To perform their role effectively, Industrial Tribunals must retain the confidence of the parties and the community and must be independent of governments, employers and unions. The members of the Tribunal must exercise their functions in a fair and impartial way."

The serious injustice done to the members of the old Commission who were, in effect, compulsorily retired by the legislative abolition of their offices gained little attention in the media. It was the substantive provisions of the legislation affecting pay and conditions of workers which dominated the media coverage of its passage. When the Bill was in parliament, the Law Institute of Victoria urged the Victorian Government to give an assurance of reappointment. The government failed to do so and, eventually, refused appointment to many. The Law Council of Australia urged the Minister for Industry and Employment to conform to the principles necessary for the independence of office-holders in statutory tribunals.

The President of the Law Council, Mr Robert Meadows, expressed the opinion that to require the members of the Victorian IRC to complete for positions on the new body, was not consistent with established principle. The Minister and the government rebuffed all of these representations. As the headline in the Melbourne *Herald Sun* put it bluntly, the government administered the '[a]xe for 16 IRC bosses', the 'bosses' involved were the commissioned office-holders whose duty had been to act fairly and independently and against whom no wrong or misbehaviour was ever alleged, still less proved.

ACCIDENT COMPENSATION TRIBUNAL

I now reach the most serious of the departures from the convention which I have described. It affects an undoubted court and undoubted judges. By the *Accident Compensation Act* 1985 the Parliament of Victoria established an Accident Compensation Tribunal. Its members enjoyed the rank, status and precedence of a judge of the County Court of Victoria. They performed judicial duties. They were each to hold office as a judge of the Tribunal during good behaviour until attaining the age of 70 years. They could be removed from office only by the Governor of Victoria on an address of both Houses of Parliament.

In November 1992 the Parliament of Victoria enacted the *Accident Compensation (WorkCover) Act* 1992 (Vic). Section 10 of that Act abolished the Tribunal. It made no provision for the continued existence for the office of the judges or for their tenure. The result was that all of the judges who were not reappointed to some equivalent office in the County Court or the Victorian AAT were effectively removed from office. They were removed without the proof of misbehaviour or by the exercise of the parliamentary procedure promised to them by parliament and accepted by them on their appointment. The result was an unprecedented protest from judges in virtually every jurisdiction of Australia. The Victorian Attorney-General has since said that she heard from 82 Australian judges. The International Commission of Jurists, the Centre for the Independence of Judges and Lawyers in Geneva, the Law Council of Australia, Law Societies and Bar Associations throughout the nation, individual judges and others protested.

All to no avail. The government was given support by ill-considered editorial opinions, as, for example, that in *The Age*. It acknowledged that tribunals 'are here to stay' with an 'essential job' but asserted :

"The mistake is to think of them as courts. Their job is administrative: quasi judicial at best. It is the fault of successive Governments that they have become robed in the judicial mantle. The reasons are understandable. It is necessary to give them real authority to demonstrate that they are not merely creatures of the Executive, and to attract decent talent. Understandable but wrong. Judicial status and the independence which goes with it must be jealously reserved to the occupants of truly judicial office - the judges of our courts."

These were words of cold comfort to the judges, known as such, promised such tenure, performing independent decision-making, thrown suddenly out of office. Of the nine who were not appointed elsewhere, each was provided with monetary compensation falling far short of the promise of office to the age of seventy, to say nothing of pension and other rights. They were afforded 'compensation' of money but not for the dispossession of office, status, and loss of reputation. They have commenced proceedings in the Supreme Court of Victoria. Those proceedings are under the scrutiny of a number of international bodies including the Law Association for Asia and the Pacific (Lawasia), the International Commission of Jurists and the International Bar Association. The newly appointed United Nations Special Rapporteur on the Independence of the Judiciary, Dato' Param Cumaraswamy, when visiting Melbourne in December 1993, expressed his concern. He promised to observe the former judges' proceedings closely. They will also be closely watched by many others.

Presumably to defeat similar claims in other contexts, legislation has been enacted by the Victorian Parliament to alter or vary the *Constitution Act* 1975 (Vic) s 85 to prevent the Supreme Court from entertaining actions for compensation or other amounts because a member of an abolished body has lost office.

