

QUESTIONNAIRE ON THE JUDICIARY
PREPARED FOR MR BASIL FERNANDO
EXECUTIVE DIRECTOR
ASIAN LEGAL RESOURCE CENTRE
30 AUGUST 1996

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As requested in your letter of 6 August I attach brief answers to the questions. Full answers would require a great deal of time and research.

1. *Appointment of Judges:*

- (a) In Australia, Judges are appointed by the Executive Council of the Commonwealth (Federal Judges). States (State Judges) and Territory (Territory Judges).
- (b) Normally to age 70 years. Justices of the High Court of Australia to age 70; other Federal Judges 70 except the Family Court, 65. Most State Judges retire at 70.
- (c) Recent legislation requires the Federal Attorney-General to consult State Attorneys-General on the appointment of Justices of the High Court. But there is no obligation to follow the consultation. As a matter of convention it is usual to consult the Chief Justice of Senior Judge. But the final decision is made by politicians and recommended to the representative of the Queen.
- (d) At the moment, issues of competency are judged by departmental officials advising their Minister. Similarly, informal investigations are carried out into the character of Judges. But in the nature of the Bar, from which most Judges are chosen, such matters tend to be common knowledge.
- (e) Typically, legislation provides for legal qualifications and practice although usually this is only for a minimum of five years. In reality, most lawyers appointed as Judges have practised for much longer. Specific academic qualifications are not required although usually enjoyed. An increasing number of solicitors and a small number of academics are being appointed as Judges in Australia, Federal and State.

2. *Length of Service:*

- (a) Retirement is typically at age 70. In New South Wales, Judges retire at age 72 although, by agreement between the Judge, the Chief Justice and the Attorney-General of the State, a Judge can serve until age 75. This increase in the length of service has come about recently because of greater difficulty in recruiting top counsel as Judges.
- (b) Judges may be removed from office for proved incapacity or misconduct. Generally, Federal and State constitutional provisions require that such removal be approved by both Houses of Parliament in the one session and submitted to the Governor-General or Governor, as the case may be. Only one Judge in Australia this century has been removed from office, viz the Honourable Mr Justice Angelo Vasta (Queensland). His removal has been the subject of criticism by the Australian Section of the International Commission of Jurists. It followed an inquiry headed by three Judges and concerned alleged improprieties and taxation offences.
- (c) The removal of Judges by the abolition of courts or tribunals has become a significant problem in Australia. In the federal sphere, upon the abolition of a court, federal judges have continued to hold federal office and have been paid as such. This is what occurred when the Australian Court of Conciliation and Arbitration was found to be unconstitutional in 1956. However, tribunals have been abolished and all previous members have not been appointed to the successor body. This occurred with the abolition of the Australian Conciliation and Arbitration Commission and the substitution of the Industrial Relations Commission of Australia. Justice Staples was not reappointed. There have been numerous State examples of this. As a result of the controversy, an amendment to the New South Wales *Constitution Act 1902* was approved by the electors at referendum in 1995. By this amendment there is entrenched in the New South Wales Constitution a provision that no Judge or Magistrate may be removed from office by the abolition of his or her tribunal but such judicial officer must be offered equivalent judicial appointment. Many proposals have been made for similar legislation in other States of Australia.

3. *Punishment of Judges:*

- (a) Judges are subject to the general law of the land and may be punished for the breach. Occasionally cases arise of traffic offences. This has not been a major concern in Australia until

how. However, in New South Wales a Judicial Commission is established by statute. This may receive and deal with complaints against Judges. It may constitute a disciplinary hearing and has heard numerous complaints against Judges. Most of them related to alleged rudeness, delay, etc. The Commission has large powers and may impose various sanctions. Usually admonition is sufficient.

4. *Appointment to office:*

Former judges can resume practise as advocates or solicitors. However, most Bar Associations impose time limitations upon the appearance of a former Judge before the Court of which he or she was formerly a member. Usually the time limit varies in accordance with the time served in judicial office but is typically two or three years. Not many Judges have returned to practise although this never occurred before about 1980. The regulation of the practise is basically left to ethical rules of professional societies and resolutions of meetings of Judges themselves.