CHILDREN'S MAGISTRATE

In Victoria, the Senior Magistrate of the Children's Court is appointed under the *Children's and Young Persons Act* 1989 s 12. The current incumbent is Mr G Levine, a well respected magistrate. According to media reports, Mr Levine was spoken to in August 1994 by the recently appointed Chief Magistrate of the State and told that the Attorney-General did not want him in the post but wanted him to resign and return to duties as an ordinary magistrate. The reports produced protests from the legal profession. One practitioner before the Children's Court reportedly remarked that, if true, the interference was 'scary'; suggesting that appointees to judicial posts were 'at the beck and call of the government of the day to keep their job.'

In September 1995 the Senior Magistrate of the Children's Court resigned and was replaced.

CONCLUSIONS

The *Melbourne Age* on 30 November 1994 in an editorial *"Matters for Judgment"* commented on my remarks to like effect as above, concerning the effective removal of office-holders in the way described above and elsewhere in Australia :

> *"The principle of judicial independent is so central to the rights and freedom of all Australians that it is rarely discussed. We take it for granted that judges will conduct trials and reach decisions with meticulous impartiality and with total disregard for political currents. What's more, we take it for granted that the reverse also applies : that no Australian government would risk the wrath of the electorate by fiddling with the independence of judges or the legal process.*
>
> *But are we justified in holding such comfortable views? Justice Michael Kirby ... has his doubts. In a speech to a gathering of judges and lawyers in Perth on Monday [he] reeled off a long list of changes*

made by governments to the personnel, powers and procedures of courts and tribunals throughout Australia in recent years. The common result of these changes, in Justice Kirby's opinion, has been a lessening of judicial independence. Furthermore, the situation is worst in Victoria, where 'the largest challenge to the conventions protecting judicial officers and other independent decision-makers has occurred ... '"

The leader writer questioned the correctness of my assumptions about removal from office of the Law Reform Commissioners and the Equal Opportunity Commissioner (Ms Moira Rayner). But went on :

"Where Justice Kirby is on safer ground is in warning that, in general, the constitutions of Australian states provide scant protection for judicial independence. Even here Mrs Wade would take issue with him, by claiming that section 85 of the Victorian Constitution and the Kennett-instituted scrutiny of acts and regulations committee give Victorians a greater surety of judicial independence than the citizens of any other state. None the less, the legislative foundation for judicial independence is fragile. Its continuing existence depends largely on respect for established conventions. By drawing attention to this fact, Justice Kirby has done us a service."

It is not enough to draw attention to the problem. Action must be taken for we can no longer rely upon conventions previously long honoured. It is essential that the culture of respect for judicial independence, and the independence of others who hold office who need similar independence from the Executive, should be re-established. On the path to re-establishing it, it would be desirable that other States of Australia should take the same course as New South Wales. They should entrench in their constitutions the same provision as now applies in New South Wales protecting judicial office-holders, at all levels of the hierarchy, from removal except for proved incapacity or misconduct. They should also provide protection in the case of the abolition of courts so that judicial officers who belong to them must then

be appointed to a position of the same rank and salary. In the old days, politicians of all political persuasions observed these fundamental conventions strictly. In the past twenty years, under Federal and State governments, Labor and Coalition, we have seen departures from these principles.

My experience in Cambodia, Solomon Islands, and elsewhere in the world, teaches me the importance of preserving the independence of judicial office-holders and those who need similar independence to perform their duties properly. The *Beijing Statement of Principles of the Independence of the Judiciary* applies as much to Australia as it does to China, Burma and other lands. *Attacks on Justice* includes reports on affront to the independence of judicial office-holders in Australia. Lawyers of today should be vigilant about these attacks. It is not enough to talk and write about them. Action is required. That includes action to amend our State constitutions to afford State judicial office-holders the same protections as are contained in the Federal constitution. Whilst we are about reflecting on Australia's constitutional arrangements for the new millenium, this subject, more than others more fashionable, should be at the top of our list. It is time to stop the self-congratulations in Australia and to look seriously at the destruction of important conventions protecting judicial independence.