5. *Pension and other benefits:*

Under *Judicial Pension Acts* Judges in Australia typically receive a judicial pension equivalent to two-thirds of the then current judicial salary. To qualify for the pension a Judge must meet two criteria, namely service for at least ten years and attaining the age of 60 years. The pension arrangements are established by statute and have not been reduced, although there is some consideration of New Zealand changes which acted prospectively to reduce benefits. Judicial pensions in Australia are non-contributory.

6. *Tenure:*

There is a constitutional prohibition against the reduction of the salary of a Federal Judge during tenure of office. During the Great Depression in the 1930s the salaries of High Court Justices were reduced by their concurrence. However, one Justice declined to agree and he was paid his full salary. Otherwise, the issue does not arise. The position is similar in the States where there is no constitutional protection which is insusceptible to simple amendment. However, salary and benefits are not reduced during tenure.

7. *Application for benefits:*

Judges are appointed with entitlements to transport, leave, pension and salary benefits. They do not normally receive

housing benefits in Australia (although the position may be different in the Northern Territory of Australia). Benefits are established by law or by convention. They are not increased during office. The only exception known to the writer occurred when a Judge moved from one jurisdiction (State) to another (Federal). Then, by application of the Judge and agreement of the State, his entitlements to Long Leave were commuted to a lump sum of money. Federal Judges have a statutory entitlement to commute Long Leave accumulated over ten years. Long Leave entitlement to Judges in Australia is typically 1 year's leave for 10 year's service. Judges can usually commute accumulated Long Leave which has not been taken up to a maximum of one year and be paid this sum on retirement. The sum is taxable but at a lower rate than income.

8. *Duration of appointment:*

Only Acting Judges are appointed for a limited duration. The appointment of Acting Judges has increased in recent years to cope with backlog and accumulated lists. They are chosen in the same way as permanent Judges and paid the same benefits except for pension which does not accumulate. They are eligible for subsequent appointment to judicial office and a small proportion are so appointed. Normally, those appointed as Acting Judges are practising barristers. A small number are solicitors and academics. The appointment of Acting Judges is controversial in Australia. Upon the termination of a commission as an Acting Judge the appointee returned to normal practice. There have been reported disadvantages suffered by former Acting Judges on their return to practice.

9. *Promotion of Judges:*

Judges are entitled to be promoted but this is an exception in the Australian judicial scene. The exceptions have increased somewhat in recent years but it is normally expected that a Judge will remain in the office to which he or she is appointed. Promotion is by the Executive Government either of the Commonwealth or of the State or Territory in which the Judge served. Such promotions are not performed in an orderly way as an aspect of a career but are one off appointments. Normally, such promotions are on established merit. They are not achieved by application.

10. *Competence:*

Bar Associations and Law Societies do monitor the competence of Judges. New systems have been introduced to provide for complaints about delay in the delivery of judicial opinions. This can be done to Presiding Judges anonymously. As well, in New South Wales, the Judicial Commission receives complaints but there is no equivalent body in other jurisdictions of Australia. Bar Associations have also been active in defending Judges against attacks on the media to which Judges cannot readily respond.

11. *Criticism:*

It is perfectly permissible to criticise the judgments and orders of Judges, conduct of Judges and appointments or promotions of Judges. Such criticism is frequently voiced. If, however, the criticism were excessive to the occasion and such as to cast doubt on the integrity of the Judge in particular proceedings, the critic would be liable to prosecution for contempt (scandalising the Court). Such prosecutions have been extremely rare in recent times and it would take an extreme case to initiate such a prosecution today.

12. *Performance:*

There are no requirements by law or practice that Judges dispose of a number of cases in a given time. The workload of Judges in Australia has increased in recent years. Most courts have their own internal arrangements to ensure the prompt delivery of opinions and the appropriate assignment of work as between different Judges. This is not a matter regulated outside the judicial branch but is left to Chief Justices aided by Registry staff.

MICHAEL KIRBY